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

Attorneys for City of Pocatello

Candice M. McHugh (ISB# 5908)
Chris M. Bromley (ISB # 6530)
MCHUGH BROMLEY, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

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

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

Attorneys for City of Idaho Falls

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

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

Petitioners,

vs.

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

Respondents.

and

Case No. CV01-23-13238

IDWR Docket No. CM-DC-2010-001

CITIES' COMBINED NOTICE OF APPEAL

Fee Category: Exempt
Idaho Code § 67-2301

IDAHO GROUND WATER APPROPRIATORS, INC., A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, BONNEVILLE JEFFERSON GROUND WATER DISTRICT, and BINGHAM GROUND WATER DISTRICT, Intervenors.
IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY

TO THE COURT AND THE PARTIES OF RECORD NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellants, City of Idaho Falls, City of Pocatello, and the Coalition of Cities[1] (collectively, "Appellants" or "Cities"), appeal against the named Respondents to the Idaho Supreme Court from the *Memorandum Decision and Order* and *Judgment* entered in the above-entitled action on May 31, 2024, Honorable Judge Eric J. Wildman

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

presiding. A copy of the *Memorandum Decision and Order* and *Judgment* are attached hereto as Appendix A and B, respectively.

2. Petitioners have a right to appeal to the Idaho Supreme Court, and the *Memorandum and Decision Order* and *Judgment* described in paragraph one are appealable orders pursuant to Rule 11(f) I.A.R.
3. The following is a preliminary statement of the issues Appellants intend to assert on appeal; provided, this list of issues on appeal shall not prevent the appellants from asserting other issues on appeal:
    a. Whether the Director of the Idaho Department of Water Resources and the district court erred as a matter of law by requiring Appellants to meet an improper evidentiary standard.
4. No order has been entered sealing all or any portion of the record.
5. Appellants do not request a transcript of the hearing before this Court. A transcript of the hearing before the Idaho Department of Water Resources was prepared and is part of the agency record and district court record.
6. Appellants request that all documents, exhibits, filings, and transcripts that are part of the agency record in this case, plus all documents automatically included in the record under Rule 28 I.A.R., be made a part of the clerk's record on appeal.
7. I hereby certify:
    a. That a copy of this notice of appeal has not been served upon any reporter because a hearing transcript is already part of the agency record;
    b. That a reporter's transcript is not requested so no fee is required.

c. That Appellants are exempt from paying the estimated fees for preparation of the record under Idaho Code section 67-2301;

d. That Appellants are exempt from paying the appellate filing fee under Idaho Code section 67-2301; and

e. That service has been made upon all parties required to be served pursuant to Rule 20 I.A.R.

DATED this 12th day of July, 2024.

MCHUGH BROMLEY, PLLC

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

HOLDEN KIDWELL HAHN & CRAPO, PLLC

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

SOMACH SIMMONS & DUNN, P.C.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2024, I served the foregoing document on the persons below via iCourt unless otherwise indicated:

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

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

Maximilian C. Bricker (ISB #12283)

Appendix A

Memorandum Decision and Order from May 31, 2024, in Ada County District Court Case CV01-23-13238

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

CITY OF IDAHO FALLS, CITY OF POCATELLO, CITY OF BLISS, CITY OF BURLEY, CITY OF CAREY, CITY OF DECLO, CITY OF DIETRICH, CITY OF GOODING, CITY OF HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF SHOSHONE, and CITY OF WENDELL, Petitioners, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES, and MATHEW WEAVER in his capacity as the Director of the Idaho Department of Water Resources, Respondents, and IDAHO GROUND WATER APPROPRIATORS INC., A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT,	Case No. CV01-23-13238 **MEMORANDUM DECISION AND ORDER**

and BINGHAM GROUNDWATER DISTRICT,

Intervenors.

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

I.

BACKGROUND

The Court entered a Memorandum Decision and Order in Ada County Case No. CV01-23-13173 contemporaneously herewith. The facts and background set forth in that Order apply here and are incorporated by reference. In addition, on August 16, 2023, the Petitioners filed a Petition seeking judicial review of the Director's Post-Hearing Order Regarding Fifth Amended Methodology Order dated July 19, 2023 ("Post-Hearing Order"). The Petition asserts the Post-Hearing Order is contrary to law and requests that the Court set it aside and remand for further proceedings. The Court entered Orders 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's determination that the Twin Falls Canal Company's forecast supply is reasonable and sufficiently accurate is affirmed.

The Petitioners argue the Director's forecast supply for the Twin Falls Canal Company underestimated its total water supply given the high snowpack in 2023. Coalition members rely upon a combination of natural flow water from the Snake River and storage water held in reservoirs to meet their irrigation needs. The degree to which each Coalition member relies upon natural flow water as opposed to storage water differs based upon their respective water rights. For example, the Twin Falls Canal Company is primarily dependent upon natural flow water to meet its irrigation needs. This is because it has large natural flow water rights and a relatively small storage water right. High snowpack has a beneficial impact on storage water rights in particular, as the reservoir system in Basin 01 can catch and store snowpack runoff when it occurs for use later in the irrigation season when water demand is high. It has less beneficial impact on natural flow water rights, which rely more on aquifer discharges. The Director commented on this in his Order Denying Motion for Reconsideration of Denial of Continuance:

> The Director disagrees that high snowpack means the SWC will not be injured. While there is a good snowpack in the hills above the ESPA, the snowpack is only part of the SWC's water supply, and recharge from the aquifer is at a record low.

> Additionally, southern Idaho is emerging from a two-year drought, and the existing storage supply going into this irrigation season is low. Forecasters are uncertain whether the storage supply system will fill this year. The Director agrees with the SWC that the "current snowpack does not tell the whole story."

R., 429. As a result, the Twin Falls Canal Company is more reliant on aquifer discharges to satisfy its irrigation needs throughout the entirety of the irrigation season than other Coalition members.

The Director's prediction of reasonable in-season demand under the methodology order is based in part on a regression analysis. R., 1022. The regression analysis is used to predict the amount of natural flow that will be available to Coalition members in a given year utilizing data "from 1990 through the irrigation year previous to the current year." R., 1022. For the Twin Falls Canal Company, a "multi-linear regression equation" is developed "by comparing the actual Snake River near Heise natural flow and the flows at Box Canyon to the natural flow diverted." R., 1022. The actual natural flow volume predicted for each Coalition member is "one standard error below the regression line, which underestimates the available supply." R., 1022. This is "to ensure senior water right holders do not bear the risk of under-prediction of supply." R., 1022.

The regression analysis utilizes a "R-squared" value. The R-squared value is a statistical measurement of how closely data points fit on a regression line." R., 1082. The R-squared value indicates how accurately the regression analysis predicts the diversions for each Coalition member for the upcoming season. R., 1082. "R-squared values are decimal numbers that range from zero to one." R., 1082. The closer the R-squared value is to one, the better the predictive effect. R., 1082.

The R-squared value for the Twin Falls Canal Company is 0.72. R., 1082. The Petitioners challenge this value. They believe using the Joint Forecast along with the multi-linear regression analysis and accompanying 0.72 R-squared value is erroneous. They assert the R-squared values for other Coalition members are better than 0.72. They further assert that the R-squared value for the Twin Falls Canal Company has declined in recent years. The Director recognized that the R-squared value for the Twin Falls Canal Company has declined recently. R., 1082. However, he stated he is "still confident the regression equation is accurately predicting TFCC's natural flow." R., 1082. He therefore concluded that the Twin Falls Canal

Company's "0.72 R-squared value is reasonable and the TFCC's natural flow forecast is sufficiently accurate." R., 1082.

The Director's finding in this respect is supported by substantial evidence in the record. Matt Anders is the technical services bureau chief for the Department. Tr., Vol. I at 20. At the hearing, he testified as to the R-squared value for the Twin Falls Canal Company, providing in part:

> Q. Switching gears a little bit. Do you recall testifying about Twin Falls Canal Company's regression equation?
>
> A. I do.
>
> Q. And based on the R-2, do you think the regression equation still accurately predicts the natural flow for the Twin Falls Canal Company?
>
> A. We think it accurately is still predicting the natural flow for Twin Falls Canal Company. But we're concerned about the downward trend in the R-squared value, indicating that it may be degrading. But we still have confidence in it at this point. We want to see it in a couple more years and see what happens.

Tr.., Vol. I at 224. The Anders' testimony establishes the R-squared value is accurately predicting the natural flow for the Twin Falls Canal Company, and that he has confidence in it at this point. In addition, the Petitioners' expert witness Greg Sullivan testified that he considered "a good relationship is when the R-squared was at least – was above .5." Tr., Vol. 2 at 157. The Court therefore finds the Director's finding is supported by substantial evidence in the record, was reached through an exercise of his discretion, and must be affirmed.

B. The Director's determination to use 2018 as the baseline year is affirmed.

The Petitioners challenge the Director's decision to use 2018 as the baseline year in the Sixth Methodology Order. 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., 1006. The purpose of predicting need is to estimate material injury. R., 1006. In the Sixth Methodology Order, the Director updated the baseline year from the previous average of diversion demands for 2006, 2008 and 2012 irrigation seasons to the diversion demand for the 2018 irrigation season. R., 1015-1016. The baseline year is selected by analyzing: (1) climate; (2) available water supply; and (3) irrigation practices. R., 1007. A

baseline year must "be recent enough to represent current irrigation practices." R., 1013. Additionally, "because the baseline year data is used to predict reasonable in-season demand for senior appropriators, safety factors must be employed to ensure the senior water rights will be satisfied. R., 1080.

The Petitioners argue utilizing a baseline year of 2018 overestimates the reasonable in-seasons demand of the Coalition. This Court previously approved the Director's use of a baseline year as a part of the methodology order in the 382 Case. In that case, the Court addressed a similar issue to that raised here. There, the City of Pocatello and IGWA made a similar argument that the Director must determine the needs of the Coalition based on historic use data associated with a year with average temperatures, evapotranspiration, and precipitation. The Court disagreed:

> The Director did not err in his intentional adoption of a baseline year based on above average temperatures and evapotranspiration and below average precipitation. The Court agrees that use of such data is necessary to protect senior rights if the Director is going to administer to an amount less than the full decreed quantity of the Coalition's rights. The arguments set forth by the City of Pocatello and IGWA that the Director must use data associated with an average year fail to take into account the legal limitations placed on the Director in responding to a delivery call. The senior is entitled to a presumption under Idaho law that he is entitled to his decreed water right. *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. If the Director is going to administer to less than the full quantity of the decreed water right, his decision must be supported by clear and convincing evidence in order to adequately protect the senior right. *A&B Irr. Dist.*, 153 Idaho at 524, 284 P.3d at 249.
>
> If the Director determined the needs of the Coalition based on historic use data associated with an average year, any decision to administer to less than the full quantity of the Coalition's decreed rights based on that data would not adequately protect its senior rights. Using data associated with an average year by its very definition would result in an under-determination of the needs of the Coalition half of the time. The Director simply cannot rely upon such data if he is going to administer to less than the decreed quantity of the Coalitions' water rights as his analysis would not be supported by clear and convincing evidence.

Memorandum Decision and Order, CV-2010-382, pp.33-34 (September 26, 2014).

Here, the Director determined there were two years that satisfied all necessary criteria for a baseline year: 2018 and 2020. However, for the reasons set forth in the Sixth Methodology Order, the Director selected 2018:

Years 2018 and 2020 satisfy all the BLY selection criteria discussed above. Each

> of these years had (1) total diversions above the average diversions for the years 2000-2021, (2) total growing degree days above the average for the years 1992-2021, and (3) reference ET values above the average for the years 1992-2021. The years 2018 and 2020 also had total precipitation values below the average precipitation for the years 1992- 2021 and were not water supply limited years. The Department has reviewed the SWC's diversion data for the 2020 irrigation season. The Department finds that 2020 ranks as the second-highest year of total diversions for the SWC and is more than one standard deviation above the average for the years 2000-2021. In comparison, 2018 ranks as the fourth-highest year of total diversions for the SWC and is less than one standard deviation above the average for the years 2000-2021. Choosing a BLY with above average diversions but within one standard deviation, ensures that a conservative year is selected that protects the senior while excluding extreme years from consideration. The Director concludes that total diversions for 2018 adequately protect senior water rights when predicting the demand shortfall at the start of the irrigation season and selects 2018 as the BLY.

R., 1016. The Director explained that in 2018 the Coalition's "diversion volume was above average at 104%." R., 1080. And, that "a safety factor of 4% is reasonable." R., 1080. As argued in the 382 Case, the Petitioners here argue that the Director should adopt a baseline year closer to 100% of average. For the reasons set forth herein, the Court finds the Director is (1) within his discretion in selecting 2018 as the baseline year, (2) that his decision is consistent with this Court's holding in the 382 Case, and (3) that his decision is supported by clear and convincing evidence. R., 1079-1082. Therefore, the Director's determination to use 2018 as the baseline year is affirmed. For the reasons set forth in this section and the preceding section, the Court also finds the Petitioners' argument that the Department's safety factors aggressively overpredict demand shortfall to be unavailing.

C. The Director's determination regarding the Twin Falls Canal Company's irrigated acres is affirmed.

The Petitioners assert the Director abused his discretion and acted contrary to law in determining the Twin Falls Canal Company's irrigation acreage. The Court entered a Memorandum Decision and Order in Ada County Case No. CV01-23-13173 contemporaneously herewith. In that Order, the Court found the Director's determination regarding the Twin Falls Canal Company's irrigated acres must be affirmed. It also found the Director's determination regarding supplemental groundwater must be affirmed. The Court incorporates its analysis on those issues herein.

D. The Director acted contrary to law by including acres associated with enlargement water rights in determining A&B Irrigation District's irrigated acres under the methodology order.

The Sixth Methodology Order attributes 15,924 acres to A&B Irrigation District for 2023. R., 1014. The Petitioners assert that evidence presented at the hearing demonstrates that A&B Irrigation District's irrigated acreage improperly included acres associated with its enlargement water rights that bear junior priority dates. At the hearing, Matt Anders testified to this issue as follows:

> Q. Okay. I'll just represent that enlargement rights have an effective priority date of 1994, which is junior to probably all of the ground water rights that are at risk of curtailment under the methodology order. And so my next question is, has there been discussion within the Department staff as to whether the methodology should be run based on the 14,637 acre figure instead of the 15,924 acre figure?
>
> A. No, we haven't had any discussions about that.
>
> Q. Okay. If, as I represented, the enlargement rights are junior to the ground water rights of IGWA and others, do you agree that it would probably be important or appropriate to make that adjustment, and run the methodology based on the 14,637 acre figure?
>
> A. I don't know. I would have to investigate it further.

Tr. Vol. I, p. 205. The Department and the Coalition do not dispute this issue. To the extent the Sixth Methodology Order includes irrigated acreage associated with A&B Irrigation District's enlargement water rights that bear junior priority dates, it violates principles of first in time first in right and is therefore contrary to law.

The Court does not, however, order remand on this issue. The Director did not predict any material injury to A&B Irrigation District in 2023 and did not curtail any junior ground water rights for purposes of predicted injury to A&B Irrigation District in 2023. Therefore, the Court finds that although the Director acted contrary to law, there is no prejudice to any of the Petitioners' substantial rights. It follows his Post-Hearing Order must be affirmed. I.C. § 67-5279(4).

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

The Petitioners assert the Director erred in determining that the Twin Falls Canal Company operates efficiently. The Court entered a Memorandum Decision and Order in Ada County Case No. CV01-23-13173 contemporaneously herewith. In that Order, the Court found the Director's determination that Coalition members operate efficiently within the limits of their delivery system must be affirmed. For the reasons set forth in the Court's Order, which reasons are incorporated herein, the Petitioners' argument on this issue is unavailing.

F. The Director's determination to switch to transient-state simulation of ESPAM is affirmed.

The Sixth Methodology Order uses transient-state simulations of the Eastern Snake Plan Aquifer Model ("ESPAM") when determining curtailment priority date. R., 1036, 1041. 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 are appropriate for evaluating the average annual impact of aquifer stresses that have been, or will be, applied for decades." R., 31. "Transient simulations are necessary to evaluate the impacts of aquifer stresses applied for short periods of time." R., 31.

Prior to his adoption of the Fifth and Sixth Methodology Orders, the Director used a steady-state simulation when determining the curtailment priority date. However, when he issued the Fifth Methodology Order, the Director determined that the use of steady-state simulation was no longer supportable:

> In previous years, the Director used steady-state modeling when determining the curtailment priority date. 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. While the first version of the ESPA groundwater flow model was not calibrated at a time-scale that supported in-season transient modeling, 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. As part of the Director's ongoing obligation to evaluate the

> methodology, the Director must evaluate whether the use of steady-state continues to be supportable.
>
> . . .
>
> As described in Finding of Fact 87, curtailment to a priority date calculated by the steady state analysis method used in the Fourth Methodology Order will only offset 9% to 15% of the predicted IDS. In contrast, curtailment to a priority date calculated with a transient simulation of a single season curtailment will offset the *full* predicted IDS unless the shortfall exceeds the accruals to the near Blackfoot to Minidoka reach by the end of the irrigation season with curtailment of all junior ground water rights. This methodology order depends on an annual evaluation of material injury and should also employ curtailment and or mitigation that supplies replacement water at the time and place required by the senior-priority water right in a quantity sufficient to offset the depletive effect of ground water withdrawal and to assure protection of the senior-priority right. Curtailment dates, periodically determined at time of recalculating in-season demand shortfall (IDS), should be calculated by a transient model simulation that will return the full quantity of water to the senior priority rights at the time and place required.

R., 35-36. As a result, the Director determined that transient simulations are necessary to simulate the short-term curtailments prescribed in the methodology:

> This methodology order depends on an annual evaluation of material injury and should also employ curtailment and or mitigation that supplies replacement water at the time and place required by the senior-priority water right in a quantity sufficient to offset the shortfall resulting from ground water withdrawal and to assure protection of the senior-priority right. Curtailment dates, periodically determined at time of recalculating in season demand shortfall (IDS), should be calculated by a transient model simulation that will return the full quantity of water to the senior priority rights at the time and place required, or the maximum quantity that can be returned by curtailing all junior water rights.

R., 1091.

The Petitioners assert the Director's adoption of transient model simulations is clearly erroneous. The Court disagrees. The Director concluded that using steady-state simulation does not provide water to senior water rights at the time and place needed. The Director's finding is supported by substantial evidence in the record. The record establishes that transient simulation "predicts timing and magnitude of response to time-varying changes in aquifer stress resulting from short-term curtailment of ground use to address a predicted shortfall." R., 1430. It shows that "less than 15% of the steady state impacts of a single-season curtailment are realized at the river reach within six months of curtailment" under steady-state. R., 1429. Jennifer Sukow, who is a technical engineer for the Department, testified to this point as follows:

Q. Good morning, Ms. Sukow. My name is John Simpson. I represent A & B Irrigation District, et al., with Mr. Thompson. I just have a couple follow up questions for you.

If you could turn to Exhibit 318 from which you testified to before. And I believe that's your slide presentation from November. And, Jennifer, if you could just look at pages 21 and 22. I believe those are your conclusions; is that correct?

A. That's correct.

Q. Those are your conclusions from the modeling you produced as a part of that presentation in November, correct?

A. Correct.

Q. As you sit here today, are those still your conclusions that you would represent to the Hearing Officer and to the parties in terms of the modeling exercise you completed in the comparison between steady state and transient?

A. Yes.

Q. Okay. And then if you would look at page 6 of that presentation. And that's the graph that you testified to earlier regarding examination by Ms. McHugh. Do you see the paragraphs in the middle of the graph regarding the "Less than 15 percent of the steady state impacts of a single-season curtailment are realized?" Do you see that language in that graph, that insert?

A. Yes.

Q. Okay. And that's your conclusion; correct?

A. Yes, that's –

Q. Yes.

A. – date from the analyses.

Q. Right. So that would support your conclusions on page 21 and 22, that the basis for why steady state analysis is not appropriate for short-term river reach gains; is that correct?

A. Well, I think beyond that, because the steady state simulations do not simulate the short-term curtailments that are prescribed in the Surface Water Coalition methodology.

Q. Okay.

A. But the difference in volume is just the result of doing something that does simulate the short-term curtailment.

Q. Right. So if you utilize the steady state model run, you are just not going to realize the amount of water into the reach to mitigate for the identified injury in the Fifth Methodology As-Applied Order; correct?

A. Not within this irrigation season.

Tr., Vol. 1, pp.96-98.

The testimony of David Colvin, an expert for the Coalition supports this conclusion:

Q. And do you want to describe your general conclusions or just refer to those in the report?

. . .

A. Opinion No. 2 was that the steady state use of ESPAM for curtailment analysis in particular is inappropriate due to the methodology's requirement for in-season benefits from curtailment. And so the in-season timing component renders a steady state model ineffective and inappropriate for modeling curtailment benefits.

Tr., Vo. 1, p.108.[1] Therefore, the Court finds the Director's decision to adopt a transient-state simulation is supported by law and substantial evidence in the record. It follows the Director's determination must be affirmed.

G. The proceeding before the Director satisfied due process.

The Petitioners raise due process concerns regarding the process utilized by the Director in issuing the Post-Hearing Order. The Court entered a Memorandum Decision and Order in Ada County Case No. CV01-23-13173 contemporaneously herewith. In that Order, the Court found the proceeding before the Director satisfied due process. Further, that the Director's Scheduling Order and Order Limited Discovery must be affirmed. For the reasons set forth in the Court's Order, which reasons are incorporated herein, the Petitioners' due process concerns are unavailing.

[1] Two of Petitioners own experts admitted that if steady state is used in the modeling that the amount of the shortfall determined by the Director's order would not be supplied during the irrigation season. Tr., Vol. II, pp. 203-204; Tr. Vol. III pp. 91-92.

H. Evidentiary standard.

The Petitioners argue that challenges to those metrics in the methodology order that are not elements of senior water right are subject to a preponderance of the evidence standard. The Court disagrees. The senior is entitled to a presumption under Idaho law that he is entitled to his decreed water right. *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. If the Director is going to administer to less than the full quantity of the decreed water right, his decision must be supported by clear and convincing evidence in order to adequately protect the senior right. *A&B Irr. Dist.*, 153 Idaho at 524, 284 P.3d at 249.

Through the framework set forth in the methodology order, 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.[2] In making that determination the Director uses certain metrics set forth in the methodology order, including the use of a baseline year. The metrics selected in the methodology order are conservatively selected so that they have a built-in safety margin to account for some uncertainty that is inherent with predictions. This is done to ensure no injury to senior rights. If a junior water right holder believes there are better metric figures that also provide for some margin for uncertainty, then that junior user needs to show that by presenting clear and convincing evidence to the Director to ensure no injury to senior rights. Unlike a surface to surface call, there is no remedy to senior water rights should the predictions turn out to be in error to the detriment of senior rights.

I. Substantial rights.

The Petitioners argue their substantial rights were prejudiced by the Director's Post-Hearing Order. For the reasons set forth herein, the Petitioners have failed to establish the Director acted contrary to law except for the issue of enlargement acres. Although the Director acted contrary to law in including A&B Irrigation District's enlargement acres when calculating its irrigated acreage, that error did not result in prejudice to any of the Petitioners' substantial rights for the reasons set forth herein. Therefore, the Petitioners have failed to show their substantial rights were prejudiced. It follows the Director's Post-Hearing Order must be affirmed.

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[2] When applying that framework, the Director may determine that a senior water right holder is entitled to less than the full quantity of his decreed right, by administering to "reasonable in-season demand."

IV.

ORDER

Therefore, BASED ON THE FOREGOING, it is ordered the Director's Post-Hearing Order is hereby affirmed.

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:

Sarah Klahn
Maximilian Bricker
sklahn@somachlaw.com
mbricker@somachlaw.com — via Email

Candice McHugh
Chris Bromley
cmchugh@mchughbromley.com
cbromley@mchughbromley.com — via Email

Robert Harris
rharris@Holdenlegal.cm
efiling@holdenlegal.com — via Email

Garrick Baxter
Kayleen Richter
garrick.baxter@idwr.idaho.gov
kayleen.richter@idwr.idaho.gov — via Email

Thomas Budge
Elisheva Patterson
tj@racineolson.com
elisheva@racineolson.com — via Email

John Simpson
Travis Thompson
jsimpson@martenlaw.com
tthompson@martenlaw.com — via Email

W. Kent Fletcher
wkf@pmt.org — via Email

Skyler Johns — via Email
Nathan Olsen
Steven Taggart
sjohns@olsentaggert.com
nolsen@olsentaggert.com
staggart@olsentaggert.com

Dylan Anderson — via Email
dylan@dylanandersonlaw.com

Date: 5/31/2024

Trent Tripple
Clerk of the Court

By Erik Rowell
Deputy Clerk

DISTRICT COURT 4TH JUDICIAL DISTRICT OF THE STATE - OF - IDAHO IN AND FOR ADA COUNTY

Appendix B

Judgment from May 31, 2024, in Ada County District Court Case CV01-23-13238

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

CITY OF IDAHO FALLS, CITY OF POCATELLO, CITY OF BLISS, CITY OF BURLEY, CITY OF CAREY, CITY OF DECLO, CITY OF DIETRICH, CITY OF GOODING, CITY OF HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF SHOSHONE, and CITY OF WENDELL, Petitioners, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES, and MATHEW WEAVER in his capacity as the Director of the Idaho Department of Water Resources, Respondents, and IDAHO GROUND WATER APPROPRIATORS INC., A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT,	Case No. CV01-23-13238 **JUDGMENT**

and BINGHAM GROUNDWATER DISTRICT,

Intervenors.

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

JUDGMENT IS ENTERED AS FOLLOWS:

The Post-Hearing Order Regarding Fifth Amended Methodology Order dated July 19, 2023, is hereby affirmed.

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:

Sarah Klahn Maximilian Bricker sklahn@somachlaw.com mbricker@somachlaw.com	via Email
Candice McHugh Chris Bromley cmchugh@mchughbromley.com cbromley@mchughbromley.com	via Email
Robert Harris rharris@Holdenlegal.cm efiling@holdenlegal.com	via Email
Garrick Baxter Kayleen Richter garrick.baxter@idwr.idaho.gov kayleen.richter@idwr.idaho.gov	via Email
Thomas Budge Elisheva Patterson tj@racineolson.com elisheva@racineolson.com	via Email
John Simpson Travis Thompson jsimpson@martenlaw.com tthompson@martenlaw.com	via Email
W. Kent Fletcher wkf@pmt.org	via Email
Skyler Johns Nathan Olsen Steven Taggart sjohns@olsentaggert.com nolsen@olsentaggert.com staggart@olsentaggert.com	via Email
Dylan Anderson dylan@dylanandersonlaw.com	via Email

Date: 5/31/2024

Trent Tripple
Clerk of the Court

By Erin Rowell
Deputy Clerk