

**Supreme Court Docket No. 38191-2010
(consolidated with nos. 38192-2010 & 38193-2010)**

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY
IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION
DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY,

Petitioners-Appellants,
and

UNITED STATES OF AMERICA, BUREAU OF RECLAMATION,
Petitioners-Respondents on Appeal,
and

IDAHO DAIRYMEN'S ASSOCIATION, INC.,
District Court Cross-Petitioner,

v.

GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water
Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES,
Respondents-Respondents on Appeal,
and

IDAHO GROUND WATER APPROPRIATORS, INC.,
Intervenor-Respondent-Cross Appellant,
and

THE CITY OF POCA TELLO,
Intervenor-Respondent-Cross Appellant.

IDWR RESPONDENTS-RESPONDENTS' ON APPEAL BRIEF

On Appeal from the District Court of the Fifth Judicial District of the State of Idaho,
in and for the County of Gooding, Case No. 2008-551,
Honorable John M. Melanson, District Judge, Presiding

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I. STATEMENT OF THE CASE

This is a proceeding for judicial review of a Final Order issued by the Director of the Idaho Department Resources (“Director” or “Department”) in response to a conjunctive management delivery call filed by the Surface Water Coalition (“SWC”).¹ Applying the Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 *et seq.* (“CM Rules”), the Director found that junior ground water pumping causes material injury to the SWC when insufficient surface water is available to satisfy its irrigation demand, and that the SWC does not require the full volume of its water rights for irrigation. On these points, the district court agreed. On appeal, the SWC challenges the Director and district court’s finding that the SWC does not require the full volume of its water rights, arguing that the Director must administer water to its “decreed diversion rates.” Notices of appeal were also filed by the City of Pocatello (“Pocatello”) and the Idaho Ground Water Appropriators, Inc. (“IGWA”) concerning the district court’s holding that the appropriate evidentiary standard of review to apply in conjunctive administration is clear and convincing evidence, rather than preponderance of the evidence. Lastly, IGWA argues that full headgate delivery for Twin Falls Canal Company (“TFCC”) is 5/8 of a miner’s inch, not 3/4 of a miner’s inch, as held by the district court.

¹ The SWC is a descriptive term used to describe the real parties in interest, who are: 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. *SWC Opening Brief* at 1.

II. FACTUAL AND PROCEDURAL BACKGROUND

1. The Surface Water Coalition and its 2005 Delivery Call

The seven entities that make up the SWC hold natural flow and storage water rights from the Snake River for irrigation purposes above Milner Dam. Ex. 1073 (map depicting SWC boundaries); Ex. 4001A (SWC water rights). The SWC's natural flow rights total 13,756 cfs. Ex. 8000 Vol. 1 at ES-23-24. Converted to a volume over the course of the irrigation season, the SWC's natural flow rights total 6,712,116 acre-feet.²

Because sufficient water could not be obtained from the natural and unregulated flow of the Snake River for irrigation, the SWC acquired storage water from the United States Bureau of Reclamation ("USBR") in reservoirs above Milner Dam. Ex. 3009 at 14; Ex. 7019 (map depicting USBR Snake River area reservoirs). The USBR can store 4,900,000 acre-feet in the Upper Snake. Ex. 3009 at 15. Forty-seven percent of that water, or 2,320,636 acre-feet, is held by the USBR for the benefit of the SWC. Ex. 3009 at 15-16; Ex. 4001A. *See U.S. v. Pioneer Irr. Dist*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007) (discussing title relative to USBR storage rights).

During the irrigation season, the SWC uses a combination of natural flow and storage water to meet its patrons' irrigation needs. R. Vol. 37 at 7058. Therefore, the total water supply available to the SWC (natural flow + storage) is 9,032,752 acre-feet.³ In comparison, the maximum volume of water ever diverted by the SWC is 4,070,993 acre-feet, or less than half the

² The irrigation season for the SWC is March 15 to November 15 (246 days). Ex. 4001A at 2-23. One cfs is converted to acre-feet per day as follows: 1 cfs x 1.9835. Over a 246-day irrigation season, the SWC's natural flow water rights are converted to a volume as follows: 13,756 (cfs) x 1.9835 (conversion to acre-feet) x 246 (days) = 6,712,116 acre-feet.

³ On judicial review, the district court affirmed the Director's ability to examine the SWC's total water supply (natural flow + storage) for purposes of determining material injury. Clerk's R. Vol. 3 at 533-535. The SWC had previously argued that reduction in either supply constituted material injury. This issue was not appealed.

sum of its water rights. Ex. 8000 Vol. 4 at AS-8 (1967 total diversions). In its expert report presented at the administrative hearing, the SWC stated that the average amount of water it needs to divert in an irrigation season is 3,274,948 acre-feet, or nearly three times less than the sum of its water rights. Ex. 8000, Vol. 2, Tbl. 9-2 at 9-12.

The Eastern Snake Plain Aquifer (“ESPA”) is predominantly composed of fractured Quaternary basalt, having an aggregate thickness that may, in some locations, exceed several thousand feet, decreasing to shallow depths in the Thousand Springs area. Ex. 3009 at 5. Ground water in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. *Id.* One of the locations at which a direct hydraulic connection exists between the ESPA and the Snake River and its tributaries is in the American Falls area. *Id.*

Located in the vicinity of American Falls is the Near Blackfoot to Minidoka reach of the Snake River. *See* Ex. 1073 (map depicting the location of the Near Blackfoot gage). The SWC uses reach gains in the Near Blackfoot to Minidoka reach for its irrigation needs. R. Vol. 37 at 7057. Due to changes in climate, conversions from flood irrigation to sprinkler irrigation, and ground water pumping, reach gains in the Near Blackfoot to Minidoka have been reduced. Ex. 1075 at 72, Ins. 18-25; Ex. 3009 at 20; R. Vol. 37 at 7052-7053. Additionally, as recognized by the Director: “The measured decrease in cumulative surface water diversions above Milner for irrigation reflects the fact that less water is generally needed in the present time to fully irrigate lands . . . than was needed in the 1960 to 1970 timeframe” Ex. 3009 at 20.

In addition to reach gains in the Near Blackfoot to Minidoka reach, the SWC also relies on snowmelt entering the state of Idaho that is diverted as natural flow or impounded by the USBR in its reservoirs. R. Vol. 37 at 7061-7062. *See* Ex. 1073 (map depicting the location of

the Near Blackfoot gage relative to the rest of the Snake River). Measured run-off into the Snake River from snowmelt is variable. Ex. 1000 at 2 (Snake River natural flow, 1911-2004); R. Vol. 3 at 569. In order to maximize storage, the USBR holds water as high in the system as possible. Tr. Vol. 6, pp. 1200-1206 (testimony of Jerold Gregg, Manager for the USBR's Snake River Area office). Therefore, SWC storage "water [in American Falls] may be stored anywhere in the system," R. Vol. 37 at 7061, including in Jackson Lake, located in the state of Wyoming. *See* Exs. 1073 and 7019 (location of Jackson Lake in relation to American Falls Reservoir).

From 2000-2005, "the Upper Snake River Basin [] experienced the worst consecutive period of drought years on record." Ex. 3009 at 17. Responding to "six[] year[s] of drought," and seeking to "restore their water supplies" the SWC filed its delivery call with then-Director Karl J. Dreher on January 14, 2005. R. Vol. 1 at 1. The delivery call sought administration and curtailment of junior ground water rights. Ex. 3009 at 1.

2. The Department's Response and May 2005 Order

On February 14, 2005, one month after the delivery call was filed, Director Dreher issued a preliminary order in response to the call. R. Vol. 2 at 197. The February 14 order was superseded by an order issued on April 19, 2005, R. Vol. 7 at 1157, which was amended by Director Dreher on May 2, 2005 ("May 2005 Order"). Ex. 3009.

In the May 2005 Order, Director Dreher agreed that the SWC was materially injured by junior ground water pumping in 2005. The May 2005 Order established the framework for quantifying material injury in 2005 and in future years. *See generally* Exs. 3009-3015. Director Dreher recognized the water rights held by the SWC, but reasoned the SWC did not require the full volume of its water rights to successfully irrigate its crops. Ex. 3009 at 11-16, 19-20. In analyzing data from the past 15 irrigation seasons (1990-2004), *id.* at 3, Director Dreher

determined 1995 was the most representative year in which the SWC received a “minimum full supply” of water,⁴ *id.* at 26. The minimum full supply of water needed was quantified by Director Dreher as 3,105,000 acre-feet. *Id.* at 26 (listing minimum full supply needed by each SWC entity, totaling 3,105,000 acre-feet).

In order to predict injury, Director Dreher compared the predicted run-off at the Heise gage with the minimum full supply. Ex. 3009 at 21-22, 25-26. If the predicted run-off was less than the minimum full supply, the SWC was found to be materially injured and junior ground water users were ordered to mitigate their depletions with replacement water.⁵ Exs. 3009 (2005 irrigation season); 3014 (2007 irrigation season). If the predicted run-off exceeded the minimum full supply, the SWC was not found to be materially injured and no replacement water was ordered. Ex. 3012 (2006 irrigation season); R. Vol. 38 at 7198 (2008 irrigation season).⁶

3. January 2008 Hearing on SWC Delivery Call

On August 1, 2007, Gerald F. Schroeder was appointed by then-Director David R. Tuthill, Jr.⁷ to preside as an independent hearing officer in the hearing on the SWC delivery call.

⁴ As explained by Director Dreher at the hearing: “[T]he maximum full supply would be the amount authorized by the various decrees and contracts for storage water from the Bureau of Reclamation. So I suppose if you added those two together, that would give you an ultimate maximum full supply that probably rarely exists in many years, which raises an interesting question. Just because that doesn’t exist, does that mean that there’s injury? I don’t think so. The minimum full supply, on the other hand, is an amount that based upon historical use you’re pretty certain is going to be needed in order for the surface water group to have a full supply.” Tr. Vol. 1, p. 47, lns. 14-25; p. 48, lns. 1-8.

⁵ The district court reversed the Director’s use of replacement water plans to make up shortages to the SWC. Clerk’s R. Vol. 3 at 537. This issue has not been appealed. In conformance with CM Rule 43, and upon petition by junior ground water users, the Director issued two final orders approving mitigation plans to mitigate material injury to the SWC. Both final orders were contested by the SWC, affirmed by the Honorable Eric J. Wildman, and were not appealed. *Memorandum Decision and Order on Petition for Judicial Review*, Case No. CV-2010-3822 (Fifth Jud. Dist., April 22, 2011); *Memorandum Decision and Order on Petition for Judicial Review*, Case No. CV-2010-3075 (Fifth Jud. Dist., Jan. 25, 2011).

⁶ In 2008, no material injury was predicted during the irrigation season, but Director Tuthill did predict a 9,800 acre-feet shortfall to TFCC’s reasonable carryover. R. Vol. 38 at 7208.

R. Vol. 25 at 4770. Director Tuthill “maintain[ed] jurisdiction over the ongoing administration of water rights related to this matter.” *Id.* Because of requests by the parties for schedule changes, and matters unrelated to the administrative proceeding before the Department, *see American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007), it was not until the summer of 2007 that the parties agreed to a hearing schedule and the appointment of the hearing officer. R. Vol. 39 at 7382.

On January 18, 2008, the hearing on the SWC delivery call commenced. R. Vol. 37 at 7048. Participating in the hearing were the SWC, the Department, the Idaho Dairymen’s Association, IGWA, Pocatello, and the USBR. The hearing ran for a period of fourteen days in which testimony and evidence were presented by the participating parties. The Department provided witnesses to explain the background of the Department’s actions and the administrative record relied upon by the Director in entering the orders at issue and to assist the parties and the hearing officer.

Expert reports were prepared by the parties and presented to the hearing officer. Using many of the same inputs for the period 1990-2006, experts for the SWC and Pocatello agreed that material injury could be quantified based on a volume of water that was less than the sum of the SWC’s water rights. R. Vol. 37 at 7096 (“surface water and ground water expert testimony used much of the same information and in some respects the same approaches . . .”). Experts for the SWC concluded the SWC’s average irrigation diversion requirement was 3,274,948 acre-feet, or 5,757,804 acre-feet less than the sum of its water rights (9,032,752 acre-feet). R. Vol. 37 at 7096; Ex. 8000 at 9-12. Pocatello concluded the SWC’s average irrigation requirement was 2,405,861 acre-feet. R. Vol. 29 at 5390; R. Vol. 37 at 7096. The SWC’s irrigation diversion

⁷ In 2007, Director David R. Tuthill, Jr. was appointed by Governor C.L. “Butch” Otter to replace Director Dreher.

requirement was 5 percent greater than Director Dreher's minimum full supply (3,105,000 acre-feet). Pocatello's irrigation diversion requirement was 23 percent less than the minimum full supply.

4. The Hearing Officer's Recommended Order

On April 29, 2008, the hearing officer issued his *Opinion Constituting Findings of Fact and Conclusions of Law* ("Recommended Order"). R. Vol. 37 at 7048. The hearing officer determined, among other things, that the Director responded timely to the SWC's delivery call; that the Director properly exercised his discretion in conducting his own, independent analysis of the call to make a decision based on the best information available; that the Director properly found material injury and ordered curtailment of junior ground water rights; that the Director should no longer accept replacement water plans, but should instead require CM Rule 43 mitigation plans; that the Director properly examined the SWC's natural flow and storage water rights to determine its total water supply and material injury; and, that TFCC's full headgate delivery should be 5/8 of a miner's inch, not 3/4. *See generally* R. Vol. 37 at 7048.

The hearing officer specifically accepted the use of a volumetric calculation for determining material injury to the SWC: "The attempt to project the amount of water that is necessary for the members of the SWC to fully meet crop needs within the licensed or decreed amounts is an acceptable approach to conjunctive management However, there should be adjustments if the process of establishing a base different from the licensed amount is to be utilized in future administration." R. Vol. 37 at 7091-7092. The hearing officer recognized the competing approaches and concluded as follows:

4. The recommendation is that the ground water users' average diversion budget analysis for the period from 1990-2006 not be accepted in determining a baseline

supply to predict need.

....

5. The conclusions in the SWC's expert testimony are closer to being acceptable, but there are problems in areas of analysis that preclude outright acceptance of the conclusions.

....

6. The minimum full supply established in the May 2, 2005, Order is inadequate to predict the water needs of the SWC on an annual basis. There are too many unaccounted variables in the minimum full supply analysis to be continued in use as the baseline for predicting the likelihood of material injury.

R. Vol. 37 at 7097 (emphasis added).

5. The Director's Final Order

On September 5, 2008, Director Tuthill issued his *Final Order Regarding the Surface Water Coalition Delivery Call* ("Final Order"). R. Vol. 37 at 7381. In the Final Order, Director Tuthill accepted virtually all of the hearing officer's recommendations, including his recommendation that the Department discontinue its use of the minimum fully supply analysis, and his recommendation that the Department use a baseline. Director Tuthill stated his intention to issue a separate, final order detailing his approach for predicting material injury. *Id.* at 7386.

As will be explained below, the Director does not use the minimum full supply analysis in administration. The minimum full supply analysis has been replaced by the Director's *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order"). Clerk's R. Vol. 7 at 1354(S). Since 2010, the Methodology Order has been used to determine material injury. Clerk's R. Vol.

5 at 849 (applying the Methodology Order to the 2010 irrigation season).⁸ The Methodology Order and orders applying the Methodology Order have been consolidated and are on judicial review before the Honorable Eric J. Wildman in Case No. 2010-382.⁹ Proceedings on the Methodology Order are stayed pending the outcome of this appeal,¹⁰ with the parties stipulating to application of the Methodology Order in the interim.¹¹

6. The District Court's Order on Judicial Review

On July 24, 2009, the Honorable John M. Melanson issued his *Order on Petition for Judicial Review* ("Order on Judicial Review"). Clerk's R. Vol. 3 at 511. In the Order on Judicial Review, the district court reversed the Director's decision that reasonable carryover shortfalls should be "categorically" limited to one year, not multiple years. *Id.* at 530. Next, the district court reversed the Director's decision that replacement water plans should continue to be authorized. *Id.* at 537. Lastly, the district court reversed the Director's decision that, because of the Director's pending recommendation in the SRBA, full headgate delivery for TFCC should be 5/8 of a miner's inch, not 3/4. *Id.* at 541.

The district court affirmed the Director's decision to examine the SWC's "total water supply" (natural flow + storage) for purposes of determining material injury. *Id.* at 533. Second, the district court affirmed the Director's use of the ESPA Model and his use of the 10 percent

⁸ No material injury was found in 2011 to the SWC's reasonable in-season demand. http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/2011/04Apr/20110418_final%20order%20re%20april%202011.pdf (last visited September 19, 2011).

⁹ Attached hereto as Addendum 1 is the *Order Denying Motion to Renumber; Order Consolidating Proceedings Involving Petitions for Judicial Review of "Methodology Order" and "As-Applied" Order*.

¹⁰ Attached hereto as Addendum 2 is the *Order Granting Motion for Stay*.

¹¹ Attached hereto as Addendum 3 is the *Motion for Stay*.

trimline. *Id.* at 536. See *Clear Springs* at ____, 252 P.3d at 93-95, 97-98. Lastly, the district court affirmed the Director's ability to quantify material injury based on a projected volume of water that could be less than the SWC's total water rights: "[T]he total combined decreed quantity of the natural flow and storage water rights can exceed the amount of water necessary to satisfy in-season demands plus reasonable carry-over. Simply put . . . a finding of material injury requires more than shortfalls to the decreed or licensed quantity of the senior right." Clerk's R. Vol. 3 at 536 (emphasis added). Even though the CM Rules "do not expressly provide for the use of a 'baseline' or other methodology . . . the Hearing Officer determined that the use of a baseline estimate to represent predicted in-season irrigation needs was acceptable This Court affirms the reasoning of the Hearing Officer on this issue." *Id.*

However, because of the Director's improper decision to issue a separate, final order detailing his approach for quantifying material injury, the district court remanded the proceedings to the Director for inclusion of his methodology. *Id.* at 543.¹²

7. The District Court's Orders on Rehearing

Petitions for rehearing were filed by IGWA and Pocatello. Two issues upon which rehearing was sought was the district court's decision that full headgate delivery for TFCC was 3/4 of a miner's inch and the district court's instruction that the Director "issue [his] final order with regard to the methodology adjustments based exclusively upon the evidence and facts contained in the record and without requiring any further hearings on the matter." Clerk's R. Vol. 4 at 574. In response, the SWC "agree[d] that the Director is required to issue a new order

¹² In footnote 8 to the Order on Judicial Review, the district court references a June 30, 2009 "Order Regarding Protocol for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover. The Order is not part of the record in this matter." Clerk's R. Vol. 3 at 542, fn. 8. The June 30 interlocutory order issued by Director Tuthill was subsequently rescinded by Director Spackman. Clerk's R. Vol. 4 at 588.

on remand based upon the facts and evidence included in the existing agency record” *Id.* at 588. The Department also concurred: “sufficient information exists to issue an order determining material injury to reasonable carryover and reasonable in-season demand. The Director will work expediently to issue the order” *Id.* at 604.

On March 4, 2010, following oral argument on rehearing, Judge Melanson¹³ agreed with the Department’s proposal to “hold in abeyance its decision on rehearing until the Director issues the new order and the time for filing a motion for reconsideration and a petition for judicial review of the order has expired.” *Id.* at 628. The district court ordered the Department to issue its order by March 31, 2010, which was later extended to April 7, 2010. *Id.* at 629.

Any objections to the district court’s process were required to be filed no later than March 10, 2010. *Id.* at 629. No party to the proceeding objected to the district court’s decision to stay its decision on rehearing in order to allow the Director time to issue his order on remand.

On April 7, 2010, Interim Director Gary Spackman¹⁴ issued his Methodology Order. Clerk’s R. Vol. 7 at 1354(S). The Methodology Order established a multi-step process for calculating material injury to irrigation season shortages and reasonable carryover. *Id.* at 1354(yy)-(bbb). The Methodology Order took into consideration the record established at the hearing, the district court’s Order on Petition for Judicial Review, and departed from the minimum full supply analysis. *Id.* at 1354(T)-(V). The Methodology Order established an adjustable baseline volume to predict material injury to the SWC. *Id.* at 1354(W)-(PP). Presently, the baseline volume in the Methodology Order is 3,145,333 acre-feet. *Id.* at 1354(dd) (“06/08 Avg. Total Diversions”). The baseline volume is 4 percent less than the 3,274,948 acre-foot irrigation diversion requirement presented by the SWC to the hearing officer in its expert

¹³ In 2009, Judge Melanson was appointed to the Idaho Court of Appeals by Governor Otter.

¹⁴ In 2009, Gary Spackman was appointed as Interim Director by Governor Otter.

report. Ex. 8000, Vol. 2 at 9-12.

On August 23, 2010, after petitions for judicial review of the Methodology Order were filed, the district court issued its *Order on Petitions for Rehearing* (“Order on Rehearing”) Clerk’s R. Vol. 7 at 1215. Pertinent to this appeal, the district court held that while the Director abused his discretion in authorizing replacement water plans, “there is no practical remedy to cure that error at this point in the proceedings.” *Id.* at 1226. The district court also adopted Judge Wildman’s evidentiary standard of review analysis from Minidoka County Case No. CV-2009-000647 (May 4, 2010), in which Judge Wildman held that the proper evidentiary standard to apply in conjunctive management delivery calls is clear and convincing. *Id.* at 1223-1224. Consequently, the district court remanded the case to the Director “so that he may apply the ‘clear and convincing’ evidentiary standard and appropriate burdens of proof when determining full headgate delivery for TFCC’s water right at issue in this case.” *Id.* at 1224. “[I]n all other respects, the Director’s September 5, 2008 *Order* is affirmed.” *Id.* at 1226.

On August 26, 2010, the Department moved the district court “to clarify and/or reconsider” its ordered remand. *Id.* at 1229. The Director sought clarification because the Methodology Order “is using 3/4 of an inch for TFCC diversions, instead of the stated 5/8 of an inch in his September 5, 2008 Final Order.” *Id.* at 1230.

Clarification of the Order on Remand was also sought by the SWC. On September 2, 2010, the SWC asked the district court to clarify whether its ordered remand applied to SWC entities other than TFCC: “Accordingly, the Coalition requests the Court clarify its remand order to provide that the Director is required to apply the same standards and burdens when reviewing material injury to the water rights of all Coalition members.” *Id.* at 1236. The SWC also asked the court to clarify if its Order on Remand “requires the Director to apply the proper burdens and

standards in making any determination under the CMR in the event this amount is ‘less than the recommended quantity’ of the SWC’s senior water rights.” *Id.* at 1237.

On September 9, 2010, the district court issued its *Amended Order on Petitions for Rehearing; Order Denying Surface Water Coalition’s Motion for Clarification* (“Amended Order on Rehearing”). *Id.* at 1240. In the Amended Order on Rehearing, the district court granted the Department’s motion that the proceeding not be remanded because the Director, in his Methodology Order, “calculated 3/4 inch per acre as TFCC’s full headgate delivery.” *Id.* at 1251. The district court then denied the SWC’s motion for clarification, because the “issues were not raised by any party on rehearing. As such, this Court will not address them further.” *Id.* at 1252 (emphasis added).

As stated previously, the Methodology Order has since been applied to the 2010 and 2011 irrigation seasons. The Methodology Order and the orders applying the Methodology Order to the irrigation season have been consolidated before Judge Wildman in Case No. 2010-382. *Addendum 1.* The judicial review proceedings are stayed pending the outcome of this appeal. *Addendum 2.* In the interim, the parties have stipulated in Case No. 2010-382 that the Methodology Order will govern conjunctive administration. *Addendum 3.*

III. STANDARD OF REVIEW

Judicial review of a final decision of IDWR is governed by the Idaho Administrative Procedure Act (“IDAPA”), chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based on the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court “shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” Idaho Code § 67-5279(1). “The agency’s factual determinations

are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record.”

Urrutia v. Blaine County, ex rel. Bd. of Comm’s, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000).

The court shall affirm the agency decision unless the court 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. Idaho Code § 67-5279(3); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron* at 417, 18 P.3d at 222.

IV. ARGUMENT

In applying the conjunctive management rules to the record, the hearing officer, the Director, and the district court found: In certain years, the SWC is materially injured by junior ground water diversions. In order to quantify material injury, the recommendation of the hearing officer, which the Director accepted and the district court affirmed, was to use an adjustable “baseline” volume to predict material injury to a quantity of water that is needed for beneficial use. The baseline has replaced former Director Dreher’s “minimum full supply” analysis; therefore, the minimum full supply analysis is moot.

Dissatisfied with the decision to use a baseline that focuses on beneficial use, the SWC asks this Court to order the Director to administer junior ground water rights in order to satisfy its “decreed diversion rates.” *SWC Opening Brief* at 20 & 22. The SWC’s argument cannot be reconciled in law or fact.

Legally, the SWC's position is inconsistent with this Court's 2007 decision in *American Falls*. There, the Court rejected the senior surface water users' argument that the Director must blindly administer junior ground water rights in order of priority without examination of the seniors' beneficial use. "If this Court were to rule that the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water." *American Falls* at 877, 154 P.3d at 448. Likewise, it is inconsistent with *Clear Springs v. Spackman*, where this Court stated: "An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water" 150 Idaho 790, ___, 252 P.3d 71, 90 (2011).

The SWC's position is also inconsistent with the facts in the record, which are binding on appeal. At the hearing, the SWC represented that the average volume of water it needs in an irrigation season is 3,274,948 acre-feet. Ex. 8000, Vol. 2 at 9-12. This volume of water is nearly three times less than the sum of its 9,032,752 acre-feet decreed diversion rates. Even ignoring the SWC's stated irrigation diversion requirement, administration to the sum of the SWC's decreed diversion rates would result in more water than the SWC's canals can physically convey and allow the SWC to irrigate more acres than are authorized for irrigation. These facts were specifically considered by the SWC in its expert report when it quantified its 3,274,948 acre-feet irrigation diversion requirement. Ex. 8000, Vol. 2 at 9-6-7. The record clearly establishes that administration to the SWC's decreed diversion rates would result in more water being delivered than it can put to beneficial use.

Separate issues on appeal were raised by IGWA and Pocatello. Regarding TFCC's full

headgate delivery, and because TFCC's water rights are at-issue in the SRBA, the district court properly held that the correct duty of water is 3/4 miner's inches. Additionally, the Director requests that, in order to provide security to the senior right while at the same time allowing the Director to ensure that the senior is putting water to beneficial use and not wasting the resource, this Court should affirm the district court's holding that the correct evidentiary standard of review in conjunctive administration is clear and convincing.

V. RESPONSE TO ISSUES RAISED BY THE SWC

1. The Minimum Full Supply Analysis Has Been Replaced By The Methodology Order; Therefore, The Minimum Full Supply Analysis Is Moot

In its Opening Brief, the SWC takes repeated issue with former Director Dreher's minimum full supply analysis. However, the minimum full supply analysis is no longer used in administration. As stated above, the hearing officer found the minimum full supply analysis was "inadequate" and recommended the Department discontinue its use. R. Vol. 37 at 7097. Former Director Tuthill agreed, and did not include his material injury framework in his Final Order; but rather stated his intention to issue a separate, final order containing his decision. *Id.* at 7386.

Even though the Department no longer used the minimum full supply analysis, Judge Melanson examined whether the Director could, for purposes of administration, use a baseline volume to determine material injury to the SWC. In its Order on Judicial Review, the district court held that the Director could use a baseline for quantifying material injury: "[T]he use of a baseline is a necessary result of the Director implementing the conditions imposed by the CMR" Clerk's R. Vol. 3 at 536. The district court then held that Director Tuthill's decision to issue a separate, final order with his material injury framework was erroneous and remanded the proceeding to correct the defect. *Id.* at 542.

In order to allow the Department to cure the error, the district court held in abeyance entry of an appealable order. Clerk's R. Vol. 4 at 628. The SWC took no issue with this approach. *Id.* at 631-633. In response, Director Spackman issued his Methodology Order. The Methodology Order has since been applied to the 2010 and 2011 irrigation seasons and is currently before Judge Wildman on judicial review.

Because the minimum full supply analysis is no longer used by the Director, this issue is moot: "Mootness . . . applies when a favorable judicial decision would not result in any relief. This Court may only review cases in which a judicial determination will have a practical effect on the outcome." *Zingiber Inv., LLC v. Hagerman Highway Dist.*, 150 Idaho 675, ___ 249 P.3d 868, 878 (2011). As a result, the Court should not review the SWC's arguments concerning the minimum full supply analysis.¹⁵ While specific arguments related to the minimum full supply analysis are moot, the issue of whether the Director may use a baseline is properly before the Court.

2. The District Court Properly Approved The Use Of A Baseline Supply To Predict Material Injury To The SWC

In analyzing the Director's minimum full supply and the parties' water budget analyses, the hearing officer recommended the use of a "baseline of predicted water need for projecting material injury." R. Vol. 37 at 7098 (emphasis added). On judicial review, the district court affirmed this decision: "The SWC argues that the Director abused his discretion and acted contrary to law by using a baseline quantity, as opposed to the decreed or licensed quantity. This Court disagrees. . . . As this Court concluded previously, the total combined decreed quantity

¹⁵ In a footnote, the SWC compares the minimum full supply analysis with the process established in the Director's Methodology Order, arguing that the "Director simply re-named the same process . . ." *SWC Opening Brief* at 23, fn. 14. The Director disagrees and notes that the substantive differences between the minimum full supply analysis and the Methodology Order are before the district court on judicial review, not this Court on appeal.

of the natural flow and storage rights can exceed the amount of water necessary to satisfy in-season demands” Clerk’s R. Vol. 3 at 535-536 (emphasis added). On appeal, the SWC asks this Court to re-weigh the substantial evidence in the record supporting the underlying decision.

In this case, Director Dreher expressly recognized the rights held by the SWC, and applied the CM Rules. Ex. 3009 at 11-16, 36-44. At the hearing, Director Dreher then explained to the hearing officer how he examined the SWC’s water rights in the context of its delivery call:

You start with the water rights’ decree in terms of what has the Court determined is the extent of the water right. But a water right is not a quantity entitlement. It’s a -- it’s a property right that authorizes the use of water under certain conditions and up to certain limits. And one of those limits is the quantity element of the right, which is the maximum amount of water that can be diverted under that right for beneficial use. But it’s the maximum amount that can be diverted. It’s not necessarily the amount that is needed.

And in the West where water is a scarce resource, at times more than other times, you don’t curtail junior uses to provide water that isn’t needed by the senior. You have to make a determination of how much water is needed by the senior to curtail those junior uses.

Tr. Vol. 1, p. 24, lns. 23-25; p. 25, lns. 1-15.

In its Opening Brief, the SWC disparages the above quotation. *SWC Opening Brief* at 24. The consequence of examining water rights as quantity entitlements with no regard for beneficial use was understood by the hearing officer and is supported by substantial evidence in the record. R. Vol. 37 at 7083-707086; *see also American Falls* at 868, 154 P.3d at 439 (“Contrary to the assertion of American Falls, depletion does not equate to material injury. Material injury is a highly fact specific inquiry that must be determined in accordance with IDAPA conjunctive management rule 42.”).

A. The Sum of the SWC's Water Rights Exceed its Canal Capacity, Irrigated Area, Maximum Volume of Water Ever Diverted, and Annual Run-Off into the Snake River

In its Opening Brief, the SWC argues that the Director lacked evidence that the SWC “would not beneficially use [its] decreed quantities” *SWC Opening Brief* at 22. This assertion directly conflicts with the record and cannot be sustained on appeal. At the hearing, the SWC did not simply tabulate its water rights and present the sum to the hearing officer. Rather, the SWC analyzed the period 1990-2006 to develop an “irrigation diversion requirement” based on six specific inputs: (1) crop type and acreage; (2) crop evapotranspiration; (3) field application (flood/sprinkler); (4) conveyance losses; (5) operational losses or returns; and (6) limit to maximum diversion and canal capacity. Ex. 8000, Vol. 2 at 9-6-7. Using those inputs, the average irrigation diversion requirement for the period 1990-2006 was 3,274,948 acre-feet.¹⁶ Ex. 8000, Vol. 2, Tbl. 9-2 at 9-12.

As previously established, the SWC's decreed water supply totals 9,032,752 acre-feet. Therefore, the SWC's water rights are 5,757,804 acre-feet greater than the “reasonable” and “conservative” annual irrigation diversion requirement it presented to the hearing officer. Ex. 8000, Vol. 2 at 9-9. The disconnect between the SWC's expert analysis and the position taken on appeal is vividly illustrated by: The inherent limitations of its canal capacity; its irrigated area; the maximum volume of water ever diverted by the SWC; and, the annual run-off into the Snake River.

¹⁶ In its expert report, the SWC tested the “reasonable[ness]” of its irrigation diversion requirement by comparing it with the USBR's “1946 water planning study for the Palisades Reservoir Project” Ex. 8000, Vol. 2 at 9-9 (emphasis added). In that study, the USBR's “computed irrigation diversion requirements for the 571,000 acres of existing and 30,000 acres of planned irrigated lands below American Falls (Reclamation, 1946).” *Id.* For those lands, the 1946 USBR study determined an irrigation diversion requirement of 3,705,000 acre-feet. *Id.* According to the SWC expert report, the 430,052 acre-feet difference between the analyses “shows both the reductions in irrigation requirements the SWC has created as a result of improved efficiency and the conservative nature of the irrigation requirement estimate provided in th[e] [SWC] analysis.” *Id.* (emphasis added).

i. The SWC's Canal Capacity

Canal capacity is an inherent limitation on a water right in the state of Idaho: “It is a well-established fact, governed by settled physical laws, that a conduit for conveying water cannot deliver an amount beyond its carrying capacity.” *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 56, 231 P. 418, 420 (1924). “[T]he aggregate rights of the users of water cannot exceed the capacity of the canal” *Gerber v. Nampa & Meridian Irr. Dist.*, 16 Idaho 1, 17, 100 P. 80, 86 (1908). CM Rule 42 authorizes the Director to examine “the rate of diversion compared to . . . the system diversion” CM Rule 42.01.d.

Understanding the law, the SWC expressly reduced its irrigation diversion requirement in its expert report to account for its canal capacity: “The computed irrigation diversion requirements were limited to the maximum diversion and canal capacity to avoid over-predicting the diversion requirement.” Ex. 8000, Vol. 2 at 9-7 (emphasis added); *see also* Ex. 8000, Vol. 4 at AU-5-6. On appeal, the SWC ignores this fact in demanding administration to its decreed diversion rates—thereby “over-predicting the diversion requirement.”

Assuming SWC canals could carry a full volume of water over the course of its 246-day irrigation season,¹⁷ and that water could be applied to beneficial use and not wasted, its canals would convey 12,941 cfs, or 6,314,444 acre-feet.¹⁸ Ex. 8000, Vol. 4 at AU-11. *Compare with* R. Vol. 29 at 5477-5483 (Pocatello expert report establishing SWC's canal capacity as 6,289,116 acre-feet). Therefore, the SWC's water rights (9,032,752 acre-feet) exceed its reported canal

¹⁷ In its expert report, for the period 1990-2006, the SWC shows that its members do not divert the full volume of their water rights during every month of the irrigation season. Ex. 8000 Vol. 2 at 9-21-27. In March, April, and October, diversions are less than in the hotter months. *Id.*

¹⁸ One cfs is converted to acre-feet per day as follows: 1 cfs x 1.9835. The “cfs” canal capacity used in the SWC's expert report is converted to an irrigation season volume as follows: 12,941 cfs x 1.9835 x 246 days = 6,314,444 acre-feet. Even if the SWC had no storage water available, the sum of its decreed natural flow diversion rates (13,756 cfs, or 6,712,116 acre-feet) still exceed its canal capacity.

capacity by 2,718,308 acre-feet. Arguing for water in excess of its canal capacity is contrary to the prior appropriation doctrine, the evidence presented to the hearing officer, and cannot be sustained on appeal.

ii. The SWC's Irrigated Area

Similar to examining canal capacity, SWC experts also examined its irrigation diversion requirement in the context of its irrigated area. Ex. 8000, Vol. 2 at 9-6. According to its expert report, the SWC irrigates 569,827 acres.¹⁹ Ex. 8000, Vol. 3, Apdx. A, Tbl. A-1 at A-1-3. The duty of water for most SWC entities is 5/8 of a miner's inch per acre, but for TFCC the recommended duty of water is 3/4 of a miner's inch per acre. Ex. 3009 at 19-20; R. Vol. 37 at 7100, 7102. In Idaho, 1 miner's inch is equivalent to 0.02 cfs; 1 cfs is equivalent to 50 miner's inches. Idaho Code § 42-220.

CM Rule 42 authorizes the Director to examine “the rate of diversion compared to the acreage of land served” CM Rule 42.01.d. Assuming 24-hour diversion of the SWC's water rights (9,032,752 acre-feet) over the course of a 246-day irrigation season, and adjusting for conveyance loss to allow 3/4 inches to be delivered to the field headgate,²⁰ the SWC's water

¹⁹ As stated in the hearing officer's Recommended Order, approximately 14,515 acres identified by the SWC as irrigated are not irrigated: “IGWA has established that at least 6,600 acres claimed by TFCC in its district are not irrigated. Similar information was submitted concerning the Minidoka Irrigation District, indicating that the claimed acreage of 75,152 includes 5,008 acres not irrigated and Burley Irrigation District has some 2,907 acres of the 47,622 acres claimed not irrigated.” R. Vol. 37 at 7100. Using “approximate” values in its Opening Brief, the SWC presented its irrigated area to this Court as 572,500 acres. *SWC Opening Brief* at 4-5. For purposes of illustration in this brief, the Department accepts the irrigated area presented in the SWC's expert report as correct.

²⁰ In a rebuttal report, the SWC compared the conveyance loss its experts calculated for each of its entities with the conveyance loss calculated by experts for Pocatello. Ex. 8201. Using entity-specific conveyance losses ascribed by the SWC experts and the number of acres that are served by each entity, the overall, area-weighted conveyance loss for the SWC is 59.3 percent. *Id.* The overall, area-weighted conveyance loss estimates provided by Pocatello's experts is 73.1 percent. According to the hearing officer, the SWC's “conveyance values do not appear reliable” R. Vol. 37 at 7097 (emphasis added). For purposes of illustration in this brief, the Department accepts the SWC's conveyance loss values as correct.

rights would allow for irrigation of 731,841 acres.²¹ Therefore, even assuming a 3/4 miner's inch duty of water for entities that deliver 5/8 miner's inches, administration to the full extent of the SWC's water rights would allow the SWC to irrigate 162,014 acres more than its expert determined were irrigated. Arguing for more water than can be put to beneficial use is contrary to the prior appropriation doctrine, the evidence presented to the hearing officer, and cannot be sustained on appeal. "[T]he extent of beneficial use was an inherent and necessary limitation upon the right to appropriate." *Clear Springs* at ____, 252 P.3d at 90.

iii. Maximum Volume of Water Ever Diverted by the SWC

CM Rule 42 authorizes the Director to examine "The amount of water being diverted and used compared to the water rights." CM Rule 42.01.e. In its expert report, the SWC presented its "total diversions" from natural flow and storage for the period 1930-2006. Ex. 8000, Vol. 4 at AS-8. In 1967, the SWC realized its greatest total diversion, 4,070,993 acre-feet. Assuming all of the water diverted was applied to beneficial use, and ignoring the irrigation diversion requirement the SWC presented to the hearing officer, the SWC's water rights (9,032,752 acre-feet) are 4,961,759 acre-feet greater than its maximum recorded diversion.²² Demanding nearly 5 million acre-feet more than its maximum recorded diversion over a period of record in excess of 75 years is contrary to the prior appropriation doctrine. CM Rule 20.03 ("An appropriator is

²¹ $9,032,752 \text{ acre-feet} \div 246 \text{ days} = 36,718.5 \text{ acre-feet per day (af/d)}$. $36,718.5 \text{ af/d} \times 1 \text{ cfs} \div 1.9835 = 18,512 \text{ cfs}$. $18,512 \text{ cfs} \times 50 \text{ miner's inches} = 925,600 \text{ miner's inches}$. $925,600 \text{ miner's inches} \times .593 \text{ (SWC conveyance loss)} = 548,881 \text{ miner's inches}$. $548,881 \text{ miner's inches} \times 1 \text{ acre} \div 0.75 \text{ miner's inches} = 731,841 \text{ acres}$.

²² Not only has the SWC never diverted 9 million acre-feet, but the total combined diversions of all surface water irrigators above Milner Dam have never exceeded 9 million acre-feet: "[B]ecause of conversions from gravity flood/furrow irrigation to sprinkler irrigation in surface water irrigation systems and other efficiencies implemented by surface water delivery entities such as the members of the Surface Water Coalition . . . the total combined diversions of natural flow and storage releases above Milner Dam for irrigation using surface water have declined from an average of nearly 9 million acre-feet annually to less than 8 million acre-feet annually . . ." Ex. 2009 at 20 (emphasis added). Therefore, the SWC asks for administration of more water than is cumulatively diverted by all surface water irrigators in the Upper Snake.

not entitled to command the entirety of large volumes of water”); *Clear Springs* at ____, 252 P.3d at 90.

iv. Annual Run-Off into the Snake River

CM Rule 42 authorizes the Director to examine “[t]he amount of water available in the source from which the water right is diverted.” CM Rule 42.01.a. In the May 2005 Order, Director Dreher, like the USBR and the United States Army Corps of Engineers, used the Heise gage for purposes of determining surface water supply available to the SWC. Ex. 3009 at 21. “The Heise Gage location is the most representative location for overall surface water supply conditions in the Upper Snake River Basin.” Ex. 3009 at 21; *see also* Ex. 1073 (mapping the physical location of the Heise gage). Director Dreher’s use of the Heise gage for predicting the SWC’s water supply was not appealed, and is used by the Director in the Methodology Order for predicting material injury. Clerk’s R. Vol. 7 at 1354(bb)-(cc), (LL).

From 1911-2004, the greatest recorded annual volume at the Heise gage was 8,401,500 acre-feet, occurring in 1997 (November 1, 1996 to October 31, 1997). Ex. 1000 at 2; Ex. 3009 at 19; R. Vol. 3 at 569. Over the period of record, the average recorded annual volume at Heise was 5,093,000 acre-feet. Ex. 1000 at 2. Comparing the period of record with the SWC’s water rights shows that its water rights (9,032,752 acre-feet) are 631,252 acre-feet more than the greatest recorded annual volume at Heise; and 3,939,752 acre-feet more than the average annual volume. Demanding more water than flows into the Snake River as run-off under average and maximum conditions is contrary to the prior appropriation doctrine.²³ CM Rule 20.03; *Clear Springs* at ____, 252 P.3d at 90.

²³ Even though the SWC’s water rights were not fully satisfied in 1997, Director Dreher specifically found that the SWC was not materially injured in that year. Ex. 3009 at 19.

The substantial evidence in the record plainly shows the effect of treating the SWC's water rights as quantity entitlements without regard for beneficial use: Canal capacity, irrigated area, the SWC's maximum recorded diversion, and the reasonable use of the State's water resources would have to be ignored. Rote, priority administration to decreed diversion rates is not the law in Idaho: "Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use." *American Falls* at 880, 154 P.3d at 451. The use of a baseline for purposes of determining material injury to an amount of water that is actually needed for beneficial use is supported by law, substantial evidence in the record, and should be affirmed on appeal.

3. The Director's Decision To Employ A Baseline Is Entitled To Deference

In recommending the use of a baseline, the hearing officer stated as follows: "Whether one starts at the full amount of the licensed or decreed right and works down when the full amount is not needed or starts at a base and works up according to the need, the end result should be the same." R. Vol. 37 at 7091. According to the district court, even though the CM Rules "do not expressly provide for the use of a 'baseline' or other methodology . . . the Hearing Officer determined that the use of a baseline estimate to represent predicted in-season irrigation needs was acceptable This Court affirms the reasoning of the Hearing Officer on this issue." Clerk's R. Vol. 3 at 536. On appeal, the SWC simply reargues this point. The hearing officer's recommendation, the Director's acceptance of that recommendation, and the district court's affirmation of the use of a baseline are entitled to deference and should be affirmed.

"[T]he courts are not alone in their responsibility to interpret and apply the law. As the need for responsive government has increased, numerous executive agencies have been created to help administer the law. To carry out their responsibility, administrative agencies are

generally clothed with power to construe [the law] as a necessary precedent to administrative action.” *J.R. Simplot Co., Inc. v. Idaho State Tax Comm’n*, 120 Idaho 849, 854, 820 P.2d 1206, 1211 (1991); *Mason v. Donnelly Club*, 135 Idaho 581, 21 P.3d 903 (2001) (extending *Simplot* to an agency’s interpretation of its administrative rules).

Under *Simplot*, a four-prong test has been developed for agency deference. The first prong asks whether the agency has been entrusted with the responsibility to administer the statute at issue. *Pearl v. Board of Professional Discipline of Idaho State Bd. of Medicine*, 137 Idaho 107, 113, 44 P.3d 1162, 1168 (2002). Here, the first prong is met as the Director, who is required by state law to be a licensed engineer, is entrusted with the responsibility to administer the State’s water resources in accordance with the prior appropriation doctrine, as established by Idaho law. Idaho Code § 42-602; Idaho Code § 42-1701(2). In accordance with the authority granted to him, the Director promulgated the CM Rules. Idaho Code § 42-603; CM Rule 0.

The second prong asks whether the agency’s construction is reasonable. *Pearl* at 113, 44 P.3d at 1168. Here, the SWC holds natural flow and storage water rights that total 9,032,752 acre-feet. The substantial evidence in the record demonstrates that the SWC’s total water supply is greater than its canal capacity, its irrigated area, its maximum recorded diversion, and annual run-off into the Snake River. The Director’s decision to employ a baseline that focuses on beneficial use, as opposed to blind priority administration, is reasonable and consistent with Idaho law; therefore, *Pearl*’s second prong is satisfied.

The third prong asks for the Court to determine that the language at issue does not treat the precise issue. *Pearl* at 113, 44 P.3d at 1168. The CM Rules require the Director to analyze material injury and lists eight non-exclusive factors that the Director may consider. CM Rule 42.

The CM Rules do not, however, set forth a method to determine material injury; therefore, *Pearl*'s third prong is met.

Finally, the fourth prong asks whether any of the rationales underlying the rule of deference are present. *Pearl* at 113, 44 P.3d at 1168. The rationales to be considered include:

(1) the rationale requiring that a practical interpretation of the statute exists, (2) the rationale requiring the presumption of legislative acquiescence, (3) the rationale requiring agency expertise, (4) the rationale of repose, and (5) the rationale requiring contemporaneous agency interpretation.

....

If one or more of the rationales underlying the rule are present, and no "cogent reason" exists for denying the agency some deference, the court should afford "considerable weight" to the agency's statutory interpretation.

Canty v. Idaho State Tax Comm'n, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002).

Here, rationales one, two, three, and five are met: (1) the Director's interpretation is practical because it focuses on beneficial use; (2) the legislature has not acted to alter or amend any portion of the CM Rules since their adoption, and has not acted to alter or amend the CM Rules since the SWC filed its delivery call in 2005; (3) as a licensed engineer, the Director is steeped with expertise in his ability to administer the State's water resources; and (5) the decision to adopt a baseline was contemporaneous with the Recommended and Final orders. Therefore, the Court "should afford considerable weight" to the Director's statutory interpretation of the CM Rules and affirm the use of a baseline.

4. The District Court's Decision is Internally Consistent

In its Opening Brief, the SWC argues that the district court's decision to affirm the use of a baseline should be reversed because it is inconsistent with the court's "later holding that 'in order to give proper presumptive weight to a decree, any finding by the Director in the context of

a delivery call proceeding that the quantity decreed exceeds the amount being put to beneficial use by the senior must be supported by clear and convincing evidence.” *SWC Opening Brief* at 30.

The only way a conflict can exist with the district court’s holding is if the SWC’s position on appeal is that the Director: (1) must administer to its decreed diversion rates; and (2) the clear and convincing evidentiary standard is an impenetrable shield to a delivery call. Again, strict priority administration to decreed diversion rates is not the law in Idaho.²⁴ *American Falls* 870, 154 P.3d at 441. Moreover, the clear and convincing standard is not insurmountable, as findings must be “highly probable or reasonably certain.” *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008). Therefore, the SWC’s position has no basis in law.

5. This Court’s Decision In *American Falls* Precludes The SWC’s Argument Regarding Administration Of Its “Decreed Diversion Rates”

The SWC’s argument on appeal that the Director must administer junior ground water users in order to satisfy its “decreed diversion rates,” *SWC Opening Brief* at 20 & 22, was rejected by the district court: “Simply put . . . a finding of material injury requires more than shortfalls to the decreed or licensed quantity of the senior right.”²⁵ Clerk’s R. Vol. 3 at 536

²⁴ The district considered and reconciled this issue in its Order on Judicial Review: “On first impression it would appear that the use of such a baseline constitutes a re-adjudication of a decreed or licensed water right. As stated by the Hearing Officer, ‘[t]he logic of the SWC in objecting to the Director’s use of a minimum full supply is difficult to avoid.’ R. Vol. 37 at 7090. However, on closer examination the use of a baseline is a necessary result of the Director implementing the conditions imposed by the CMR with respect to regulating junior rights” Clerk’s R. Vol. 3 at 535-536.

²⁵ The hearing officer expressed a similar opinion in his Recommended Order: “The Director is not limited to counting the number of acre-feet in a storage account and the number of cubic feet per second in the license or decree and comparing the priority date to other priority dates and then ordering curtailment to achieve whatever result that action will obtain regardless of actual need for the water and the consequences to the State, its communities and citizens. Application of the water to a beneficial use must be present, not simply a desire to use the maximum right in the license or decree because that simplifies management of the water right.” R. Vol. 37 at 7086 (emphasis added).

(emphasis added). The district court’s decision is in accord with *American Falls* and should be affirmed.

In *American Falls*, blind, priority administration of senior natural flow and storage water rights in conjunctive administration was struck down. There, the Court first disposed of the surface water users’²⁶ argument that priority alone governs in conjunctive administration: “The district court rejected American Falls’ position at summary judgment that water rights in Idaho should be administered strictly on a priority in time basis.” *American Falls* at 870, 154 P.3d at 441 (emphasis added). “[N]o appeal was taken” from this issue. *Id.*

Next, the Court turned to the surface water users’ argument that “the Director is required to deliver the full quantity of decreed senior water rights according to their priority” *Id.* at 876, 154 P.3d at 447 (emphasis in original) (internal quotation removed). That argument, too, was rejected: “If this Court were to rule that the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.” *Id.* at 877, 154 P.3d at 448 (emphasis added).

Finally, the Court reviewed the surface water users’ argument that they were entitled to full reservoirs: “At oral argument, one of the irrigation attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights.” *Id.* at 880, 154 P.3d at 451 (emphasis added). According to the Court, “This is simply not the law of Idaho.” *Id.* “Neither the Idaho Constitution, nor statutes, permit irrigation

²⁶ Other than Milner and NSCC, all other members of the SWC were party to the litigation. *American Falls* at 862, 154 P.3d at 433.

districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use.” *Id.* (emphasis added). *See also Clear Springs* at ____, 252 P.3d at 90 (“An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water . . .”).

Based on *American Falls*, the SWC is prohibited from arguing that priority and decreed diversion rates alone govern the Director’s determination of material injury in conjunctive administration. “Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public’s interest in this valuable commodity, lies an area for the exercise of discretion by the Director.” *American Falls* at 880, 154 P.3d at 451.

6. The District Court’s Ordered Remand Was Proper

Lastly, the SWC argues that this proceeding should be remanded because the district court “erred by failing to properly require the Director to issue a single final order in this matter.” *SWC Opening Brief* at 32. The SWC misinterprets the record and its argument should be rejected on appeal.

In this case, the district court held that Director Tuthill erred by not incorporating his material injury analysis in the Final Order that was subject to the court’s review. Clerk’s R. Vol. 3 at 542. Because of the error, and consistent with Idaho Code § 67-5279(2), the district court “remanded” the proceeding to the Director “for further proceedings consistent with this decision.” *Id.* at 543. Pursuant to statute, this was the only relief that could be given by the district court. *Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266, ____, 255 P.3d 1152, 1162 (2011).

Prior to staying the proceedings to allow the Director time to issue his material injury

order, the district court specifically asked the parties if there were any objections to the process. Clerk's R. Vol. 4 at 629. While the parties wanted to ensure that the Director's order would be based on the underlying record, no objections were raised to the process. *Id.* at 631, 637, 643. There is no basis now for complaint.

In that same vein, and upon issuance of the Methodology Order, petitions for judicial review were filed by the parties. IGWA and Pocatello sought to consolidate the Methodology Order proceedings before Judge Melanson in CV-2008-551 (the underlying proceeding on appeal to this Court).²⁷ "The Honorable John M. Melanson has handled the 551 Case for over two years, and continues to preside over the case after being appointed to the Court of Appeals. He is most familiar with the large agency record . . . and with the issues raised by the parties." *Addendum 4* at 6. The SWC opposed consolidation with Judge Melanson and instead sought review before Judge Wildman, as presiding judge of the SRBA.²⁸ "All appeals from any decision of the Department must be assigned to the SRBA District Court." *Addendum 5* at 5 (emphasis in original).

On July 29, 2010, Judge Wildman, as presiding judge of the SRBA, agreed with the SWC that the Methodology Order was properly before his court and should not be consolidated with Judge Melanson. *Addendum 1*. On September 9, 2010, after Judge Wildman entered his July 29, 2010 order, Judge Melanson, then with the Idaho Court of Appeals, entered his Amended Order on Rehearing, which allowed appeal of CV-2008-551 to be taken. Clerk's R. Vol. 7 at 1240. Because Judge Wildman granted the exact relief requested by the SWC, there is no basis now for complaint.

²⁷ Attached hereto as Addendum 4 is a copy of *IGWA and Pocatello's Motion for Consolidation*.

²⁸ Attached hereto as Addendum 5 is a copy of the SWC's *Joint Response to IGWA and Pocatello's Motion for Stay and Consolidation and Motion to Renumber Appeals and to File Appeals in Gooding County Case No. CV-2008-00551*.

The SWC also argues there are multiple, final orders “to govern conjunctive administration” *SWC Opening Brief* at 32 (emphasis added). This is incorrect. The final order that governs conjunctive administration is the Methodology Order, which is on judicial review before Judge Wildman. The minimum full supply analysis is moot.

Because the SWC cannot show that the Director erred in a manner specified in Idaho Code § 67-5279(3), and that its substantial rights have been prejudiced, Idaho Code § 67-5279(4), the SWC’s argument must fail.

7. The Director’s Prior Use Of Replacement Water Plans Are Not At Issue In This Appeal

In its Opening Brief, the SWC points to flaws with former Director Dreher and Tuthill’s use of replacement water plans, describing specific problems that occurred with implementation of the replacement plans in 2005 and 2007. *SWC Opening Brief* at 25-28. On judicial review, the district court reversed the Director’s use of replacement water plans. Clerk’s R. Vol. 3 at 537. The district court further stated there was “no practical remedy to cure that error at this point in the proceedings.” Clerk’s R. Vol. 7 at 1226, 1251. No party to this appeal has challenged the district court’s decision; therefore, the issue is not before the Court on appeal.²⁹

²⁹ Junior ground water users subsequently filed two CM Rule 43 mitigation plans to mitigate for material injury. *Memorandum Decision and Order on Petition for Judicial Review*, Case No. CV-2010-3822 (Fifth Jud. Dist., April 22, 2011); *Memorandum Decision and Order on Petition for Judicial Review*, Case No. CV-2010-3075 (Fifth Jud. Dist., Jan. 25, 2011). The plans were subject to administrative hearings, which resulted in Director Spackman issuing two final orders. *Id.* The SWC filed petitions for judicial review with regard to each final order with Judge Wildman. *Id.* The final orders were affirmed by the district court, with no appeal taken. Any issue with regard to implementation of the CM Rule 43 mitigation plans will be subject to review.

VI. RESPONSE TO ISSUES RAISED BY IGWA AND POCATELLO

1. Whether Twin Falls Canal Company's Headgate Delivery Is 5/8 Or 3/4 Of A Miner's Inch Is Not At Issue And/Or Is Not Ripe For Review

On appeal, IGWA argues: "In applying the CM Rules in this case, the Director determined that Twin Falls Canal Company ("TFCC") could meet its irrigation needs with 5/8 inch of water per acre. The district court reversed that decision on the basis that the Director must use a heightened 'clear and convincing evidence' standard of proof This Court should reverse the district court decision" *IGWA Opening Brief* at 18. IGWA misinterprets the district court's decision; thus, there is no basis for reversal.

The Final Order established TFCC's full headgate delivery as 5/8 of a miner's inch. R. Vol. 37 at 7382. On judicial review, the district court reversed this conclusion because the Director had recommended 3/4 of a miner's inch in the SRBA.³⁰ Clerk's R. Vol. 3 at 541-542. Because the Director did not include his material injury analysis in the Final Order, the district court remanded the proceeding to cure that error. *Id.* at 542. On remand, the Director issued his Methodology Order, based on a 3/4 of a miner's inch headgate delivery for TFCC. Clerk's R. Vol. 7 at 1230. In its Amended Order on Remand, the district court held as follows: "While the Court has ruled that the Director abused his discretion and exceeded his authority by . . . failing to apply the correct presumptions and burden of proof in making the determination under the CMR that TFCC was entitled to less than the quantity recommended . . . the Director has, upon remand, calculated 3/4 inch per acre as TFCC's full headgate delivery." *Id.* at 1251.

³⁰ The Director's recommendations in the SRBA for TFCC do not contain a condition or remark on their face specifying a duty of water. *See* Ex. 4001A at 5, 13, and 54. The duty of water was established in the record. Ex. 3009 at 19-20; Clerk's R. Vol. 3 at 541-542.

Because the Director is using 3/4 of a miner's inch, there is no controversy to resolve. Pocatello correctly acknowledges this fact in its Opening Brief: "IDWR's order on remand evaluated TFCC's claims of injuries by reference to the 3/4 inch standard, an action which arguably neutralizes the dispute over the evidentiary standard." *Pocatello Opening Brief* at 2, fn. 1.

If, however, IGWA is asking this Court to establish, in this proceeding, that TFCC's full headgate delivery is 5/8 of a miner's inch, the issue should be dismissed because it is not ripe for review. "The traditional ripeness doctrine requires a petitioner or plaintiff to prove 1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication." *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002).

As stated by the district court, the Director made a recommendation in the SRBA that TFCC's full headgate delivery is 3/4 of a miner's inch. Clerk's R. Vol. 3 at 541. Pursuant to the SRBA district court's orders granting the state of Idaho's motions for interim administration, the watermaster is delivering water to TFCC in accordance with the Director's recommendation. Clerk's R. Vol. 3 at 522-523, 541; *see also* Idaho Code § 42-1417. The Director's recommendation is still at-issue in the SRBA. Clerk's R. Vol. 3 at 541-542. The Director has not amended his recommendation.

In accordance with *Noh*, there is not "a present need for adjudication" because the SRBA district court has not issued a final decision on TFCC's water rights. The SRBA district court is the only court with jurisdiction in the state of Idaho to establish the elements of a water right. *Walker v. Big Lost Irrigation District*, 124 Idaho 78, 81, 856 P.2d 868, 871 (1993). Once a final decision is entered by the SRBA district court concerning TFCC's water rights, parties to that

proceeding will be able to file an appeal with this Court. Idaho Appellate Rule 11. Until a final decision is entered by the SRBA district court, the issue of TFCC's full headgate delivery is not ripe for review. Consequently, the Court should decline to address IGWA's argument on appeal.

2. The Director's Evidentiary Decisions Should be Supported by Clear and Convincing Evidence

On appeal, IGWA and Pocatello argue that the Director has the authority and discretion to determine, in the context of a conjunctive management delivery call, that a senior water user may need less water for beneficial use than the maximum authorized diversion rate or volume on the senior's decree or license. The Director agrees: "Somewhere between the absolute right to use a decreed water right an obligation not to waste it and to protect the public's interest in the valuable commodity, lies an area for the exercise of discretion by the Director." *American Falls* at 880, 154 P.3d at 451.

The Director disagrees, however, with IGWA and Pocatello's position that his evidentiary decision should be supported by the lower evidentiary threshold, preponderance of the evidence. In order to properly "guard" priority of right, Idaho Code § 42-101, the Director's decisions should be supported by clear and convincing evidence.

The prior appropriation doctrine, as established by Idaho law, protects holders of senior water rights. Idaho Const. Art. XV, § 3. Because this protection is not absolute, "there must be some exercise of discretion by the Director." *American Falls* at 875, 154 P.3d at 446. A senior's use must be reasonable, beneficial, and not result in monopolization or waste of the resource. CM Rule 20.03; *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911); *Clear Springs* at ____, 252 P.3d at 89-90; *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960); *Mountain Home Irrigation District v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957); *Niday v. Barker*, 16 Idaho

73, 79, 101, P. 254, 256 (1909); *Farmers' Co-operative Ditch Co. v. Riverside Irrigation District, Ltd.*, 16 Idaho 525, 535, 102 P. 481, 483 (1909); *Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907). “Economy must be required and demanded in the use and application of water.” *Clear Springs* at ____, 252 P.3d at 89. The Director must “equally guard all the various interests involved.” *Id.*

In conjunctive administration, the amount of water necessary for beneficial use can be less than decreed or licensed quantities—it is therefore possible for a senior to receive less than the decreed or licensed amount, but not suffer injury. *American Falls* at 868, 154 P.3d at 439. The “public waters of this state shall be subjected to the highest and greatest duty.” *Clear Springs* at ____, 252 P.3d at 89. Thus, a senior water right holder cannot demand that junior ground water right holders diverting water from a hydraulically connected aquifer be required to make water available for diversion unless that water is necessary to accomplish an authorized beneficial use. “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.” *Id.*

Given the authority and discretion vested in the Director in conjunctive administration, his evidentiary decisions should be supported by reasonable certainty. “Clear and convincing evidence is generally understood to be ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *Kimball* at 546, 181 P.3d at 472.

The clear and convincing standard balances the objectives of the prior appropriation doctrine by providing security to the senior right while at the same time allowing the Director to ensure the senior is putting water to beneficial use and not wasting the resource. Therefore, the Director requests the Court affirm the district court’s holding.

VII. CONCLUSION

In this case, the actions taken by the Director in responding to the conjunctive administration delivery call filed by the SWC were consistent with constitutional and statutory provisions, were supported by the record, were made upon lawful procedure, and were within the Director's discretion. Based on the foregoing, the Department respectfully requests that this Court affirm the Final Order. Idaho Code § 67-5279(3).

RESPECTFULLY SUBMITTED this 21st day of September, 2011.

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CHRIS M. BROMLEY
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Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that, unless otherwise noted, I served a true and correct copy of the following described document on the persons listed below by electronic mail and by mailing in the United States mail, first class, with the correct postage affixed thereto on this 21st day of September 2011.

Document Served: **IDWR RESPONDENTS-RESPONDENTS' ON APPEAL BRIEF**

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ADDENDUM INDEX

<u>Addendum No.</u>	<u>Document</u>
1	<i>Order Denying Motion to Renumber; Order Consolidating Proceedings Involving Petitions for Judicial Review of "Methodology Order" and "As-Applied Order"</i>
2	<i>Order Granting Motion for Stay</i>
3	<i>Motion for Stay</i>
4	<i>IGWA and Pocatello's Motion for Consolidation</i>
5	<i>Surface Water Coalition's Joint Response to IGWA and Pocatello's Motion for Stay and Consolidation and Motion to Renumber Appeals and to File Appeals in Gooding County Case No. CV-2008-00551</i>

ADDENDUM 1

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

I.

FACTS AND PROCEDURAL BACKGROUND

1. On June 23, 2010, the Director of the Idaho Department of Water Resources issued his *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Methodology Order*”) in IDWR Docket No. CM-DC-2010-001. The following *Petitions for Judicial Review* were filed in Gooding County seeking review of the *Methodology Order* on or about July 21, 2010: (1) Idaho Ground Water Appropriators, Inc.’s *Petition for Judicial Review* in Gooding County Case CV-2010-383; (2) The Surface Water Coalition’s *Petition for Judicial Review* in Gooding County Case No. CV 2010-384; and (3) The City of Pocatello’s *Petition for Judicial Review* in Gooding County Case CV-2010-388.²

2. On June 24, 2010, the Director issued his *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3&4); Order on Reconsideration* (“*As-Applied Order*”) in IDWR Docket No. CM-DC-2010-001. The following *Petitions for Judicial Review* were filed in Gooding or Twin Falls County seeking review of the *As-Applied Order* on or about July 21, 2010: (1) Idaho Ground Water Appropriators, Inc.’s *Petition*

² Although all *Petitions* sought review of the same *Methodology Order*, each was assigned a separate case number by the Gooding County Clerk.

for *Judicial Review* in Gooding County Case CV-2010-382; (2) The Surface Water Coalition's *Petition for Judicial Review* in Twin Falls County Case CV-2010-3403; and (3) The City of Pocatello's *Petition for Judicial Review* in Gooding County Case CV-2010-387.³

3. On July 21, 2010, Idaho Ground Water Appropriators, Inc. and the City of Pocatello jointly filed a *Motion for Consolidation*, requesting that their respective *Petitions for Judicial Review* of the *Methodology Order* and the *As-Applied Order* be consolidated into a single proceeding. Specifically, the *Motion* requested that their *Petitions for Judicial Review* of the *Methodology Order* and the *As-Applied Order* be consolidated into pre-existing Gooding County Case CV-2008-551.⁴ Oral argument was not requested on the *Motion*.

4. The Clerk of the Gooding County District Court subsequently filed *Notices of Reassignment* in the above-mentioned cases assigning them to this Court for disposition and further proceedings.

5. On July 23, 2010, Idaho Ground Water Appropriators, Inc. and the City of Pocatello filed a joint *Motion to Renumber Appeals and to File Appeals in Gooding County Case No. CV-2008-551*, wherein they moved this Court to renumber and file the cases involving petitions for judicial review of the *Methodology Order* in Gooding County Case No. CV-2008-551. Oral argument was not requested on the *Motion*.

³ The Gooding County Clerk also assigned separate case numbers for all *Petitions* seeking review of the *As-Applied Order*.

⁴ The Honorable John M. Melanson issued an *Order on Petition for Judicial Review* in Gooding County Case CV-2008-551 on July 24, 2009. The *Order* remanded in part to the Director for the purpose of adopting a methodology for predicting material injury to reasonable in-season demand and reasonable carryover. *Petitions for Rehearing* were filed and granted. In the interim, Judge Melanson was appointed to the Idaho Court of Appeals but retained the case on a pro tem basis for the purpose of ruling on the *Petitions for Rehearing*. Judge Melanson stayed the issuance of a decision on the *Petitions for Rehearing* pending the issuance of the Director's order on the action taken on remand and the expiration of the time periods for filing a motion for reconsideration and petition for judicial review of the new order. Thereafter, the Director issued the *Methodology Order* and the *As-Applied Order*.

6. On July 28, 2010, the Surface Water Coalition filed its *Joint Response to IGWA and Pocatello's Motion for Stay and Consolidation and Motion to Renumber Appeals and to File Appeals in Gooding County Case No. CV-2008-551*, wherein the Coalition agreed with Idaho Ground Water Appropriators, Inc. and the City of Pocatello that the various *Petitions for Judicial Review* filed by the parties seeking judicial review of the *Methodology Order* and the *As-Applied Order* should be consolidated into one proceeding. The Coalition did not agree however with Idaho Ground Water Appropriators, Inc.'s and the City of Pocatello's assertion that the *Petitions* should be consolidated into pre-existing Gooding County Case CV-2008-551. Rather the Coalition contends that the *Petitions* should be consolidated into a single proceeding before the SRBA District Court pursuant to the Idaho Supreme Court's *Administrative Order* dated December 9, 2009 which declares that all petitions for judicial review made pursuant to Idaho Code § 42-1701A of any decision from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court.

II. ANALYSIS

A. **Motion to Renumber Appeals.**

This Court finds Gooding County Case CV-2008-551 and the *Petitions* filed in Gooding County Cases CV-2010-383, CV 2010-384 and CV-2010-388 to be separate and distinct actions under Idaho Rule of Civil Procedure 84. The *Petitions for Judicial Review* filed in Gooding County Case CV-2008-551 sought judicial review of a final agency action (i.e., the Director's September 5, 2008 *Final Order Regarding the Surface Water Coalition Delivery Call*) separate and distinct from the final agency action from which judicial review is sought in Gooding County Cases CV-2010-383, CV 2010-384 and CV-2010-388 (i.e., the Director's *Methodology Order*). As a result, the Clerk of the District Court did not error in assigning new case numbers to the *Petitions* in Gooding County Cases CV-2010-383, CV 2010-384 and CV-2010-388 upon filing.

Moreover, Idaho Supreme Court Administrative Order dated December 9, 2009, which became effective the 1st day of July, 2010, declares that all petitions for judicial review made pursuant to Idaho Code § 42-1701A of any decision from the Department of Water Resources be assigned to the presiding judge of the Snake River Basin Adjudication District Court. Likewise, on July 1, 2010, this Court issued an *Administrative Order Adopting Procedures for the Implementation of the Idaho Supreme Court Administrative Order Dated December 9, 2009*, providing that upon filing of a petition for judicial review from any decision of the Department of Water Resources, the clerk of the district court where the action is filed shall forthwith issue, file, and concurrently serve upon the parties a *Notice of Reassignment*, assigning the matter to the presiding judge of the Snake River Basin Adjudication District Court for disposition and further proceeding. Pursuant to the plain language of the Idaho Supreme Court's December 9, 2009 *Administrative Order* and this Court's subsequent July 1, 2010 *Administrative Order*, the Clerk of the District Court correctly entered a *Notice of Reassignment* assigning the *Petitions* in Gooding County Cases CV-2010-383, CV 2010-384 and CV-2010-388 to this Court. As a result, Idaho Ground Water Appropriators, Inc.'s and the City of Pocatello's joint request to renumber the *Petitions* seeking judicial review of the *Methodology Order* into Gooding County Case CV-2008-551 is denied

B. Motion to Consolidate.

A court's decision whether to grant or deny a request for consolidation is a discretionary one. *Branom v. Smith Frozen Foods of Idaho, Inc.*, 83 Idaho 502, 508, 365 P.2d 958, 961 (1961). The Idaho Supreme Court has directed that "whenever the court is of the opinion that it may expedite its business and further the interests of the litigants, at the same time minimizing the expense upon the public and the litigants alike, the order of consolidation should be made." *Id.*

In this case, the parties are in agreement that the *Petitions for Judicial Review* filed by the parties seeking judicial review of the *Methodology Order* and the *As-Applied Order* should be consolidated into one proceeding. This Court finds that these *Petitions* involve similar issues, and that consolidation of these *Petitions* will expedite resolution of

this matter. However, pursuant to the Idaho Supreme Court's December 9, 2009 *Administrative Order* and this Court's subsequent July 1, 2010 *Administrative Order*, and for the reasons set forth above concerning the *Motion to Renumber Appeals*, the *Petitions* will be consolidated in a single proceeding before the SRBA District Court rather than in Gooding County Case CV-2008-551.

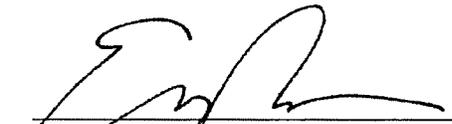
III.
ORDER

THEREFORE, THE FOLLOWING ARE HEREBY ORDERED:

1. Idaho Ground Water Appropriators, Inc.'s and the City of Pocatello's *Motion to Renumber Appeals and to File Appeals in Gooding County Case No. CV-2008-551* is **denied**.
2. The *Petitions for Judicial Review* filed by the Idaho Ground Water Appropriators, Inc., the Surface Water Coalition and the City of Pocatello respectively, seeking judicial review of the Director's *Methodology Order* and *As-Applied Order*, shall be consolidated into Gooding County Case No. CV-2010-382.

Dated

July 29, 2010


ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **ORDER CONSOLIDATING PROCEEDINGS INVOLVING PETITIONS FOR JUDICIAL REVIEW OF "METHODODOLOGY ORDER" AND "AS-APPLIED ORDER"** were mailed on July 29, 2010, by first-class mail to the following:

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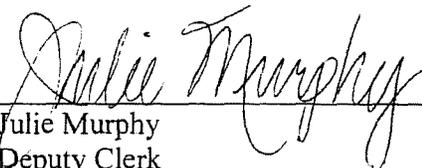
American Falls Reservoir District #2
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Minidoka Irrigation District
Represented by:
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Gary Spackman
Interim Director, IDWR
Represented by:
State of Idaho
Deputy Attorney Generals
Garrick L. Baxter
Chris M. Bromley
PO Box 83720
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City of Pocatello
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City of Pocatello
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Denver, CO 80202


Julie Murphy
Deputy Clerk

ADDENDUM 2

District Court - SRBA
 Fifth Judicial District
 In Re: Administrative Appeals
 County of Twin Falls - State of Idaho

DEC 13 2010

By _____

 Clerk
 Deputy Clerk

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

IDAHO GROUND WATER)
 APPROPRIATORS, INC.,)
)
 Petitioners,)
 vs.)
 CITY OF POCA TELLO,)
)
 Petitioner,)
 vs.)
 TWIN FALLS CANAL COMPANY,)
 NORTH SIDE CANAL COMPANY, A&B)
 IRRIGATION DISTRICT, AMERICAN)
 FALLS RESERVOIR DISTRICT #2,)
 BURLEY IRRIGATION DISTRICT,)
 MILNER IRRIGATION DISTRICT, and)
 MINIDOKA IRRIGATION DISTRICT,)
)
 Petitioners,)
 vs.)
 GARY SPACKMAN, in his capacity as)
 Interim Director of the Idaho Department of)
 Water Resources, and THE DEPARTMENT)
 OF WATER RESOURCES,)
)
 Respondents.)
 _____)
)
 IN THE MATTER OF DISTRIBUTION OF)
 WATER TO VARIOUS WATER RIGHTS)
 HELD BY OR FOR THE BENEFIT OF)
 A&B IRRIGATION DISTRICT,)
 AMERICAN FALLS RESERVOIR)

Case No.: CV-2010-382
)
 (consolidated Gooding County Cases
) CV-2010-382, CV-2010-383, CV-
) 2010-384, CV-2010-387, CV-2010-
) 388, and Twin Falls County Case CV-
) 2010-3403)
)
**ORDER GRANTING MOTION
 FOR STAY**

DISTRICT #2, BURLEY IRRIGATION)
DISTRICT, MILNER IRRIGATION)
DISTRICT, MINIDOKA IRRIGATION)
DISTRICT, NORTH SIDE CANAL)
COMPANY AND TWIN FALLS CANAL)
COMPANY)

On December 10, 2010, Respondents Gary Spackman and the Idaho Department of Water Resources filed a *Motion for Stay*, requesting that this Court stay all proceedings in the above-captioned matter pending the Idaho Supreme Court's issuance of its decision in the appeal presently pending before it of the final order issued in Gooding County Case CV 2008-551 ("SWC Supreme Court Appeal"). No party opposes the *Motion* and all of the Petitioners to this action support the stay as evidenced by their respective signatures to the *Motion*. The parties agree that the outcome of the SWC Supreme Court Appeal may affect the consideration and/or resolution of the *Petitions for Judicial Review* filed in this matter.

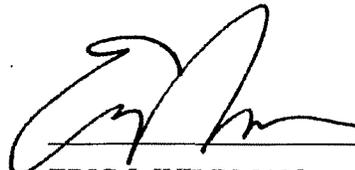
Therefore, THE FOLLOWING ARE HEREBY ORDERED:

1. The oral argument and the briefing schedule set forth for the above-captioned matter in this Court's *Procedural Order Governing Judicial Review of Final Order of Director of Idaho Department of Water Resources*, dated August 3, 2010, and this Court's *Order Amending Date for Oral Argument on Petition for Judicial Review*, dated October 21, 2010 are hereby vacated.

2. Proceedings in the above-captioned matter are hereby stayed pending the Idaho Supreme Court's issuance of its decision in the SWC Supreme Court Appeal.

3. Within 30 days of the Idaho Supreme Court's issuance of its decision in the SWC Supreme Court Appeal, the parties shall contact this Court regarding a status and scheduling conference to resolve any remaining matters in the above-captioned matter.

Dated December 13, 2010.


ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION FOR STAY was mailed on December 13, 2010, with sufficient first-class postage to the following:

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GARY SPACKMAN
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A&B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT
MILNER IRRIGATION DISTRICT
NORTH SIDE CANAL COMPANY
TWIN FALLS CANAL COMPANY

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A&B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT
MILNER IRRIGATION DISTRICT
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(Certificate of mailing continued)

MINIDOKA IRRIGATION DISTRICT

Represented by:
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BURLEY, ID 83318
Phone: 208-678-3250

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

ADDENDUM 3

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

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CHRIS M. BROMLEY, ISB #6530
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Boise, Idaho 83720-0098
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Facsimile: (208) 287-6700

Attorneys for Respondents

District Court - SRBA Fifth Judicial District In Re: Administrative Appeals County of Twin Falls - State of Idaho	
DEC 10 2010	
By _____	Clerk
_____	Deputy Clerk

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

IDAHO GROUND WATER APPROPRIATORS, INC.,)	
)	
Petitioners,)	
)	
vs.)	
)	
CITY OF POCATELLO,)	
)	
Petitioner,)	
)	
vs.)	
)	
TWIN FALLS CANAL COMPANY, NORTH SIDE CANAL COMPANY, A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, and MINIDOKA IRRIGATION DISTRICT,)	
)	
Petitioners,)	

Case No. CV-2010-382

(consolidated Gooding County
Cases CV-2010-382, CV-2010-383,
CV-2010-384, CV-2010-387,
CV-2010-388, and Twin Falls
County Case CV-2010-3403)

MOTION FOR STAY

MOTION FOR STAY

vs.

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

Respondents.

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

COME NOW, Respondents Gary Spackman and the Idaho Department of Water Resources ("IDWR") and hereby move this Court for an order staying the appeal related to Consolidated Case No. CV-2010-382 ("Consolidated 382") which includes IDWR's Methodology Order and subsequent orders that apply the methodology in 2010.¹ As indicated by their signatures below, the motion is supported by counsel for the City of Pocatello, the Ground Water Users, and the Surface Water Coalition.

On September 9, 2010, the Honorable John M. Melanson issued his *Amended Order on Petitions for Rehearing; Order Denying Surface Water Coalition's Motion for Clarification* in

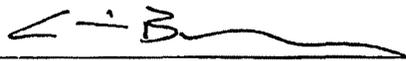
¹ Case No. 2010-5520 involves the Surface Water Coalition's petition for judicial review of the Interim Director's "Step 7 Order", issued on September 17, 2010. The Interim Director also recently issued a final "Step 9 Order" on November 30, 2010, which the Surface Water Coalition intends to appeal as well. The parties agree that all cases involving application of the Director's "Methodology Order" should be consolidated and stayed. The parties intend to file the appropriate motions for consolidation and stay in these related cases so that all matters may be joined together in Consolidated 382.

A&B Irr. Dist. et al. v. IDWR et al., Gooding County District Court Case No. 2008-000551. Judge Melanson issued a *Judgment Nunc Pro Tunc* in that case on November 30, 2010. Notices of appeal have been filed by IDWR, the City of Pocatello, the Ground Water Users, and the Surface Water Coalition, Case No. 38193-2010 ("SWC Supreme Court Appeal").

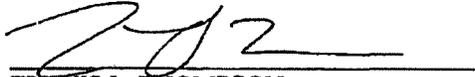
The issues on appeal in Consolidated 382 relate to the issues raised in the SWC Supreme Court Appeal. Resolution of issues in the SWC Supreme Court Appeal may moot certain issues in the appeal pending in Consolidated 382. In addition, proceeding with the appeal in Consolidated 382 may result in inconsistent determinations by appellate courts on related issues in the context of the SWC Delivery Call. For purposes of judicial economy, IDWR and the parties to these proceedings request that this Court stay all proceedings in the above-captioned matters until a decision has been entered by the Idaho Supreme Court in the SWC Supreme Court Appeal. Within 30 days of a decision in the SWC Supreme Court Appeal, the parties will contact this Court regarding a status and scheduling conference to resolve any remaining matters in Consolidated 382.

IDWR and the parties to these proceedings further agree that, in the interim, administration of hydraulically connected ground water and surface water rights shall continue as set forth in the Methodology Order.

DATED this 10th day of December, 2010.


CHRIS M. BROMLEY
Deputy Attorney General
Idaho Department of Water Resources

DATED this 27 day of December, 2010.



TRAVIS L. THOMPSON
Attorney for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District, North
Side Canal Company and Twin Falls Canal
Company

DATED this _____ day of December, 2010.

C. THOMAS ARKOOSH
Attorney for American Falls Reservoir District #2

DATED this _____ day of December, 2010.

W. KENT FLETCHER
Attorney for Minidoka Irrigation District

DATED this _____ day of December, 2010.

SARAH A. KLAHN
Attorney for the City of Pocatello

DATED this _____ day of December, 2010.

CANDICE M. MCHUGH
Attorney for the Ground Water Users

MOTION FOR STAY

DATED this ____ day of December, 2010.

TRAVIS L. THOMPSON
Attorney for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District, North
Side Canal Company and Twin Falls Canal
Company

DATED this ____ day of December, 2010.

C. THOMAS ARKOOSH
Attorney for American Falls Reservoir District #2

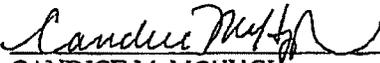
DATED this ____ day of December, 2010.

W. KENT FLETCHER
Attorney for Minidoka Irrigation District

DATED this ____ day of December, 2010.

SARAH A. KLAHN
Attorney for the City of Pocatello

DATED this 8th day of December, 2010.



CANDICE M. MCHUGH
Attorney for the Ground Water Users

MOTION FOR STAY

DATED this _____ day of December, 2010.

TRAVIS L. THOMPSON
Attorney for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District, North
Side Canal Company and Twin Falls Canal
Company

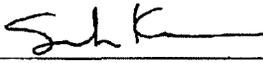
DATED this _____ day of December, 2010.

C. THOMAS ARKOOSH
Attorney for American Falls Reservoir District #2

DATED this _____ day of December, 2010.

W. KENT FLETCHER
Attorney for Minidoka Irrigation District

DATED this 9th day of December, 2010.



SARAH A. KLAHN
Attorney for the City of Pocatello

DATED this _____ day of December, 2010.

CANDICE M. MCHUGH
Attorney for the Ground Water Users

MOTION FOR STAY

DATED this ____ day of December, 2010.

TRAVIS L. THOMPSON
Attorney for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District, North
Side Canal Company and Twin Falls Canal
Company

DATED this ____ day of December, 2010.

C. THOMAS ARKOOSH
Attorney for American Falls Reservoir District #2

DATED this 10 day of December, 2010.

W. KENT FLETCHER
Attorney for Minidoka Irrigation District

DATED this ____ day of December, 2010.

SARAH A. KLAHN
Attorney for the City of Pocatello

DATED this ____ day of December, 2010.

CANDICE M. MCHUGH
Attorney for the Ground Water Users

MOTION FOR STAY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of December, 2010, I caused a true and correct copy of the foregoing **MOTION FOR STAY** to be filed with the Court and served on the following parties by the indicated methods:

<p><i>Original to:</i> SRBA Court 253 3rd Ave. North P.O. Box 2707 Twin Falls, ID 83303-2707 Facsimile: (208) 736-2121</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Facsimile</p>
<p>John A. Rosholt John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>
<p>C. Thomas Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 32 Gooding, ID 83330 tarkoosh@capitollawgroup.net</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>

DATED this ____ day of December, 2010.

TRAVIS L. THOMPSON
Attorney for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District, North
Side Canal Company and Twin Falls Canal
Company

DATED this ____ day of December, 2010.

C. THOMAS ARKOOSH
Attorney for American Falls Reservoir District #2

DATED this 10 day of December, 2010.



W. KENT FLETCHER
Attorney for Minidoka Irrigation District

DATED this ____ day of December, 2010.

SARAH A. KLAHN
Attorney for the City of Pocatello

DATED this ____ day of December, 2010.

CANDICE M. MCHUGH
Attorney for the Ground Water Users

MOTION FOR STAY

<p>Randall C. Budge Candice M. McHugh Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net tjb@racinelaw.net</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>
<p>A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>
<p>Sarah A. Klahn WHITE & JANKOWSKI LLP 511 Sixteenth Street, Suite 500 Denver, CO 80202 sarahk@white-jankowski.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>



Chris M. Bromley
Deputy Attorneys General

ADDENDUM 4

DISTRICT COURT
GOODING CO. IDAHO
FILED

JUL 21 PM 3:30

CLERK
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Thomas J. Budge, ISB #7465
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Attorneys for the City of Pocatello

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

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

Cross-Petitioner,

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

Respondents,

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

Case No.: CV-2010-000382

IGWA AND POCATELLO'S MOTION
FOR CONSOLIDATION

ORIGINAL

MINIDOKA IRRIGATION DISTRICT,
NORTH SIDE CANAL COMPANY AND
TWIN FALLS CANAL COMPANY

Petitioners Idaho Ground Water Appropriators (“IGWA”) and the City of Pocatello (“City” or “Pocatello”), by and through undersigned counsel (collectively, “Petitioners”) move for consolidation of two matters pending on judicial review. For the reasons set forth below, Petitioners move the Court to consolidate judicial review of the ongoing appeal in Gooding County Case No. CV-2008-551 (the “551 Case”) with the contemporaneously filed appeals¹ of *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4); Order on Reconsideration* the Director of the Idaho Department of Water Resources dated June 24, 2010 (“*Final As-Applied Order*”).

The 551 Case involves an appeal of the Director’s final order in the Surface Water Coalition’s Delivery Call *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.*² The newly filed appeal involves the application of the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* in the *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4); Order on Reconsideration* in the 551 case for administration for the 2010 irrigation season.

¹ The City and IGWA have both filed *Petitions for Judicial Review* of the *Final As Applied Order*.

² The seven irrigation entities listed in the matter are known as the Surface Water Coalition.

PROCEDURAL HISTORY

On June 23, 2010, the Department issued the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Final Methodology Order”) in *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company*. The *Final Methodology Order* was issued in response to a remand by the Court in the 551 Case. See *Order Staying Decision for Rehearing Pending Issuance of Revised Final Order* issued March 4, 2010, in the 551 Case. The City and IGWA have appealed the *Final Methodology Order* in the 551 Case as part of the ongoing matter that was remanded to IDWR.

On June 24, 2010, the Department issued a *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4); Order on Reconsideration* (“Final As-Applied Order”) in the same administrative matter as *the Final Methodology Order*.³ The *Final Methodology Order* and the *Final As-Applied Order* were the subject of separate, but limited hearings held on May 24 and 25, 2010.

The *Final As-Applied Order* is the Department’s application of its *Final Methodology Order* in the administrative proceeding for the 2010 irrigation season. Both the *Final Methodology Order* and *Final As-Applied Order* are based on substantially the same agency

³ *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company*.

record. The City and IGWA have appealed both the *Final Methodology Order* and the *Final As-Applied Order* in separate petitions for judicial review, filed concurrently with this Motion with the Gooding County District Court.⁴

ARGUMENT

I. The Idaho APA Provides For Consolidation Of Appeals From The Same Agency Action.

Pursuant to the Idaho Administrative Procedure Act (“Idaho APA”), when two or more petitions for judicial review of the same agency action have been filed, “the administrative judge in the judicial district in which the first petition was filed, after consultation with the affected judges, shall order consolidation of the judicial review of the petitions.” I.C. § 67-5272(2). “[S]eparate consideration of the petitions in different counties or by different district judges shall be stayed” until consolidation of the petitions is ordered. *Id.*

Pursuant to Idaho Code § 67-5272(2), the administrative judge of the Fifth Judicial District is statutorily charged with deciding whether to consolidate Petitioners’ appeals of the Director’s *Final Methodology Order* and *Final As-Applied Order* (collectively “Orders”). Both Orders stem from the same agency action: the Department was ordered by the Court in the 551 Case to issue a new order explaining the agency’s methodology for determining material injury to the parties’ water rights, which the Department issued in the *Final Methodology Order*, and applied to the 2010 irrigation season in the *Final As-Applied Order*. Both Orders set forth IDWR’s methods to be used to determine material injury to the water rights at issue in the 551 Case, and how that injury analysis will be used in administration. The *Final As-Applied Order*

⁴ The Director’s *Final Methodology Order* and *Final As Applied Order* are final agency actions subject to judicial review pursuant to Idaho Code §67-5270(3).

appeals should be consolidated with the 551 Case as both matters involve the same agency action.

II. The Court Has Authority Under The Idaho Appellate Rules And Rules Of Civil Procedure To Consolidate The Appeals Because The Matters Involve Similar If Not Identical Parties, Facts And Legal Issues.

The Court has the authority to consolidate Petitioners' appeals of the *Final As-Applied Order* with the pending 551 Case and the appeal therein of the Department's *Final Methodology Order*. Numerous Idaho Supreme Court decisions state that cases may be consolidated for appeal if similar issues and parties are involved, to wit, *Alpine Villa Dev. Co., Inc. v. Young*, 99 Idaho 851, 590 P.2d 578 (1979) ("four actions were consolidated on appeal due to the similarity of facts and identity of legal issues"); *Ada County v. Schemm*, 96 Idaho 396, 529 P.2d 1268 (1974) ("These two cases were consolidated upon appeal since both involve the same real property and present essentially the same question").

Idaho Appellate Rule 48 provides the Court with authority to consolidate appeals in the same manner and pursuant to the same standard as general civil matters⁵:

[In] cases where no provision is made by statute or by these rules, proceedings in the Supreme Court shall be in accordance with the practice usually followed in such or similar cases, or as may be prescribed by the Court or a Justice thereof."

Therefore, because there is no Idaho Appellate Rule explaining the standard that courts should use to evaluate consolidation of appeals, courts should turn to Idaho Rule of Civil Procedure Section 42(a), which permits courts to consolidate matters that involve "a common question of law or fact."

⁵ Further, the Idaho Appellate Rules acknowledge the possibility of consolidated appeals. *See* I.A.R. 35(g) (in cases consolidated for purposes of appeal parties may join in a single brief and may adopt by reference any part of the brief of another party).

“Whenever the Court is of the opinion that consolidation will expedite matters and will minimize expense upon the public and the parties, an order of consolidation should be made.” *Harrison v. Taylor*, 115 Idaho 588, 597, 768 P.2d 1321, 1330 (1989). Consolidating the Petitions for Judicial Review of the *Final Methodology Order* and its application as found in the *Final As-Applied Order* into one appeal before Judge Melanson for judicial review is the best use of judicial resources. Consolidation of this appeal with the 551 Case is appropriate because the two appeals share common questions of fact, law and essentially identical parties⁶:

- As explained above, the two Orders involve the same agency action: a delivery call initiated by the Surface Water Coalition in 2005.
- The two Orders set forth the Departments’ methodology for determination of material injury to certain water rights of the Surface Water Coalition at issue in the 551 Case.
- Essentially the two appeals raise identical legal issues.
- One of the numerous issues Petitioners have raised in the new appeal concerns the Department’s compliance with the Court’s limited remand, including whether the *Final Methodology Order* is supported by the original record in the 551 Case, as ordered by the Court.
- Finally, because a central issue in Petitioner’s new appeals concerns whether the *Final Methodology Order* has been applied in the *Final As-Applied Order* in an arbitrary and capricious manner, consolidation is required in this matter and is in the interests of judicial economy.

The Honorable John M. Melanson has handled the 551 Case for over two years, and continues to preside over the case after being appointed to the Court of Appeals. He is most familiar with the large agency record (consisting of over 7,500 pages, in addition to a few hundred exhibits) and with the issues raised by the parties. Judge Melanson’s familiarity with the case is undisputed, and it would promote judicial economy to consolidate the two cases on his docket. Further, consolidating the pending *Petitions for Judicial Review* would relieve the Department from

⁶ The United States Bureau of Reclamation was an active participant in the delivery call hearing which resulted in the need for the Methodology Order, but was not an active participant in the As-Applied Order matter.

having to reproduce the large agency record and would relieve the parties of having to review the record again to make sure it contained all the relevant documents.

Finally, consolidation will more quickly allow conclusion of both appeals, and lead to a more expedited final decision and possibility for further appeal to the Supreme Court. Consolidation will also allow a reviewing court to see not only the *Final Methodology Order* but its actual application to a specific water year in the *Final As-Applied Order*, in which the Director found material injury to the senior users. No party will be prejudiced by consolidation, and indeed costs and complications from multiple appeals raising the same issues in multiple courts will be avoided.

WHEREFORE, Petitioners respectfully request that the Court order consolidation before Judge Melanson because the appeals involve the same agency action, similar issues of fact and law, essentially the same parties, and a nearly continuous administrative record. The Court should stay IGWA and the City of Pocatello's appeals of the *Final As-Applied Order* pursuant to Idaho Code Section 67-5272(2) so that it can be consolidated with the appeals in the 551 Case by the administrative judge of the Fifth Judicial District.

Petitioners do not request argument on this Motion.

Dated this 20st day of July, 2010.

CITY OF POCATELLO ATTORNEY'S OFFICE

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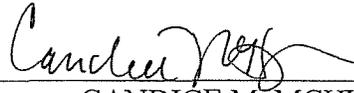
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ADDENDUM 5

APPROPRIATORS, INC.;)
)
 Petitioners,)
)
 vs.)
)
CITY OF POCATELLO;)
)
 Petitioner,)
)
 vs.)
)
GARY SPACKMAN, in his capacity as Interim)
Director of the Idaho Department of Water)
Resources, and THE IDAHO DEPARTMENT)
OF WATER RESOURCES,)
)
 Respondents.)
)
 _____)
IN THE MATTER OF DISTRIBUTION OF)
WATER TO VARIOUS WATER RIGHTS)
HELD BY OR FOR THE BENEFIT OF A&B)
IRRIGATION DISTRICT, AMERICAN)
FALLS RESERVOIR DISTRICT #2,)
BURLEY IRRIGATION DISTRICT,)
MILNER IRRIGATION DISTRICT,)
MINIDOKA IRRIGATION DISTRICT,)
NORTH SIDE CANAL COMPANY, AND)
TWIN FALLS CANAL COMPANY)
 _____)

COME NOW, Petitioners, A&B Irrigation District (“A&B”), American Falls Reservoir District #2 (“AFRD#2”), Burley Irrigation District (“BID”), Milner Irrigation District (“Milner”), Minidoka Irrigation District (“MID”), North Side Canal Company (“NSCC”), and Twin Falls Canal Company (“TFCC”) (collectively hereafter referred to as the “Surface Water Coalition”, “Coalition”, or “SWC”), by and through their undersigned counsel, and hereby respond to the *Motion for Stay and Consolidation* and *Motion to Renumber Appeals and to File*

Appeals in Gooding County Case No. CV-2008-551, filed jointly by Idaho Ground Water Appropriators, Inc. (“IGWA”) and the City of Pocatello.

PROCEDURAL HISTORY

Presently pending before this Court are six appeals from two final orders issued by the Interim Director of the Idaho Department of Water Resources: the June 23, 2010 *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (the “*Methodology Order*”) and the June 24, 2010 *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3&4); Order on Reconsideration* (the “*As-Applied Order*”).

The *Methodology Order* was appealed to the Gooding County District Court by the Coalition (Appeal No. CV-2010-384), IGWA (Appeal No. CV-2010-383); and the City of Pocatello (Appeal No. CV-2010-388). The *As-Applied Order* was appealed to the Gooding County District Court by IGWA (Appeal No. CV-2010-382) and Pocatello (Appeal No. CV-2010-387). The Coalition appealed the *As-Applied Order* to the Twin Falls County District Court (Appeal No. CV-2010-3403). Pursuant to the Supreme Court’s December 9, 2009 *Administrative Order*, each of these appeals has been reassigned to the SRBA District Court for further proceedings.

Each appeal of the *Methodology Order* was filed in conjunction with the original appeal in *A&B, et al. v. IDWR* (Gooding County Case No. CV-2008-551). However, pursuant to the *Administrative Order*, each appeal was given a separate case number and subsequently reassigned to the SRBA District Court. IGWA and Pocatello filed a joint *Motion to Renumber Appeals & to File Appeals in Gooding County Case No. CV-2008-551*, seeking to have the cases removed from the SRBA Court and assigned back to the Gooding County District Court.

In addition, IGWA and Pocatello moved to have their appeals of the *As-Applied Order* consolidated with their appeals of the *Methodology Order*.

ARGUMENT

The Coalition agrees that the various appeals of the *Methodology Order* and the *As-Applied Order* should be consolidated into one proceeding. Consolidation is consistent with the purpose of the law governing consolidation. See I.C. § 67-5272(2). Consolidating these appeals into one action will allow for judicial economy and convenience, as each of the appeals stems from the same administrative orders issued by IDWR's Interim Director. Furthermore, whereas the *Methodology Order* purports to establish the Director's framework for determining "reasonable in-season demand" and "reasonable carryover" and material injury to the Coalition's senior surface water rights for conjunctive administration, the *As-Applied Order* attempts to apply the facts to the methodology for the 2010 irrigation season. As such, hearing all appeals in one proceeding is the most efficient manner to resolve the various petitions for judicial review. In sum, the Coalition agrees the cases should be consolidated.

Pursuant to the Supreme Court's *Administrative Order*, and this Court's July 1, 2010 *Administrative Order Adopting Procedures for the Implementation of the Idaho Supreme Court Administrative Order Dated December 9, 2009*, the proper forum for these consolidated appeals is the SRBA District Court.

The Supreme Court's *Administrative Order* is unambiguous: "It is hereby ordered that all petitions for judicial review of *any decision* regarding the administrative of water rights from the Department of Water Resources *shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court.*" (Emphasis added). There is no exception to this

requirement in either the *Administrative Order* or this Court's procedural rules. All appeals from any decision of the Department must be assigned to the SRBA District Court.

In the *A&B et al. v. IDWR* appeal, the Honorable John M. Melanson issued his *Order on Petition for Judicial Review* on July 24, 2009. IGWA and Pocatello each sought rehearing of that order. Those petitions have been fully briefed and argued and are pending. Judge Melanson stayed a decision on rehearing until the Director had issued an order "determining material injury to reasonable in-season demand and reasonable carryover." *Order Overruling Objection to Order Staying Decision*, (Mar. 25, 2010). The Court held "in abeyance any final decision on rehearing until the Director issues a *Final Order* and the time period for filing motions for reconsideration and petitions for judicial review of the new order have expired." *Id.* Judge Melanson did not state that petitions for judicial review must be filed in conjunction with the existing appeal. Nothing in the Court's order can be read to override the clear mandate of the Supreme Court's *Administrative Order*. As such, the cases should be consolidated before the SRBA District Court.

Now that the Interim Director's final orders have been issued, there is no longer any reason to postpone a decision on IGWA's and Pocatello's petitioners for rehearing. As such, Melanson can issue a decision on the pending motions and the appeals of the *Methodology Order* and *As-Applied Order* can proceed before the SRBA Court, as required by the *Administrative Order*.

CONCLUSION

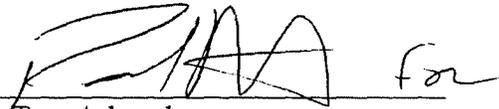
Presently pending before this Court are six appeals of two final decisions by the Interim Director. The Supreme Court's *Administrative Order* requires that they be reassigned before this Court. Furthermore, consolidation is appropriate. As such, the *Motion to Renumber Appeals*

should be denied and the *Motion or Stay and Consolidation* should be granted, with the appeals being consolidated before the SRBA District Court.

The Coalition requests a hearing on this matter.

RESPECTFULLY SUBMITTED this 28th day of July, 2010.

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I HEREBY CERTIFY that on the 28TH day of July, 2010, I served true and correct copies of the foregoing upon the following by the method indicated:

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