

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

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

Petitioner,

vs.

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

Respondents,

and

IDAHO GROUND WATER APPROPRIATORS INC., A&B
IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT,
MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL
COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN
FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION
DISTRICT, BONNEVILLE-JEFFERSON GROUND WATER
DISTRICT, and BINGHAM GROUNDWATER DISTRICT,

Intervenors.

**Case No.
CV01-23-13238**

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

RESPONDENT IDWR'S BRIEF

Judicial Review from the Idaho Department of Water Resources
Gary Spackman, Director, Presiding

RAÚL R. LABRADOR
ATTORNEY GENERAL

SCOTT L. CAMPBELL
Chief of Energy and Natural Resources
Division

GARRICK BAXTER, ISB No. 6301
KAYLEEN R. RICHTER, ISB No. 11258
Deputy Attorneys General
Idaho Department of Water Resources
PO Box 83720
Boise, Idaho 83720-0098
garrick.baxter@idwr.idaho.gov
kayleen.richter@idwr.idaho.gov

Attorneys for Respondents

Robert L. Harris
HOLDEN KIDWELL HAHN & CRAPO,
PLLC
PO Box 50130
Idaho Falls, ID 83405
efiling@holdenlegal.com

Attorney for City of Idaho Falls

Thomas J. Budge
Elisheva M. Patterson
RACINE OLSON, PLLP
201 E. Center St.
PO Box 1391
Pocatello, Idaho 83204
tj@racineolson.com
elisheva@racineolson.com

*Attorneys for Idaho Ground Water
Appropriators, Inc. (IGWA)*

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

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

Sarah A. Klahn
Maximilian C. Bricker
SOMACH SIMMONS & DUNN, P.C.
1155 Canyon Blvd., Suite 110
Boulder, CO 80302
sklahn@somachlaw.com
mbricker@somachlaw.com

Attorneys for City of Pocatello

John K. Simpson
Travis L. Thompson
MARTEN LAW LLP
163 Second Ave. West
PO Box 63
Twin Falls, Idaho 83303-0063
jsimpson@martenlaw.com
tthompson@martenlaw.com

*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company, and Twin Falls
Canal Company*

W.Kent Fletcher
FLETCHER LAW OFFICE
PO BOX 248
Burley, Idaho 83318
wkf@pmt.org

*Attorney for American Falls Reservoir
District #2 and Minidoka Irrigation District*

Skyler C. Johns
Nathan M. Olsen
Steven L. Taggart
OLSEN TAGGART PLLC
PO Box 3005
Idaho Falls, ID 83403-3005
sjohns@olsentaggart.com
nolsen@olsentaggart.com
staggart@olsentaggart.com

*Attorneys for Bonneville-Jefferson Ground
Water District*

Dylan Anderson
DYLAN ANDERSON LAW PLLC
PO Box 35
Rexburg, Idaho 83440
dylan@dylanandersonlaw.com

Attorney for Bingham Groundwater District

TABLE OF CONTENTS

I. STATEMENT OF THE CASE..... 1

 A. Nature of the Case..... 1

 B. Statement of the Facts and Procedural Background. 1

 i. Review of the Fourth Amended Methodology Order 1

 ii. The Fifth Amended Methodology Order 3

 iii. The Hearing on the Fifth Amended Methodology Order and the April As-Applied Order
 5

II. ISSUES PRESENTED ON APPEAL..... 6

III. STANDARD OF REVIEW 7

IV. ARGUMENT 8

 A. Junior appropriators must prove by clear and convincing evidence that their use will not injure the senior’s right. 8

 B. The Director’s conclusion that TFCC’s Forecast Supply is reasonable and sufficiently accurate is not clearly erroneous..... 9

 C. The Director’s decision to rely on 2018 as the baseline year is supported by substantial evidence and is not arbitrary, capricious, or an abuse of discretion. 14

 D. The Director’s conclusion regarding cumulative bias is supported by substantial evidence and is not arbitrary, capricious or an abuse of discretion. 19

 E. The Director’s quantification of SWC’s irrigated acreage is not arbitrary, capricious, an abuse of discretion, or contrary to law..... 22

 i. TFCC’s irrigated acreage figure is supported by substantial and competent evidence and the Director’s reliance upon it is not an abuse of discretion..... 24

 ii. The Director did not abuse his discretion when he determined the information regarding supplemental ground water use was insufficient. 27

 iii. The Department must further evaluate A&B’s irrigated acre figure. 30

 F. The Director’s conclusion that TFCC’s operations are reasonable is not clearly erroneous.
 31

 G. The Director’s decision to adopt a transient model simulation is supported by case law and substantial evidence in the record. 33

 H. The Director did not violate the Cities’ due process rights. 40

I.	The Director acted within his discretion to limit the type and scope of discovery.....	43
J.	The Director did not prejudice the Cities’ substantial rights.	44
V.	CONCLUSION.....	45

TABLE OF CASES AND AUTHORITIES

Cases

A & B Irr. Dist. v. Idaho Dep't of Water Res., 153 Idaho 500, 284 P.3d 225 (2012)..... 8, 9, 22, 23

A & B Irr. Dist. v. Idaho Dep't of Water Res., No. CV-2009-647 (Minidoka Cnty. Dist. Ct. Idaho Nov. 2, 2010) 9

Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res., 143 Idaho 862, 154 P.3d 433 (2007)..... 14, 21, 22, 42

Barron v. Idaho Dep't of Water Res., 135 Idaho 414, 18 P.3d 219 (2001)..... 7

Chisholm v. Idaho Dep't of Water Res., 142 Idaho 159, 125 P.3d 515 (2005)..... 17, 32

City of Pocatello v. Idaho Dep't of Water Res., No. CV01-23-08258 (Ada Cnty. Dist. Ct. Idaho 2023) 5

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011)..... 7

Dovel v. Dobson, 122 Idaho 59, 831 P.2d 527 (1992)..... 7

Idaho Ground Water Appropriators, Inc. v. Idaho Dep't of Water Res., No. CV01-23-08187 (Ada Cnty. Dist. Ct. Idaho 2023)..... 5

Idaho Ground Water Appropriators, Inc. v. Idaho Dep't of Water Res., No. CV01-23-13173, (Ada Cnty. Dist. Ct. Idaho 2024)..... 1

Idaho Ground Water Appropriators, Inc. v. Spackman, No. CV-2010-382 (Gooding Cnty. Dist. Ct. Idaho 2014) 15, 22, 28

Idaho Ground Water Assoc. v. Idaho Dep't of Water Res., 160 Idaho 119, 369 P.3d 897 (2016) 39, 40

Idaho Power Co. v. Idaho Dep't of Water Res., 151 Idaho 266, 255 P.3d 1152 (2011) 8

In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irrigation Dist., 155 Idaho 640, 315 P.3d 828 (2013) 7, 9

Rangen, Inc. v. Idaho Dep't of Water Res., 160 Idaho 251, 371 P.3d 305 (2016)..... 18, 40

Rangen, Inc. v. Idaho Dep't of Water Res., No. CV-2014-2446 (Twin Falls Cnty. Dist. Ct. Idaho 2014) 34

Rangen, Inc. v. Idaho Dep't of Water Res., No. CV-2014-4970 (Twin Falls Cnty. Dist. Ct. Idaho 2015) 34

S. Valley Ground Water Dist. v. Idaho Dep't of Water Res., No. 49632, 2024 WL 136840 (Idaho 2024) 37

Tupper v. State Farm Ins., 131 Idaho 724, 963 P.2d 1161 (1998) 7

Vickers v. Lowe, 150 Idaho 439, 247 P.3d 666 (2011) 40

Statutes

I.C. § 42-1701A 7, 40, 41, 45

I.C. § 67-5242 41

I.C. § 67-5277 7

I.C. § 67-5279 7, 44

Rules

IDAPA 37.01.01.520 43

IDAPA 37.01.01.521 43

IDAPA 37.01.01.600 44

IDAPA 37.03.11.040 31, 37, 38, 42

IDAPA 37.03.11.042 23, 27, 31

IDAPA 37.03.11.043 33

IDAPA 37.03.11.050 37

I.R.C.P. 26..... 43

I.R.E. 201 9

I. STATEMENT OF THE CASE

A. Nature of the Case.

This is a judicial review proceeding regarding the *Post-Hearing Order Regarding Fifth Amended Methodology Order* (July 19, 2023) (“Post-Hearing Order”), a final order issued by the Director of the Idaho Department of Water Resources (“Department” or “Director”). The order updates the methodology used to determine material injury to members of the Surface Water Coalition¹ (“SWC”) in the ongoing SWC Delivery Call. Petitioners City of Idaho Falls, City of Pocatello, and the Coalition of Cities² (collectively, “Petitioners” or the “Cities”), challenge the updated methodology order, alleging the order is not supported by substantial evidence in the record, is arbitrary, capricious, or an abuse of discretion, and was made upon unlawful procedure.

B. Statement of the Facts and Procedural Background.

For history of the methodology order preceding the instant amendment, refer to sections B.i–ii of *Respondent IDWR’s Brief* in the concurrent judicial review of the methodology, which the Director adopts and incorporates herein. *Idaho Ground Water Appropriators, Inc. v. Idaho Dep’t of Water Res.*, No. CV01-23-13173, (Ada Cnty. Dist. Ct. Idaho Jan. 19, 2024).

i. Review of the Fourth Amended Methodology Order

In 2020 and 2021, Matt Anders, Department Technical Services Bureau Chief, and his staff reviewed data sets supporting the Fourth Methodology Order. Tr. Vol. I, p. 169, L. 23 through p. 172, L. 2. The Department undertook this exercise because, as the methodology order acknowledges, the Director has an “ongoing duty” to “review and refine the process of

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

predicting and evaluating material injury.” R. 1004. In 2022, the Director decided that it was necessary to update the methodology order. On August 5, 2022, during a status conference in the SWC Delivery Call, the Director instructed Department staff to convene a committee to review and provide comments on potential technical changes to the Fourth Methodology Order. R. 2866.

Department staff assembled a technical working group composed of Department staff, experts representing the parties to the ongoing SWC Delivery Call, and other interested parties.³ *Id.* The Department identified proposed changes to the methodology and presented them to the technical working group during six meetings between November 16 and December 14, 2022. *Id.* At the final meeting, Department staff stated that they would provide the technical working group with their preliminary recommendations on potential technical changes to the methodology. *Id.* On December 23, 2022, Department staff issued the *Summary of Recommended Technical Revisions to the 4th Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover for the Surface Water Coalition*. R. 2866.

In the preliminary recommendation summary, the Department requested that the technical working group submit written comments responding to the preliminary recommendations or any other topic covered during the meetings. *Id.* The Department received and considered comments from: (i) Heidi Netter and Greg Sullivan (Spronk Water Engineers, Inc.) on behalf of the

³ Two emails from expert witness Greg Sullivan (Spronk Water) addressed to the technical working group members suggest that the following people were involved with the technical working group: Matthew Anders (Department), Jaxon Higgs (Water Well Consultants), Sophia Sigstedt (Lyunker Technologies), Dave Shaw (ERO Resources), Heidi Netter (Spronk Water), Kara Ferguson (Department), Dave Colvin (LRE Water), TJ Budge (Racine Olson, PLLP), Kent Fletcher (Fletcher Law Office), Travis Thompson (Marten Law LLP), Sarah Klahn (Somach Simmons & Dunn, P.C.), Chris Bromley (McHugh Bromley, PLLC), Candice McHugh (McHugh Bromley, PLLC), Matt Howard (USBR), Randy Brown (Southwest Irrigation District), Kresta Davis (Idaho Power), Dave Blew (Idaho Power), Brian Ragan (Department), Garrick Baxter (Department), John Simpson (Barker Rosholt & Simpson, LLP), Ethan Geisler (Department), Jennifer Sukow (Department), Mathew Weaver (Department), Mark Cecchini-Beaver (Department), Sean Vincent (Department), and Gary Spackman (Department). R. 2871–72.

Coalition of Cities and the City of Pocatello; (ii) Sophia Sigstedt (Lynker Technologies) on behalf of IGWA; and (iii) Dave Shaw (ERO Resources) and Dave Colvin (LRE Water) on behalf of the SWC. R. 1300–04; 2867–78; 2879–85.

ii. *The Fifth Amended Methodology Order*

In recognition of the Director’s obligation to timely administer water, the deficiencies of the Fourth Methodology Order, and the concern that using the Fourth Methodology Order was no longer legally supportable, the Director determined it was necessary to update and implement the methodology urgently due to the upcoming season. R. 2, 35–36, 1421.⁴

Therefore, on April 21, 2023, the Director issued the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fifth Methodology Order”) and the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (“April As-Applied Order”).⁵ R. 1–47, 48–61. In the Fifth Methodology Order the Director: (1) updated climate, hydrologic, and demand data used to determine material injury; (2) updated the baseline year; (3) updated reasonable carryover volumes for the SWC; and (4) changed how the Eastern Snake Plain Aquifer Model (“ESPAM 2.2”) is deployed to calculate a priority curtailment date from steady state to transient analysis. R. 1–47, 1421.

The Director then took the proactive step of setting the Fifth Methodology Order and the April As-Applied Order for hearing, setting a prehearing conference, and authorizing discovery

⁴ For context, Exhibit 317 is a document the Department prepared on April 25, 2023, to answer the public’s frequently asked questions about the updated methodology. R. 1421–23. The Cities’ counsel downloaded and printed the document from the Department’s website and marked it as Exhibit 5 during Jennifer Sukow’s deposition. At hearing, the parties stipulated to its admission. Tr. Vol. IV, p. 13, L. 13–14.

⁵ Given current forecasting techniques, the earliest the Director could predict material injury “with reasonable certainty” was soon after the United States Bureau of Reclamation (“USBR”) and the United States Army Corps of Engineers (“USACE”) issued the Joint Forecast within the first week of April. R. 18.

by issuing a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* (“Notice of Hearing”). R. 62. The Director explained that he anticipated parties would request a hearing on one or both orders and acknowledged that “time [wa]s of the essence because the irrigation season ha[d] commenced for water users.” *Id.* The Notice of Hearing scheduled a prehearing conference for April 28, 2023, and an in-person evidentiary hearing for June 6–10, 2023. *Id.*

When the Director applied the amended methodology in the April As-Applied Order, the Director predicted an in-season demand shortfall of 75,200 acre-feet, which would result in mitigation requirements or curtailment for ground water rights with priority dates junior to December 30, 1953. R. 53. However, the Director did not require immediate curtailment. Instead, the Director notified water right holders of the possible curtailment and of the upcoming hearing so that “junior ground water users ha[d] the opportunity for a hearing before being curtailed. R. 104, 430.

Prior to the prehearing conference, the Cities moved the Director to continue the evidentiary hearing from June 6–10 “until a date in December or January 2024.” R. 87. During the prehearing conference, IGWA, Bonneville-Jefferson Ground Water District (“BJGWD”), and McCain Foods orally moved to join the Cities’ Motion to Continue. R. 1070. The Director orally denied the Cities’ motion. Following the prehearing conference, on May 2, 2023, the Director issued a *Scheduling Order and Order Authorizing Remote Appearance at Hearing* (“Scheduling Order”). R. 126–31.

On May 5, 2023, the Director memorialized his oral decision denying the motion to continue in an *Order Denying the Cities’ Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions*. R. 298–304. That same day, the Director issued *Notice of Materials Department Witnesses May Rely Upon at Hearing*

and Intent to Take Official Notice. R. 305–10. Also on that day, the Cities, IGWA, BJGWD, and Bingham Groundwater District (“BGWD”) (collectively, the “Ground Water Users”) moved the Director to reconsider his denial of a continuance. R. 323–30. The SWC responded in opposition on May 8, 2023. R. 400–06. The Director denied the Ground Water Users’ motion to reconsider on May 19, 2023. R. 425–34.

Also on May 19, 2023, the Cities, BJGWD, BGWD, and McCain Foods filed a *Complaint for Declaratory Relief, Petition for Writ of Prohibition, and Petition for Writ of Mandamus* initiating CV01-23-08258. Simultaneously, IGWA filed a *Petition for Judicial Review* and various motions, initiating CV01-23-08187. The Ground Water Users sought relief from this Court to stop or delay the administrative hearing in this matter set for June 6–10, 2023. On June 1, 2023, this Court heard the Ground Water Users’ petitions and motions and orally dismissed the same. *Idaho Ground Water Appropriators, Inc. v. Idaho Dep’t of Water Res.*, No. CV01-23-08187 (Ada Cnty. Dist. Ct. Idaho June 1, 2023); *City of Pocatello v. Idaho Dep’t of Water Res.*, No. CV01-23-08258 (Ada Cnty. Dist. Ct. Idaho June 1, 2023).

iii. The Hearing on the Fifth Amended Methodology Order and the April As-Applied Order

The hearing on the Fifth Methodology Order and the April As-Applied Order proceeded as scheduled on June 6, 2023. The hearing lasted four days. The Ground Water Users and the SWC appeared represented by counsel. Thirteen witnesses testified, many of which were experts. The parties were provided with the opportunity to examine and cross-examine all witnesses including those appearing remotely. The parties offered and admitted sixty-five exhibits. At the conclusion of the hearing, the Director requested that the parties submit post-hearing briefs by June 16, 2023. The parties all timely submitted post-hearing briefs. R. 924–41, 942–57, 958–79, 980–95, 996–1003.

Following receipt of the parties' post-hearing briefs, the Director considered the record presented and the parties' arguments in favor of and in opposition to the Fifth Methodology Order. As a result, on July 19, 2023, the Director issued the *Post-Hearing Order Regarding Fifth Amended Methodology Order* ("Post-Hearing Order") alongside the *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Sixth Methodology Order")⁶ and the *Order Revising April 2023 Forecast Supply and Amending Curtailment Order (Methodology Steps 5 & 6)* ("July As-Applied Order"). R. 1067–1100, 1004–53, 1054–66.

On August 16, 2023, the Cities timely filed this *Notice of Appeal and Petition for Judicial Review of Final Agency Action* requesting judicial review of the *Post-Hearing Order*.

II. ISSUES PRESENTED ON APPEAL

Respondents' formulation of the issues presented is as follows:

1. Whether the Director's conclusion that TFCC's forecast supply is reasonable and sufficiently accurate is clearly erroneous.
2. Whether the Director's decision to select 2018 as the baseline year is supported by substantial evidence or is arbitrary, capricious, or an abuse of discretion.
3. Whether the Director's conclusion regarding cumulative bias is supported by substantial evidence or is arbitrary, capricious, or an abuse of discretion.
4. Whether the Director's quantification of the SWC's irrigated acreage is arbitrary, capricious, an abuse of discretion, or contrary to law.
5. Whether the Department's conclusion that TFCC's operations are reasonable is clearly erroneous.
6. Whether the Director's decision to adopt a transient model simulation is supported by law and substantial evidence.
7. Whether the Director violated the Cities' due process rights.
8. Whether the Director abused his discretion by limiting the nature and scope of discovery.

⁶ The Fifth Methodology Order and the Sixth Methodology Order are nearly identical, save for the corrected data found to be in error during the June 6 hearing and a few other non-substantive matters that were included in the Sixth Methodology Order. In this brief, the two orders are referred to interchangeably unless noted otherwise.

9. Whether the Director prejudiced the Cities' substantial rights.

III. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). "The district court's review is limited to those issues raised before the administrative tribunal and those the tribunal lacked the authority to decide." *In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 648, 315 P.3d 828, 836 (2013) (citing *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 796, 252 P.3d 71, 77 (2011)) [hereinafter *In re A & B*].

The court shall affirm the agency decision unless it finds the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3); *Barron v. Idaho Dep't of Water Res.*, 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. I.C. § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. "Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion." *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998). If the agency action is not affirmed, it shall be set aside, in whole or

in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

IV. ARGUMENT

A. Junior appropriators must prove by clear and convincing evidence that their use will not injure the senior's right.

As an initial matter, the Cities challenge their burden of proof, arguing that “for those metrics in the Methodology Orders that are *not* elements on the face of SWC’s decrees, the Cities need only demonstrate that the Director’s determination for a particular metric is not supported by substantial evidence.” Cities Opening Br. 22. The Cities reason that because the methodology orders “incorporate metrics that are not elements of SWC’s water rights,” challenges to those metrics “must meet the preponderance of the evidence standard, not the heightened standard of ‘clear and convincing.’”⁷ *Id.* The Cities suggest that these “metrics” include the baseline year, reasonableness, crop water need, climate-related factors like evapotranspiration, and “Heise Gage and SWC diversion data.” *Id.*

Whether the “metrics” are elements of a water right does not impact the controlling evidentiary standard. Parsing the inputs of the methodology into those that are elements of a water right and those that are not and applying separate evidentiary standards is unsupported by Idaho law. The Director uses all inputs within the methodology to determine material injury to members of the SWC in the ongoing SWC Delivery Call. In *A&B Irr. Dist. v. Idaho Dep't of Water Resources*, the Idaho Supreme Court ruled that the clear and convincing evidence standard applies to determinations of material injury: “It is Idaho's longstanding rule that proof of ‘no injury’ by a junior appropriator in a water delivery call must be by clear and convincing

⁷ Clear and convincing evidence is evidence indicating that the thing to be proved is “highly probable or reasonably certain.” *In re Doe*, 157 Idaho 694, 699, 339 P.3d 755, 760 (2014).

evidence. Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence.” 153 Idaho 500, 524, 284 P.3d 225, 249 (2012); *see also In re A & B*, 155 Idaho at 655, 315 P.3d at 843.⁸ This issue has been resolved for over a decade and there is no basis to reconsider the applicability of the clear and convincing evidence standard now.

B. The Director’s conclusion that TFCC’s forecast supply is reasonable and sufficiently accurate is not clearly erroneous.

The Cities argue that the Director’s forecast supply for Twin Falls Canal Company “grossly underestimate[ed] TFCC’s total water supply in light of the extraordinary snowpack and runoff associated with Snake River tributaries in 2023.” Cities Opening Br. 23. The Cities allege that the forecast fails in two respects: (1) the forecast is “far less accurate at predicting TFCC’s supplies (R-squared value of 0.72) than predicting any other SWC members’ supplies (R-squared values range from 0.84-0.93)”; and (2) the forecast “fails to consider runoff in tributary streams that join the Snake River below the Heise Gage but above TFCC’s point of diversion.” *Id.* at 23–24. The Director considered these arguments and rejected them in the Post-Hearing Order,

⁸ Consider also, the district court’s analysis and conclusions detailed in the *Memorandum Decision and Order on Petition for Rehearing in A & B Irrigation District v. Idaho Department of Water Resources*:

In sum, the application of a clear and convincing standard to the determination that a senior can get by with less water than decreed is consistent with the established presumptions and standards of proof. The standard reconciles giving the proper presumptive weight to the quantity decreed while at the same time allowing the Director to take into account such considerations as post-decree factors and in particular waste under the CMR. The standard avoids putting the senior right holder in the position of re-defending or re-litigating that which was already established in the adjudication. It avoids the risk that an erroneous determination will leave the senior short of water to which he was otherwise entitled, thereby promoting certainty and stability of water rights. The standard provides for effective timely administration by reducing contests to the sufficiency of the Director’s findings. The Director’s determination in an organized water district will be difficult to challenge by either the senior or junior sought to be enjoined. The alternative is a system which lacks certainty in water rights.

Mem. Decision and Ord. on Pet. for Rehr’g, at 19, *A & B Irr. Dis’t v. Idaho Dep’t of Water Res.*, No. CV-2009-647 (Minidoka Cnty. Dist. Ct. Idaho Nov. 2, 2010). The Department requests the Court take judicial notice of the decision as a court record under I.R.E. 201.

explaining that the “ground water users failed to offer sufficient evidence that TFCC’s natural flow forecast is flawed or that TFCC’s 0.72 R-squared value is unreasonable.” R. 1082. Because the Director was not presented sufficient evidence to the contrary, the Director concluded that “TFCC’s 0.72 R-squared value is reasonable and the TFCC’s natural flow forecast is sufficiently accurate.” *Id.* The Director’s conclusion is not clearly erroneous and is supported by substantial and competent evidence.

To determine material injury, the Director uses the methodology to predict reasonable in-season demand (“RISD”) and reasonable carryover “for the senior priority surface water rights during the upcoming irrigation season.” R. 1005. “In-season demand shortfall (“IDS”) will be computed by subtracting RISD from the forecast supply (“FS”).” R. 1006. Forecast supply is a combination of “natural flow and stored water.” R. 1022. The Director calculates the initial forecast supply in April after “the USBR and the USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage from April 1 to July 31 for the forthcoming year.” R. 1022. The joint forecast “is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.” *Id.* Using “data from 1990 through the irrigation year previous to the current year, a regression equation [was] developed for each SWC member.” *Id.* “The regression equations will be used to predict the natural flow diverted for the upcoming irrigation season.” *Id.* For Twin Falls Canal Company, a “multi-linear regression equation[] [was] developed by comparing the actual Snake River near Heise natural flow and the flows at Box Canyon to the natural flow diverted.” *Id.*

To evaluate regression model performance, one looks to the R-squared value. R. 2652. The R-squared value indicates the “proportion of variance in the response variable that can be explained by the predictor variable(s) in the model.” *Id.* The value ranges from 0 to 1 where “0 indicates that the predictor variable(s) explains NONE of the variability of the response variable”

and “1 indicates that the predictor variable(s) explains ALL of the variability of the response variable.” *Id.* In the context of the regression equations used to predict the natural flow diverted for the upcoming irrigation season, the R-squared value indicates how accurately the regression equation predicts each SWC member’s natural flows.

The R-squared value for TFCC’s April predicted natural flow model is 0.72, or in other words the regression equation explains approximately 72% of the variability in the data. R. 2655. While the R-squared value has declined in recent years, the Department remains confident that the regression equation is accurately predicting TFCC’s natural flow. R. 1082; Tr. Vol. I, pp. 224–25.⁹ Nevertheless, the Department would consider using alternate variables to calculate TFCC’s forecast supply if it “could find another predictor variable that works better.” Tr. Vol. I, p. 189, L. 11–12. Indeed, the Department has been exploring alternate variables but has not yet identified any that are more accurate than the current variables. Tr. Vol. I, p. 189, L. 14–20. Further, when the Department met with the technical working group in November and December of 2022, the Department “discussed updating the regression models used to forecast the SWC’s water supplies in April.” R. 1022, 2647–60. However, the Director found “that the current models still adequately forecast water supplies in April” and determined to “continue to rely on the existing regression models.” *Id.*

The Cities argue that the “Department’s determination that TFCC’s 0.72 R-squared is “reasonable” was arbitrary and capricious.” Cities Opening Br. 25. As explained, the Director’s determination that the strength of the R-squared value continued to indicate that the regression

⁹ Matt Anders testified:

We think it accurately is still predicting the natural flow for Twin Falls Canal Company. But we're concerned about the downward trend in the R-squared value, indicating that it may be degrading. That the regression may be degrading. But we still have confidence in it at this point. We want to see it in a couple more years and see what happens.

Tr. Vol. I, p. 224, L. 11–17.

equation was accurately predicting TFCC's natural flow was not arbitrary or capricious. Whether a 0.72 R-squared is "reasonable" necessarily depends on the circumstances surrounding the variables in the regression equation and its purpose. In addition, the Cities' expert, Greg Sullivan, proposed relying on regression equations with R-squared values greater than 0.50 to compute the monthly project efficiencies that are used in the RISD calculations. R. 1536. Mr. Sullivan testified that he "considered a good relationship [to be] when the R-squared was at least—was above 0.50." Tr. Vol. II, p. 157, L. 4–6. Mr. Sullivan also referred to R-squared values greater than 0.50 as showing "moderate to strong" correlations. R. 817. This suggests that the Cities' own expert would endorse regression equations with R-squared values greater than 0.50, which the TFCC forecast supply R-squared value of 0.72 is. Ultimately, the Director's reliance on the TFCC forecast supply regression equation and his conclusion that the 0.72 R-squared value is reasonable are not arbitrary and capricious, was within the Director's discretion and based on an exercise of reason.

The Cities also challenge the Director's reliance on the "Joint Forecast to predict TFCC's water supplies" as being "arbitrary and capricious. Cities Opening Br. 24. The Joint Forecast is created and issued by the United States Bureau of Reclamation and the United States Army Corps of Engineers and "is generally as accurate a forecast as is possible using current data gathering and forecasting techniques." R. 1022. "Currently the USBR and USACE's Joint Forecast is an indispensable predictive tool at the Director's disposal for predicting material injury to RISD." R. 1042.

The Cities claim that the Joint Forecast does not account for "above-average snowpack totals" in tributaries to the Snake River below the Heise Gage. Cities Opening Br. 24. The Cities allege that although the Department was aware of the high snowpack, "there were no discussions within the Department to consider them when forecasting SWC's supplies." *Id.* The Cities

conclude that the “Department’s choice to disregard this information that could improve its water supply forecasting not only defies its duty to use the ‘best available science and information,’ but resulted in the Department’s FS being wildly inaccurate, one of two reasons why the Department walked back its initial DS prediction for TFCC.”¹⁰ *Id.*

Again, the Joint Forecast “is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.” R. 1022. The Director relies on the Joint Forecast to calculate each SWC entity’s initial regression equations to forecast supply. The strength of the TFCC regression equation, illustrated by the 0.72 R-squared value, cuts against the Cities’ argument that the Joint Forecast is inaccurate in predicting supply. Further, the Cities overemphasize the impacts and predictive value of the high snowpack in 2023. The Director addressed the juniors’ high snowpack arguments in the Order Denying Motion for Reconsideration of Denial of Continuance, issued May 19, 2023:

In both their Motion for Continuance and Motion for Reconsideration, the Groundwater Users argue that there will be no prejudice to the senior surface water users this year because of high snowpack. The Director disagrees that high snowpack means the SWC will not be injured. While there is a good snowpack in the hills above the ESPA, snowpack is only part of the SWC’s water supply, and recharge from the aquifer is at a record low. Additionally, southern Idaho is emerging from a two-year drought, and the existing storage supply going into this irrigation season is low. Forecasters are uncertain whether the storage supply system will fill this year. The Director agrees with the SWC that the “current snowpack does not tell the whole story.”

R. 429. Further, the Cities did not present affirmative evidence that had the Director incorporated some unspecified quantification of the snowpack totals to forecast the SWC’s supply, the forecast supply would have been more accurate. Instead, the Cities simply assert that the information “could improve [the Department’s] water supply forecasting.” Cities Opening Br.

¹⁰ The Department did not “walk back” its initial DS prediction for TFCC, it evaluated the actual data, incorporated the information into the relevant equations, and revised its prediction consistent with the steps of the methodology, which resulted in a determination of no shortfall by July.

24. Accordingly, the Director's reliance on the Joint Forecast is not an abuse of discretion, nor is it arbitrary and capricious.

C. The Director's decision to rely on 2018 as the baseline year is supported by substantial evidence and is not arbitrary, capricious, or an abuse of discretion.

The Cities challenge the Director's decision to rely on 2018 diversions as the baseline year (BLY) in the Sixth Methodology Order, departing from using an average of diversions in 2006, 2008, and 2012 as the BLY in the Fourth Methodology Order. Cities Opening Br. 26. The Cities claim that the "Department's selection of 2018 as the new BLY *goes beyond* what is required to avoid shifting the risk to the seniors." *Id.* at 28. The Court must reject the Cities argument because the Director's adoption of 2018 as the BLY is supported by substantial evidence in the record and is not arbitrary, capricious or an abuse of discretion.

"A baseline year is a year or average of years when irrigation demand represents conditions that can predict need in the current year. The predicted irrigation demands of the current irrigation season are derived from the baseline year and are compared to estimated water supplies to predict material injury to senior appropriators." R. 1079. The baseline year is selected by analyzing three factors: (1) climate; (2) available water supply; and (3) irrigation practices. R. 1007. "Because the baseline year data is used to *predict* reasonable in-season demand for senior appropriators, safety factors must be employed to ensure the senior water rights will be satisfied." R. 1080. The use of safety factors protects the "senior water rights from an underprediction of water need because, under Idaho law, a senior appropriator is presumed entitled to his or her fully decreed water right." *Id.* (citing *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 877–78, 154 P.3d 433, 448–49 (2007) [hereinafter *AFRD2*]).

To select a baseline year that employs necessary safety factors, the baseline year “should represent a year[] of above average diversions and should not represent a year[] of average or below average diversions. An above average diversion year[] selected as the BLY should also represent a year[] of above average temperatures and reference ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors.” R. 1007. The baseline year “must be recent enough to represent current irrigation practices.” R. 1013.

In the Fourth Methodology Order, the Department’s baseline year averaged the SWC diversion volumes for 2006, 2008, and 2012 (“BLY 06/08/12”). R. 1015. The Department considered the years 2000–2014 when deciding the BLY. *Id.* For the Fifth and Sixth Methodology Order, the Department considered the years 2000–2021. When the Department considered the new data (from 2014–2021), the “total diversions by the SWC for the previous BLY 06/08/12 are 100% of the average SWC diversions for the years 2000–2021.” *Id.* The Director concluded that “[a]s a result of adding the new data, BLY 06/08/12 no longer satisfies the presumption criteria that total diversions in the BLY should exceed the average annual diversions.” *Id.* (citing Mem. Decision & Order on Pets. for Jud. Rev., at 34, *IGWA v. Spackman*, No. CV-2010-382 (Gooding Cnty. Dist. Ct. Idaho Sept. 26, 2014) [hereinafter 2014 District Court Order]).

When the Director considered the years 2000–2021, the Director determined that there were two years that satisfied all necessary criteria for a baseline year: 2018 and 2020. R. 1016, 1080, 2726. In the Sixth Methodology Order, the Director explained how 2018 and 2020 satisfied all the baseline year selection criteria:

Each of these years had (1) total diversions above the average diversions for the years 2000–2021, (2) total growing degree days above the average for the years 1992–2021, and (3) reference ET values above the average for the years 1992–

2021. The years 2018 and 2020 also had total precipitation values below the average precipitation for the years 1992–2021 and were not water supply limited years. The Department has reviewed the SWC’s diversion data for the 2020 irrigation season. The Department finds that 2020 ranks as the second-highest year of total diversions for the SWC and is more than one standard deviation above the average for the years 2000–2021. In comparison, 2018 ranks as the fourth-highest year of total diversions for the SWC and is less than one standard deviation above the average for the years 2000–2021. Choosing a BLY with above average diversions but within one standard deviation, ensures that a conservative year is selected that protects the senior while excluding extreme years from consideration.

R. 1016. Based on this analysis, the Director concluded that “total diversions for 2018 adequately protect senior water rights when predicting the demand shortfall at the start of the irrigation season and selects 2018 as the BLY.” *Id.*

In 2018, the SWC’s total diversion volume was above average at 104[.57]%, or 4[.57]% above average.¹¹ R. 1016, 1080. The Director determined that a “safety factor of 4% is reasonable.” R. 1080. The Cities argue that the use of 2018 as a baseline year is “unreasonably conservative” and advocate for selecting a baseline year that provides safety factors closer to 1% or 2%, “consistent with those associated with the 2006/2008 BLY that this Court approved in 2014[.]”¹² Cities Opening Br. 27. The Cities also claim that if “a safety factor of 4% is

¹¹ In the Post-Hearing Order, the Director discussed the diversion volumes in the Fifth Methodology Order, stating that in “2018 the SWC’s diversion volume was above average at 104%” and concluding that a “safety factor of 4% is reasonable.” R. 1080. In footnote 12 of the Sixth Methodology Order, the Director explained that Department staff erred “in calculating AFRD2’s 2018 adjusted diversion value for the Fifth Methodology Order, which was identified during the June 6 Hearing.” R. 1016. The Director concluded that the error was minor, and “had no appreciable impact on any calculations in the Fifth Methodology Order that relied on AFRD2’s 2018 diversion volume.” *Id.*

When the Director recalculated AFRD2’s diversion value, AFRD2’s 2018% of average increased; however, the Director mistakenly did not update the value in the table from 106% to 107%. The increase also impacted the total 2018% of average by increasing the percent from 104% to 105%. This increase is deceptive in that the percent only increased by 0.15%, but the increase caused the whole number percent to be rounded up (e.g., $3,346,939/3,200,617 \times 100 = 104.57\%$ compared to $3,341,939/3,200,389 \times 100 = 104.42\%$). R. 12, 1016. As the Director concluded in footnote 12 of the Sixth Methodology Order, the error was minor and the 0.15% increase in total 2018% of average does not alter the Director’s conclusion that the safety factor is reasonable.

¹² When one considers the BLY 06/08/12 with the data from 2000–2021, as demonstrated in the Sixth Methodology Order, the safety factors for TFCC and AFRD2 are 0%, or their diversion volume was equal to the average. R. 1016. As this Court explained in the 2014 District Court Order, “[u]sing data associated with an average year by its very definition would result in an under-determination of the needs of the Coalition half of the time.” R. 776. Similarly,

reasonable,’ then the Department must find a BLY that provides a 4% safety factor for all of the seniors.”¹³ *Id.* at 28. The Cities urge the Court to “reject as clearly erroneous the Director’s conclusion that its selection of the 2018 BLY was ‘reasonable’ and, on remand, require the Department to select a new BLY that is indeed reasonable, especially when predicting TFCC’s and AFRD2’s RISD.” *Id.*

The Court should reject the Cities’ argument because the Director’s selection of the 2018 BLY is a discretionary decision supported by substantial and competent evidence.¹⁴ As described above, the Director determined that the BLY 06/08/12 no longer satisfied the criteria for a baseline year and did not sufficiently protect senior appropriators. The Director evaluated the criteria, considered the new data from 2014 to 2021, and identified two years, 2018 and 2020, that satisfied all necessary criteria for a baseline year. 2018 and 2020 represented years of above average diversions and did not represent years of average or below average diversions. They represented years of above average temperatures and reference ET, and below average precipitation. Ultimately, the Director rejected 2020 as the baseline year because the SWC’s diversion volumes were “abnormally high” at 110.5% of average. R. 1082. Instead, the Director

in the Post-Hearing Order, the Director explained that the “purpose of selecting a baseline year with diversions above average is to protect the senior surface water rights, not to select a number closest to the average diversion volume.” R. 1081.

¹³ The Cities note that while the SWC’s total 2018 diversions were 104% of average, the safety factor for TFCC and AFRD2 was 6%, the safety factor for Milner was 10%, and the safety factor for A&B was 8%. Cities Opening Br. 27. In contrast, the Cities argue that the BLY 06/08/12 used in the Fourth Methodology Order “provided TFCC and AFRD2 safety factors of 1% and 2%, respectively.” *Id.* The Cities did not argue to the Director that he should select a baseline year that provides a 4% safety factor for all seniors, and the Director did not consider doing so. The range of % of average diversions in the BLY 06/08/12 used in the Fourth Methodology Order is the same range as the % of average diversions in the BLY 2018 used in the Sixth Methodology Order. *Compare* R. 1390 *with* R. 1016. The range between the lowest average % diversion for an SWC entity and the highest average % diversion for an SWC entity for both the BLY 06/08/12 and the BLY 2018 is 10%. Such a range was not an issue with the BLY 06/08/12 and likewise should not be an issue with the BLY 2018.

¹⁴ “Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion.” *Chisholm v. Idaho Dep’t of Water Res.*, 142 Idaho 159, 164, 125 P.3d 515, 520 (2005). Substantial evidence is “more than a mere scintilla” but “less than a preponderance of evidence.” *Id.*

selected 2018 as the baseline year, concluded that the above average diversions of 104%, or a safety factor of 4% was reasonable, and that “[y]ear 2018 best satisfies the criteria for a baseline year and sufficiently protects senior appropriators.” R. 1082.

The standard of review here is whether the Director’s decision is supported by substantial evidence and is not arbitrary, capricious or an abuse of discretion. Discretionary decisions of an agency shall be affirmed if the agency (1) perceived the issue in question as discretionary, (2) acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and (3) reached its own decision through an exercise of reason. *Rangen, Inc. v. Idaho Dep’t of Water Res.*, 160 Idaho 251, 255, 371 P.3d 305, 309 (2016).

As outlined above, there is substantial evidence in the record supporting the Director’s conclusion that 2018 is the appropriate BLY. The Director perceived the issue of the appropriate BLY to be a discretionary decision, as evidenced by his decision-making process. The Director acted within the outer limits of his discretion as he ensured that the BLY was above average but also excluded 2020 as a BLY because certain diversion volumes were “abnormally high” at 110.5% of average.

While it is understandable that the Cities would prefer the Director adopt a standard closer to 100% of average, the Director explained his justification for not doing so. As the Director stated, “The purpose of selecting a baseline year with diversions above average is to protect the senior surface water rights, not to select a number closest to the average diversion volume.” R. 1081. He explained that “historical data shows that averaging SWC diversion volumes from 2006/2008/2012 for the baseline year resulted in shortfalls in four out of eight

years from 2015 to 2022.”¹⁵ R. 1081. In other words, adopting an average diversion volume close to 100% is still not sufficiently protective. Contrary to the Cities’ suggestion, the Director’s adoption of a 4% combined average safety factor (as opposed to a fixed 4% safety factor for each SWC member) is not arbitrary or capricious but is consistent with the Director’s previous approach of adopting a combined average for all SWC members. The bottom line is that the Director’s decision is supported by substantial and competent evidence in the record and is not arbitrary, capricious, or an abuse of discretion. Cities failed to meet their burden to show that the agency erred.

D. The Director’s conclusion regarding cumulative bias is supported by substantial evidence and is not arbitrary, capricious or an abuse of discretion.

The Cities argue that the Department’s decisions regarding TFCC’s forecast supply and selection of the 2018 BLY, combine to “illustrate the magnitude of the Department’s inaccuracy when predicting TFCC’s demand shortfall (DS).” Cities Opening Br. 28. The Cities assert “[w]hile forecasts are inherently imperfect, the Department’s DS prediction under the *Fifth Methodology Order* reflects inaccuracies that amount to an abuse of discretion.” *Id.* at 29. However, the Cities also argue that the “court should reject as clearly erroneous the Director’s conclusion that, cumulatively, ‘the Department’s safety factors do not aggressively overpredict demand shortfall’ and require on remand that the Director correct the flaws in the two DS prediction variables as requested[.]” *Id.* at 31–32.

¹⁵ In footnote 26, the Cities assert “the *Final Order Establishing 2018 Reasonable Carryover (Methodology Step 9)* (see App. B) reveals that there was zero DS in 2018, so the 10,996 acre-feet DS amount that is reflected in the far-right column appears to be erroneous.” Cities Opening Br. 29. The table the Cities reference is a “Summary of Hindcast SWC Delivery Call Demand Shortfall Calculations 2000-2022.” *Id.* at 30, R. 2450. The values in the table are derived from hindcasting (i.e., if one took today’s data and looked back) and are not a recitation of past DS amounts from prior Step 9 orders. When the DS was calculated in real time in 2018 there was no DS, consistent with the 2018 Step 9 Order. However, when the DS calculations were run with current data, the hindcast revealed that there would have been a shortfall of 10,996 acre-feet in 2018. The DS amount for 2018 in the table is not erroneous, it is a hindcast.

As explained above, the Sixth Methodology Order’s calculation of Twin Falls Canal Company’s forecast supply is sufficiently accurate and the 2018 baseline year is not unreasonably conservative. The Cities recognize, and the Director explained in the Post-Hearing Order, that had the Director used the 2018 baseline year from 2015–2022, “in one of eight years the April demand shortfall would have been less than the actual demand shortfall in November and in two of eight years, the July demand shortfall would have been less than the actual demand shortfall in November.” R. 1083, 2450, 2730. In other words, even with the greater protection afforded to seniors by using 2018 as the baseline year, historical data indicates that the methodology would not aggressively overpredict demand shortfall. It follows that the updated methodology is not “unreasonably conservative.”

Further, the methodology is a tool used to *predict* need and estimate material injury. The Director uses the best available forecasting techniques to limit unpredictability of the prediction and methodically revisits the forecast throughout the season as more actual data becomes available. For example, consider the Director’s calculation of reasonable in season demand:

Prior to the irrigation season, reasonable in-season demand (“RISD”) is the projected annual diversion volume for each SWC entity during the year of evaluation that is attributable to the projected beneficial use of growing crops within the service area of the entity. Given that climate and system operations for the year being evaluated will likely be different from the BLY, the RISD must be adjusted for those differences. As stated by the Hearing Officer, “The concept of a baseline is that it is adjustable as weather conditions or practices change, and that those adjustments will occur in an orderly, understood protocol.”

R. 1016-17 (internal citation omitted). Also consider the Director’s adjustment of forecast supply:

As stated by the Hearing Officer, “There must be adjustments as conditions develop if any baseline supply concept is to be used.” A prediction of the upcoming season’s supply and demand is calculated at the beginning of the irrigation season and adjusted at specified milestones during the irrigation season to address changes in water supply and demand conditions in response to actual climatic and water supply conditions.

R. 1022 (internal citation omitted).

As these examples demonstrate, the nature of the methodology and the function of the nine steps is to predict material injury during the irrigation season by forecasting (Steps 1–3), honing the prediction by revising the forecasting and incorporating in-season data (Steps 5–8), and by reflecting on the results at the end of the season (Step 9). *See* R. 1044–48. “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.” *AFRD2*, 143 Idaho at 880, 154 P.3d at 451.

The Cities claim that “the Department’s predictions in April 2023 overstated DS by approximately 200,000 acre-feet” and that such a prediction “reflects inaccuracies that amount to an abuse of discretion” or that it is perhaps clearly erroneous. Cities Opening Br. 29, 32. The Cities derive their 200,000 acre-foot figure from aggregating the differences between the forecasted values in Step 1 for TFCC and the end of year values reflected in Step 9, and then rounding up.¹⁶ Contrary to the Cities’ belief, differences between the initial projected supply/demand and the season ending values do not indicate errors or inaccuracies but rather are inherent to the methodology. Without providing context for an aggregate difference between initial forecast values and season ending values for other years it is impossible to tell whether an aggregate difference in all forecast values of “200,000 af” is meaningful. What is meaningful,

¹⁶ TFCC’s April Forecast Supply (1,046,519 af) less TFCC November Total Supply (1,130,031 af) equals a decrease in 83,512 af. TFCC’s April RISD value (which is its historical diversion volumes from 2018 BLY) (1,121,717 af) less TFCC’s season ending RISD value (1,007,766 af) equals an increase in 113,951 af. If one combines the change in forecast supply to actual supply (83,512 af) with the change in BLY/RISD to season ending RISD (113,951 af) one reaches the numeral 197,463, which the Cities appear to have rounded up to 200,000. However, the value is not meaningful. If the FS is less than the RISD, the negative difference is the demand shortfall. If the FS is greater than the RISD, there is no demand shortfall. In April 2023, the Director predicted TFCC would experience an in-season demand shortfall of 75,200 af. The Director revised his predictions throughout the season with actual data of both TFCC’s demand and supply and determined TFCC would not experience an in-season demand shortfall. The total acre-feet difference between all projected values and the actual values is removed from context and does not meaningfully support any conclusions.

however, is that in April 2023 the Director predicted that TFCC would experience a demand shortfall of 75,200 acre-feet. Then through collection of data and the revision of the forecasts the Director determined by July that TFCC would not experience a demand shortfall, and TFCC did not experience a demand shortfall.

This demonstrates the Director exercising his discretion by conservatively projecting the initial demand shortfall to protect senior water right holders and then responding to changes in the environment during the irrigation season—none of which is an abuse of the Director’s discretion nor is clearly erroneous. The Director, in an exercise of discretion, has decided that this is what is necessary to protect the seniors from the uncertainty associated with the April forecast. The Director’s decision to employ safety factors in this manner is supported by previous decisions of this court (2014 District Court Order, at 34), is based on substantial and competent evidence in the record and is not arbitrary, capricious or an abuse of discretion. Cities failed to meet their burden to show that the agency erred.

E. The Director’s quantification of SWC’s irrigated acreage is not arbitrary, capricious, an abuse of discretion, or contrary to law.

The Cities argue that the SWC irrigated acre figures are “arbitrary, capricious, an abuse of discretion, and contrary to law.”¹⁷ Cities Opening Br. 32. “The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed.” *AFRD2*, 143 Idaho at 878, 154 P.3d at 449. “If the Director is going to administer to less than the full amount of acres set forth on the face of the [SWC’s] Partial Decrees, such a determination must be supported by clear and convincing evidence.” R. 761. “Once a decree is

¹⁷ “An action is capricious if it was done without a rational basis. It is arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles.” *A & B Irr. Dist. v. Idaho Dep’t Of Water Res.*, 153 Idaho 500, 511, 284 P.3d 225, 236 (2012) (internal citations omitted).

presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence.” *A & B Irr. Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 524, 284 P.3d 225, 249 (2012). “[I]f the junior users believe for some reasons that the seniors will receive water they cannot beneficially use, it is their burden under the established evidentiary standards and burdens of proof to prove that fact by clear and convincing evidence.” R. 773.

The Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 (“CM Rules”), Rule 42.01 states that, in determining whether a senior irrigator is using water efficiently yet still suffering injury, the Director may consider: “the rate of diversion compared to the acreage of land served” and “[t]he amount of water being diverted and used compared to the water rights.” CM Rule 42.01.d, e.

In Step 1 of the Sixth Methodology Order, the Director requires members of the SWC to “submit electronic shape files to the Department delineating the total anticipated irrigated acres for the upcoming year within their water delivery boundary or confirm in writing that the existing electronic shape file submitted by SWC has not varied by more than five percent.” R. 1044. Step 1 acknowledges that “[b]ecause the SWC members can best determine the irrigated acres within their service area, the SWC should be responsible for submitting the information to the Department.” *Id.*

The Director uses the irrigated acre figure to calculate crop water need (“CWN”).¹⁸ R. 1018–19. Crop water need “is derived by multiplying crop specific ET values, adjusted for estimated effective precipitation, by the total irrigated area of individual crop types, and summing the CWN for each crop type.” R. 1019. Or, as Matt Anders testified:

¹⁸ Crop water need “is the volume of irrigation water required for crop growth within a SWC entity boundary, such that crop growth is not limited by water availability.” R. 1018.

[W]hen we calculate crop water need, the equation is we take the ET, and we subtract off the effective precipitation. And then we take the ET by crop type, and multiply it by the acres of each crop type that we have calculated with the crop mix.... And then with the crop water need, we divide that by project efficiency, and that becomes the reasonable in-season demand on a monthly basis.

Tr. Vol. I, p. 193, L. 3–12.

The Cities focus on three irrigated acres issues: (1) TFCC’s Irrigated Acres; (2) Supplemental Ground Water Use; and (3) A&B’s Irrigated Acres.

- i. TFCC’s irrigated acreage figure is supported by substantial and competent evidence and the Director’s reliance upon it is not an abuse of discretion.*

The Cities argue that the “Director’s use of 194,732 acres for TFCC’s irrigated acreage significantly overstates the number of acres *actually* being irrigated[,]” which they argue is “clearly erroneous and an abuse of discretion that violates the Director’s duty identified by the Supreme Court, as well as his duty to use the ‘best available science and information,’ in order to avoid delivering water to the SWC that is not ‘attributable to the beneficial use of growing crops within the service area of the entity.’” Cities Opening Br. 35.

TFCC’s natural flow Snake River water rights authorize their shareholders to irrigate 196,162 acres. R. 10. However, it is undisputed that TFCC no longer irrigates 196,162 acres. R. 1083. A 2013 shapefile submitted by TFCC in compliance with Step 1 indicates that TFCC irrigates 194,732 acres. R. 1084. “TFCC concedes its members are currently irrigating no more than 194,732 acres.” *Id.* From 2014–2022, TFCC represented to the Director that “the number of acres TFCC irrigated has not varied by more than 5% from the previous (2013) shapefile numbers.” *Id.* Therefore, “the Department used the 2013 shapefile to predict TFCC’s irrigated acres for 2023.” R. 1014, 1084.

When TFCC’s consultant, David Shaw, compiled the 2013 shapefile, he excluded hardened acres and included acres that could have been irrigated in 2013 but were not. R. 1084; Vol. IV, p. 152, L. 5 through p. 153, L. 13. Mr. Shaw testified that in his opinion the 2013

shapefile represents the best available information for determining TFCC’s irrigated acres.¹⁹ “Unlike the 2013 shapefile, the 2017 shapefile includes only acres that *were irrigated* in 2017 and excludes the acres that *were not irrigated* in 2017 but *could be irrigated* in future years, e.g., 2023.” *Id.* The Department considers this distinction critical because, as Mr. Shaw explained in the SWC expert report, TFCC “has no way of knowing whether land covered by shares will or will not be irrigated and must prepare to meet the share delivery obligation.” R. 1234.

The Cities claim that Mr. Anders “testified that the TFCC 2013 shapefile showing 194,732 acres and used by the Department in the *Fifth Methodology Order* contains “hardened” (un-irrigable) acres.”²⁰ Cities Opening Br. 33–34. The Cities also claim that Mr. Anders testified that “the Department’s 2017 data is a ‘more accurate representation of irrigated acres than the 2013 shapefile.’” *Id.* at 34. The quoted language is an excerpt of counsel’s question, not Mr. Anders’ testimony. Tr. Vol. I, p. 195, L. 10–11. When one considers the context of Mr. Anders’ affirmative answer, one can appreciate that Mr. Anders endorsed the accuracy of the 2017

¹⁹ In a colloquy with counsel for the Cities, Mr. Shaw testified:

A. . . . Irrigated acres may change over time. If there were resources to update that shapefile every year, you would have -- that would be the best solution. But we haven't seen that happen.

Q. And it would be seem to be consistent that if we're looking for use of best available information to use, in fact, what is best available information; correct?

A. And right now that's the 2013 shape.

Q. Even though that's from 2013 and we're in 2022?

A. That's the best available we have, yes.

Tr. Vol. IV, p. 164, L. 15 through p. 165, L. 1.

²⁰ Mr. Shaw compiled the 2013 shapefile for TFCC. Mr. Shaw’s testimony rebuts the contention that the 2013 shapefile includes hardened acres. As Step 1 recognizes, “the SWC members can best determine the irrigated acres within their service are, [so] the SWC should be responsible for submitting the information to the Department.” R. 1044.

irrigated lands dataset *for 2017*, not as being more accurate than the 2013 shapefile for use in the methodology.²¹

Indeed, when asked whether he agreed that “the Department’s hand digitized maps that are created using the irrigated lands dataset process are highly accurate,” Mr. Anders testified that he thought “they are highly accurate for the year that they are created for.”²² Tr. Vol. I, p. 142, L. 20–24. When Cities’ counsel asked whether there was a threshold at which Mr. Anders would conclude that reliance on the 2013 shapefile was inaccurate, Mr. Anders answered: “Until we get something that passes, or that I feel passes the, or achieves the clear and convincing, I think we’re going to use that. The clear and convincing by Judge Wildman of, if you are going to reduce the acres, you have to be clear and convincing.” Tr. Vol I, p. 143, L. 17–21.

For the Director to reduce TFCC’s predicted irrigated acres below 194,732, the junior ground water users bear the burden of proving the accuracy of the lesser number by clear and

²¹ To place Mr. Anders’ answer in context, one must consider his exchange with counsel:

Q. Okay. The 2017 irrigated lands dataset, I understood from Jennifer Sukow's testimony, that it does go kind of field by field and removes hardened acres; is that correct?

A. That dataset has three classifications in it. In the irrigated, it takes out any hardened acres. That's usually just fields. But the semi-irrigated will have, as Jennifer explained, will have farmsteads, or maybe a subdivision, where there are a mixture of hardened acres and irrigated acres in there.

....

Q. Yes. Once the 2017 irrigated lands dataset was completed, at that time do you agree that it would have provided a more accurate representation of irrigated acres than the 2013 shapefile?

A. I think so, yes.

Tr. Vol. I, p. 194, L. 19 through p. 195, L. 12.

²² For example, Mr. Anders testified on this issue with the 2017 irrigated lands dataset:

So the part of that to me is that was created in 2017. So while it has the accuracy, I think the timeliness of that dataset does not meet the standard of clear and convincing. You can open that dataset and see acres that are considered non-irrigated. Overlay it on a recent air photo, maybe a 2021 or something a 2022, and see that it is irrigated. So to me, that's not convincing that those acres should be removed. They said in the 2017, that dataset indicates that they should be removed. But if we look at recent air photos. It shouldn't be. They are irrigated.

Tr. Vol. I, p. 155, L. 24 through p. 156, L. 10.

convincing evidence. The Cities claim that the “evidence shows it is ‘highly probable’ that TFCC’s irrigated acres is no more than 183,589 acres.” Cities Opening Br. 34. The 183,589-acre figure is from an expert witness report authored by SPF Water Engineering, on behalf of the Idaho Ground Water Appropriators, Inc., titled *Estimate of Non-Irrigated Acres within the Twin Falls Canal Company Service Area*, which the methodology relied upon prior to 2015. R. 364. The Director did not use the 183,589-acre figure after 2015 because the Director began relying on the 2013 shapefile. Again, the 2013 shapefile more accurately encompasses TFCC’s potential irrigated acres because it includes acres that could have been irrigated in 2013 but were not and excludes hardened acres. The 2011 and 2017 irrigated lands datasets are a snapshot in time of what *was actually irrigated* in 2011 and 2017.

Therefore, the Cities did not establish an alternative number of acres irrigated supported by clear and convincing evidence. The Director’s decision to use the irrigated acres figure from the 2013 shapefile is supported by substantial competent evidence. The Director did not abuse his discretion when relying on the best available information for determining TFCC’s predicted irrigated acres and such information is not clearly erroneous.

- ii. *The Director did not abuse his discretion when he determined the information regarding supplemental ground water use was insufficient.*

The Cities challenge the Director’s conclusion that “at this time, the information submitted or available to the Department is insufficient to determine the extent of supplemental irrigation on lands within the service areas of SWC entities.” Cities Opening Br. 36; R. 1014.

When determining the total acreage irrigated with surface water by the SWC entities, the Department may consider supplemental ground water use. *See* R. 1014, 1045; *see also* CM Rule 42. 01.h. However, without sufficient information on supplemental ground water use, the Director is prohibited from reducing a water user’s full decreed entitlement. R. 761 (2014

District Court Order holding that the Director was prohibited from administering less than the seniors full decree given that “the record d[id] not contain evidence that acres accounted for...[we]re being irrigated from a supplemental ground water source...”).

The Cities argue that the Department “could have considered supplemental ground water data in this matter and abused his discretion by refusing to do so[.]” Cities Opening Br. 37. The Cities assert that “there is information available to the Department through its Water Management Information System (“WMIS”) database and Geographic Information Shapefiles (“GIS”) regarding groundwater right places of use and points of diversion.” *Id.* at 36. The Cities claim that SWC’s expert, Dr. Brockway, “uses this data in conjunction with transfer applications...and while not perfect, considers it to be a reliable source of information for historical ground water diversions in other Department contexts.”²³ *Id.* The Cities also claim that the Department could calculate supplemental ground water by “employ[ing] the same methodology” used to estimate “ground water use on mixed-source ground in the ESPA model where both surface and ground water entitlements are authorized to be used.” *Id.* at 37. The Cities assert that “[a]lthough the Director found that available supplemental ground water use

²³ In footnote 41, the Cities argue:

Certainly, if the available Department data on supplemental ground water use was deficient, one would expect the Department to have engaged in some effort to obtain data or refine existing data since the *Fourth Methodology Order* was issued seven (7) years ago in April of 2016. If the Department will not do the work on its own and denies Petitioners any meaningful opportunity to discover information in a timely manner, the agency’s inability to incorporate this type of information into the Methodology Order is self-fulfilling.

Cities Opening Br. 36. The Director notes that the Cities have been on notice of the deficiencies in the current available supplemental ground water data for the same amount of time as the Department. Further, the Director notes that the WMIS/GIS data the Cities urge the Department to rely upon to determine the extent of supplemental irrigation is accessible to non-agency experts and would not require a discovery request to be obtained. The Cities acknowledge this fact in their argument that Dr. Brockway’s testimony supports that the “WMIS data is the ‘best available’ and that information could then be matched to places of use and points of diversion for ground water rights that are contained within TFCC’s service area.” *Id.* It is the Cities’ burden to prove by clear and convincing evidence that the lands within the SWC service areas are irrigated with supplemental ground water.

data was not sufficient or reliable, the Department witnesses did not present any evidence or testimony as to the bases for this conclusion[.]” *Id.*

Contrary to the Cities’ contention, Matt Anders testified in detail regarding why the Department’s current information is insufficient to determine the extent of supplemental irrigation. Tr. Vol. I, p. 196, L. 21 through p. 202, L. 17. For example, consider the following exchange between Mr. Anders and counsel for IGWA:

Q. Okay. Could the Department utilize place of use shapefiles, water right conditions, and diversion data to analyze supplemental ground water use within the Surface Water Coalition entities?

A. I think that you could start the analysis with those pieces of data, the water rights, and the WMIS I pumping data. I don't think you can get all the way to clear and convincing with those two pieces of data.

Q. What else would you need?

A. Those -- I think you need to talk to the individual water users or some fraction of them to try to get an idea of how they are using the water. Some of those systems are complicated. They have well water in with surface water shares. You have to understand the system about where the water is being applied, and when it's being applied. And I don't think you can get that without talking to the users, at least on some level.

Tr. Vol. I, p. 198, L. 20 through p. 199, L. 11.

Again, it is the junior users’ burden of proving by clear and convincing evidence that the SWC acreage was irrigated with supplemental ground water. The junior users failed to proffer sufficient evidence concerning the quantity of acres TFCC members could irrigate with supplemental ground water rights. The burden of proof did not shift to either the Department or TFCC. The Director has the discretion, not the obligation, to consider the impact of supplemental ground water use. The Director recognized that he could consider supplemental ground water, determined that he did not have sufficiently reliable information to do so, and declined to rely on or incorporate the insufficient information—all in accordance with his discretion and within reason. Therefore, the Director did not abuse his discretion when he declined to use insufficient

information to determine the extent of supplemental irrigation on lands within the service areas of SWC entities.

iii. The Department must further evaluate A&B's irrigated acre figure.

The Cities argue that the “Department’s number in the *Fifth Methodology Order* for A&B’s irrigated acreage (15,924 acres) includes areas associated with A&B’s enlargement water rights that bear junior priority dates (“enlargement acres”). Cities Opening Br. 37–38; R. 1014, 2907.

At the hearing, counsel for IGWA and Matt Anders, Department Technical Services Bureau Chief, had the following exchange regarding A&B’s irrigated acres figure:

Q. Okay. I'll just represent that enlargement rights have an effective priority date of 1994, which is junior to probably all of the ground water rights that are at risk of curtailment under the methodology order. And so my next question is, has there been discussion within the Department staff as to whether the methodology should be run based on the 14,637 acre figure instead of the 15,924 acre figure?

A. No, we haven't had any discussions about that.

Q. Okay. If, as I represented, the enlargement rights are junior to the ground water rights of IGWA and others, do you agree that it would probably be important or appropriate to make that adjustment, and run the methodology based on the 14,637 acre figure?

A. I don't know. I would have to investigate it further.

Tr. Vol. I, p. 205, L. 1–16. The Department has evaluated the figure used for A&B’s irrigated acres and agrees that the 15,924-acre figure includes enlargement acres.²⁴ At this time, the Department does not have sufficient information to decide how to address A&B’s enlargement acres in the methodology. Therefore, the Department has determined, as Mr. Anders testified, that it must evaluate A&B’s irrigated acre figure further. Nevertheless, the Director did not predict a demand shortfall for A&B in 2023 and no juniors were prejudiced by the Director’s reliance on the 15,924-acre figure. R. 50, 1061; Cities Opening Br. App. B-1, at 3.

²⁴ In compliance with Step 1, A&B has reported and confirmed its irrigated acres to be 15,924 acres annually since March 25, 2014.

F. The Director’s conclusion that TFCC’s operations are reasonable is not clearly erroneous.

The Cities argue that the “Director’s conclusion that TFCC remains ‘reasonably efficient’ is not supported by substantial evidence” and that if “TFCC’s operations are not ‘reasonably efficient,’ then the Director’s reliance on its ‘project efficiency’ in the RISD calculation for TFCC is without basis.” Cities Opening Br. 39–40.

CM Rule 40 states that in determining whether to regulate water rights in a delivery call, “the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42.” IDAPA 37.03.11.040.03. Under CM Rule 42, two of the factors the Director may consider are “the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application[;]” and “[t]he extent to which the requirements of the holder of a senior-priority water right could be met with the user’s existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices.” IDAPA 37.03.11.042.01.d, g.

In the methodology, the Director projects the SWC’s RISD for the season by dividing each entity’s CWN by its recent historical project efficiency. R. 1087. Project efficiency is the “same concept as system efficiency, which was presented at the 2008 Hearing.” R. 1017. By using “project efficiency and its input parameters of crop water need and total diversions, the influence of the unknown components for which data is not obtainable can be captured and described without quantifying each of the components.” *Id.* These unknown components include “seepage loss (conveyance loss), on-farm application losses (deep percolation, field runoff), and system operational losses (return flows).” *Id.* The project efficiency for each surface water

delivery system is unique and depends on numerous factors including: (1) length of delivery system; (2) geological materials through which the system delivers water; (3) nature of structures that deliver water; and (4) method of application of irrigation water. R. 1087.

In the Fourth Methodology Order, the Director averaged project efficiencies for each SWC member “over an eight-year period (2007–2014) and project efficiency greater or less than two standard deviations were excluded from the calculation.” R. 1018. When the Director updated the methodology and issued the Fifth and Sixth Methodology Orders, the Director found “that averaging over a rolling period of 15 years results in project efficiency values that are more consistent from year-to-year, reducing the impact of short-term trends.” *Id.*

The methodology order’s approach to calculating the efficiencies of SWC members did not change in the Fifth and Sixth Methodology Orders and the Court has already determined that the approach is acceptable. R. 772–73, 1088. Further, “if the junior users believe for some reasons that the seniors will receive water they cannot beneficially use, it is their burden under the established evidentiary standards and burdens of proof to prove that fact by clear and convincing evidence.” R. 773, 1088.

The Cities argue that the Director’s conclusion that TFCC’s diversions and efficiency are reasonable “overlooked much contradictory evidence and testimony and is not supported by substantial evidence.” Cities Opening Br. 40–41. The Director’s analysis in the Post-Hearing Order rebuts this contention and demonstrates that the Director considered the arguments and evidence presented, weighed them accordingly, and reached his conclusion through an exercise of reason.²⁵ R. 1087–89.

²⁵ Where there is conflicting evidence, an “agency’s findings are binding on this Court as long as they are supported by substantial and competent evidence, regardless of whether [the Court] might have reached a different conclusion.” *Chisholm*, 142 Idaho at 164, 125 P.3d at 520. “Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion.” *Id.* (citation omitted). Substantial evidence is “more than a mere scintilla” but “less than a preponderance of evidence.” *Id.*

The evidence supporting the Director’s conclusion includes Mr. Barlogi’s testimony, both live (Tr. Vol. II, p. 13, L. 18 through p. 21, L. 17) and pre-filed (R. 1178-1205), Mr. Shaw’s testimony (Tr. Vol. IV, p. 146, L. 15–21), and the SWC Expert Report on Fifth Methodology and Related Orders (R. 1232-1261). *See also* Tr. Vol. II, pp. 75, 90–91, 94–96; Tr. Vol. IV, p. 146. The Director’s conclusion is supported by substantial competent evidence in the record and his reliance on the project efficiency term in the RISD calculation is not clearly erroneous.

G. The Director’s decision to adopt a transient model simulation is supported by case law and substantial evidence in the record.

Under previous versions of the methodology order, the Director used a steady-state simulation when determining the curtailment priority date in the SWC delivery call. R. 1089. In the Fifth Methodology Order, the Director examined “whether the use of steady-state continues to be supportable.” R. 35. The Director concluded that steady-state was no longer supportable and changed to a transient-state simulation. R. 31, 35, 40.

At the hearing in this matter, the Cities opposed the Director’s decision and the SWC supported the decision. In his Post-Hearing Order, the Director affirmed the decision to switch, concluding that a transient-state simulation should be used because it is the only method that will ensure a senior gets the full quantity of water at the time and place required. R. 1091.

The Director’s decision to adopt a transient-state simulation is supported by case law, administrative authorities, and the substantial evidence in the record. As the Director stated in the Post-Hearing Order, “[t]he presumption under Idaho law is that the senior is entitled to his decreed water right’ Entitlement to the decreed water right includes receiving water in the quantity and at the time and place required.” R. 1090. This is consistent with CM Rule 43.03.b, which emphasizes that mitigation must be provided “at the time and place required by the senior-priority water right,” IDAPA 37.03.11.043.03.b. The Director also has an obligation to

address a mitigation deficiency in the year it occurs. Mem. Decision & Order on Pet. for Jud. Rev., at 10, *Rangen, Inc. v. Idaho Dep't of Water Res.*, No. CV-2014-2446 (Twin Falls Cnty. Dist. Ct. Idaho Dec. 3, 2014); Mem. Decision & Order, at 8–9, *Rangen, Inc. v. Idaho Dep't of Water Res.*, No. CV-2014-4970 (Twin Falls Cnty. Dist. Ct. Idaho June 1, 2015).

The Director concluded that calculating a curtailment date using steady-state simulation does not provide water to the senior priority rights in the quantity required and at the time and place required. R. 1091. This was based in part on the testimony of IDWR employee Jennifer Sukow. Ms. Sukow prepared a presentation for the technical working group in November 2022, which included conclusions she drew from modeling. R. 1424. The presentation was admitted into evidence at the hearing and Ms. Sukow adopted its conclusions in her testimony. Tr. Vol. I, p. 97, L. 1–15. Her presentation explained the difference between steady-state and transient-state model simulations. R. 1428. Steady-state “predicts long-term response to continuous curtailment of groundwater used at a constant rate for an infinite number of years.” *Id.* However, curtailments under the methodology order “are not continuous or long-term” and “groundwater use does not occur at a constant rate throughout the year.” *Id.* Conversely, transient modeling predicts timing and changes in aquifers resulting from short-term curtailment like in the SWC delivery call. R. 1430. Ms. Sukow explained in her presentation that if steady-state is used, only a fraction of the amount of water needed by a senior will arrive to the senior in the year of the curtailment. R. 1429 (“[l]ess than 15% of the steady state impacts of a single-season curtailment are realized at the river reach within six months of curtailment”; “25% of steady state at 1 year”); *see also* Tr. Vol. I. p. 97, L. 17–25. Ms. Sukow explained that this meant water would not be available to the senior to mitigate injury when needed:

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

A. Not within this irrigation season.

Tr. Vol. I, p. 98, L. 17–22.

Ms. Sukow concluded:

- Steady state simulations are appropriate for evaluating the impacts of aquifer stresses that have been applied for decades (i.e. groundwater pumping, continuous curtailment to same date every year).
- Transient simulations are appropriate to evaluate the impacts of aquifer stresses applied to evaluate the impacts of aquifer stresses applied for short periods of time (i.e. short-term curtailments with varying priority dates).
- Steady state simulations of continuous curtailment do not simulate the short-term curtailments prescribed in the SWC methodology.
- Transient simulations better simulate the short-term curtailments prescribed in the SWC methodology.

R. 1444.

Ms. Sukow’s conclusions were supported by the testimony of David Colvin, an expert for the SWC. Mr. Colvin testified that “the steady state use of ESPAM for curtailment analysis in particular is inappropriate due to the methodology's requirement for in-season benefits from curtailment. And so the in-season timing component renders a steady state model ineffective and inappropriate for modeling curtailment benefits.” Tr. Vol. I, p. 108, L. 14–20. It was Mr. Colvin’s opinion “that the transient superposition model for ESPAM2.2 is the appropriate model for calculating the reach gain benefits from curtailing junior ground water pumping.” Tr. Vol I, p. 108, L. 20–23.

Greg Sullivan, the Cities’ expert witness, admitted that if steady state is used in the modeling to determine a curtailment date, the amount of shortfall determined by the order will not be supplied in that year. Tr. Vol. II, p. 203, L. 9–13; Tr. Vol. II, p. 204, L. 1–6.

Sophia Sigstedt, IGWA’s expert witness, agreed that the only way to ensure that water reached the senior during the irrigation season was by using a transient simulation:

Q. So if we're attempting to use the model to identify what actions need to be taken on the ESPA to deliver a volume of water into the Blackfoot to Minidoka

reach during the irrigation season, the transient model would be the only version to use; is that correct?

A. That's correct.

Tr. Vol. III, p. 91, L. 22 through p. 92, L. 2.

Based on case law and the testimony at hearing, the Director concluded:

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

R. 1091.

The Cities ask this Court to reverse the Director's decision to use transient-state simulation, calling it "clearly erroneous." Cities Opening Br. 43. The Cities ask the Court to order the Director to "issue an updated Methodology Order that determines curtailment dates pursuant to steady-state modeling." *Id.* at 45. The Court must reject this request because, as explained above, steady-state modeling is contrary to the key principle in Idaho law that mitigation should be provided in the quantity required and the time and location needed by the senior. Ms. Sukow, Mr. Colvin and even the juniors' own experts reached the same conclusion: If mitigation must be provided in the quantity required and at the time and place required by the senior, transient-state modeling is required. Because the Director's decision to use transient-state simulation is consistent with Idaho law and supported by substantial evidence in the record, the Court must affirm the Director's conclusion.

The Cities also argue that the Court should require the Director to use steady-state simulations because a transient-state simulation "is over-inclusive and threatens curtailment against junior users that are not actually causing the demand shortfall." Cities Opening Br. 45

(emphasis in original). The Cities cite Mr. Sullivan’s expert report (R. 1546–47) in support of the argument that certain junior ground water users “are not actually causing the demand shortfall.”

The problem with this argument is that Mr. Sullivan’s novel theory on causation is based on what would have happened if the Department had curtailed certain junior ground water users back in the 1980s. His argument is that if wells with 1980’s priorities had been curtailed in the 1980s, there would be no injury now: “[H]ad those wells not pumped, there would be 75,000 acre-feet more in the river.” Tr. Vol. II, p. 190, L. 24–25. He argues that since there would be no injury now had they not pumped, the ground water users senior to 1980 should not be curtailed: “[T]he users that are, you know, junior to the mid-‘80s are the ones responsible or the ones that caused that and they should be the ones responsible for the mitigation.” Tr. Vol. II, p. 191, L. 5–8.

The first problem with this argument is that the Department cannot administer based on what didn’t occur previously. In a delivery call proceeding in Idaho, the CM Rules govern. *S. Valley Ground Water Dist. v. Idaho Dep’t of Water Res.*, No. 49632, 2024 WL 136840, at *9 (Idaho Jan. 12, 2024). Under the prior appropriation doctrine and the CM Rules, the Director cannot choose to simply not curtail some junior ground water users. IDAPA 37.03.11.040.01 (“[U]pon a finding by the Director . . . that material injury is occurring, the Director, through the watermaster, shall: a. Regulate the diversion and use of water in accordance with the priorities of rights . . .”). Ground water users subject to this delivery call are all ground water users within the Eastern Snake Plain Aquifer area of common ground water supply (“ESPA ACGWS”) (IDAPA 37.03.11.050.01) and junior to October 11, 1900 (the date of TFCC and NSCC natural flow water rights). The ground water rights within the ESPA ACGWS and junior to October 11, 1900, are the water rights whose pumping affects the SWC.

In the as-applied orders, the Director evaluates the predicted shortfall and determines the curtailment date that is necessary to provide water to the senior at the amounts needed and at the time and location needed by senior. While the amount of injury will vary each year, the group subject to curtailment does not change. The Director has concluded that the SWC is being materially injured by junior ground water pumping on the ESPA. Upon a finding of material injury, the Director must regulate the diversion and use of water in accordance with the priorities of rights. IDAPA 37.03.11.040.01. The only exception is if there is an effectively operating mitigation plan in place. IDAPA 37.03.11.040.02.c. Mr. Sullivan admitted under cross examination that if his approach was to be adopted, only a fraction of the mitigation obligation calculated by the Director would be provided to the senior when needed. Tr. Vol. II, p. 204, L. 24 through p. 205, L. 5. Because Mr. Sullivan’s approach is contrary to the CM Rules and would not ensure that the senior gets water in the quantity required and at the time and place required by the senior, it must be rejected by this Court.

The Cities also argue that transient-state modeling should be rejected by this Court because “[t]he change to the transient-state model does not properly balance both the interests of the seniors and the juniors.” Cities Opening Br. 44. As proof of this, the Cities point out that using transient modeling during the 2023 irrigation season would have resulted in the idling of roughly 700,000 acres but curtailment using steady-state would have idled only 75,000 acres. *Id.* Just because steady-state would have resulted in less acres being curtailed is not justification for keeping steady-state. As described above, transient-state modeling is consistent with Idaho case law and the CM Rules and ensures that the seniors get water in the quantity required and at the time and location required.

Moreover, as the Idaho Supreme Court has made clear, disparity per se between the impact to the juniors and the benefit to the senior is not justification alone for not curtailing.

Idaho Ground Water Assoc. v. Idaho Dep't of Water Res., 160 Idaho 119, 132, 369 P.3d 897, 910 (2016). “[T]he very nature of conjunctive management involves a large disparity between the number of acres curtailed and the accrued benefits to a senior surface water right.” *Id.* In the Post-Hearing Order, the Director considered the Cities and IGWA’s arguments about balancing. The Director, recognizing his authority to balance the interests involved, quoted *Idaho Ground Water Association v. Idaho Department of Water Resources*:

In light of this challenging balancing requirement, it is necessary that the Director have some discretion to determine in a delivery call proceeding whether there is a point where curtailment is unjustified because vast amounts of land would be curtailed to produce a very small amount of water to the caller. As discussed, Idaho law contemplates a balance between the “bedrock principles” of priority of right and beneficial use. *In Matter of Distribution of Water to Various Water Rights Held By or For Benefit of A & B Irrigation Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2013). The Director is authorized to undertake this balancing act, subject, as he acknowledged here, to the limitations of Idaho law.

R. 1093.

The Director considered the amount of water that would accrue to the senior and concluded that a trim line was not appropriate:

The spatial distribution of long-term impacts of Ground Water Users on aquifer discharge to the near Blackfoot to Minidoka reach is documented in the record. In Ms. Sigstedt’s expert report, Figure 3-6 shows the steady state response function, which is the long-term impact of pumping on the near Blackfoot to Minidoka reach as a percentage of the volume of ground water used. Ex. 837 at 38. Figure 3-6 shows that Ground Water Users on both sides of the Great Rift (the boundary applied to the Rangen delivery call trim line) have significant long-term impacts on aquifer discharge to the [reach of the Snake River the SWC relies upon]. As a result, the Director concludes that a trimline is not appropriate.

R. 1093.

Here, the Director recognized his discretionary authority to balance the interests of juniors and seniors and concluded that because water users throughout the ESPA have significant long-term impacts on the SWC, no adjustments should be made. Because the Director’s decision was based on evidence in the record and was consistent with the grant of discretion to the

Director under *Idaho Ground Water Association v. Idaho Department of Water Resources*, this Court must reject the Cities balancing argument.

H. The Director did not violate the Cities’ due process rights.²⁶

The Cities argue that the Director violated the Cities’ due process rights. Cities Opening Br. 45. As an initial matter, the Cities argue that the Director’s conclusion in the Post-Hearing Order that the Director did not violate the juniors’ due process rights “is beyond the Director’s authority.” *Id.* The Director addressed the juniors’ due process arguments because IGWA raised the argument in its Post-Hearing Brief. R. 975–76. Whether the Director had the authority to answer the due process question does not affect the district court’s decision on judicial review because it is a legal question that the district court freely reviews. *Rangen, Inc.*, 160 Idaho at 255, 371 P.3d at 309 (citing *Vickers v. Lowe*, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011)).

Next, the Cities argue that they “were given insufficient time to gather and develop evidence to support their arguments prior to the June 6-9, 2023 hearing[.]” Cities Opening Br. 46. The Cities claim that the “Department’s discovery restrictions made it functionally impossible to develop evidence.” *Id.* The Cities assert that the Director’s invocation of the urgency of the timely resolution of the dispute was “an all-purpose excuse[] to foreclose any meaningful inquiry by junior users into the bases of the Methodology Orders and any meaningful analysis of the SWC’s uses and practices.” *Id.* Therefore, the Cities allege that “[a]ll of this amounts to a violation of the Cities’ right to due process.” *Id.*

The Director issued the Fifth Methodology Order in compliance with Idaho Code § 42-1701A(3). After the Director issued the order, any person aggrieved, including the Cities, was entitled to a hearing on the order. A hearing contesting the action of the Director under subsection (3) “shall be held and conducted in accordance with the provisions of subsections (1)

²⁶ The Director adopts and incorporates herein *Respondent IDWR’s Brief* in CV01-23-13173.

and (2).” I.C. § 42-1701A(3). Subsection (1) provides that hearings before the Director shall be conducted in accordance with the Idaho Administrative Procedures Act (“APA”) and the Department’s Rules of Procedure. I.C. § 42-1701A(1). Subsection (2) permits the Director to appoint a hearing officer to conduct such a hearing and imparts the hearing officer with related duties. I.C. § 42-1701A(2). Under Idaho Code § 67-5242, the presiding officer is vested with responsibilities to promote the full adjudication of the merits at the hearing. *See* I.C. § 67-5242 (3). The Cities received actual notice of the hearing, sufficient opportunity to be heard, and a full adjudication of the merits of its challenge to the Fifth Methodology Order.²⁷

Any prejudice the Cities suffered by the compressed hearing schedule was outweighed by the Director’s duty to timely administer water rights in priority. While the Director recognized the compressed hearing schedule was a potential burden on the parties, the Director noted it was “a burden being born[e] by all parties, both the senior water users and the junior ground water users.” R. 429. When scheduling the hearing, the Director had to weigh “the need of the senior water user to have timely administration” against “the ground water users desire to have more time to prepare for the hearing.” *Id.* One factor the Director considered was the parties’ technical

²⁷ The Director issued the Fifth Methodology Order, the April As-Applied Order, and the Notice of Hearing on April 21, 2023. R. 1, 48, 62. The Director scheduled the hearing for approximately six weeks later, to begin on June 6, 2023. R. 62. In the six weeks between the issuance of the Fifth Methodology Order and the hearing, the Cities conducted discovery (*see e.g.*, R. 400–15), deposed two Department witnesses (R. 393–96, 435–36; *see e.g.*, Tr. Vol. I, p. 68, L. 2–5), deposed a representative of Twin Falls Canal Company (R. 440–45; *see e.g.*, Tr. Vol. II, p. 75, L. 8–15), solicited and received an expert witness report (R. 1511–79), and conducted several rounds of motion practice.

The hearing proceeded as scheduled from June 6–9, 2023. The Cities appeared at the hearing, represented by counsel, all four days. Tr. Vol. I, p. 2; Tr. Vol. II, pp. 2–3; Tr. Vol. III, pp. 2–3; Tr. Vol. IV, pp. 2–3. At the hearing, thirteen witnesses testified and were subject to cross-examination. The Cities conducted the direct examination of four witnesses: Gregory K. Sullivan, Anthony Olenichak, Scott King, and Dean Delorey. Tr. Vol. II, pp. 111–197; Tr. Vol. III, pp. 228–237; Tr. Vol. IV, pp. 14–24; Tr. Vol. IV, pp. 27–34. The Cities cross-examined all witnesses except for Richard Lynn Carlquist. The Cities presented both evidence and arguments at hearing and timely submitted a post-hearing brief. R. 942–57. As the record demonstrates, the Cities received notice of the hearing, participated in pre-hearing discovery and motion practice, received a full and robust opportunity to examine and cross-examine witnesses, and timely submitted its post-hearing argument to the Director. The hearing complied with all due process, the APA, and Department requirements.

experts' familiarity with the methodology order. *See id.* The Director observed that “the experts for IGWA and the Cities have represented those entities for many years. The experts have a familiarity with the methodology order.” *Id.* While all the experts working on the compressed timetable would have likely appreciated more time to develop their opinions, the Director’s responsibility to timely respond to injury incurred by senior water users without unnecessary delay predominated. R. 430; *see AFRD2*, 143 Idaho at 874, 154 P.3d at 445. The Director urged repeatedly that time was of the essence given the April As-Applied Order predicted an in-season demand shortfall. *E.g.*, R. 300. “The urgency for water administration mandates a timely decision because ‘[w]hen a junior appropriator wrongfully takes water that a senior appropriator is entitled to use, there is often the need for very prompt action.’” R. 300.

The Cities were on notice that the Director sought to make technical changes to the methodology order in August 2022—ten months prior to the hearing. The Cities’ experts participated in the technical working group, which developed and narrowed the proposed updates to the methodology order. The Cities were on actual notice of the Fifth Methodology Order and the hearing in April 2023—six weeks prior to the hearing. The Department has used a methodology order since 2010 and has modified and amended the methodology several times to account for new data, modeling revisions, climate trends, and changes in law. While the timeline of the instant amendment was compressed, the Cities had time to secure expert witnesses and analyze the proposed changes to the Fourth Methodology Order. All parties were subject to the same timeline. The Director weighed the Cities arguments in support of extended time against his duty to timely address injury and concluded that the latter prevailed. The Director did not

violate the Cities' due process rights and the Cities were not unduly prejudiced by the compressed timeline.²⁸

I. The Director acted within his discretion to limit the type and scope of discovery.

The Cities argue that the “Director’s orders limiting discovery on the Fifth Methodology Order and denying discovery on the Sixth Methodology Order resulted in a heightened evidentiary standard in these proceedings, and as discussed, have precluded Petitioners from gathering and developing the evidence apparently necessary to persuade the Director that the values he is using to predict and determine SWC’s demand shortfall are flawed.” Cities Opening Br. 47. The Cities’ argument is not supported by citations to either the record or supporting authority. Additionally, the Cities’ argument fails because the Director was within his authority to limit the type and scope of discovery.

“Unless otherwise provided by statute, rule, order or notice, the scope of discovery is governed by the Idaho Rules of Civil Procedure (see Idaho Rule of Civil Procedure 26).” IDAPA 37.01.01.520.02. In general, the scope of discovery under I.R.C.P. 26 is as follows: “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense[.]” I.R.C.P. 26(b)(1)(A). It is also within the Director’s discretion as the presiding officer to limit the type and scope of discovery in an administrative hearing. IDAPA 37.01.01.521.

²⁸ The Cities also complain that they were not granted permission to conduct discovery on the Sixth Methodology Order. Cities Opening Br. 46. After the Director issued the Sixth Methodology Order, Cities sought a hearing on the order and identified four issues they wanted a hearing on. R. 1169–70. As explained in the *Order Denying Request for Hearing and Motion Authorizing Discovery*, the Cities were denied a hearing because “[t]he Parties have previously been afforded an opportunity for a hearing on the issues identified related to the Sixth Methodology Order and are not entitled to a hearing pursuant to Idaho Code § 42-1701A(3)” R. 1170. The Director denied the request for discovery, stating “[b]ecause the Director is denying the request for hearing, the request to authorize discovery is moot. The Director therefore denies the request for discovery.” R. 1171. The Director did make clear that this would not foreclose the ground water users from trying to present updated information to the Department in the future: “The Director emphasizes that this denial does not prevent the ground water users from presenting updated scientific information or data to the Director in the future. For example, if the ground water users prepare a new analysis of hardened acres within the boundary of a SWC member, this would be new information the Director may consider in the future.” R. 1170–71.

Additionally, “[t]he presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute, rule or recognized in the courts of Idaho.” IDAPA 37.01.01.600.

The Director properly exercised his discretion in limiting the manner and scope of discovery to expedite the discovery process considering the compressed hearing schedule and to exclude irrelevant evidence. The Cities were, therefore, not prejudiced by the Director’s exercise of his discretion in limiting the type and scope of discovery.

J. The Director did not prejudice the Cities’ substantial rights.

Even if the Court finds that the Director erred and met one of the conditions in Idaho Code § 67-5279(3), an “agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.” I.C. § 67-5279(4). The Cities argue that the Director’s Post-Hearing Order, Fifth Methodology Order, and Sixth Methodology Order prejudice their substantial rights “because the Department erroneously administers ground water rights under the Fifth Methodology Order.” Cities Opening Br. 48.

Despite acknowledging that the Cities “have safe harbor from curtailment under their approved mitigation plan” the Cities argue that they “have a significant interest in ensuring that the applicable Methodology Order accurately predicts and determines the SWC’s material injury (and curtailment date to offset the injury) so that ground water rights are not erroneously subject to curtailment.” *Id.* at 49. The Cities assert that due to the alleged inaccuracies in the methodology’s predictions and determinations of SWC’s demand shortfall and curtailment dates, the “Department’s administration in accordance therewith erroneously infringes upon Petitioners’ real property rights.” *Id.*

The Cities argument fails. The Director's orders do not inaccurately predict and determine SWC's demand shortfall. In addition, the Department's administration in accordance with the orders did not infringe upon the Cities' water rights because the Cities, as they recognize, were covered by an approved mitigation plan, and were protected from curtailment.

The Cities also argue that the Director's limitations on discovery "preclude[ed] Petitioners from presenting crucial evidence at the June 6-9, 2023 hearing" thereby prejudicing "Petitioners' substantial right to due process." *Id.* The Cities argument fails because the Director limited the type and scope of discovery within the bounds of his discretion and the Cities were not deprived of due process. The Director provided the Cities the process they were due prior to issuing the Fifth Methodology Order, during the pre-hearing period, and at the hearing. The Cities had a full and fair opportunity to be heard on their issues with the Fifth Methodology Order. Therefore, the Director did not prejudice the Cities' substantial rights to due process.

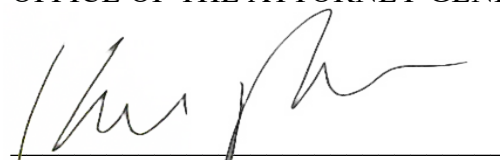
V. CONCLUSION

The Director issued the Fifth Methodology Order in compliance with Idaho Code § 42-1701A(3). The Director provided all interested parties with actual notice of the order and the full and fair opportunity to be heard. The Director proceeded from the issuance of the order to the hearing on a compressed schedule due to the urgency for water administration given the April As-Applied Order predicted an in-season demand shortfall and the concern that using the Fourth Methodology Order was no longer legally supportable. The Director did not abuse his discretion in issuing the Fifth Methodology Order, addressing pre-hearing matters, presiding over the hearing, or in the substantive updates to the methodology. The Director's decisions are supported by substantial and competent evidence in the record. The Director's actions did not prejudice the Cities' substantial rights. Accordingly, the Court should affirm the Director's

actions regarding the Fifth Methodology Order and affirm the Post-Hearing Order and the Sixth Methodology Order.

DATED this 16th day of February 2024.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'Kayleen Richter', written over a horizontal line.

KAYLEEN R. RICHTER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of February 2024, I caused to be served a true and correct copy of the foregoing, via iCourt E-file and Serve, upon the following:

Candice M. McHugh
Chris M. Bromley
MCHUGH BROMLEY, PLLC
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

Sarah A. Klahn
Maximilian C. Bricker
SOMACH SIMMONS & DUNN, P.C.
sklahn@somachlaw.com
mbricker@somachlaw.com

Robert L. Harris
HOLDEN KIDWELL HAHN & CRAPO,
PLLC
efiling@holdenlegal.com

John K. Simpson
Travis L. Thompson
MARTEN LAW LLP
jsimpson@martenlaw.com
tthompson@martenlaw.com

Thomas J. Budge
Elisheva M. Patterson
RACINE OLSON, PLLP
tj@racineolson.com
elisheva@racineolson.com

W. Kent Fletcher
FLETCHER LAW OFFICE
wkf@pmt.org

Dylan Anderson
DYLAN ANDERSON LAW
dylan@dylanandersonlaw.com

Skyler C. Johns
Nathan M. Olsen
Steven L. Taggart
OLSEN TAGGART PLLC
johns@olsentaggart.com
nolsen@olsentaggart.com
staggart@olsentaggart.com
icourt@olsentaggart.com



KAYLEEN R. RICHTER
Deputy Attorney General