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ATTORNEYS FOR THE IDAHO GROUND WATER APPROPRIATORS

BEFORE DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

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

**PETITION FOR RECONSIDERATION
ON *FINAL ORDER REGARDING
METHODOLOGY FOR DETERMINING
MATERIAL INJURY TO REASONABLE IN-
SEASON DEMAND AND REASONABLE
CARRY OVER DATED APRIL 7, 2010***

The IDAHO GROUND WATER APPROPRIATORS, INC., (hereinafter “IGWA” or “Ground Water Users”) by the undersigned counsel and on behalf of its members, hereby petitions for reconsideration of the Director’s *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* dated April 7, 2010 (“Methodology Order”). IGWA objects to the *Methodology Order* and requests

reconsiderations on the following grounds.

INTRODUCTION

At the April 14, 2010 status conference the Director invited Petitions for Reconsideration and encouraged the parties to critically review the Methodology Order and provide constructive criticism and recommendations. At the outset the Ground Water Users wish to express their appreciation for the considerable effort undertaken by the Director and Staff in preparing the Methodology Order as well as their hope and expectation that the recommendations and criticism provided below will be construed as a positive and constructive effort to improve the Methodology Order and correct glaring and significant errors. Because the Department has yet to provide the parties with the input data and calculations used to determine the projected 84,300 acre-feet shortfall set forth in the Director's April 14, 2010, letter, the short timeframe to analyze and evaluate the same to meet the April 21, 2010, deadline for filing Petitions for Reconsideration severely impairs and prejudices the Ground Water Users ability to provide a thorough response and analysis. Accordingly, the Ground Water Users will address key points and reserve the right to supplement the same based on further analysis that will be performed once the Department provides the requested data input and computations used to arrive at the predicted demand shortfall to SWC entities. The Ground Water Users will also propose alternative approaches that may be used for 2010 in order to give the parties some relief during the upcoming irrigation season pending further analysis given the time constraints at hand with the irrigation season started.

With due respect to the Director and Staff, the Ground Water Users are disappointed in the Methodology Order. The Methodology Order for the most part adopts the original simple

methodology of using historical diversion records to estimate shortfall and mitigation requirements that was used by former Director Dreher on short notice who anticipated improvement and refinement following a hearing and rigorous analysis. This is despite the voluminous record that has been established concerning irrigated acreage, crop irrigation requirements and efficiencies. Unfortunately, it appears that considerably more effort was expended in trying to defend the Methodology Order than in getting the end result right. The Methodology Order discusses at length an array of factors that are critical to accurately determine actual crop needs, water supply entitlements, and irrigation requirements but these important factors were ultimately disregarded in determining the mitigation requirements for groundwater users.¹ The adopted methodology of establishing reasonable in-season demand (“RISD”) based on a simple average of 2006 and 2008 diversion records produces results that are indefensible and based upon facts not in the record. The data concerning 2008 diversions was not in existence at the time of the hearing and therefore did not undergo the required rigors and scrutiny of the hearing process. It would be clearly reversible error for the Director to consider 2008 data and contrary to the District Court’s mandate that the SWC demand and carry-over issues be decided based on the record established at the hearing.

Basing the initial determination of RISD by averaging diversions in two selected

¹ Findings of Fact 8-9 discuss the Hearing Officer’s guidance that “non-irrigated acres should not be considered,” “water budget should be based on acres, not shares,” “full headgate delivery for TFCC should be calculated at 5/8 inch instead of ¼ inch”, yet the only number that really matters is the initial demand shortage, which relies on headgate diversion averages. Findings of Fact 17-21 regarding how crop water needs should be determined were ultimately ignored and Findings of Fact 32-40 discussing “water balance” was rejected entirely in Finding of Fact 41. And, while Findings of Fact 41-45 discuss efficiencies and crop water needs, all were essentially rejected in favor of a headgate diversion average as that is the number Ground Water Users have to insure against early in the season or face curtailment

“normal” water years is an over-simplified approach that should be rejected in favor of method that correctly addresses the amount of water needed for beneficial use under each water right. A process that is a refinement of the crop water needs as proposed by the parties at the hearing, should be preferred particularly since no party presented any evidence in support of determining SWC demand by averaging of historical diversions. Further, the methodology of averaging historic diversion as a method entirely ignores and provides no means to account for TFCC’s financial motive and well-established history of diverting water for hydropower generation unrelated to crop requirements. It further ignores a growing number of hardened non-irrigated acres well recognized by the Hearing Officer, ignores irrigation efficiency and waste determinations. Essentially, the Methodology Order does not determine what constitutes beneficial use of water and instead allows the senior user to set what constitutes beneficial use by continuing inefficient irrigation practices and to divert more what than is required to raise their crops.

Perhaps the most grievous error of the Methodology Order is the assumption that all SWC water shortages are ground water-user caused. This assumption is contrary to Idaho law and the facts in this case. As recognized by the Supreme Court, depletion does not equal material injury. *American Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Resources*, 143 Idaho 862, 868, 2007). Further, the Hearing Officer found that “[w]ater may not be available through no cause related to junior users.” *Opinion Constituting Findings of Fact, Conclusions of Law and Recommended Order*, SWC Delivery Call (“Recommended Order”) at 31. Based on a false assumption that all shortages are due to ground water pumping, the Methodology Order completely fails to recognize and account for shortages that are attributable to below average

precipitation and then fails to determine what portion, if any of the SWC supply shortages are attributable to these natural facts. This segregation of impacts is a critically important concept recognized by both prior directors and the Hearing Officer and in the Conjunctive Management Rules but lost or ignored in the Methodology Order. Recommended Order at 15, 22. While the aquifer and the Snake River are interconnected, as found by the hearing officer, “[t]hat does not mean that all water withdrawn from pumping has an adverse effect on surface water users dependent upon the Snake River.” Id. at 29 Groundwater use can only affect “reach gains” and injure natural flow rights that are dependent on them. Except for TFCC and NSCC, all SWC members and particularly AFRD2 rely almost exclusively on flood flows and storage. Recommended Order at 10.

By erroneously assuming that all projected shortage is caused by ground water use the Methodology Order disregards the Department’s own WD01 delivery records and the knowledge and experience of the District’s water master and managers. The Director is urged to consult with Lyle Swank and Tony Olenichak to gain a better understanding of the importance of this concept. By so doing the facts will become clear that the projected 27,400 AF shortage to AFRD2 is factually unsupportable and must be rejected. AFRD2 almost exclusively relies upon flood flows passing Blackfoot and on storage water supplied by snowmelt; these are entirely unaffected and unsupplied by ground water pumping.

The averaging of historical diversions should also be rejected as an improper and inaccurate means of determining irrigation demand. Both the SWC’s expert Brockway and the City of Pocatello’s expert Sullivan presented an approach to determine the irrigation needs or RISD. While each achieved different results, they employed similar methods that gave

consideration to actual crop water needs, irrigated acres, seepage loss, field application efficiencies, rainfall, temperature and the like, all in keeping with CM Rule 42.01.d. and g. While these methods were discussed at length in Findings of Fact 32-40, rather than refine and adopt these recommended approaches, the Director instead took a step backwards and merely averaged historical diversions in two water years.

Averaging diversions in two water years of unlimited supply to establish demand, coupled with the deliberate under-prediction of the available supply results in a gross overstatement of the SWC demand shortfall. (The flaw in the methodology is clearly evidenced by the result of 84,300 AF shortfall, more than triple the 2005 obligation of 27,006 acre-feet.) This is certain to result in substantial curtailments of already-planted acres in 2010, cost Ground Water Users millions of dollars in unnecessary storage water lease costs, and set a dangerous and unsustainable precedent for the future.

While SWC members may have water shortages at times, only shortages caused by junior ground water pumping impacts on reach gains can give rise to mitigation obligations. While developing a methodology for determining actual crop water needs is the best long-term solution, given the time constraints and with the irrigation season starting, the Ground Water Users propose reasonable and simple alternatives for 2010 below.

DISCUSSION

There is no question that ground water users cannot be curtailed or forced to mitigate for injury that they do not cause. See Recommended Order at 65 (when there's a finding of material injury from ground water pumping, mitigation or curtailment is appropriate.) Further, as the Hearing Officer found, "[i]f crop needs are met by the combined use of natural flow and

storage water and there is sufficient water for reasonable carryover, there is no material injury.” Recommended Order at 67. In other words, any methodology adopted, must consider the impact of ground water pumping on the actual supply needed by the SWC to irrigate their crops. If the supply is sufficient for irrigation even if it is affected by ground water pumping, there is no material injury. At present, the Methodology Order incorrectly assumes that all shortages to TFCC and AFRD are proximately caused by ground water pumping. Yet, evidence in the record clearly established that ground water pumping can only influence base flows in the Snake River. This means that any shortages due to climate, reduction of reach gains by reduced incidental recharge from changed irrigation practices or other such factors are not the responsibility of Ground Water Users. If groundwater pumping is not the proximate cause of the shortage, then Ground Water Users cannot be curtailed or forced to mitigate. The Methodology Order ignores this key principle recognized by the Hearing Officer and both prior Directors.

With the above comments and principles in mind, IGWA requests reconsideration of the following issues:

A. The Forecast of Irrigation Water Need (Demand Shortfall) is Unreasonably Inflated.

1. Use of 2008 Data Is Impermissible

The *Methodology Order* was intended to rely on evidence presented at the hearing. As such, the 2008 data should not be included. Judge Melanson’s *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order* states on page 2:

IDWR stated that there is sufficient information for the Director to issue and order determining material injury to reasonable in-season demand and reasonable carryover, without conducting a hearing or requiring additional information from

the parties. However, IDWR requested thirty to sixty days to develop a new methodology, apply that methodology to the facts on the record, and issue an order in accordance with this Court's previous holding.

(emphasis added). As such, the 2008 data should be excluded.

2. Use of Averaged 2006 and 2008 Data Artificially Inflates Projected Shortage and Historical Diversions Do Not Equal Crop Needs

The proposed methodology relies on recent historical diversion made by the SWC in two water years of unlimited water supply as the basis to establish the initial shortage. By relying on these historical diversions by the SWC entities to project initial irrigation water need, the amount of shortage is unreasonably inflated and not related to actual crop needs. CM Rule 42.01.d allows the Director to evaluate "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." Hearing Officer Schroeder also found that "in considering whether there is material injury.... [i]t is relevant to consider how much water is necessary to irrigate crops to maturity." Recommended Order at page 54.

In this case the Director does not analyze these important considerations until his re-evaluation in July, by which time it is too late for groundwater users to adjust the amount of mitigation water they are to deliver. The initial demand determination is artificially inflated and unreasonable. At best, the proposed methodology simply presumes that these factors are appropriately reflected in the historical 06/08 diversions which is not a valid presumption and actually not supported by the evidence. Furthermore, no party suggested that demand by the SWC be estimated based on historical diversions without any consideration of actual crop water needs. For the Director to ignore the substantial evidence in the record on this point and instead

estimate the SWC water demand based on historical average diversions in years of unlimited water supply is unreasonable and without scientific rigor. A method must be established to determine actual irrigation demand for each SWC entity separately based upon an initial projection of actual crop water needs, an evaluation of actual irrigated acres, and consideration of actual conveyance losses and efficiencies. Using the same methodology, updated projections can be “trued-up” during and at the end of the irrigation season.

It is a flawed assumption that historical diversions reflect actual crop irrigation requirements. This assumption is without support in the record and does not accurately determine the amount of water needed for the beneficial use of irrigation. As an example, the record establishes that TFCC derives millions of dollars in revenue from power generation. Tr. p. 1722, L. 5 – p. 1726, L.2, Exhibit 4607. Thus they have a financial incentive and demonstrate a history of diverting the maximum amount of water early and late in the season for power generation purposes unrelated to crop irrigation requirements. Id. and Tr. p. 1728, L. 9 – p. 1729, L. 10. Finding of Fact 54 gives lip service to such considerations but it does not include use of water in the early and late season for hydro-power use, and Findings of Fact 55 and 56 enshrine historical diversion practices that include diversions for such non-irrigation use. By actually evaluating crop water needs, the Director would account for such uses and ensures that the use of the state’s water resources is optimized and not hoarded by those who are unreasonably inefficient or have some other self-serving purpose in diverting more water than is needed for irrigation, like in this case where there is an interest in generating power.

While the Methodology Order recites the fact the supplemental ground water supplies should be accounted for, (Methodology Order at 14 and 33) the fact is that the Methodology Order's initial shortfall assessment does not consider the groundwater supplies available to SWC entities, just as it ignores reductions in irrigated acreage and actual crop needs.

3. Delivery Entitlement of TFCC Must Be Based Upon $\frac{5}{8}$ Inch Delivery.

The Hearing Officer found that TFCC's delivery entitlement is $\frac{5}{8}$ inch (Recommended Order at).² TFCC delivered $\frac{3}{4}$ inch in 2006 as there were no supply shortages. Methodology Order at 12, fn. 5. If the Director is going to use historical diversions as the basis for determining water need, TFCC's 2006 diversion should be reduced before including it in the average for 2006/2008. The 2006 TFCC diversion should be prorated downward from $\frac{3}{4}$ to $\frac{5}{8}$, before using it to calculate the 06/08 average Reasonable In-Season Demand. Doing so is in keeping with the well established facts. The facts clearly show that TFCC only needs (at most) $\frac{5}{8}$ inch to raise crops.

The TFCC Operation Policy (1998) states that the company's water right is $\frac{5}{8}$ of a miners inch per share. Exhibit 4167. In its 1999 Water Management Plan, the company states that the system was planned and constructed to deliver $\frac{5}{8}$ of a miner's inch per acre. Exhibits 4166 and 4166A. Further, TFCC's publications to its shareholder also support that $\frac{5}{8}$ of a miners inch is the proper amount that would meet beneficial use for TFCC (although, examining actual crop needs may show that even less is required). Exhibit 4610. NSCC manager Ted Diehl testified

² Judge Melanson's *Decision on Petition for Judicial Review* stated that TFCC's demand should be based on $\frac{3}{4}$ inch, however, a Petition for Rehearing on that issue is pending and will be decided as a part of the final order from the District Court.

that NSCC is less efficient than TFCC, has a similar crop mix, yet, NSCC can raise a full crop to maturity on $\frac{5}{8}$ inch; these facts should not be ignored by the Director. Diehl Testimony at 4, Tr. p. 1680, L. 12-24. Any methodology used must not consider that TFCC's maximum authorized use under its water right is the necessary amount to meet the beneficial use of irrigation. Historic diversions may be "legal" up to that amount, but they certainly do not reflect what TFCC needs in a delivery call under the CM Rules.

4. Methodology Order Does Not Evaluate Whether Crops Are Water Short.

In the A&B Delivery Call, the Department analyzed crop needs to determine whether or not the lands were in fact water short. However, in this case, the Director does not analyze whether or not the SWC's crops suffer water shortage. A delivery call should not be honored or curtailment ordered unless water is needed to raise crops. Further, there is evidence in the record on all of the necessary inputs to determine whether or not the lands are water short. The City of Pocatello's Expert Reports by Mr. Sullivan and Mr. Franzoy contains details regarding conveyance losses, efficiencies, irrigation application methods, crop distribution and the like.

Further, the Department could utilize the analysis it did in A&B to compare land that is not water short to the Surface Water Coalition's lands. The Methodology Order gives no consideration given to CM Rule 42.01.g that states that the Director should evaluate whether the senior-priority water right could be met with the "existing facilities" or by "employing reasonable diversion and conveyance efficiency and conservation practices." Rather, than look at TFCC's efficiencies, for example, the Director simply took their past diversions as being "reasonably efficient" and in line with modern conservation practices, yet, both assumptions are without support in the record and actually contrary to the facts.

Because of the time constraints and detailed analysis required to conduct a thorough crop irrigation requirement estimate, the Ground Water Users recommend several alternatives that can be readily implemented for this year, any of which will provide the SWC with a suffice water supply without wasting water and without imposing unsupportable obligations on the Ground Water Users. See Section A.5. below.

5. Alternative to Use of 2006/2008 Average Diversions

The first alternative, for 2010, the Director could assume the average crop water need for TFCC estimated by the SWC experts (448,800 af) and a project efficiency of 50% (they have demonstrated that they can achieve 55%). This gives a baseline demand of 897,600 acre-feet. This information is in the record from both the City of Pocatello experts and the SWC experts.

If the Director insists, however, on using a simplified method that relies on historic diversion, then as a second alternative, the year 2006 should be used prorated downward to reflect $\frac{5}{8}$ rather than $\frac{3}{4}$. The Director admits in the Methodology Order that “2006 satisfies the Hearing Officer’s recommendations better than any other single year in the recent record.” Methodology Order at 11. The Director could also use the prorated 2006 diversion to account for the $\frac{5}{8}$ inch delivery in the 06/08 average as a variation of this second alternative.

A third option, at least for 2010, would be to use the 1992 diversion (the 1,009,000 af in IGWA’s mitigation plan) when TFCC delivered $\frac{5}{8}$. TFCC should at least be as efficient in 2010 as they were 1992.

A fourth alternative would be to take the irrigated acres for TFCC and $\frac{5}{8}$ inch per acre which would result in roughly a demand of 1 million acre-feet. (April 15 - October 15 at a $\frac{5}{8}$ entitlement would be 183 days. 180 days on 200,000 acres is: $(0.02 * \frac{5}{8}) * 200,000$ acres

1.9835 183 = 907,450 acre-feet.) The $\frac{5}{8}$ inch per acre is consistent with the other SWC and closer to an actual reasonable efficiency than $\frac{3}{4}$ inch. This is consistent with the historic facts (ie. 1961) and testimony by Alberdi that full crops can be raised within TFCC's system on $\frac{5}{8}$ inch.

B. The Forecasted Supply Methodology is Flawed.

1. The Forecasted Supply Should Rely on the Best Information Available.

The methodology for predicting the natural flow supply available to each entity does not rely on the best statistical estimate and consistently under-predicts the natural flow likely to be available. Finding of Fact 58 in the Methodology Order relies on a regression equation for each SWC member "by comparing the actual Heise natural flow to the natural flow diverted." By itself, that may be appropriate, but the actual natural flow volume for the Director's "Forecast Supply" "will be one standard error below the regression line." By doing this, the water supply is unreasonably and improperly restricted. Use of this methodology is particularly problematic for the entities with more junior natural flow rights whose historical natural flow diversions are highly variable.

The estimated (predicted) value from an ordinary least-squares regression is the Best Linear Unbiased Estimate ("Unbiased Estimate") of the predicted variable (in the present instance, the natural flow diversions of the SWC entities). The least-squares regression procedure does not provide any information about the accuracy of an estimate offset by a constant or variable. To use such an offset purposefully disregards the readily available best unbiased estimate, introduces unknown error and leads to decisions that are arbitrary and not

based on best available information.

The Director indicates that the purpose of this offset is to be “purposefully conservative.” CL17. It is but one of many assumptions and steps in the proposed methodology that introduces conservatism. As a result, the degree of conservatism in the resulting injury calculation is unknown. However, as described elsewhere in this Petition, the Ground Water Users believe that the resulting calculated injury is unrealistically large and inconsistent with the record developed in this matter.

As implemented in the Methodology Order, the use of biased projections of natural flow availability has irreversible consequences. Groundwater users either are required, at great expense, to secure and make available amounts of water based on these projections, or they are curtailed for the season. Despite the Director’s assertion that the proposed methodology “...ensures that junior ground water users provide only the required amount of water” the methodology provides no mechanism for groundwater users to recover expenses associated with acquiring amounts of water greater than what is ultimately determined to have been required, to recover losses associated with unnecessary curtailment. CL14. At the very least, the best Unbiased Estimate should be used to predict the amount of natural flow supply for all entities.

2. Ground Water Users Are Not Responsible for Shortages Due to Reservoir Evaporation

In estimating the supply available to the SWC entities, the Director (in the April 14th letter) adds the allocated storage supply to the projected natural flow. The allocated storage supply is net of a deduction (from the contracted amount of each entities’ storage space) for reservoir evaporation.

Because the allocated storage supply is added to projected natural flow to determine the total supply available to each entity, the calculated shortages to the entities include the evaporation deductions. Groundwater users are not obligated to mitigate for reservoir evaporation. This flaw in the method accounts more than 11,000 acre-feet of the calculated shortages to AFRD2 and TFCC.

3. The SWC Have Always Experienced Shortages in Dry-Years, Even Before Ground Water Pumping

The Methodology Order, violates CMR rule 43.03.b by requiring ground water users to guarantee unlimited water supply going forward and by requiring replacement at times the entities did not historically have a full supply. The Director selected the years 2006 and 2008 in part because they represented diversions not limited by water supply. Methodology Order at FF28. The use of average diversions for 06/08 as the diversion entitlement for the SWC entities essentially requires ground water users to guarantee the entities' diversions will hereafter never be limited by water supply. Evidence presented at hearing showed that the SWC entities experienced shortages in dry years prior to the advent of ground water development. Exhibit 4162, which is an excerpt from the Palisades Report, supports this fact and shows that the canals diverting below Neeley would not have had any carry over at the end of 1934 and 1935. The April-July natural flow at Heise for these two years is similar to that contained in the Joint Forecast for 2010.

4. AFRD2's Natural Flow Supply Is Not Injured by Ground Water Pumping

Evidence presented at hearing showed that AFRD2 relies almost exclusively on storage water and never has any meaningful supply of natural flow water. The Methodology Order

however, requires ground water users to meet a RISD that exceeds a full storage allocation to AFRD2 by 22,180 acre-feet. This natural flow shortfall to AFRD2 is implicitly assumed to be caused by ground water pumping which is entirely unsupportable and in fact refuted by the Department's own Water District 01 delivery records. The Water District 01 delivery records clearly demonstrate that AFRD2's 1921 priority natural flow right never receives any water in bad water years and at best is supplied water only one or two days in good water years. Early planning documents of AFRD2 show that it was dependent on storage with the assumption that it would receive zero natural flow in many years. Exhibit 4161 shows that AFRD2 was anticipated to have an average annual diversion requirement of 401,733 acre-feet and to receive no natural flow in dry years. The proposed methodology ignores this important fact.

The facts show that AFRD2 relies upon storage and they have a full allocation in 2010. Because of the below average snow pack and the attendant low runoff, the 1921 high-water right of AFRD2 will never be in priority because all of the runoff will go to the reservoirs or to earlier priority natural flow rights. Generally, when TFCC and NSCC start diverting water under their 1900 priority water rights, they command the entire available natural flow and AFRD2 gets no more natural flow. TFCC and NSCC have already turned on this year. It is a well known and established fact that ground water pumping only effects reach gains to the river that supply the 1900 rights of TFCC and NSCC. There is simply no data in the Water District 01 records to support the conclusion that AFRD2 is suffering material injury from ground water pumping. This fact is also well known by Water Master Lyle Swank and Tony Olenichak who should be consulted and relied upon by the Director. Because of the high runoff in 2006 and 2008, AFRD2 got some natural flow and thus they have an apparent shortage in comparison to the

selected years.

5. Natural Flow Supply Is Also Unreasonably Under-Predicted.

The Methodology Order under-predicts the natural flow supplies likely to be available to the SWC entities because it does not use the Best Unbiased Estimate of that supply provided by the regressions historical natural flow diversions and Joint Forecast . For example, in 2007, the flow at Heise was similar to the Joint Forecast for 2010. If one compares the 2007 actual natural flow diversions of AFRD2 and TFCC to the projected natural flows available to them in 2010 under the Methodology Order, it can be concluded that the Methodology Order under-predicts the natural flow supply of those entities by more than 45,000 acre-feet. If the Order were to require groundwater users to acquire water only after the Date of Allocation, when actual natural flow supplies are better known, this would not be consequential. But the Order as it presently stands requires groundwater users to immediately make irreversible commitments to make up for this under-prediction of natural flow availability.

It is also noteworthy that despite an alleged water shortage in 2010, TFCC presently has leased 1,000 shares representing an estimated 4-5,000 acre-feet to Southwest Irrigation District (“SWID”). See SWID’s mitigation plan to Blue Lakes, IDWR Case No. CM-MP-2009-001. This lease and similar leases are not accounted for in the proposed methodology and are inconsistent with a determination that TFCC is short of water in the amount of 56,900 AF in 2010 since it apparently has an expected excess supply of 4-5000 acre-feet.

C. Efficiencies are Unreasonably Low.

The efficiency calculations contained in Finding of Fact 44 directly contradict Conclusion of Law Nos. 7 and 12, and Idaho law that require that water not be wasted and that diversion and use be reasonable. Conclusion of Law 12 states that the Surface Water Coalition "... should exercise reasonable efficiencies in order to promote the optimum utilization of the state's water resources." (emphasis added). Further, Idaho law and provides for the optimum utilization of the state's water resources. The Director's method to account for efficiencies is entirely without support in the record. Because the City of Pocatello's experts provided information on this issue at the hearing, the Ground Water Users adopt their comments on this issue.

D. Process.

1. Ignoring Record Improper. The Director is perpetuating the problem of ignoring key factors necessary to accurately establish SWC demand necessary to raise irrigated crops based on evidence and methods presented in the record by the parties, discussing yet not incorporating critical recommendations of the Hearing Officer and adopting a simple head gate diversion number as a baseline. As stated by the Hearing Officer:

The approach adopted in the May 2, 2005 Order was a response to a call for curtailment which required a response. It was never intended as a final word. Within this context it is time for the Department to move to further analysis to meet the goal of minimum full supply but with the benefit of the extended information and analysis offered by the parties and available to its own staff. It

would be desirable to recommend the results of one or the other studies conducted by the parties. As indicated, that recommendation cannot be made. The analysis of each does, however, speak to the factors to be considered.

Recommended Order at 51.

The methodology falls far short of this directive and ignores key issues such as irrigated acres, crop needs, irrigation application and efficiencies all of which are necessary to determine the amount of water needed for beneficial use. Beneficial use, reasonable use without waste, optimum use of the resource are to be evaluated based on how much water the crops need and how the water is actually used.

2. Waste of Resources Will Occur. While the Order states that Reasonable In-Season Demand “will be corrected during the season to account for variations in climate and water supply” there is no practical way for groundwater users to recover the investment in over-mitigation dictated by the conservative method used in April to estimate injury. See Methodology Order at 5.

3. Comments on Steps on Pages 33-36 of Methodology Order.

Step 1 sets forth a reasonable and proper procedure for determining the total irrigated acres of the SWC. Step One should be modified and clarified to ensure that non-irrigated acres are excluded and that a 5/8 inch delivery is utilized for purposes of determining irrigation demand. See Methodology Order p. 3, ¶ 8 regarding the Hearing Officer’s guidance stating the non-irrigated acres should be excluded, full headgate delivery to TFCC should be calculated on 5/8 inch not 3/4. The initial irrigation demand methodology incorrectly ignores this guidance.

Step 4 requires junior users to secure and provide a volume of storage water equal to the

difference of the April projected demand shortfall and reasonable carryover shortfall, for all injured members of the SWC” by the May 1 deadline and, “[i]f junior ground water users cannot provide this information, by May 1, or within fourteen days from the issuance of the values set forth in Step Three, whichever is later in time, the Director will issue an Order curtailing junior ground water users.” The May 1st deadline to provide storage water leases is too soon and process needs to be changed in order to allow ground water users sufficient time to secure leases after the day of storage allocation. The water supply available for lease is dependent upon the reservoir allocation date and the associated rental pool price. That is typically sometime in late May or June. The practical realities established over the past several years of leasing mitigation water demonstrate that storage contract holders will not make available a specific quantity to lease until the reservoir allocation is made upon which their supply is know and the rental pool price established which can vary from \$6 to \$22 per acre foot. For these reasons, the May 1 deadline for the Ground Water Users to secure their required volume of mitigation water should be moved back to July 1. This should be sufficient timing as the Time of Need will be later in the irrigation season and most likely nearly the end of the irrigation season when carryover storage volume obligations are determined.

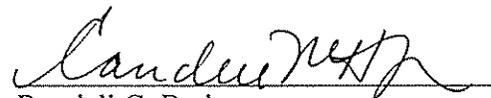
Step 5 should be modified to set the Time of Need date as a specific date. Because the defined Time of Need will vary by year and by SWC entity, it would be easier to administer and more certain and reliable for the parties to have a set date established. The Ground Water Users suggest that this date be the earlier of the day the SWC entity runs out of storage water or the end of the irrigation season.

CONCLUSION

Based on the foregoing the Ground Water Users request that the Methodology Order be modified to determine what amount of material injury, if any is due to ground water pumping and in making that evaluation that the amount of water to grow crops to maturity is analyzed for each SWC entity, regardless of historical diversions. Importantly, if crop water needs are met by the combined use of natural flow and storage water, and there is sufficient water for reasonable carryover, there is no material injury. Recommended Order at 67. The current methodology does not evaluate crop water needs and hence ignores this guidance of the Hearing Officer. Further, there can be no obligation to AFRD2 as their water supply is not impacted by groundwater pumping.

The Ground Water Users also request that the forecast of water supply rely on the best information available and that it not be artificially decreased and that the process to meet mitigation requirements be modified as set forth above.

Submitted this 21st day of April, 2010.


Randall C. Budge
Candice M. McHugh

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2010, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated:

Gary Spackman, Interim Director Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 Fax: 208-287-6700	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Email
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Candice [Signature]