

A. Dean Tranmer I.B. # 2793
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
(208) 234-6149
(208) 234-6297 (Fax)
dtranmer@pocatello.us

Sarah A. Klahn I.B. #7928
Kelly L. Snodgrass
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, Colorado 80202
(303) 595-9441
(303) 825-5632 (Fax)
sarahk@white-jankowski.com

ATTORNEYS FOR THE CITY OF POCATELLO

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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

**POCATELLO'S MEMORANDUM
OF EXCEPTIONS TO THE
OPINION CONSTITUTING
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDATION**

The City of Pocatello ("Pocatello") hereby files its exceptions, pursuant to Idaho Department of Water Resources Rule of Procedure 720.02.b to the Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation filed April 29, 2008 ("Opinion") as modified by the Hearing Officer's denial, on June 10, 2008, of various parties' substantive requests for reconsideration.

INTRODUCTION

On January 14, 2005, the Surface Water Coalition (“SWC”) made a delivery call to the Idaho Department of Water Resources (“IDWR” or “Department”) asserting that their natural flow and storage rights had been reduced by depletions to the aquifer caused by junior ground water pumping. The SWC alleged material injury and requested curtailment of junior ground water rights in the Eastern Snake Plain Aquifer (“ESPA”).

In response, the Director of IDWR (“Director”) issued an interlocutory order on February 14, 2005, and a final Amended Order on the delivery call issued May 2, 2005 (“May 2, 2005 Order”). The May 2, 2005 Order found material injury to certain SWC members based on shortages in natural flow and carry-over storage supplies and required junior ground water users to provide replacement water. It also contained extensive findings of fact and conclusions of law which were challenged by the SWC, the United States Bureau of Reclamation (“BOR”), Idaho Ground Water Users Association (“IGWA”), and Pocatello, among others. Thereafter, based on updated water supply forecasts, the May 2, 2005 Order was supplemented numerous times to reflect the material injury findings based on the changed water supplies. The following summarizes those supplemental Orders:

- July 22, 2005 Supplemental Order Amending Replacement Water Requirements

- Unusually high precipitation and cool temperatures in May and June of 2005 resulted in areas in the Upper Snake River Basin receiving near or above 150% of the long-term average precipitation resulting in a delayed demand for natural flow diversions by SWC and increased storage. Thus, the predicted natural flow diversions, preliminary storage accruals, predicted shortages, and material injury projections for 2005 were amended to replace those set forth in the May 2, 2005 Order. The predicted shortages reflected a potential shortage for AFRD#2 only, and material injury for only AFRD#2 and TFCC, requiring IGWA to supply 27,700 acre-feet (“af”), the minimum amount of replacement water. A final determination of actual replacement water required would be made at the end of the 2005 season.

- IGWA, and the SWC filed petitions for reconsideration or petitions for hearing.
- December 22, 2005 Second Supplemental Order Amending Replacement Water Requirements
 - IDWR considered preliminary diversion data following the 2005 irrigation season and updated the replacement requirements finding the total shortage and material injury projection 14% greater than that in the May 2, 2005 Order. Additionally, IDWR found that only TFCC had shortages and material injury in 2005 of 152,200af. Thus, IGWA was ordered to provide the remainder of the 27,700af not yet provided and an additional 18,340af of replacement water in 2006. Updated amounts of increases to reach gains were calculated using version 1.1 of ESPAM and IGWA was permitted to provide replacement water over time on an annual basis in amounts and at times equal to the increase in reach gains that would result from curtailment based on the ESPAM.
 - IGWA, and the SWC filed petitions for reconsideration.
- June 29, 2006 Third Supplemental Order
 - This Order established the final accounting for the 2005 irrigation season resulting in a final presumed material injury finding for TFCC of 127,900af. In predicting shortages for the 2006 irrigation season, IDWR found that none of the SWC members had reasonably likely predicted shortages.
 - IGWA and the SWC filed petitions for reconsideration; BOR filed a petition for clarification.
 - Proceedings were stayed during the appeal of the *American Falls Reservoir Dist. #2 v. Idaho Dept. of Res.*, 143 Idaho 862, 154 P.3d 433 (2007)(“AFRD#2”) matter.
- July 17, 2006 Fourth Supplemental Order
 - Based on IGWA’s July 10 letter, the Director updated IGWA’s mitigation requirements to reflect the reduction in storage water use by TFCC in 2005 due to a lease and non-use of ground water rights held by FMC Idaho. Additionally, although IGWA identified adequate water to satisfy its remaining mitigation requirements, the Director refused to acknowledge such until it was processed through the Water District 01 rental pool procedures.
 - IGWA filed a petition for reconsideration.
- May 23, 2007 fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007

- On February 23, 2007, the SWC renewed its original call with IDWR. On March 5, 2007, the Idaho Supreme Court issued its decision in *AFRD#2*. On May 15, IDWR received the Ground Water Districts' Amended Joint Replacement Water Plan for 2007 increasing IGWA's mitigation requirements and requesting reconsideration and hearing on the May 2, 2005 Order and all subsequent Orders. On May 21, SWC filed its Protest and Motion to Dismiss the Ground Water Districts' Amended Joint Replacement Water Plan for 2007 arguing the IDWR Administrative Rules do not contemplate replacement water plans.
- The Order found no material injury for any member of the SWC in 2006 and predicted material injury of 58,914af to TFCC for 2007. It conditionally approved IGWA's 2007 Replacement Water Plan, denied the SWC's motion to dismiss the replacement water plan, and granted a hearing on the motion. Additionally, it predicted carryover shortfalls of 43,017af for *AFRD#2* and 38,400af for TFCC for 2008 for which IGWA was to provide replacement water in 2008.
- IGWA, Pocatello, and SWC filed petitions for reconsideration; BOR filed a petition for hearing.
- On June 4, 2007, IGWA and Pocatello requested that the hearing on the 2007 Replacement Plan be vacated. That request was denied, but the scope of the hearing was limited.
- On June 21, 2007, SWC filed a Request for Updated Material Injury Determination for 2007 Water Right Administration.
- July 11, 2007 Sixth Supplemental Order Amending Replacement Water Requirements and Order Approving IGWA's 2007 Replacement Water Plan
 - IDWR determined material injury to TFCC of 46,929af for 2007, predicted carryover shortfalls to members of the SWC of 67,791af, and approved IGWA's Replacement Water Plan for 2007.
 - IGWA, Pocatello, and SWC filed petitions for reconsideration.
- December 20, 2007 Seventh Supplemental Order Amending Replacement Water Requirements
 - IDWR found material injury to TFCC of 17,345af during 2007 irrigation season and a predicted carryover shortfall of 19,891af for *AFRD#2* and 38,400af for TFCC and that IGWA must provide proof of 14,345af available for TFCC by January 7, 2008 with the remaining 3000af due after accounting for the 2007 irrigation season. IGWA was not required to provide carryover water until the forecast for unregulated inflow at the Heise gauge was completed.

- IGWA and Pocatello filed petitions for reconsideration.
- May 23, 2008 Eighth Supplemental Order Amending Replacement Water Requirements
 - IDWR found material injury to TFCC in the amount of 21,811af, requiring IGWA to provide an additional 7,466af of replacement water. Because it was projected that all reservoirs would fill in 2008, IGWA's carryover requirements were cancelled.
 - On June 2, 2008, the SWC filed a letter in response disputing that the Eight Supplemental Order was a final agency order and requesting hearing in the event it was.

A hearing on the matter was set for January 18, 2008, to be presided over by Hearing Officer Judge Gerald F. Schroeder. The Hearing Officer issued his Opinion following the hearing, on April 29, 2008. On May 12th and 13th respectively, BOR and the SWC each filed a Motion to Reconsider. On June 10, 2008, the Hearing Officer granted the BOR Motion to the extent it requested correction of certain background facts; the Hearing Officer denied the remainder of BOR's Motion and the SWC's Motion in its entirety. Pursuant to IDWR Rule of Procedure 720.02.b, Pocatello's exceptions are filed in response to the Opinion, as modified by the Order Regarding Objections to Recommended Order of June 10, 2008.

DISCUSSION

In the Opinion, the Hearing Officer addressed both procedural and substantive issues related to the SWC Delivery Call, and elaborated on the legal framework, established by Idaho case law and specifically in *AFRD#2*, for consideration of surface water-to-ground water calls generally. Pocatello's Exceptions are divided into two parts. First is a summary of the conceptual framework of the Opinion. Second, are Pocatello's exceptions to the Opinion, with references to Pocatello's Post-Trial Brief and Pocatello's Proposed Findings of Fact, Conclusions of Law and Ruling.

Acknowledgement of the Opinion's conceptual framework is important, because it reflects a correct and thorough statement of Idaho law. However, some of the specific findings made by the Hearing Officer appear to be in conflict with or are otherwise inconsistent with the larger framework of the Opinion. Pocatello's exceptions to the Opinion arise from these inconsistencies.

I. ORGANIZING LEGAL FRAMEWORK FOR THE OPINION: ROLE OF THE PUBLIC INTEREST IN A DELIVERY CALL

Summary of relevant provisions in the Opinion:

Section XII.1.

- a. Based on constitutional provisions, statutes, and case law, the public interest is a proper interest to be considered in responding to a request for the administration of water rights. (Opinion at 36-39).
- b. The principle of "first in time, first in right" is modified by the consideration of subject the public interest. The maximum amount available under a decree or license does not create an entitlement in a delivery call, absent a showing of beneficial use. (Opinion at 39).

The Opinion is founded on an understanding of Idaho water law that incorporates certain constitutional doctrines, including consideration of the "public interest". Idaho Const. art. XV, §§ 1 and 7. The Order notes that the discretion of the Director to administer delivery calls is not unfettered, but must consider the prior appropriation doctrine as modified by the concept, found in I.C. § 42-101, that water is the property of the state "which, in providing for its use, shall equally guard all the various interests involved." Opinion at 37. As described in *Schodde v. Twin Falls Land and Water Co.*, 224 U.S. 107, (1912) The constitutional principle of the "public interest" affects:

determination of whether there will be curtailment or other mitigation to provide for carryover storage water...consideration of issues of farm efficiency as opposed to achievable farm efficiency....Consideration of the public interest gives relevance to evidence of the economic impact of curtailment upon the State and local communities.

Opinion at 39, Section XII.1. The Opinion also noted that the Rules of Conjunctive Management of Surface & Ground Water Resources (“CMR”) are consistent with these constitutional, statutory, and case law directives, constraining the discretion of the Director to consider more than simply which water is senior and curtail accordingly.

Section XIII.5 and XIII.7

- a. Curtailment of the ground water users may not put water into the field of the senior surface water user in time to remediate the damage caused by a shortage, whereas the curtailment is devastating to the ground water user and damaging to the public interest which benefits from a prosperous farm economy. (Opinion at 43).
- b. Minimum full supply acknowledges the beneficial use standard, by projecting how much water will be needed to grow crops, and providing for the opportunity for the Department to re-examine and possibly raise the baseline minimum amount if more is needed to satisfy crop requirements. (Opinion at 44).

Section XVII.6 and XVII.9, XVII.12.

- a. When calling for curtailment of junior ground water users there are limitations on the rights to carryover storage water from curtailment and the Director has discretion in determining whether the carryover water is reasonably necessary for future needs. (Opinion at 60).
- b. The amount of carryover storage is limited by the concept of reasonableness, restricting curtailment to fulfilling the licensed or adjudicated purpose of storage. (Opinion at 61).

The Order noted, as did the Idaho Supreme Court in *AFRD#2*, that the senior water rights’ ability to call out junior ground water users is not without limitation. Opinion at 36-38. Curtailment is not the only remedy, and in fact, any determination to curtail must be preceded by an inquiry to determine the amount of water necessary for beneficial use by the senior. Even then, curtailment as a remedy must be compared with the efficacy of providing replacement or mitigation water. Curtailment may not be appropriate, because changing weather conditions may either increase or decrease the amount of water required for senior’s beneficial uses. For instance, if during an irrigation season the amount of water to satisfy senior beneficial uses

increases, additional curtailment mid-season is an extremely inefficient (if not impossible) means to provide adequate water supplies to seniors. By contrast, if during an irrigation season the amount of water required to satisfy senior beneficial uses decreases, junior ground water users have needlessly idled their land and effectively “over-mitigated”.

By the same token, curtailment or mitigation to provide sufficient carryover storage for one year is reasonable. Opinion at 62. Ordering curtailment to meet storage needs beyond the next year is almost certain to require ground water pumpers to give up valuable property rights or incur substantial financial obligations to provide additional water that ends up not being needed by the senior users because of improved natural water supply conditions. Opinion at 62.

II. POCATELLO’S EXCEPTIONS TO THE OPINION

Given the Order’s organizing principles, Pocatello’s Exceptions arise from apparent inconsistencies between the “public interest” considerations and specific determinations made by the Hearing Officer. However, given the discretion vested in the Director under the public interest doctrine and other constitutional provisions, the Opinion can be modified for any final order in this matter to incorporate exercise of the Director’s discretion on these points.

In summary, Pocatello’s takes exception to the following recommendations:

- a. **Water Budget Analyses are inadequate for administration.** The conflicting processes used by the surface water users and ground water users do not promote much faith in the water budget analysis and it must be rejected. (Opinion at 50-51, section XIV).
- b. **Each of the SWC members is operating with reasonable diversion and conveyance efficiency.** (Opinion at 54).
- c. **Reasonableness, not achievable farm efficiency, is the standard in determining whether irrigators are wasting water.** (Opinion at 56).
- d. **Determination that SWC suffered a shortage in 2004 based on the Farm Services analysis and unsubstantiated lay testimony is not founded in “substantial evidence”.** (Opinion at 29-30).

- e. **There is a right to reasonable carryover of storage water and there may be curtailment or a requirement of mitigation to meet that amount.** The Conjunctive Management Rule 42.01.g. sets some guidelines for determining a reasonable amount of carry-over storage to assure water supplies for future dry years. (Opinion at 59 and 63).

DISCUSSION

A. **The Opinion improperly rejects the water budget method.**

The May 2, 2005 Order employed a “Minimum Full Supply” (“MFS”) method to respond to the SWC’s claims of injury. The Department examined the record of water diversions in recent years and compared that to the allegations made by the SWC regarding the amounts of water diverted at the river headgate that each of the SWC members considered to be a minimum full supply. Based on the SWC allegations and WD01 accounting, the Director determined that 1995 was a year in which the SWC received a MFS of water; from that the Director extrapolated to the amount of water that would be required in 2005 to avoid injury.

At trial, former-Director Dreher testified that he had not intended that this method would remain unchallenged or unchanged as a result of the hearing in this matter. He frankly acknowledged that it was a means to resolve the SWC claims of shortage in a relatively short period of time. Testimony of Karl Dreher at 52, January 16, 2008. Pocatello does not disagree with the Hearing Officer that the MFS method was appropriate for interim administration, prior to a hearing in which both sides could present evidence. Opinion at 39-48. However, that does not mean that the method is appropriate as an administrative method going forward.

Pocatello understands the Opinion to recommend adoption of a modification of the MFS methodology as a means of administration. *See*, Opinion at 52-53. For the reasons discussed below, Pocatello believes that merely modifying the MFS standard will be insufficient to provide a robust administrative methodology. In addition, consideration of the public interest, which

should be applied in determining how to administer the SWC's delivery call, requires application of a method other than MFS. The parties both presented testimony about problems with the MFS including the fact that the method does not accurately reflect actual crop needs, because it does not consider the climatic variables and institutional parameters that affect the irrigation water requirements of the SWC members.

On the other hand, to the extent the Opinion, in Section XIV, identifies considerations that must be borne in mind in developing an administrative methodology, Pocatello largely agrees. *See, e.g.*, Opinion at 52, Section XIV.7.c.¹

1. The water budget methodology is appropriate for administration.

The water budget analysis as developed conceptually by both the SWC and Pocatello incorporates the variables that can cause irrigation requirements to vary from year to year resulting in a more dynamic procedure that is more responsive to changing conditions than the MFS procedure. The variables included in the water budget approach that affect irrigation water requirements include irrigated area, cropping pattern, temperature, precipitation and other climatic variables, conveyance losses, farm irrigation efficiency, and soil moisture storage. The result is a more accurate forecast of the amount of the irrigation water requirements for each of the SWC members, and whether a shortage is likely to occur, given projections of available storage and natural flow water supply.

2. There is no record support for continued reliance on the MFS.

The record does not support a finding that the water budget should be rejected. The experts for SWC and Pocatello both testified that the "irrigation diversion requirements" or "water budget" analysis they used were consistent with 42.01.d. and g. of the CMR and Mr.

¹ Changes in facilities, diversion, conveyance, and irrigation practices from earlier years should be considered [in administering the SWC call], e.g. the extent to which conversions to sprinklers have affected water use over time.

Dreher agreed that this type of engineering analysis was consistent with the CMR. *see* Pocatello's Proposed Findings of Fact, Conclusions of Law and Ruling at 18-19 section V.G. Additionally, there was no testimony from any party, or from Mr. Dreher, that the MFS was the correct one to use. The ground water users' analyses did not differ dramatically from the SWC water budget determinations except for the NSCC and TFCC systems. *See* Exhibit 3061, Table 2 and 5, attached to Pocatello's Post-Trial Brief. As Pocatello described in its Post-Trial Brief and Proposed Findings of Fact, Conclusions of Law and Ruling, the differences in the irrigation requirements of the opposing parties for the NSCC and TFCC were primarily the result of different inputs for conveyance losses and farm efficiencies. Further, the Opinion found that the conveyance loss inputs used by the SWC were developed using an unreliable method. Opinion at 50.

As a matter of administrative law, no party to the hearing presented any evidence in support of the MFS as a means to administer surface-to-ground water delivery calls going forward. In fact, among the few things the ground water users and surface water users agreed upon was that a water budget method was an alternative preferable to the Minimum Full Supply ("MFS") approach. The Director should reverse the findings of the Opinion and adopt a water budget methodology as the tool to administer the SWC delivery call.

3. The record provides sufficient evidence to revise the Opinion's findings and recommendations and develop a water budget, either by reliance on specific inputs developed by the parties or by reliance on specific inputs developed by the Department.

The evidence submitted at hearing and in the written submissions made by the parties pre-trial provides sufficient information and direction for the Director to implement a water budget methodology for conjunctive administration of ground water and surface water rights. Both the ground water users and the surface water users proposed specific data inputs for

consideration in adopting a water budget method of administration.² Therefore, even if the results submitted by the opposing parties differ dramatically, the evidence presented is sufficient for the Director to determine which inputs are appropriate for a reliable water budget analysis.

For instance, while the Opinion found that the SWC's conveyance losses were unreliable and that the element of soil moisture was not adequately addressed³, Pocatello's analysis included those values, and their reliability was not questioned in the Opinion. *For further discussion of this point, see*, Pocatello's Proposed Findings of Fact, Conclusions of Law and Ruling at 24-26; Pocatello's Post-Trial Brief at 11-14. Therefore, the Director could utilize Pocatello's values in lieu of the SWC's unreliable values to obtain a reliable water budget analysis.

Alternatively, the Department could decline to rely on any particular inputs provided by Pocatello or SWC to a water budget analysis, and instead develop its own inputs. It was undisputed at the hearing that the water budget inputs are "knowable", in the sense of being objective and measurable. The Department could develop its own conveyance loss values, for example, by requiring the canal companies to compile and submit information regarding farm deliveries and canal spills or waste. Each of the SWC members already measure or estimate this information in some fashion.

The Department adopted the water budget approach in the A&B Irrigation District Order. *See Order of January 29, 2008*, at 9-23. The Department has sufficient expertise—as demonstrated by the A&B Order as well as certain exhibits received into the record in this case⁴ -

² See Pocatello's Proposed Findings of Fact, Conclusions of Law and Ruling at 18-36 and Pocatello's Post-Trial Brief at 6-16; IGWA's Post Hearing Brief And Proposed Findings of Fact And Conclusions of Law at 33; Surface Water Coalition Proposed Findings of Fact & Conclusions of Law at 30.

³ Opinion at 50.

⁴ See Exhibit 3040, Karl J. Dreher and David R. Tuthill Jr. *Report Regarding Evaluation of Irrigation Diversion Rates, Report to the SRBA District Court I*, August 15, 1996.

to modify the inputs to the water budget as necessary. The need to finesse the analysis, proposed by both sides, does not require rejection of the method outright. The Director should use his discretion, considering the public interest, to employ the water budget approach as a methodology going forward in administering delivery calls.

B. SWC’s conveyance and diversion efficiencies are not reasonable.

1. The Opinion’s finding that each of the SWC members is operating with conveyance efficiencies is improper and conflicts with other findings in the Opinion.

As discussed *supra*, the Opinion found that the SWC’s “conveyance loss values do not appear reliable....” Opinion at 50. Despite this, a subsequent section of the Opinion concludes that “[t]he evidence in this case indicates that each of the SWC members is operating with reasonable diversion and conveyance efficiencies.” Opinion at 55. As a matter of engineering, and for purposes of administration, either the SWC’s conveyance efficiencies are reasonable or they are not. The evidence supports the earlier finding in the Order that the SWC’s conveyance efficiencies are not reliable—and thus, are not efficient. *See also*, Pocatello’s Proposed Findings of Fact, Conclusions of Law and Ruling at 21-27 section V.I. and J; Pocatello’s Post-Trial Brief at 6-14, section .C.

2. The Opinion’s finding that each of the SWC members is operating with reasonable diversion efficiency is not based on substantial evidence.

With regard to “diversion efficiencies”, the testimony or evidence presented regarding the reasonableness of SWC *diversions* was somewhat limited. The Opinion refers to the fact that the SWC members have improved their conveyance practices over time; that they changed many systems from flood irrigation to sprinkler; and that any differences between irrigation district practices are not conclusive of unreasonable practices in concluding that SWC facilities are

reasonable. Opinion at 54-55. This is not equivalent to evidence of the reasonableness of the SWC diversion systems.

Further, the testimony about the *diversions* from the river shows a striking pattern of diversion *inefficiency*. SWC members testified that, although their members require less water to produce a crop due to reliance on more efficient sprinkler delivery systems (in the NSCC sprinkler delivery systems make up as much as 90% of the on-farm delivery methods) they continue to divert the same amount of water at the river headgate. In light of these practices, and in the context of a delivery call where curtailment of juniors is being requested, the fact that the SWC has kept up with the times is not sufficient proof that they are employing reasonable diversion facilities. On the contrary, the appropriate inquiry is whether the diversion practices in light of the delivery systems employed are reasonable. Without such an inquiry, any conclusions regarding diversion efficiency render Rule 42.01 g. meaningless.

3. Little or no evidence was received for canals other than NSCC and TFCC.

Furthermore, the Opinion found that *each* of the SWC members is operating with reasonable diversion efficiencies. Opinion at 55. Even if the information on which the Opinion relies is viewed as “substantial”, the Opinion’s findings were specific to Twin Falls Canal Company (“TFCC”) and North Side Canal Company (“NSCC”). Opinion at 54-55. There was little or no evidence presented by any other of the SWC members regarding the operation of their facilities. Furthermore, the Opinion explicitly recognized that each of the SWC member’s irrigation systems is unique. Opinion at 54-55. Therefore, it is improper to apply testimony regarding a particular canal company’s system to all other members of the SWC simply because they are banded together as parties for purposes of litigation.

Additionally, the evidence received regarding diversion efficiencies for TFCC showed that its diversion systems are in fact not reasonably efficient, particularly when compared to

POCATELLO’S MEMORANDUM OF EXCEPTIONS TO THE OPINION CONSTITUTING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION - 14

other members of the SWC⁵. *See* Exhibit 3007a⁶. In fact, TFCC does not even track the amount of its diversions that end up back in the Snake River⁷. TFCC should be required to be at least as efficient as other SWC members before a finding that they are operating with reasonable diversion efficiency is appropriate.

4. The determination that the SWC members' diversions and conveyance systems are reasonable is contrary to the public interest.

Pursuant to the Idaho Constitution, waters of the state are a public resource and must achieve optimum utilization in the public interest. Idaho Const. art. 15, §§ 1 and 7. The CMR recognize this principle as well and require consideration of it when determining reasonable use of surface and ground water resources, including a determination that the senior calling right is utilizing reasonable diversion and conveyance efficiency and conservation practices. CMR 42.01.g⁸. A proper consideration of diversion and conveyance efficiencies goes beyond mere assertion of the canal company regarding its operations. Instead, an analysis of the operation of those facilities with regard to the public interest is required.

The Opinion rejected SWC's assertions regarding conveyance efficiencies and that should be affirmed. The Director can enter a final order in this matter without deciding the issue of the reasonableness of diversion efficiencies, and thus should decline to include Section XV of the Opinion in its entirety in the final order.

C. Achievable efficiency findings.

1. The Opinion improperly concluded that "achievable efficiency" is at odds with "reasonable efficiency" rather than a measure thereof.

⁵ Pocatello does not concede that any member of the SWC is utilizing reasonably efficient means of diversion, but offers the evidence for comparison of TFCC's diversion requirements and efficiencies to those of other SWC members.

⁶ Exhibit 3007 A, Spronk Water Engineer's Updated Expert Report, Tables 6-13.

⁷ Testimony of Vince Alberdi, January 28, 2008, at 1737, lines 8-24.

⁸ Recognition of the public interest principle is recognized throughout the CMR as well. *See* CMR 10.07, 20.03, 20.05, 30.1.b, 30.07.g, 40.03, and 43.03.g.

The Opinion concludes that “reasonable efficiencies”, not achievable farm efficiencies, are the proper standard in determining whether irrigators are “wasting water”. Opinion at 56. The Opinion relies on the language of CMR 42.01.g. which requires “reasonable diversion and conveyance efficiency and conservation practices....” Opinion at 56. Pocatello offered the concept of “achievable efficiency” not as a new standard but as a measure of what is required by the CMR. Further, Pocatello has not alleged that diversions in excess of those called for under an “achievable efficiency” standard are wasteful.

The differences between these two efficiency measures was discussed during the testimony of Dr. Brockway. *See* Testimony of Charles Brockway at 2313-15, January 31, 2008. Despite his attempt to distinguish the two sets of efficiency values, Dr. Brockway recognized in his testimony not only that the SWC’s efficiencies were at or above the achievable efficiency standards identified by Pocatello’s experts, but that the achievable efficiency analysis was in fact very similar to his own. Testimony of Charles Brockway, January 31, 2008, at 2313-14.

Dr. Brockway testified that his efficiency values were an attempt to actual efficiencies of the SWC. In his view, the SWC’s actual efficiencies *are* reasonable. However, rather than simply dividing the amount of water diverted at the headgate by the amount delivered to the field (the “actual efficiency”) Dr. Brockway adjusted his efficiency values based on his experience. Testimony of Charles Brockway, January 31, 2008⁹, at 2297-98 and 2304-05. He was unable to describe clearly why he had made various adjustments. *Id.*; *see also* Brockway Deposition Transcript Excerpts, Oct. 22, 2007, Exhibit 3043. Such an approach is an arbitrary, unscientific, and therefore a poor basis for administration. Dr. Brockway’s efficiencies are well below the efficiencies that are recommended by the IDWR’s own guidelines (*see, e.g.*, Exhibit 3040, 1996

⁹ A discussion of this method is included in Pocatello’s Proposed Findings of Fact, Conclusions of Law and Ruling at 21-24 and Pocatello’s Post-Trial Brief at 6-16.

Dreher-Tuthill Report.) and if implemented in the context of administration, would have the effect of legitimizing irrigation practices by certain of the canal companies at levels below which they should reasonably be expected to operate during a delivery call.

Thus, as a practical matter, absent Pocatello's efficiency evaluations, which took into account, *inter alia*, objective measures such as slope, soil type, and delivery systems as required by IDWR guidelines, there is no indication of what "reasonable efficiencies" should be.

2. The record indicates an appropriate method for determining efficiency.

The record from this matter includes testimony and other information about how efficiency should be determined. In fact, despite their differing approaches, the record shows that both Dr. Brockway's and Mr. Franzoy's goals were the same in regards to their efficiency evaluations. See Pocatello's Proposed Findings of Fact, Conclusions of Law and Ruling at 21-27 section V.I. and J; Pocatello's Post-Trial Brief at 6-14, section .C. These methods are consistent with the Department's methods outlined in Exhibit 3040¹⁰.

3. The public interest demands a more rigorous determination of efficiency for purposes of administration than that suggested by SWC's witnesses.

The Opinion noted that the question of "efficiency" was among the areas in which a public interest inquiry was particularly important. Opinion at 39, section XII. 1. It's easy to see why—in a delivery call, the senior is alleging that the amount of water available is insufficient to meet his needs, and asking juniors to curtail to supply additional water. If the SWC's (or any senior's) existing operations as assumed to be *per se* reasonable, Rule 42.01g is rendered meaningless.

The purpose of the efficiency testimony in the case was to determine the proper assumptions for the water budget analysis, which in turn was posited as an administrative

¹⁰ Karl J. Dreher and David R. Tuthill Jr. *Report Regarding Evaluation of Irrigation Diversion Rates, Report to the SRBA District Court I*, August 15, 1996.

method to determine whether the senior is short of water or not. If the SWC particularly, and seniors generally, can continue their current operations so long as their facilities are not “decayed or damaged systems that are allowed to continue or practices that cause water to be wasted in transit” (Opinion at 55) seniors can be as inefficient as they like, and make up for any shortages through curtailment of juniors.

D. No substantial evidence for finding that SWC was short in 2004.

At Section IX.4. of the Opinion, the SWC is determined to have suffered material injury from ground water pumping in 2004. Opinion at 30. The Opinion states, *inter alia*:

IDWR staff contacted University of Idaho Agricultural Extension Agents and the U.S. Department of Agriculture Farm Service County Directors in Lincoln, Gooding, Jerome, and Twin Falls counties and determine that there were estimated losses of 35% because of shortages in surface water supplies, *though not primarily the result of shortages from the Snake River.*

Opinion at 30. Neither this paragraph in the Opinion, nor the information referenced in the paragraph that formed the basis of FOF 109 in the May 2, 2005 Order, provide any basis for a finding of shortage to SWC water rights due to ground water diversions. In fact, testimony from SWC managers directly contradicts the findings in section IX.4. The manager of Twin Falls Canal Company, Vince Alberdi, admitted that neither TFCC nor its consultants could substantiate changes in crop rotation, crop loss or land fallowing, and that no studies have been conducted to investigate whether this type of evidence of water shortage exists or existed in the past. Testimony of Vince Alberdi at 1787-90, January 28, 2008. Under Idaho law, substantial evidence is required to support administrative determinations. Idaho Code § 67-5279 (“I.C.”); *Barron v. Idaho Dept. of Water Resources*, 18 P.3d 219, 222-23 (Idaho 2001) (“[u]nder the IDAPA, the IDWR’s decision may be overturned only where its findings:...(d) are not supported by substantial evidence in the record...”); *Fremont-Madison Irr. Dist. and Mitigation Group v. IGWA*, 926 P.2d 1301, 1309 (Idaho 1996) (“the party asserting a claim is in the best position to

POCATELLO’S MEMORANDUM OF EXCEPTIONS TO THE OPINION CONSTITUTING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION - 18

establish the existence of a controverted fact, and must, therefore, bear the burden of proving the existence of that fact”). The determination in Section IX.4- of the opinion is not supported by substantial evidence and indeed is contradicted by the evidence as presented. The Director should decline to adopt this in the final order in this matter.

E. Carry-Over Storage

The Opinion concluded that “there is a right to reasonable carryover of storage water and there may be curtailment or a requirement of mitigation to meet that amount,” and subsequently outlined guidelines for determining reasonable carry-over. Opinion at 59 and 63. Pocatello takes exception to this finding because it runs contrary to the constitutional principle of beneficial use.

The Court in *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600, 604 (2007)(“*Pioneer*”) established that storage in and of itself is not a beneficial use, unless and until it is put to its decreed or licensed use. Additionally, the Court in *American Falls Reservoir Dist. v. Idaho Dept. of Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007)(“*AFRD#2*”) found that “[t]o permit excessive carryover of stored water without regard to the need for it, would be in itself unconstitutional.” Therefore, reasonable carry-over need not be determined before the end of the irrigation season, nor supplied by juniors prior to an established need for it to avoid material injury by the senior water users. *see* Pocatello’s Proposed Findings of Fact, Conclusions of Law and Ruling at 21-33 section V.I-K; Pocatello’s Post-Trial Brief at 17-18, section II.

CONCLUSION

While Pocatello agrees with and supports many of the Opinion’s recommendations, it takes exception to the aforementioned recommendations because they are inconsistent with the concept of the Public Interest, which is the organizing principle for the Opinion. Pocatello


respectfully requests the Director consider these exceptions and include modifications accordingly in the final order entered in this matter. Any decision not to address a particular finding of the Opinion does not indicate Pocatello's acceptance thereof nor prevent it from disputing any additional findings in the future.

Respectfully submitted, this 24th day of June, 2008.

CITY OF POCATELLO ATTORNEY'S OFFICE

By 
A. DEAN TRANMER

WHITE & JANKOWSKI

By 
SARAH KLAHN
Attorney for City of Pocatello

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2008, I caused to be served a true and correct copy of the foregoing **Pocatello's Memorandum of Exceptions to the Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation** by electronic mail to:



 Sarah Klahn, White & Jankowski, LLP

<p>Gerald F. Schroeder Hearing Officer State of Idaho Dept of Water Resources 322 E Front St Boise ID 83720-0098 *** service by electronic mail</p> <p>facsimile – 208-287-6700 fcjschroeder@gmail.com Victoria.Wigle@idwr.idaho.gov Dave.tuthill@idwr.idaho.gov</p>	<p>Daniel V. Steenson Ringert Clark PO Box 2773 Boise ID 83701 *** service by electronic mail only</p> <p>facsimile – 208-342-4591 dvs@ringertclark.com</p>	<p>Josephine P. Beeman, Esq. Beeman & Associates 409 W Jefferson Boise ID 83702 *** service by electronic mail only</p> <p>facsimile – 208-331-0954 jo.beeman@beemanlaw.com</p>
<p>C. Tom Arkoosh Arkoosh Law Office 301 Main St Gooding ID 83330 *** service by electronic mail only</p> <p>facsimile – 208-934-8873 tarkoosh@cableone.net alo@cableone.net</p>	<p>John Rosholt John Simpson Travis Thompson Barker Rosholt 113 Main Ave West Ste 303 Twin Falls ID 83301-6167 *** service by electronic mail only</p> <p>facsimile – 208-735-2444 jar@idahowaters.com tlt@idahowaters.com jks@idahowaters.com</p>	<p>Michael Gilmore Deputy Attorney General Statehouse, Room 210 PO Box 83720 Boise ID 83720-0010 *** service by electronic mail</p> <p>facsimile – 208-334-2830 mike.gilmore@ag.idaho.gov</p>
<p>W. Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318-0248 *** service by electronic mail only</p> <p>facsimile – 208-878-2548 wkf@pmt.org</p>	<p>Randy Budge Candice McHugh Scott J. Smith Racine Olson PO Box 1391 Pocatello ID 83204-1391 *** service by electronic mail only</p> <p>rcb@racinelaw.net cmm@racinelaw.net sjs@racinelaw.net</p>	<p>Terry Uhling J.R. Simplot Co 999 Main St Boise ID 83702 *** service by electronic mail only</p> <p>tuhling@simplot.com</p>

<p>Roger D. Ling Attorney at Law PO Box 623 Rupert ID 83350 *** service by electronic mail only</p> <p>facsimile – 208-436-6804 rdl@idlawfirm.com</p>	<p>Kathleen Carr US Dept Interior, Office of Solicitor Pacific Northwest Region, Boise Field Office 960 Broadway Ste 400 Boise ID 83706 *** service by electronic mail only</p> <p>facsimile – 208-334-1918 kmarioncarr@yahoo.com</p>	<p>James Tucker Idaho Power Co 1221 W Idaho St Boise ID 83702 *** service by electronic mail only</p> <p>jamestucker@idahopower.com</p>
<p>A.Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 *** service by electronic mail only</p> <p>facsimile – 208-234-6297 dtranmer@pocatello.us</p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N Curtis Road Boise ID 83706-1234 *** service by electronic mail only</p> <p>facsimile – 208-378-5003 mhoward@pn.usbr.gov</p>	<p>James Lochhead Mike Gheleta Brownstein Hyatt 410 – 17th St 22nd Floor Denver CO 80202 *** service by electronic mail only</p> <p>jlochhead@bhf-law.com MGheleta@BHFS.com</p>
<p>Allen Merritt Cindy Yenter IDWR 1341 Fillmore St Ste 200 Twin Falls ID 83301-3033 *** service by electronic mail and facsimile only</p> <p>facsimile – 208-736-3037 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov</p>	<p>Lyle Swank IDWR 900 N Skyline Dr Idaho Falls ID 83402-6105 *** service by electronic mail and facsimile only</p> <p>facsimile – 208-525-7177 lyle.swank@idwr.idaho.gov</p>	<p>Michael C Creamer Jeffrey C. Fereday Givens Pursley 601 W Bannock St Ste 200 PO Box 2720 Boise ID 83701-2720 *** service by electronic mail only</p> <p>mcc@givenspursley.com jcf@givenspursley.com</p>