

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

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

CASE NO. CV-2008-551

Petitioners,)

vs.)

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

Respondents.)

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

**CITY OF POCATELLO'S REPLY BRIEF
IN SUPPORT OF PETITION FOR REHEARING**

On Appeal from the Idaho Department of Water Resources

Honorable John M. Melanson, Presiding

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The City of Pocatello, by and through undersigned counsel hereby submits this Reply in support of its Petition for Rehearing. Pocatello's Petition for Rehearing requests that the Court clarify its holding on page 30 of the Court's July 24, 2009 Order on Petition for Judicial Review to include the following language (underlined):

While the CMR are vague with respect to procedural framework components, the Idaho Supreme Court acknowledged such but nonetheless upheld the constitutionality of these rules in *AFRD#2*. As such, the Director is required to follow the procedures for conjunctive administration as outlined in the CMR when responding to a delivery call between surface and ground water users. For procedural purposes, the hearing held in this matter met the requirements of the CMR and due process insofar as it provided the opportunity for a hearing on the Director's injury finding; prospectively, in order to provide all participants with due process and an opportunity to be heard on the issue of replacement water, IDWR may hold a hearing on the adequacy of the juniors' replacement supplies pursuant to the procedure outlined in the CMR to provide timely replacement water in the amounts specified in the Director's May 2, 2005 Amended Order.

City of Pocatello's Opening Brief in Support of Petition for Rehearing, p. 3.

The injury amounts established in the Director's May 2, 2005 Order were affirmed by the Hearing Officer in this matter after a three week hearing from January 18 through February 5, 2008 ("2008 Hearing") regarding the methodology that the Director used to determine injury (referred to as "Minimum Full Supply"). The Hearing Officer's April 29, 2008 Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation ("Hearing Officer's Recommendation"), R p. 007048-007118, discusses how the Director's methodology for determining material injury should be altered in future calls; it does not find fault with the Director's May 2, 2005 injury amounts retrospectively. The Court should clarify its Order on Petition for Judicial Review instructing IDWR that the process remaining in the matter before the Court, namely the call initiated by the SWC in January 2005, is a hearing pursuant to CMR 43 on the adequacy of junior mitigation supplies to meet the injury amounts established in the Director's May 2, 2005 Order.

Contrary to the contentions of the SWC in its Response to Petitions on Rehearing, a party does not have to file an appeal of a final order in order to affirm the Director's findings. *Cf.* Surface Water Coalition's Response to IGWA's and City of Pocatello's Petitions for Rehearing, p. 13. SWC's Petition for Judicial Review did not raise a challenge to the injury amounts established in the May 2, 2005 Order. Instead, the SWC raised the narrow issue of "[w]hether the Director gave proper weight and deference to the SWC's decreed senior water rights." Order on Petition for Judicial Review, p. 15.¹ Because the SWC did not challenge the Director's affirmation of the injury amounts set in the May 2, 2005 Order, that holding has been affirmed and the Court should clarify that the SWC is estopped from attempting to rejudicate the matter in the final proceeding to be completed in this case, namely a CMR 43 hearing on the adequacy of junior mitigation supplies.

1. The Injury Amounts in the May 2, 2005 Order were adopted by the Director's 2008 Final Order and not the subject of Petitioner's appeal before the Court.

As the Director noted in his Final Order, "[t]he foundational findings made by the former Director in the May 2005 Order are the subject of much at issue in this proceeding." Director's Final Order Regarding the Surface Water Coalition Delivery Call, September 5, 2008 ("Final Order"), R p. 007382, ¶ 3. The May 2, 2005 Order found that junior water pumping had caused material injury to the SWC, and utilized a "minimum full supply" standard in predicting material injury. R p. 001382-001385. The SWC appealed the May 2, 2005 Order (and interim orders entered prior to the hearing in this matter) on the ground that the injury amounts determined by the Director were erroneous. After a three week trial in January of 2008, the Hearing Officer disagreed.

¹ As discussed in Pocatello's Brief in Support of Rehearing, the SWC has repeatedly sought delivery of its water rights based on the amounts of water in its licenses and/or decrees, disregarding fundamental principles of Idaho water law. *See* City of Pocatello's Opening Brief in Support of Petition for Rehearing, p. 5 n.1.

In his Order, the Hearing Officer rejected the SWC challenges to the Director's injury determinations made in the May 2, 2005 and interim orders, but also outlined requirements that IDWR must use in the future to determine material injury amounts:

The attempt to project the amount of water that is necessary for the members of SWC to fully meet crop needs within the licensed or decreed amounts is an acceptable approach to conjunctive management, but there have been applications of the concept of a minimum full supply that should be modified if the use of the protocol is to be retained.

....

[T]here should be adjustments if the process of establishing a base different from the licensed amount is to be utilized in future administration.

Hearing Officer's Recommendation, R p. 007091, ¶ 8 & R p. 007386, ¶ 23 (emphasis added, internal citation omitted).² The Hearing Officer's analysis was forward-looking in nature:

"[T]he Department must modify the minimum full supply analysis as a method of establishing a baseline of predicted water for projecting material injury." R p. 007098, ¶ 7 (emphasis added).

The Hearing Officer's Recommendation rejected SWC's challenges to the Director's determinations of injury in the May 2, 2005 Order and affirmed those amounts. R p. 007071, ¶ 12 ("Unless modified explicitly or by necessity from the recommendation in this opinion, the findings and conclusions of the Director's in the various Orders are accepted.").

"Material injury is a highly fact specific inquiry that must be determined in accordance with IDAPA conjunctive management rule 42." Final Order, R p. 007388, ¶ 7; May 2, 2005 Order, R p. 001401, ¶ 47. The Director adopted and made final, for purposes of this appeal, the injury amounts established in his May 2, 2005 Order. "[T]he findings of fact and conclusions of law entered by the former Director and the Hearing Officer in these matters, unless discussed and

² For example, the Hearing Officer found that any future determination of injury by IDWR must utilize a methodology that is flexible in nature in order to accurately determine injury in response to changing conditions. Hearing Officer's Recommendation, R p. 007093-007094, ¶ 8.e. & R p. 007098, ¶ 7 ("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.").

modified in this FINAL ORDER, are hereby accepted. All other requests for relief, unless specifically discussed herein are hereby denied.” R p. 007392.

This Court has also made findings related to the Director’s Order regarding *future* methodologies for purposes of determining injury. However, the amounts of water that were determined to be injurious by Director Dreher in the pre-hearing administrative orders and affirmed by Justice Schroeder were not challenged by the SWC except insofar as the SWC again asserted that it was entitled to the full decreed amounts on the face of its water rights. That challenge, like the ones made by the SWC to the Director and the Hearing Officer, failed. To wit: that “depletion does not equate to material injury.” Final Order, R p. 007388 ¶ 7; May 2, 2005 Order, R p. 1401, ¶ 47.

The fact that the Department, in an attempt to address the problems identified with the Minimum Fully Supply procedures identified by Hearing Officer Schroeder and the Director’s Final Order, issued the 2008 Protocol during the pendency of this appeal amounts only to the agency getting ahead of the script. It was on this basis that the Court found *untimely* the Department’s issuance of a new protocol. *See* Order on Petition for Judicial Review, p. 32, ¶ V.F.. By the same token, the Court determined that the Director’s determination regarding the scope of Department discretion to determine carryover was incorrect, not that the amounts of carryover were incorrect.³ What was before the Court in this appeal was the methodology that IDWR will use *prospectively* to determine injury to carryover storage in the future, and the Court’s determinations did not disturb the Director’s determinations of injury either to water rights or carryover storage reflected in the May 2, 2005 Order. The SWC cannot try to reverse the Director’s affirmance of these amounts by raising the issue now in an untimely manner.

³ The Court found “that permitting carry-over for more than just the next season is categorically unreasonable [Instead, the Director] *can significantly limit or even reject* carry-over for multiple years based on the specific facts and circumstances of a particular delivery call.” Order on Petition for Judicial Review, p. 22 (emphasis added).

2. The remaining procedure in the calls initiated by the SWC in 2005 is a Rule 43 hearing on whether the mitigation supplies of junior water users are adequate to meet the injury requirements of the SWC, as established in the May 2, 2005 Order.

The Court should clarify that the remaining process to be afforded to participants is a hearing *solely* on the issue of the reliability of the juniors' proffered replacement water pursuant to CMR 43. Indeed, the Hearing Officer stated in his Recommendation that the determination of minimum full supply (as established in the May 2, 2005 Order) is also a determination of the amount of necessary water for mitigation of injury purposes. R p. 007087, ¶ 3 ("The amount determined to be a minimum full supply affects the determination of whether there is material injury from ground water pumping and the extent of mitigation if there is material injury.") (emphasis added). When a mitigation plan filed under CMR 43 is contested, there are two issues to be resolved at the hearing: (1) what amount of water is necessary to avoid injury, and (2) whether the junior ground water user acquired an adequate supply for that purpose. The first question was determined at the 2008 hearing conducted by the Hearing Officer.

Contrary to the assertions of the SWC, this Court, in its role as a court of appeal in this matter, is to instruct the agency upon remand which issues have been affirmed and which require further proceedings by the agency. Idaho Code section 67-5279(2)(d) requires that "[i]f the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." Part of the Court's role in remanding is to provide guidance on future proceedings to ensure that the agency acts in accordance with the Court's decision.

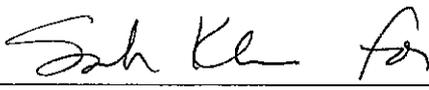
CONCLUSION

In this matter, the parties have been accorded the opportunity for a hearing regarding the first inquiry the Director's determination regarding the magnitude and amount of the SWC injury due to ground water pumping. The SWC's appeal of this determination was limited to its assertion that it is entitled to the amount of water represented on the face of its decrees and

licenses. The Hearing Officer, Director and this Court have rejected the SWC's argument. A CMR 43 hearing regarding the Ground Water Users' replacement supplies cannot turn into yet another opportunity for the SWC to revisit the injury determination already made through the 2008 Hearing. To hold otherwise would allow rehearing on injury amounts in the proceeding initiated by the SWC in 2005. That issue has already been determined, and under the doctrine of res judicata, must be enforced. Therefore, because the injury amounts found in the Director's May 2, 2005 Order were affirmed by the Director and not appealed by the SWC, the final step to complete the procedure afforded to parties in the current proceeding before the Court is an Order remanding the matter to IDWR for a hearing on the adequacy of the mitigation supplies to be provided by junior appropriators. The SWC has a right to a hearing on the adequacy of the replacement supplies acquired by the Ground Water Users, and nothing more.

Respectfully submitted this 30th day of November, 2009.

CITY OF POCA TELLO ATTORNEY'S OFFICE

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2009, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Reply Brief in Support of Petition for Rehearing in Case No. CV-2008-0000551** upon the following by the method indicated:



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