

LAWRENCE G. WASDEN
ATTORNEY GENERAL

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

GARRICK L. BAXTER, ISB #6301
Deputy Attorney General
Idaho Department of Water Resources
P. O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov

Attorneys for Respondents

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

IDAHO GROUND WATER)
APPROPRIATORS, INC.,)

Petitioner,)

vs.)

CITY OF POCATELLO,)

Petitioner,)

vs.)

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

Petitioners,)

vs.)

Case No. CV-2010-382

(consolidated Gooding County
Cases CV-2010-382, CV-2010-383,
CV-2010-384, CV-2010-387,
CV-2010-388, Twin Falls
County Cases CV-2010-3403,
CV-2010-5520, CV-2010-5946, CV-2012-
2096, CV-2013-2305, CV-2013-4417, and
Lincoln County Case CV-2013-155)

**MOTION TO REMAND
METHODOLOGY ORDER TO
IDAHO DEPARTMENT OF
WATER RESOURCES**

GARY SPACKMAN, in his official capacity as)
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)
_____)

COMES NOW the Idaho Department of Water Resources (“IDWR” or “Department”) and Gary Spackman, Director of IDWR (“Director”), and moves this Court for an order remanding this proceeding back to IDWR pursuant to Idaho Rule of Civil Procedure 84(r) and Idaho Appellate Rule 13.3. This motion seeks a limited remand for the purpose of allowing the Director to revise the “Methodology Order” to conform to the Idaho Supreme Court’s decisions regarding application of the Conjunctive Management Rules (“CM Rules”).

BACKGROUND

1. On June 23, 2010, the Director issued his *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”).
2. Following the issuance of the Methodology Order and subsequent orders implementing the same, various parties filed petitions for judicial review in the Fifth Judicial District resulting in the following cases now pending before this Court: case nos. CV-2010-384, CV-2010-3403,

CV-2010-5520, CV-2010-5946, CV-2012-2096, CV-2013-2305, and CV-2013-4417 filed by the Surface Water Coalition¹ (“SWC”); case no. CV-2013-155, filed by American Falls Reservoir District No. 2; case nos. CV-2010-382 and CV-2010-383, filed by the Idaho Ground Water Appropriators, Inc. (“IGWA”); and case nos. CV-2010-387 and CV-2010-388, filed by the City of Pocatello.

3. This Court has consolidated the above-listed cases under case no. CV-2010-382² and stayed the proceedings “pending the Idaho Supreme Court’s issuance of its decision in the SWC Supreme Court Appeal.” *Order Granting Motion For Stay, Case No. CV-2010-382* (Dec. 13, 2010).

4. The Idaho Supreme Court issued its decision in the SWC Supreme Court Appeal on December 17, 2013. *In The Matter Of Water Distribution To Various Water Rights Held By And For The Benefit Of A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, And Twin Falls Canal Company, Docket Nos. 38191/38192/38193* (Dec. 17, 2013) (“December 17 Decision”).

ARGUMENT

This Court’s order staying these proceedings recognized that after the Idaho Supreme Court issued its decision in the SWC Supreme Court Appeal, it would be necessary “to resolve any remaining matters in the above-captioned matter.” *Order Granting Motion For Stay* at 2. For the reasons discussed below, efficient and economical resolution of the remaining matters

¹ A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, American Falls Reservoir District #2, and Minidoka Irrigation District.

² *Order Granting Motions To Consolidate, Case No. CV-2010-382* (Nov. 12, 2013); *Order Consolidating Proceeding Into Gooding County Case No. CV-2010-382, Case No. CV-2010-5520* (Jan. 3, 2011); *Order Consolidating Proceeding Into Gooding County Case No. CV-2010-382; Order Granting Motion For Stay, Case No. CV-2010-5946* (Jan. 3, 2011); *Order Denying Motion to Renumber; Order Consolidating Proceedings Involving Petitions for Judicial Review of “Methodology Order” and “As-Applied Order,” Case No. CV-2010-382* (Jul. 29, 2010).

would be promoted by a limited remand of the proceedings to allow the Director to revise the Methodology Order to conform to applicable decisions of the Idaho Supreme Court.

This Court has authority and discretion to order such a remand under Idaho court rules. Rule 84(r) of the Idaho Rules of Civil Procedure provides, in part, that “[a]ny procedure for judicial review not specified or covered by these rules shall be in accordance with the appropriate rule of the Idaho Appellate Rules.” I.R.C.P. 84(r). Rule 13.3 of the Idaho Appellate Rules, in turn, provides for a “[t]emporary remand” to an administrative agency “to take further action as designated in the order of remand” upon the Court’s motion, or upon a party’s motion “showing good cause.” I.A.R. 13.3(a).

Since the Director issued the Methodology Order more than three years ago, the Idaho Supreme Court has issued three decisions addressing the application of the CM Rules, including two decisions regarding application of the CM Rules to the SWC’s delivery call. *December 17 Decision; A & B Irr. Dist. v. Idaho Dep’t Of Water Res.*, 153 Idaho 500, 284 P.3d 225 (2012); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). The Idaho Supreme Court’s decisions have clarified the legal principles that apply to the methodology for resolving the SWC’s delivery call in this proceeding.

With the benefit of these decisions, the Director has determined it is necessary to revise the Methodology Order to reflect the Idaho Supreme Court’s guidance. For instance, the Methodology Order should be revised to conform to the Idaho Supreme Court’s holding that Idaho Code § 42-226 has no application in a delivery call by a surface water appropriator against a ground water appropriator, *Clear Springs Foods, Inc.*, 150 Idaho at 804, 252 P.3d at 85, and its holdings regarding application of the “clear and convincing” evidence standard. *December 17 Decision*, 2013 WL 6631515, at *12; *A&B Irr. Dist.*, 153 Idaho at 524, 284 P.3d at 249.

The SWC has asserted to the Director that additional changes are also necessary under the *December 17 Decision*. See *Surface Water Coalition's Petition For Reconsideration And Request For Hearing On Final Order Establishing 2013 Reasonable Carryover (Step 10); Motion To Authorize Discovery*, IDWR Docket No. CM-DC-2010-001 (Dec. 30, 2013) (“The [Methodology Order] and ‘methodology’ for conjunctive administration do not comply with the Idaho Supreme Court’s recent decision [on December 17, 2013]. . . . the Director should reconsider and set aside the Methodology Order and all subsequent orders, including the 2013 Step 10 Order.”).³ Other parties to these proceedings may also have identified revisions to the Methodology Order they believe are necessary under the Idaho Supreme Court’s decisions.

Given that the Methodology Order was issued without the benefit of the Idaho Supreme Court’s decisions, and that at least the Department and the SWC apparently agree the Methodology Order in its current form does not conform to the Idaho Supreme Court’s decisions, it is appropriate to remand these proceedings to the Department. A remand is inevitable because the Idaho Administrative Procedure Act requires a judicial review proceeding to be “remanded for further proceedings” before the agency when the agency’s decision does not conform to the controlling law. Idaho Code § 67-5279(3). Allowing the Director to revise the Methodology Order to address legal issues he has identified under the Idaho Supreme Court’s decisions would promote judicial economy and efficiency. By addressing the legal issues now, instead of moving forward with an order that does not conform to the recent Idaho Supreme Court decisions, the parties and the Court avoid additional cost and delay. A remand would also allow the Director to correct clerical errors in the Methodology Order. See *Order Revising April*

³ For a full copy of this document see link below:

http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/2013/12Dec/20131230_SWC's%20Pet%20for%20Recons%20&%20Req%20for%20Hearing%20on%20Metho%20Step%2010%20Final%20Order.pdf

2013 Forecast Supply (Methodology Steps 6 – 8), IDWR Docket No. CM-DC-2010-001 (Aug. 27, 2013), at 2 n.1 (“The Director has determined the reference in Methodology Order Step 8 to ‘RISD’ is incorrect and should instead reference ‘DS.’”).⁴

Such a limited remand would also allow other parties to brief the Director on any other legal issues that they believe must be addressed for the Methodology Order to conform to the Idaho Supreme Court’s decisions. This would provide an opportunity to resolve some of the remaining issues without further judicial proceedings, and/or to narrow the remaining issues for purposes of judicial review.

The limited remand sought herein would not unduly delay the proceedings, as it would address only the legal and clerical issues in the Methodology Order. Further, if the other parties choose not to submit briefing to the Director regarding revisions to the Methodology Order, the Director is prepared to issue a revised Methodology Order within two weeks after entry of an order granting this Motion.

The limited remand sought herein would not address the other orders challenged in this consolidated proceeding. The other orders implement the methodology, and any issues remaining under the other orders after the Methodology Order is revised would be addressed when judicial proceedings in this matter resume following issuance of the revised Methodology Order.

CONCLUSION

There is good cause for a limited temporary remand of these proceedings to allow the Director to revise the Methodology Order to address legal issues clarified by the Idaho Supreme

⁴ For a full copy of this document see link below:

[http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/2013/08Aug/20130827_Order%20Revising%20April%202013%20Forecast%20Supply%20\(Method%20Steps%206-8\).pdf](http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/2013/08Aug/20130827_Order%20Revising%20April%202013%20Forecast%20Supply%20(Method%20Steps%206-8).pdf)

Court's decisions reading the application of the CM Rules, and to address known clerical errors in the Methodology Order. Such a limited remand should also allow other parties to submit briefing to the Director on these matters. The Department and the Director request that this Court grant this motion and enter an appropriate remand order.

DATED this 29th day of January, 2014.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
CHIEF, NATURAL RESOURCES DIVISION



GARRICK L. BAXTER
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of January, 2014, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the methods indicated:

Original to:

SRBA Court
253 3rd Ave. North
P.O. Box 2707
Twin Falls, ID 83303-2707
Facsimile: (208) 736-2121

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile

John A. Rosholt
John K. Simpson
Travis L. Thompson
Paul L. Arrington
BARKER ROSHOLT & SIMPSON, LLP
196 River Vista Place, Suite 204
Twin Falls, Idaho 83301-3029
jks@idahowaters.com
tlt@idahowaters.com
pla@idahowaters.com

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

C. Thomas Arkoosh
ARKOOSH LAW OFFICES
P.O. Box 2900
Boise, ID 83701-2900
tom.arkoosh@arkoosh.com

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

W. Kent Fletcher
FLETCHER LAW OFFICE
P.O. Box 248
Burley, ID 83318
wkf@pmt.org

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Randall C. Budge
Thomas J. Budge
RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED
P.O. Box 1391
Pocatello, ID 83204-1391
rcb@racinelaw.net
tjb@racinelaw.net

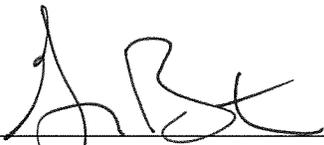
- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

A. Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello, ID 83201
dtranmer@pocatello.us

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Sarah A. Klahn
Mitra Pemberton
WHITE & JANKOWSKI LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email



GARRICK L. BAXTER
Deputy Attorney General