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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,	)	**Case No. CV-2010-382**
vs.	)	(consolidated Gooding County Cases CV-2010-382, 2010-383,2010-384, 2010-387, 2010-388, and Twin Falls County Cases CV-2010-3403, 2010-5520, 2010-5946, 2012-2096, 2013-2305, 2013-4417, and Lincoln County Case CV-2013-155)
CITY OF POCATELLO,	)	
Petitioner,	)	
vs.	)	
TWIN FALLS CANAL COMPANY, NORTH SIDE CANAL COMPANY, A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, and MINIDOKA IRRIGATION DISTRICT,	)	**CITY OF POCATELLO'S OPENING BRIEF ON JUDICIAL REVIEW (METHODOLOGY ORDER)**
Petitioners,	)	

vs.)
)
GARY SPACKMAN, in his 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)
)

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I. Statement of the Case

The matter before this Court is the third round of appeals from a delivery call initiated in 2005 by the Surface Water Coalition ("SWC"). A truncated procedural history of the SWC delivery call litigation is provided below. *In Re Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irrigation Dist.* ("*SWC I*"), 155 Idaho 640, 315 P.3d 828, 831−35 (2013) contains a detailed procedural history of this matter.

A. SWC's 2005 Delivery Call

On January 14, 2005, the SWC filed a delivery call, requesting administration of all of the SWC entities' natural flow and storage water rights. 2008-551 R. 1.[1] SWC claimed that the entities required the entire decreed amounts of their natural flow and storage rights for beneficial use, and that "[t]he extent of injury equals the amount of water diminished and the cumulative shortages in natural flow and storage water." 2008-551 R. 2.

In response, the Director of the Idaho Department of Water Resources ("Director") concluded that the SWC entities' water rights are injured when "diversion under the junior rights intercept a sufficient quantity of water to interfere with the exercise of the senior primary and supplemental water rights for the authorized beneficial use." 2008-551 R. 1401, ¶ 45. The Director rejected the SWC's claim that the entities were, as a matter of law, entitled to curtailment of all Eastern Snake Plain Aquifer ("ESPA") junior water users to provide delivery of their maximum decreed flow rates and storage volumetric limits. "Contrary to the assertion of the Surface Water Coalition, depletion does not equate to material injury." *Id.* ¶ 47. The Director proceeded to determine injury by evaluating what was necessary for the "authorized beneficial use" based on the minimum amounts of water SWC needed (later termed the

[1] The record submitted by the Idaho Department of Water Resources on April 4, 2014 contains two CD-ROM discs. In referencing the record, Pocatello shall refer to Bates stamped record documents on Disc 1 of 2 as "CM-DC-2010-001 R." and to the Bates stamped record documents on Disc 2 of 2 as "2008-551 R."

"minimum full supply" ("MFS")[2]) of combined storage and direct flow water rights for each of the SWC entities. *Id.* ¶¶ 45, 48.[3] However, the Director initially defined SWC's water demands based on historical diversions from 1995 alone—referred to as the "baseline year" ("BLY"), rather than a water balance method examining the SWC's actual water needs. 2008-551 R. 7088 (*Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* ("Hearing Officer's Recommendations"), Apr. 29, 2008). The Director's initial methodology for determining material injury will be referred to herein as the "MFS Methodology."

B. American Falls Reservoir District No. 2 ("AFRD#2")

While the delivery call was pending, the SWC entities filed a new proceeding in Gooding County District Court in August of 2005 challenging the constitutionality of the Director's application of the Conjunctive Management Rules ("CMR")[4] to the delivery call, and the constitutionality of the CMR themselves. The intertwined procedural history of the delivery call proceedings and *AFRD#2* is described in more detail in the Court's 2007 Opinion. *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.* ("*AFRD#2*"), 143 Idaho 862, 868, 154 P.3d 433, 439 (2007).

In *AFRD#2*, the Idaho Supreme Court upheld the CMR as facially constitutional and affirmed beneficial use as the measure and extent of a water right. *Id.* at 877, 154 P.3d at 448. "Concurrent with the right to use water in Idaho 'first in time,' is the obligation to put that water to beneficial use." *Id.* at 880, 154 P.3d at 451. To permit allocation of excessive water for which the senior user has no need is "in itself unconstitutional." *Id.* The Court also gave guidance as to

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[2] Because of the nature of this appeal, Pocatello's brief is laden with acronyms and terms of art. Appendix A to this brief contains a key referencing some of the frequently used acronyms relevant to this appeal.

[3] The Director issued several additional supplemental orders during 2005 and 2006 to adjust or otherwise revise the determinations made in the May 2005 Order (the 2nd, 3rd and 4th Supplemental Orders). In early 2007, Mr. Tuthill replaced Mr. Dreher as Director. During 2007 through 2008 he issued the 5th, 6th and 7th Supplemental Orders to the May 2005 Order.

[4] Idaho Department of Water Resources' ("Department" or "IDWR") *Rules for Conjunctive Management of Surface and Ground Water Resources* are codified at IDAPA 37.03.11.

the proper standard of review in delivery calls: "[s]omewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out." *Id.*

C. 2008 Administrative Hearing and Final Agency Order

After the Idaho Supreme Court announced the *AFRD#2* decision, the Department and parties proceeded to hearing in a contested case over the MFS Methodology. After a three week hearing in 2008, Hearing Officer Schroeder concluded that, *inter alia*, defining "injury" to the SWC based on "the amount of water that is necessary for the members of SWC to fully meet crop needs" was acceptable, but the Hearing Officer determined that pursuant to the guidance given to the Department in *AFRD#2*, the MFS Methodology had to be refined based on various factors[5] if the Department wanted to continue to use a "baseline year" approach. 2008-551 R. 7091, ¶ 8.

At the heart of the Hearing Officer's Recommendations is the conclusion that methods to determine injury to SWC must consider *actual* SWC water needs for beneficial use because "use of water above that amount would not be applied to a beneficial use and would constitute waste." *Id.* ¶ 7. "[I]n considering whether there is material injury . . . . [i]t is relevant to consider how much water is necessary to irrigate crops to maturity." *Id.* at 7101, ¶ 1. The Hearing Officer affirmed that need must be based on "the minimum amount of water the surface water users need to meet their <u>crop requirements</u>" and the Director's "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

[5] These are termed Hearing Officer Factors ("HO Factors") and listed and discussed in Part IV.B.1 *infra*.

amounts[,] is an acceptable approach to conjunctive management." *Id.* at 7087, ¶ 2 (emphasis added), 7091, ¶ 8.

In his [2008 Final Order], Director Tuthill considered the Hearing Officer's Recommendations and accepted all of the Hearing Officer's findings and conclusions, except the Director concluded that his authorization of temporary replacement plans during pendency of the call was proper. 2008-551 R. 7381−95 (*Final Order Regarding the Surface Water Coalition Delivery Call* ("2008 Final Order"), Sept. 5, 2008). The Director also announced an intention to issue a subsequent order revising the MFS Methodology to comply with the Hearing Officer's Recommendations. *Id.* at 7386, ¶ 25.

D. 2009 District Court Decision–Case No. 2008-551

The SWC appealed the Director's 2008 Final Order and the MFS Methodology. The Director did not issue a new methodology order before the district court engaged in judicial review of the Director's 2008 Final Order. On appeal, the District Court upheld the Director's analysis of injury to SWC's water rights, confirming that analysis of the SWC entities' water needs beyond their decrees was required. 2008-551 R. 10075 (*Order on Petition for Judicial Review* ("2009 District Court Decision"), July 24, 2009). The court also stated that where there is not water available to meet the decreed or licensed quantity, "juniors will only be regulated or required to provide mitigation subject to the material injury factors set forth in CMR 042." *Id.* at 10100. "Thus, the district court affirmed in part, reversed in part, and remanded the matter to the Department for further proceedings." *SWC I*, 155 Idaho 640, 315 P.3d at 834.

In February 2010, IDWR informed the parties that there was sufficient information in the record "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." 2008-551 R. 10201. In other words, the Director announced that he would be issuing a new methodology in accordance with

the 2009 District Court Decision, which upheld the Hearing Officer's decision. At this point, the SWC delivery call was essentially bifurcated: the 2009 District Court Decision was appealed to the Idaho Supreme Court (*see* discussion in Part F, below), and the matter of issuing a methodology order that complied with the Hearing Officer's Recommendations was remanded to the Department. Both branches of the proceedings in the SWC delivery call are discussed below in chronological order.

E. Director's 2010 Methodology Order Proceedings

On April 7, 2010 the Director issued an order announcing a new methodology for determining injury to reasonable in-season demand ("RISD")—the term that replaced "minimum full supply"—and carryover. CM-DC-2010-001 R. 32. The SWC, Ground Water Users, and the City of Pocatello ("Pocatello") all filed Petitions for Reconsideration with the Department asking the Director to revise the methodology to comply with the record and the Court's orders. CM-DC-2010-001 R. 78; 87; and 110. Pocatello requested a hearing. CM-DC-2010-001 R. 83. The Director noticed a hearing to begin May 24, 2010, but limited the scope of the hearing "to provide the parties the opportunity to contest or rebut the [Director's use of] 2008 data." CM-DC-2010-001 R. 313.

Before a hearing was held, the Director issued an order applying the new methodology to the 2010 irrigation season. CM-DC-2010-001 R. 185. That order is referred to by the parties as the "As Applied Order." All parties requested a hearing on the As Applied Order, which the Director granted, but limited the scope of the hearing to the "issue of whether the [As Applied Order] followed Steps 3 and 4 of the Methodology Order." CM-DC-2010-001 R. 326. Therefore, neither hearing allowed parties to question the merits of the Director's new methodology, or its application to the 2010 water year. After hearing the Director entered a final order in the As Applied proceeding and issued a final order on the new methodology. CM-DC-

2010-001 R. 605 (*Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4); Order on Reconsideration* ("As Applied Order"), June 24, 2010); CM-DC-2010-001 R. 564 (*Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("2010 Methodology Order"), June 23, 2010).[6]

The district court subsequently lifted the stay on the petitions for rehearing in Case No. 2008-551 and entered an order on August 23, 2010, concluding that the Department had complied with the limited remand by issuing the 2010 Methodology Order. 2008-551 R. 10593. The court did not substantively review the 2010 Methodology Order at that time as it was on appeal in a separate matter (the captioned matter before the court today). The appeals of the 2010 Methodology Order in the captioned matter were subsequently stayed on agreement by all parties until the Idaho Supreme Court considered the appeal of the Director's MFS Methodology, discussed below in Part F. *Order Granting Motion for Stay*, Case No. CV-2010-382, Dec. 13, 2010.

1. Summary of 2010 Methodology

An abbreviated summary of the Director's 2010 Methodology is provided below. The 2010 Methodology Order outlines a ten-step process to "determin[e] material injury to reasonable in-season demand and reasonable carryover." CM-DC-2010-001 R. 597. RISD is the term generally used in the 2010 Methodology Order to describe the estimate of SWC's predicted in-season irrigation demand. Initially, RISD is developed by selecting an historic year or years of above-average SWC diversions. *Id.* at 568. By relying on RISD, the 2010 Methodology

[6] Pocatello's appeal of the As Applied Order is addressed in a separate brief filed concurrently in this matter pursuant to the Court's February 24, 2014 *Order Amending in Part Procedural Order Governing Judicial Review of Final Orders of Director of Idaho Department of Water Resources*.

Order is founded on the type of "baseline year" analysis that was relied on in the original 2005 Order to develop the MFS.

The 2010 Methodology Order "describe[s] processes for predicting the water supply for an upcoming irrigation season, determining any demand shortfall for the SWC, and determining the ground water users' mitigation obligation for the shortfall." CM-DC-2010-001 R. 606.

- Step 1 requires that the SWC provide certain data to the Department regarding irrigated acreage for the coming year. CM-DC-2010-001 R. 597.
- Step 2 requires that crop water need be calculated for all the land within the boundaries of the SWC, once a month, beginning in April. *Id.* at 597−98. However, these crop water need calculations are not utilized in the 2010 Methodology until much later in the season, and do not play a role in the initial projection of injury to the SWC.
- Step 3 of the 2010 Methodology requires the Director to issue an "April Forecast Supply for the water year and will compare the April Forecast Supply to the baseline demand ('BD') to determine if a demand shortfall ('DS') is anticipated for the upcoming irrigation season." *Id.* at 598.
- Step 4 requires that "[i]f the April DS is greater than the reasonable carryover shortfall from the previous year, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure and provide a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the difference of the April projected demand shortfall and reasonable carryover shortfall." *Id.* The amount of projected shortfall in the initial forecast conducted pursuant to Steps 3 and 4 is therefore the amount that juniors must purchase and secure in order to avoid curtailment. *Id.*

- Step 5 involves the calculation of injury to SWC's storage and the consideration of carryover storage in the calculation thereof. *Id.* at 599.
- Approximately half way through the irrigation season, Step 6 requires that the Director "(1) evaluate the actual crop water needs up to that point in the irrigation season; (2) estimate the Time of Need date; and (3) issue a revised Forecast Supply." *Id.* This is the first time in the season that the Director uses data other than historical to predict SWC's remaining in-season irrigation demand. *Id.* at 599−600. However, although the Director's calculations in Step 6 incorporate data related to crop water need, the analysis relies primarily on monthly irrigation diversions, and does not incorporate a "reasonableness" evaluation of whether the diversions were necessary for beneficial use as called for by the HO Factors. *Id.* at 578. *See infra* at Part IV.B.4.
- Step 7 implements any changes in the forecast required by Steps 5 and 6. At this point in the season the Director revises the SWC predicted in-season irrigation supply (RISD) and adjusts injury (DS) projections. *Id.* at 600. However, pursuant to Step 4, described above, the juniors will have already secured mitigation water based on the original RISD and DS projections made at the beginning of the season.
- Step 8 requires that at the Time of Need, juniors provide the lesser of the two volumes of DS that calculated in Steps 4 or that calculated in Steps 6 and 7. *Id.*
- At the end of the irrigation season, on or before November 30, the Department pursuant to Step 9 determines the total actual volumetric demand and total actual crop water need for the entire irrigation season. *Id.* This information is used only for the analysis of future adjustments to the 2010 Methodology and for evaluation of carryover storage shortfall.

- Step 10 states that "[a]s an alternative to providing the full volume of reasonable carryover shortfall established in Step 9, junior ground water users can request that the Department model the transient impacts of the proposed curtailment based on the Department's water rights data base and the ESPA Model." *Id.* at 601.

F. Idaho Supreme Court Decision (*SWC I*)

Meanwhile, the Idaho Supreme Court issued a decision in 2013 on the 2009 District Court Decision in Case No. 2008-0551—the appeal of the Director's MFS Methodology. The key issue on appeal involved whether the Director had the authority and discretion to evaluate a delivery call by reference to the beneficial use needs of the calling seniors or if he was required to administer SWC's delivery call by reference to decreed quantities alone. *SWC I*, 155 Idaho 640, 315 P.3d at 836−37. The SWC effectively asked the court to revise its ruling in *AFRD#2*, arguing that its entities were entitled to delivery of its decreed water rights without an examination of beneficial use. The Court once again rejected this argument, and "affirm[ed] the district court's order approving the Director's use of a predicted baseline of senior water right holders' <u>needs</u> as a starting point in considering the material injury issue in a water call." *Id.* at 844 (emphasis added). Therefore the Court affirmed the Director's methodology to examine the needs of the SWC, <u>as modified by the Hearing Officer</u> and adopted in the Director's 2008 Final Order. The Court expressly limited its review to the Director's pre-2010 methodology—"[s]ince the district court did not review this final [2010] methodology order, the findings of fact that shape that methodology and <u>any modifications to the methodology are not properly before this Court</u>." *Id.* at 837 (emphasis added).

II. Issues Presented on Appeal

A. Whether the 2010 Methodology Order calculates RISD in a manner consistent with Idaho law and the law of the case.

B. Whether the 2010 Methodology Order calculates Forecast Supply in a manner consistent with Idaho law and the law of the case.

C. Whether the Director's decision to unreasonably limit the scope of the May 24th hearing in this matter violated the parties' due process rights.

III. Standard of Review

Idaho Code section 67-5279 controls judicial review of agency actions. A district court shall review an agency action to determine if it was: "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; or (d) arbitrary, capricious, or an abuse of discretion." I.C. § 67-5279. "The doctrine of 'law of the case' . . . provides that [if,] 'upon an appeal, the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal." *Swanson v. Swanson*, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000).

IV. Argument

A. Introduction

The Idaho Supreme Court in *SWC I* determined that in evaluating material injury in a delivery call, the Director must go beyond the face of the calling seniors' decrees to evaluate seniors actual water needs. *AFRD#2*, 143 Idaho at 877, 154 P.3d at 448. In doing so, the court affirmed the decisions of the district court, Director and Hearing Officer regarding the Director's MFS Methodology in the SWC delivery call, essentially affirming the Director's ability to rely on a baseline year analysis so long as the HO Factors are satisfied. The captioned matter

involves whether the 2010 Methodology Order does, in fact, comply with the prior decisions in this case.

The Director's 2010 Methodology overestimates SWC's beneficial use needs by relying on historical diversions by the SWC, without further adjustment.[7] This is not consistent with the Hearing Officer's Recommendations, which required the Director to rely on more than historical diversions in defining the amount of SWC's injury. This finding was expressly adopted by the Director, and affirmed by this Court and the Idaho Supreme Court. Accordingly, the Court should remand this matter to the Department to issue an injury methodology that complies with the Hearing Officer's Recommendations and Idaho law.

B. The 2010 Methodology Order does not calculate RISD in a manner consistent with Idaho law and the law of the case.

1. The Hearing Officer's Recommendations, adopted by the Director and affirmed by the district and supreme courts, required that SWC's water demand be defined by more than historical diversions.

To understand why the 2010 Methodology is not consistent with law, it is useful to briefly review the Director's MFS Methodology, the Hearing Officer's Recommendations and the HO Factors. The MFS Methodology relied on a baseline year of historical diversions—1995—that the Director determined was representative of "full headgate diversions"[8] absent the lease of any storage water. The Director then compared the 1995 MFS amounts with forecast water supply available to the SWC under their natural flow rights (based on an analysis at the Heise Gage) and storage rights based on the USBR, USACE Joint Storage Forecast. 2008-551 R. 7065−67. Shortfalls between MFS and Forecast Supply were determined

[7] "At the start of the irrigation season, RISD is equal to the baseline demand, or total season adjusted diversions for the baseline year(s)." CM-DC-2010-001 R. 581.
[8] The Director rejected the SWC's argument that its entities were entitled to delivery of full decreed amounts. Those arguments have similarly been rejected by all reviewing courts at all points in this litigation.

to be injurious to SWC, and junior ground water users were required to make up the difference, either through amounts made available during the irrigation season or to carry-over amounts. *Id.*

The Hearing Officer upheld the baseline year method of determining a senior's water needs based on actual diversions as opposed to relying on decreed amounts. *Id.* at 7091. However, the Hearing Officer precluded the Department from defining need as equivalent to historical diversions alone—the MFS Methodology needed to be modified and adjusted if "a base . . . is to be utilized in future administration." *Id.* at 7091−92. The Hearing Officer did not think that selection of a particular year of historical diversions was a reliable basis for defining diversion requirements. "The fact that the 1995 water year provided full headgate deliveries **does not by itself tell whether all that water was applied to a beneficial use** or whether there was more water than could be applied to a beneficial use." *Id.* at 7092 (emphasis added). "The minimum full supply established in the May 2, 2005, Order is inadequate to predict the water needs of SWC on an annual basis. There are too many unaccounted variables in the minimum full supply analysis to be continued in use as the baseline for predicting the likelihood of material injury." *Id.* at 7097.

At the 2008 hearing, the parties presented competing water balance[9] budgets in order to establish "the needs of SWC members." *Id.* at 7096. The Hearing Officer did not question the science behind these analyses—indeed, he referred to the water balance budgets as utilizing "sophisticated analytical techniques" and constituting "enlightening science." *Id.* Instead, he found that because of the disparities in the baseline amounts of water proffered by each of the parties, there was no "acceptable average budget analysis amounts from either party." *Id.* at 7098. The Department "<u>must modify</u> the minimum full supply analysis . . . . with the benefit of

[9] A water balance is an analysis of water supply adequacy based on a "systematic analysis of water requirements, water losses and water availability through the use of routine analytical approaches and conservation of mass." 2008-551 Exhibit 3007A at 15.

the extended information and analysis offered by the parties and available to its own staff." *Id.* (emphasis added).

"Properly applied the minimum full supply approach is an attempt to measure . . . the amount of water senior surface users need to raise crops of their choosing to maturity with the number of cuttings weather conditions will allow." *Id.* Therefore, a single year of data can only be used if that data is "subjected to the type of [water balance] analysis applied by both the surface and ground water users." *Id.* at 7098−99. **"[F]ocusing on a single year can only be a starting point**, not sufficient without material adjustments." *Id.* at 7099 (emphasis added).

The Hearing Officer concluded that a proper need analysis must consider, *inter alia*, the following factors (the HO Factors):

- "Predictions of need should be based on an average year of need, subject to adjustment up or down depending upon the particular water conditions for the irrigation season." *Id.* at 7096.
- Historical information may be used provided, *inter alia*, such information is tested "to determine if the usage involved waste." *Id.* at 7098.
- If historical diversions are used, they must be adjusted to account for precipitation, evaporation, and reflect a "normal" temperature year. *Id.* at 7099.
- "[S]ignificant cropping changes" must be considered. *Id.*
- "Changes in facilities, diversion, conveyance, and irrigation practices from earlier years" must be considered. *Id.*
- "Analysis of soil conditions to determine how water is retained or lost is a factor" as it impacts "the timing and extent of water delivery." *Id.*
- Acreage that is no longer irrigated must be accounted for. *Id.* at 7100.

- "[T]he calculation of a water budget in determining if there will be curtailment should be based on acres not shares." *Id.*
- Reasonable farm efficiencies must be reviewed in evaluating need. *Id.* at 7103.

The Director adopted all of the Hearing Officer's recommendations discussed above. 2008-551 R. 7392.[10] The HO Factors are law of the case and are central to any evaluation of the 2010 Methodology.

The district court expressly affirmed the Hearing Officer's findings that the HO Factors must be used to adjust any projection of need based on historical diversions—"[u]ltimately the Hearing Officer determined that the use of a baseline estimate to represent predicted in-season irrigation needs was acceptable provided the baseline was adjustable to account for weather variations and that the process satisfied certain other enumerated conditions. R. Vol. 37 at 7086-7100. This Court affirms the reasoning of the Hearing Officer on this issue." 2008-551 R. 10100 (emphasis added). The Idaho Supreme Court also affirmed. *SWC I*, 155 Idaho 640, 315 P.3d at 844. The Idaho Supreme Court noted that the decision it affirmed included the Hearing Officer's requirement that the baseline methodology be "improve[d]" to be "more responsive to actual conditions." *Id.* at 833.

2. The 2010 Methodology Order defines SWC's water demand as historical diversions, without consideration of the HO factors.

The Director's 2010 Methodology Order was issued pursuant to a limited remand to implement the Hearing Officer's findings and "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." 2008-551 R. 10201 (emphasis added). A review of the new methodology,

[10] "[T]he findings of fact and conclusions of law entered herein, and the findings of facts and conclusions of law entered by the former Director and the Hearing Officer in these matters, unless discussed and modified in this FINAL ORDER, are hereby accepted."

termed RISD, demonstrates that it disregards the Hearing Officer's factors and, like MFS, relies solely on historical diversions to define the amount SWC requires for beneficial use.

RISD is the amount of "historic demands associated with a baseline year or years [] as selected by the Director." CM-DC-2010-001 R. 568. In other words, the Director defined SWC's water needs by simply averaging SWC's diversions from 2006 and 2008. "[T]he Director declines to adopt the water balance method of estimating pre-irrigation season RISD proposed by the parties (based on historic crop water need adjusted for estimated project efficiencies and other facts." *Id.* at 568−69. The Director expressly stated that the parties' water balance methods did not contain errors—but that because there is a "range of values . . . that are possible if contributing components to that total demand are calculated using different methods, or with different estimates of unknown parameters." *Id.* at 577. Therefore, the Director declined to examine actual water needs at all, and instead again relied on historic diversions alone to define need.

The RISD not only fails to consider the factors mandated by the Hearing Officer, but also inflates SWC entities' water needs for beneficial use by setting the baseline year of historic diversions as one that "represent[s] a year(s) of <u>above average</u> diversion, and [ ] avoid[ing] years of below average diversions. . . . the BLY should also represent year(s) of <u>above average</u> temperatures and ET, and below average precipitation." *Id.* at 570 (emphasis added). This results in selection of a year of historical diversions when SWC diverted higher than average amounts of water. This is contrary to the Hearing Officer's finding that "[p]redictions of need should be based on an <u>average</u> year of need," that use of any historical diversions in calculating need "should be adjusted to . . . [account for] a <u>normal</u> temperature year," and must account for an "<u>average</u> amount of precipitation." 2008-551 R. 7096, 7099, 7092 (emphasis added).

3. The 2010 Methodology intentionally underestimates available supply.

After defining SWC's water needs based on above-average historical diversion data alone, as outlined above, the Director next makes a supply forecast for the season as part of Steps 3 and 4 that underestimates available supply. CM-DC-2010-001 R. 582. Forecast supply is calculated after the Joint Forecast is issued, at which point the Director develops a regression equation "for each SWC member by comparing the actual Heise natural flow to the natural flow diverted." *Id.* However, for purposes of projecting supply, "The actual natural flow volume that will be used in the Director's Forecast Supply will be one standard error below the regression line, which underestimates the available supply." *Id.* (emphasis added). Choosing one standard deviation below the best fit line results in the Director using a predicted supply that is significantly less than what the best available evidence shows is a more accurate prediction of forecast supply. As a result, the regression does not reflect a direct relationship between the forecast supply and the historical diversions by the SWC members and is at best an arbitrary administrative tool.

The underestimation of supply, coupled with the overestimation of demand, described above, results in an unreasonably inflated estimate of predicted material injury. Once again, the 2010 Methodology directly conflicts with the Hearing Officer's finding that "[p]redictions of need should be based on an average year of need," that use of any historical diversions in calculating need "should be adjusted to . . . [account for] a normal temperature year," and must account for an "average amount of precipitation." 2008-551 R. 7096, 7099, 7092.

4. The 2010 Methodology Order mid-season adjustment of RISD does not correct the problems with basing the initial prediction of injury on historical diversions alone, and is contrary to Idaho law.

As described above, the RISD is based on historical diversions using a "baseline year(s)" by reference to annual climatological and hydrologic data. The RISD value is not qualitatively

different from the "minimum full supply" value rejected by the Hearing Officer as inadequate (absent imposition of the HO Factors), and its legal and technical inadequacies are described *supra*.

The 2010 Methodology Order does include, facially, one of the HO Factors: it provides a means to adjust the RISD during mid-and late-irrigation season. CM-DC-2010-001 R. 599−601. The purpose of the Factor requiring adjustment of RISD was to allow administration in response to changes in, *inter alia,* climatological factors. However, the 2010 Methodology Order adjustment approach is technically invalid, and results in an adjustment to the RISD that is legally inadequate. In addition, the adjustment methods are insufficient to correct for the initial RISD, which over-estimates in-season irrigation demands as described above. Finally, the adjustment approach is inconsistent with the CMR. In short, even though termed an "adjustment" factor, the 2010 Methodology Order's approach to adjustment of the RISD cannot be said to satisfy this HO Factor.

a. <u>The Project Efficiency/CWN evaluation used to adjust RISD is not technically valid</u>.

The Department's Project Efficiency equation is:

$$E_p = CWN/Q_D$$

Where: E_p= project efficiency, CWN= crop water need, and Q_D= irrigation entity diversion of water specifically put to beneficial use for growing of crops within the irrigation entity.

Id. at 578.

Without belaboring the arithmetic, the E_p equation divides calculated crop water requirements that assume an infinite water supply (the CWN) by the actual diversions made by the SWC in a given irrigation season. *Id.* This is compared to the RISD which, as described

above, is the historic diversions made by SWC entities in a baseline year (or years, as in the current RISD) of above-average diversions, below average precipitation, and above-average ET—in other words, an over-estimate of SWC requirements for beneficial use in the year of administration. The resulting comparison adjusts the RISD.

This adjustment process is fundamentally flawed. The RISD, as described above, is selected to overestimate demand. While the adjustment to RISD is made using E_p, no analysis is made at any time of whether the RISD diversions in the historical year were necessary for beneficial use. To the extent that historical diversions comprising initial RISD were greater than necessary to meet the actual crop water demands, use of those historical diversions to establish baseline water requirements will result in curtailment of junior ground water users to provide water in excess of SWC's needs.

Further, adjustments based on "project efficiencies" are not applied by the Director to SWC's projected need until the middle of the irrigation season—as such, efficiency is not a limit on initial RISD, which IDWR uses at the beginning of the irrigation season to determine predicted injury to SWC, and thus, the amount of mitigation water juniors must secure. The Hearing Officer found that defining SWC's need to "be higher than the amount necessary . . . would require commitments to be made for the acquisition of water that at times would not be needed. It would not encourage reasonable conservation as required in CM Rule 42.01." 2008-551 R. 48, ¶ 1. Accordingly, the Director's selection of RISD based on historical operations, and to only consider "project efficiencies" in the middle of the irrigation season, is not in accordance with the Hearing Officer's Recommendations.

The bias that arises from the use of an inflated RISD in this adjustment process is reflected in the April 29, 2010 analysis by Greg Sullivan, P.E., submitted for purposes of the

hearing in this matter. CM-DC-2010-001 R. 204. Table 1 in Mr. Sullivan's analysis compares RISD to projected water supply and compares the after-the-fact project efficiency analysis described in the equation above to project water supply. *Id.* at 221. Using the overestimated RISD shows a shortage to Twin Falls Canal Company; using the after-the-fact project efficiency analysis shows no shortage to Twin Falls Canal Company.

However, the adjustment of RISD with a monthly after-the-fact project efficiency evaluation is technically invalid. After-the-fact project efficiency simply characterizes SWC diversions to that point in the season assuming an infinite water supply. While the analysis may be a useful yardstick on a seasonal basis, it is technically invalid on the monthly basis used by IDWR (*see* Steps 1−2). As shown in Table 1 and Figure 1 of Greg Sullivan's analysis, the results are nonsensical, and suggest that SWC is short of water at times of the year when that is technically impossible. *Id.* at 220.

Finally, contrary to the rationale stated in the 2010 Methodology Order at paragraph 43, the "project efficiency" analysis is not the same as the "system efficiency" evaluation relied on by both Pocatello and SWC's engineers in this matter. CM-DC-2010-001 R. 578. Specifically, the "project efficiency" analysis fails to incorporate a "reasonableness" evaluation called for under Idaho law, most recently by the Idaho Supreme Court in *SWC I.* 2008-551 R. 7103; *SWC I*, 155 Idaho 640, 315 P.3d at 836−37. Use of IDWR's after-the-fact project efficiencies rewards inefficient operations and has the potential to result in unnecessary curtailment or mitigation.

b. The 2010 Methodology Order does not consider CMR 42 factors.

As stated by the district court in *SWC I*, "juniors will only be regulated or required to provide mitigation subject to the material injury factors set forth in [Rule] 042. Rule 042 of the [CMR] lists a number of factors the Director is to consider in determining material injury to

senior rights." *SWC I*, 155 Idaho 640, 315 P.3d at 836. CMR 42.01 states the Director is to consider, *inter alia*, the following factors in evaluating material injury:

> d. If for irrigation, 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.
>
> e. The amount of water being diverted and used compared to the water rights.
>
> f. The existence of water measuring and recording devices.

IDAPA 37.03.11.042.01.

The Hearing Officer required that, pursuant to CMR 42, the Director consider the diversion requirements of the SWC's crops and the reasonable and efficient operation of the irrigation systems that are in place in predicting material injury. 2008-551 R. 7098−99. *See also id.* at 7102 ("Are the practices in place reasonable in conserving water or are the SWC members claiming and using more water than is necessary to develop healthy crops to full maturity utilizing the systems and practices in place.").

5. <u>The 2010 Methodology Order violates the law of the case</u>.

The Idaho Supreme Court affirmed the concept of a BLY methodology that starts with "a predictive baseline of the senior water right holders' <u>actual needs</u>." *SWC I*, 155 Idaho 640, 315 P.3d at 835 (emphasis added). In order to define "actual needs," the Hearing Officer ordered that "it is time for the Department to move to further analysis to meet the goal of the minimum full <u>supply but with the benefit of the extended information and analysis offered by the parties</u> and available to its own staff." 2008-551 R. 7098, ¶ 7. Despite the Hearing Officer's clear direction, the Director has not moved forward—he "decline[d] to adopt the water balance method of determining the quantity of water needed by SWC members." CM-DC-2010-001 R. 577. Further, the 2010 Methodology requires the selection a year of "above average diversions," "above average temperatures and ET, and below average precipitation" results in an inflated

estimate of SWC's diversion requirements, and not one based on an actual beneficial use analysis, as required by the Hearing Officer and the law of the case. *Id.* at 570.

The Director is bound by the Hearing Officer's Recommendations and must rely on a methodology that complies with and considers the HO Factors. "The doctrine of 'law of the case' is well established in Idaho and provides that upon an appeal, the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress . . . ." *Swanson*, 134 Idaho at 515, 5 P.3d at 976 (internal quotation marks and citation omitted). The Department did not appeal the Hearing Officer's Recommendations—in fact, the Director adopted the recommendations in relevant part, and the recommendations were affirmed on appeal to the district court and Idaho Supreme Court. *See Ins. Associates Corp. v. Hansen*, 116 Idaho 948, 782 P.2d 1230 (1989) (trial court's findings in original decision were "law of the case" on remand).

6. <u>The 2010 Methodology violates the doctrine of beneficial use</u>.

Further, the 2010 Methodology ignores actual need and beneficial use, and therefore is inconsistent with Idaho law. "[B]eneficial use acts as a measure and limit upon the extent of a water right . . . ." *SWC I*, 155 Idaho 640, 315 P.3d at 838. Article XV, section 3 of the Idaho Constitution provides that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . . . Priority of appropriation shall give the better right as between those using the water." Seniors can only call for the amount of water that can be beneficially used. *AFRD#2*, 143 Idaho at 868, 154 P.3d at 439. "Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use." *Id.* at 880, 154 P.3d at 451. A "prior appropriator may ultimately claim entirety of his original appropriation, but he is

only entitled to the amount of water he actually puts to beneficial use during the time it takes him to prepare his land for cultivation." *SWC I*, 155 Idaho 640, 315 P.3d at 838. Consideration of the HO Factors in the initial calculation of RISD would satisfy the doctrine of beneficial use—in the absence of such consideration, the 2010 Methodology cannot stand.

7. The 2010 Methodology is not supported by substantial evidence.

Finally, the 2010 Methodology's project of need at the beginning of the irrigation season is not based on the record or supported by substantial evidence. *See* I.C. § 67-5248 (2) ("Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding."). "Substantial evidence is more than a scintilla of proof, but less than a preponderance. It is relevant evidence that a reasonable mind might accept to support a conclusion." *Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 112, 44 P.3d 1162, 1167 (2002) (citations omitted). "[T]he standard requires the reviewing court to consider all of the record and to determine on the basis of that record whether the agency's factfinding is reasonable." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 363 (1993/1994).

At the 2008 hearing, experts for both the SWC and Pocatello presented a water balance approach to evaluate the SWC's water needs and determine "the amount of water SWC members actually need to meet full crop years over time." 2008-551 R. 7096, ¶ 3. These analyses, which reached different results, employed similar methods and considered "soil composition . . . the losses in conveyance, evaporation, and crop needs." *Id.* The Director's alternative method is not supported by any evidence in the record, especially his decision that "a [baseline year of historic diversions] should represent a year(s) of above average diversion, and [should] avoid years of below average diversions. . . . the BLY should also represent year(s) of above average

temperatures and ET, and below average precipitation." CM-DC-2010-001 R. 36 (emphasis added). Further, the Director expressly rejected the Hearing Officer's Factors that the Hearing Officer had ruled must be included in any Department methodology. CM-DC-2010-001 R. 577. Because the 2010 Methodology is not only not supported by substantial evidence, but is wholly inconsistent with all of the evidence in the record that SWC's needs are not equivalent to historical diversions, the 2010 Methodology Order should be reversed.

C. The Director limited the scope of the May 24th hearing in violation of Pocatello's due process rights.

The parties did not have the opportunity at hearing to examine or present expert testimony regarding the reliability of the Director's new methodology, or whether it was consistent with the Hearing Officer's ordered factors to be considered. The Director ordered that the only issue that could be examined at hearing was whether the Director's consideration of 2008 data was proper. In other words, the only issue parties were able to address at hearing was whether the Director properly considered new data regarding activities that followed the occurrence of the 2008 hearing, for example precipitation data from 2008, which were outside the original record. CM-DC-2010-001 R. 570. The Director stated that despite the fact that the 2010 Methodology Order "may not be based on the methods that -- methods that were proposed or the processes that were proposed by the parties in the [2008] hearing itself," questioning whether the 2010 Methodology was in compliance with the Hearing Officer's Recommendations was "beyond the scope of [the district court's] directive to the Department." Methodology Hearing Tr., May 24, 2010, CM-DC-2010-001 22:17–23:7.

Due process requires meaningful opportunity to be heard on issues in dispute. Procedural due process requires that parties have an opportunity to be heard, and this opportunity "must occur at a meaningful time and in a meaningful manner." *Cowan v. Bd. of Comm'rs of Fremont*

County, 143 Idaho 501, 512, 148 P.3d 1247, 1258 (2006). Due process also requires an agency to grant "an aggrieved party the opportunity to present a case and have its merits fairly judged." *Jackson Water Works, Inc. v. Pub. Utilities Comm'n of Cal.*, 793 F.2d 1090, 1097, (9th Cir. 1986). "The opportunity to present reasons why a proposed action should not be taken is a fundamental due process requirement." *Martin v. Sch. Dist. No. 394*, 393 F.Supp.2d 1028, 1037 (D. Idaho 2005).

Specifically, the Director is required "to assure that there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary" and "[s]hall afford all parties the opportunity to respond and present evidence and argument on all issues involved." I.C. § 67-5242(3)(a), (b). Instead, the Director limited the scope of the hearing to the issues that he believed were involved, and refused to admit evidence and testimony regarding Pocatello's issues with the 2010 Methodology—namely that it was not consistent with the Hearing Officer's Recommendations and was not based on evidence in the record. To wit: when Pocatello cross-examined Department employees about their validation methods for the 2010 forecast shortfall and their decision to utilize a baseline year instead of a water balance analysis that considered the Hearing Officer's factors, the Director refused to allow that line of questioning because it went beyond "whether the 2008 dat[a] is accurate and reliable or not." Methodology Hearing Tr., May 24, 2010, CM-DC-2010-001 53:8−10.

At that time, the Director indicated that there would be a "broader opportunity" in the As Applied hearing to explore the Director's 2010 Methodology. *Id.* at 53:20−54:5. However, when Pocatello attempted to proffer the testimony of its expert regarding whether the Director's 2010 Methodology Order and As Applied Order considered the factors deemed relevant by the Hearing Officer, the Director would not permit testimony. As Applied Hearing Tr., May 25,

2010, CM-DC-2010-001 201:11–24. Pocatello made an offer of proof regarding the testimony its expert would give on the issue, and the Director refused to admit the offer of proof. *Id.* at 202:24–203:16.

V. Conclusion

The Director's 2010 Methodology Order bases SWC's predicted water needs on SWC's historical diversions alone. This approach does not accurately predict in-season irrigation needs of the SWC. The initial calculation of injury, therefore, used by the Director as the basis to curtail junior water users and require mitigation water, violates the law of the case and the doctrine of beneficial use. For this reason, and for the other reasons raised in this brief, Pocatello requests that the Court reverse and remand the 2010 Methodology Order for a hearing that satisfies due process, and order the Director to issue a methodology order that complies with the law of the case.

Respectfully submitted, this 13th day of June, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2014, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Opening Brief on Judicial Review (Methodology Order)** in **SRBA Case No. CV-2010-382, Gooding County** upon the following by the method indicated below:

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USEFUL DEFINITIONS AND ACRONYMS

BD – "baseline demand" – the amount of water SWC diverted in the BLY.

BLY – "baseline year" – refers to the use of one or more years of diversions as a basis for determining the predicted in-season irrigation needs of the SWC in a delivery call; the BLY method was used by the IDWR to develop both the MFS and RISD values.

DS – "demand shortfall" – the difference between BD and the Forecast Supply; in other words: Forecast Supply − BD = DS

"Forecast Supply" – the sum of the predicted natural flow at the Heise gage and the Joint Forecast for storage in the Upper Snake River issued by the USBR and USACE

"HO Factors" – refers to the factors qualifying IDWR's reliance on a BLY methodology to predict in-season irrigation needs for SWC. The HO Factors were adopted by the Hearing Officer in the 2008 Recommendations and affirmed by the district court and Idaho Supreme Court in *SWC I*.

MFS – "minimum full supply" – used in the IDWR May 2, 2005 Order which was the initial response to the SWC delivery call and predicted the in-season irrigation needs of the SWC based on diversions in 1995.

RISD – "reasonable in-season demand" – used in the 2010 Methodology Order. Also a BLY method of predicting the in-season irrigation needs of the SWC.