

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
Mitra M. Pemberton
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202
(303) 595-9441
(303) 825-5632 (Fax)
sarahk@white-jankowski.com
mitrap@white-jankowski.com

Attorneys for the City of Pocatello

**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, AMERICAN FALLS RESERVOIR)
DISTRICT #2, BURLEY IRRIGATION)
DISTRICT, MILNER IRRIGATION DISTRICT,)
and MINIDOKA IRRIGATION DISTRICT,)
)
Petitioners,)

Case No. CV-2010-382

(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'S
RESPONSE BRIEF ON JUDICIAL
REVIEW (AS APPLIED ORDER)**

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. INTRODUCTION

The *Surface Water Coalition's* (“SWC”) *Joint Opening Brief (As Applied Appeal)* (“SWC’s Opening Brief”) focuses on the Idaho Department of Water Resources’ application of the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”) in 2013, claiming that 2013 demonstrates the dire consequences the Director’s Methodology visits on seniors. The one fact missing from the SWC’s briefing, however, is that when the Director assessed the SWC’s “total actual volumetric demand and total actual crop water need for the entire irrigation season” following the end of the irrigation season pursuant to Step 9 of the Methodology Order the Director determined that the SWC entities’ 2013 diversions exceeded their actual RISD, and therefore no injury occurred. [CM-DC-2010-001 R. 1045](#). In other words, in 2013 the SWC received all of the water necessary to meet its RISD, and even received mitigation water in excess of that amount. As explained below, the disparities between the Director’s predictions of injury throughout the season are due to the errors in the Methodology that result in an over-prediction of injury early in the season, coupled with inaccurate accounting for crop water needs and efficiencies that result in inaccurate predictions of need.

II. 2013 ESTABLISHES THE FACT THAT THE METHODOLOGY ORDER OVERPREDICTS NEED AND UNDERPREDICTS SUPPLY

Pursuant to the Methodology Order, the Director issued an April 2013 Forecast Supply predicting injury in the amount of 14,200 acre-feet to Twin Falls Canal Company (“TFCC”). [CM-DC-2010-001 R. 829](#) (*Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1–4)*) (“April Initial Forecast”), Apr. 17, 2013). As explained in *City of Pocatello’s Opening Brief on Judicial Review (As Applied Order)* (“Pocatello’s Opening Brief”), the prediction of injury in the beginning of the season (Steps 3 and 4) that produces the initial

forecast is based on a calculation of RISD based exclusively on the Director’s chosen baseline historical year of diversions (“BLY 2006/2008”) and a calculation of forecast supply that is intentionally one standard deviation below the supply that the Director actually predicts will be present (“Total Supply”). Pocatello’s Opening Brief at 14–16. The Director’s April Initial Forecast of both is found below:

	Predicted Natural Flow Supply	Predicted Storage Allocation	Minidoka Credit Adjustment	Total Supply	BLY 2006/2008	Shortfall
A&B	5,035	116,770		121,805	58,492	-
AFRD2	58,759	381,744	1,000	441,503	415,730	-
BID	89,254	214,392	5,130	308,776	250,977	-
Milner	7,772	80,310		88,082	46,332	-
Minidoka	131,984	333,683	8,370	474,037	362,884	-
NSCC	361,822	834,101	(7,750)	1,188,173	965,536	-
TFCC	799,407	238,552	(6,750)	1,031,209	1,045,382	14,200
					Total	14,200

[CM-DC-2010-001 R. 831](#).¹

In August, the Director recalculated the predicted RISD and material injury pursuant to Steps 6 and 8, referred to as the “revised shortfall prediction.” [CM-DC-2010-001 R. 953](#) (*Order Revising April 2013 Forecast Supply (Methodology Steps 6–8)* (“August Revised Forecast”), Aug. 27, 2013). Adjustments were made to the forecast supply based on the sum of the actual natural flow diversions that had occurred, the predicted natural flow diversions based on an analog year, and the actual storage allocation to date. *Id.* Adjustments to RISD were based on crop water need (“CWN”) for those months of the irrigation season that have already passed. *Id.* [at 950](#).² The Director’s August Revised Forecast is found below:

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.”

² As described in Pocatello’s Opening Brief, the Director’s monthly after-the-fact efficiencies, used to calculate CWN, are technically flawed. Pocatello’s Opening Brief at 9.

	Natural Flow Diverted through 8/7	Predicted Natural Flow 8/8 to 10/31	Natural Flow Adjustment	Preliminary Storage Allocation	Minidoka Credit Adjustment	Total Supply	RISD	Shortfall
A&B	0	0	0	107,790		107,790	64,796	0
AFRD2	23,006	0		383,334	1,000	407,340	461,373	54,000
BID	75,811	4,008	(3,714)	213,604	5,130	294,839	291,737	0
Milner	7,356	0	(3,011)	78,597		82,941	54,089	0
Minidoka	106,340	5,621		306,026	8,370	426,357	419,324	0
NSCC	270,139	54,431		808,260	(7,750)	1,125,080	1,117,188	0
TFCC	563,521	309,078		239,546	(6,750)	1,105,394	1,156,605	51,200
							Total	105,200

Id. at 953.

A comparison of the April Initial Forecast and August Revised Forecast shows that in the August recalculation total supply forecast was decreased for each entity except TFCC, RISD projection was increased, and consequently, the Director’s shortfall prediction was increased to 54,000 acre-feet to TFCC and 51,200 acre-feet to AFRD2.

At the end of the irrigation season, pursuant to Steps 9 and 10, the Director calculated the final season ending RISD for each entity. [CM-DC-2010-001 R. 1045](#) (*Final Order Establishing 2013 Reasonable Carryover (Methodology Step)*) (“Final 2013 Calculation”), Nov. 27, 2013). Notably, the shortfall numbers were eliminated from the Director’s August Revised Forecast. “These differences [were] due to changes in total supply and RISD that reflect diversion and ET data not available at the time the previous order was issued.” *Id.* at 1046. The Director’s final 2013 calculations are found below:

Entity	Natural Flow Diverted through 10/31	Natural Flow Adjustment	Preliminary Storage Allocation	In-Season Storage Adjustment	Total Supply	RISD	Shortfall
A&B	-	-	107,791	9,470	117,261	63,972	-
AFRD2	23,066	(2,633)	383,334	8,300	412,067	403,754	-
BID	82,954	(3,714)	213,604	8,555	301,400	293,518	-
Milner	4,418	(3,011)	78,597	3,888	83,891	50,228	-
Minidoka	117,363	-	306,026	8,370	431,759	420,257	-
NSCC	332,931	-	808,260	15,750	1,156,941	1,005,718	-
TFCC	884,777	-	239,546	3,700	1,128,023	1,056,907	-

Id. at 1047.

As is clear from the table above, at the end of the season there was no injury to any of the SWC members (*see* “Shortfall” column). As compared to the August Revised Forecast, total supply (*i.e.*, the amount actually diverted) for each entity increased and RISD decreased for every entity except Burley Irrigation District (BID) and Minidoka Irrigation District, and drastically decreased in the case of TFCC and AFRD2. The shortfall predicted in August was erased because the “Total Supply” column for each entity exceeded the RISD column in the Final 2013 Calculation. If the Idaho Ground Water Appropriators, Inc.’s mitigation water is subtracted from the total supply for TFCC and AFRD2, the “Total Supply” for each entity still exceeds the RISD.³ Therefore, TFCC and AFRD2 had enough water to meet RISD and were not injured in 2013 based on the Director’s end of season calculation, even if mitigation water is excluded.

The drastic differences in the Director’s three calculations of injury throughout the 2013 season (the April Initial Forecast, August Revised Forecast, and Final 2013 Calculation) can be explained by examining how the Methodology Order functions. In short, the Director initially predicted a shortage of 14,200 acre-feet of water in April , which was increased to over 100,000 acre-feet in August, and in November, it was determined that SWC had enough water to meet RISD, and the Director found no injury. The injury prediction increased between the April Initial Forecast and the August Revised Forecast in part because the months of May and June 2013 were unexpectedly dry, resulting in an increase in the amount of water necessary to raise crops (RISD) and a decrease in the forecast supply. However, the inaccuracy of the Director’s predictions of injury are compounded by errors in the Methodology itself. As explained by

³ Attachment A to the Final 2013 Calculation explains the adjustments made to the final 2013 numbers—the “Total Supply” numbers include the amount of mitigation water the Idaho Ground Water Appropriators, Inc. secured for the SWC for the 2013 irrigation season—7,300 to AFRD2 and 6,900 to TFCC—among other adjustments. [CM-DC-2010-001 R. 1051-52](#).

Pocatello’s Opening Brief, the Methodology Order does not take into consideration crop water need and efficiencies in the prediction of RISD until halfway through the irrigation season. The Director applies these limitations to SWC’s need (RISD) for the first time about half way through the irrigation season. [CM-DC-2010-001 R. 599–600](#). This results in initial RISD being based on historical diversions alone, without consideration of crop water needs.

Further, the way crop water need and “project efficiencies” is calculated pursuant to Steps 6 through 8 is technically flawed and results in dramatic swings in computed diversion demands. [CM-DC-2010-001 R. 211](#). The use of monthly project efficiencies—calculated by dividing crop irrigation demand by the volume of water diverted—does not work on a monthly basis because it does not take into account the amount of water diverted that was not immediately consumed and instead went into soil moisture. *Id.* at 210. Therefore, even “modest differences in CIR translate into substantial differences in diversion requirements at the beginning and end of the irrigation season when the project efficiencies determined by IDWR are low.” *Id.* at 211.

III. THE DIRECTOR CONSIDERED AND DENIED SWC’S REQUEST FOR RECALCULATION

In May 2013, the SWC requested the Director recalculate injury based on the fact that the Director failed to consider additional information available in May 2013 relevant to the forecast supply: (1) the Water District 01 Water Report, and (2) TFCC’s “predictive tool” for estimating available natural flow. [CM-DC-2010-001 R. 862–63](#).

Contrary to the SWC’s representations, the Director did consider the May 2013 Water District 01 Water Report. [CM-DC-2010-001 R. 889–90](#). The Director found that the Water Report contained information consistent with that relied upon by the Director in the initial April forecast—that American Falls Reservoir was likely to fill, but was not full yet, and that while the

Water District 01 Water Report “provides a broad overview of fill possibilities depending on weather patterns,” it did not provide any information that would cause the Director to alter his forecast. *Id.* at 890.

Further, the Director properly declined to use TFCC’s predictive tool in projecting the 2013 irrigation season because it was not submitted until May 1, 2013, and because the SWC “failed to provide the Department information necessary to be able to evaluate TFCC’s predictive tool.” *Id.* Further, the Director noted that even if TFCC’s predictive tool was used it resulted in a difference of 3,726 acre-feet of predicted natural flow. *Id.* Therefore the Director’s decision to not utilize TFCC’s predictive tool and not recalculate injury in May had a reasoned basis, is supported by the law and facts, and was not arbitrary and capricious or an abuse of his discretion. *Am. Lung Assoc. of Idaho/Nevada v. Dep’t of Agric.*, 142 Idaho 544, 547, 130 P.3d 1082, 1085 (2006); *Galli v. Idaho County*, 146 Idaho 155, 158, 191 P.3d 233, 236 (2008).

IV. CONCLUSION

Contrary to the allegations of its opening brief, the SWC was not injured in 2013. In 2013—admittedly a dry year—the SWC still received enough water to meet the Director’s determination of RISD, and received mitigation water to boot. Contrary to the picture of inequity drawn by SWC in their opening brief, administration in 2013 was not to their detriment, and in fact highlights the errors of the Methodology Order to over predict injury and under-predict supply, to the detriment of juniors. Further, the Director considered the information submitted during the irrigation season from the SWC and determined that recalculation of injury was not appropriate. The Court should reject SWC’ appeal of the As Applied Orders on the above-argued grounds.

Respectfully submitted, this 14th day of July, 2014.

CITY OF POCATELLO ATTORNEY'S OFFICE
Attorneys for the City of Pocatello

By 
A. Dean Tranmer

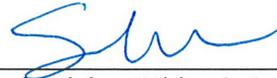
WHITE & JANKOWSKI, LLP
Attorneys for the City of Pocatello

By 
Sarah A. Klahn

By 
Mitra M. Pemberton

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2014, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Response Brief on Judicial Review (As Applied Order)** in SRBA Case No. CV-2010-382, Gooding County upon the following by the method indicated below:



Sarah Klahn, White & Jankowski, LLP

Julie Murphy, Deputy Clerk SRBA District Court 253 3rd Ave North P.O. Box 2707 Twin Falls ID 83303-2707	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile 208-736-2121, Phone 208-736-3011 <input type="checkbox"/> Email
Gary Spackman, Director IDWR P.O. Box 83720 Boise ID 83720-0098 deborah.gibson@idwr.idaho.gov	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile 208-287-6700, Phone 208-287-4942 <input checked="" type="checkbox"/> Email
Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson 195 River Vista Place Ste 204 Twin Falls ID 83301-3029 tlt@idahowaters.com pla@idahowaters.com jf@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile 208-735-2444 <input checked="" type="checkbox"/> Email
W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley ID 83318 wkf@pmt.org	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile 208-878-2548 <input checked="" type="checkbox"/> Email
Garrick L. Baxter Deputy Attorneys General – IDWR P.O. Box 83720 Boise ID 83720-0098 garrick.baxter@idwr.idaho.gov kimi.white@idwr.idaho.gov	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile 208-287-6700 <input checked="" type="checkbox"/> Email
Randall C. Budge Thomas J. Budge Racine Olson Nye Budge & Bailey 201 E Center St / PO Box 1391 Pocatello ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net bjh@racinelaw.net	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile 208-232-6109 <input checked="" type="checkbox"/> Email
Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello ID 83201 dtranmer@pocatello.us	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile 208-234-6297 <input checked="" type="checkbox"/> Email