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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-
CITY OF POCATELLO,	)	384, 2010-387, 2010-388, and Twin
	)	Falls County Cases CV-2010-3403,
Petitioner,	)	2010-5520, 2010-5946, 2012-2096,
	)	2013-2305, 2013-4417, and Lincoln
vs.	)	County Case CV-2013-155)
)	
TWIN FALLS CANAL COMPANY, NORTH)	
SIDE CANAL COMPANY, A&B IRRIGATION	)	CITY OF POCATELLO’S
DISTRICT, AMERICAN FALLS RESERVOIR	)	RESPONSE BRIEF ON JUDICIAL
DISTRICT #2, BURLEY IRRIGATION	)	REVIEW (METHODOLOGY
DISTRICT, MILNER IRRIGATION DISTRICT,	)	ORDER)
and MINIDOKA IRRIGATION DISTRICT,)	
)	
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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INTRODUCTION

The Surface Water Coalition (“SWC” or “Coalition”) has raised a myriad of complaints with the June 23, 2010 *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). [CM-DC-2010-001 R. 564](#).¹ As is clear from *City of Pocatello’s Opening Brief on Judicial Review (Methodology Order)* (“Pocatello’s Opening Brief”), the City of Pocatello (“City” or “Pocatello”) is no defender of the Methodology Order—the City objects to the Methodology Order’s calculation of, *inter alia*, RISD (reasonable in-season demand), forecast available supply, and its failure to properly consider reasonable efficiencies and crop water needs. Pocatello’s Opening Brief at 11–22. As explained by Pocatello’s Opening Brief, the Methodology Order’s failure lies in the Director’s decision to ignore the direction of the Hearing Officer to consider actual crop water need and reasonable efficiencies under average, rather than dry conditions. However, in considering remand instructions to the Idaho Department of Water Resources (“Department”) in response to each parties’ objections, a review of the law of the case is necessary, in particular what this Court and the Idaho Supreme Court have said about the requirements of the Director’s injury methodology.

The decisions in *AFRD#2*² and *SWC I*,³ have given the Department guidance on how to craft a methodology for predicting injury that meets the requirements of Idaho law. As explained below, the Court has previously considered the timing complaints of the SWC, and put forth a process for the Department to use in administering this delivery call. The Court has also previously considered and rejected the SWC’s desire for an early season guarantee that the SWC

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 *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 154 P.3d 433 (2007).

³ *In Re Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irrigation Dist.*, 155 Idaho 640, 315 P.3d 828 (2013).

will have more than enough water to meet its needs, regardless of actual need. The SWC's complaints with the methodology ignore the law of the case in this matter, and even contradict the Coalition's positions before the Department.

I. CANAL COMPANIES ARE LIMITED TO CALLING FOR WATER THAT IS NECESSARY FOR IRRIGATION IN AN AVERAGE YEAR, UNIQUE TO EACH ENTITIES' WATER RIGHTS AND NEEDS.

This case is on its second appeal after the Hearing Officer, Director, this District Court, and the Idaho Supreme Court all upheld the basic principle that a determination of material injury must examine a senior's needs, and not simply the senior's decreed amounts. *See, e.g.,* Pocatello's Opening Brief § IV.B.5 (discussing law of the case). The SWC's arguments contending that the Director must examine the senior's needs in a manner contrary to the principles embodied in the law of this case are in error.

As explained in Part II, below, the only injury methodology that satisfies all of the SWC's complaints in this matter is curtailment of all junior ground water rights until the SWC entities receive their full decreed amounts. This sort of strict shut and fasten administration was rejected by the Idaho Supreme Court in *AFRD#2*, confirmed by *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011), and recently reaffirmed in *SWC I*. The doctrine of beneficial use precludes such a result.

While there may be some open questions of law in water rights administration, one issue that has been resolved without doubt is that a senior is only able to call for that amount of water necessary for beneficial use. "The concept that beneficial use acts as a measure and limit upon the extent of a water right is a consistent theme in Idaho water law." *SWC I*, 155 Idaho 640, 315 P.3d at 838. "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.” *AFRD#2*, 143 Idaho at 880, 154 P.3d at 451.⁴

The Idaho Supreme Court affirmed the Director’s approach of assessing the SWC entities’ irrigation needs, stating that “[t]he Director may . . . employ a baseline methodology for management of water resources and as a starting point in administration proceedings.” *SWC I*, 155 Idaho 640, 315 P.3d at 838. “The prior appropriation doctrine is comprised of two bedrock principles—that the first appropriator in time is the first in right and that water must be placed to a beneficial use.” *Id.* The District Court had affirmed the same concept:

senior right holders are authorized to divert and store up to the full decreed or licensed quantities of their storage rights, but in times of shortage juniors will only be regulated or required to provide mitigation subject to the material injury factors set forth in CMR 042. . . . pursuant to these factors a finding of material injury requires more than shortfalls to the decreed or licensed quantity of the senior right.”

[2008-551 R. 10100](#). “The concept that beneficial use acts as a measure and limit upon the extent of a water right is a consistent theme in Idaho water law.” *SWC I*, 155 Idaho 640, 315 P.3d at 838.

The Hearing Officer, recognizing this principle, determined in 2008 that any projection of material injury must be based on the SWC’s water needs in an average year, and that a proper need analysis must consider certain factors, including, *inter alia*, cropping changes, soil conditions, and changes in irrigation practices and irrigated acreage. *See* Pocatello’s Opening Brief at 13–14. As highlighted in Pocatello’s Opening Brief, this is the real error with the

⁴ “At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho.” *Id.*

Methodology—that it doesn’t examine the SWC’s needs in predicting RISD, but relies instead only on historical diversions.

A. Supplemental ground water rights must be considered.

Specifically, in administering a delivery call, “the Director ‘has the duty and authority’ to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right.” *AFRD#2*, 143 Idaho at 876, 154 P.3d at 447. Indeed, “[i]f this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.” *Id.*

The Methodology Order’s consideration of acres that the SWC is not irrigating—including those irrigated by other, supplemental ground water acres—is consistent with, and indeed, required by, the doctrine of beneficial use. If acreage under the SWC’s decreed area is receiving water to grow crops from other water rights, the SWC cannot call for water to irrigate those same acres, no matter who holds the supplemental rights—to find otherwise would directly conflict with the Court’s decisions in *AFRD#2* and *SWC I*.

In the initial delivery call, the Director requested information regarding supplemental ground water uses within the SWC member service areas. In his May 2, 2005 Amended Order, the Director found that

an unknown number of landowners in the member irrigation districts and shareholders in the member canal companies hold supplemental ground water rights. Because the members of the Coalition did not identify landowners and shareholders, or the places of use within their boundaries, that receive water from the Coalition members and that also can be supplied ground water under supplemental rights in a timely manner the use of supplemental ground water rights can not be presently assessed. The Director will review and consider all of the additional information submitted . . . and if warranted, issue an amended order in this matter.

[2008-551 R. 1382](#) (emphasis added).

Contrary to the SWC’s representations, the Director did not reject consideration of such information, and is not precluded from considering supplemental ground water use on the SWC’s lands. By the SWC’s own reporting, over 48,000 acres of Coalition land is irrigated by supplemental ground water rights. [2008-551 R. 5130–31](#); [2008-551 Exhibit 3029](#). The Director cannot ignore an additional water supply that is available to meet the irrigation needs of a significant number of the SWC’s acres—in other words, if beneficial use is being met by a separate supply on acres that the SWC is claiming injury to, the beneficial use doctrine requires that the Director must consider this supply.

B. Initial RISD projection overestimates rather than underestimates need.

The SWC claims that “[t]he Methodology Order’s baseline year [(“BLY”)] underestimates the Coalition’s water use needs.” *Surface Water Coalition’s Joint Opening Brief (Methodology Appeal)* (“SWC’s Opening Brief”) at 19. In particular, the SWC claims that the Methodology Order underestimates need because the Director must use more recent dry year data to define RISD—in particular, they request the use of 2012 and 2013 data.⁵ SWC’s Opening Brief at 21.

Currently, the Methodology Order bases RISD at the beginning of the season on historical diversions from a BLY that represents a year(s) of above-average diversions, “of above average temperatures and ET, and below average precipitation.” [CM-DC-2010-001 R. 570](#). In other words, the Director has declared that historical diversions in a dry year will always define the SWC’s needs in projecting material injury—the SWC complains that the Director has chosen the wrong dry year.

⁵ The SWC provides no citation to the record as to where it proposed use of 2012 and 2013 as the baseline before the Department at any time in the proceeding. If not raised before the agency, this argument is waived. “The district court’s review is limited to those issues raised before the administrative tribunal and those the tribunal lacked the authority to decide.” *SWC I*, 155 Idaho 640, 315 P.3d at 836.

Neither the Department's current method, nor that suggested by the SWC, is permissible under the law of the case. The Hearing Officer prohibited use of a dry year in predicting the SWC's RISD. "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." [2008-551 R. 7096](#) (emphasis added). Further, the Hearing Officer ordered 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." *Id.* at [7099](#), [7092](#) (emphasis added).

Interestingly, the SWC argued before the Department in 2010 that the Director must examine historical diversions from 1990 to 2008 "to better represent the Coalition's 'average diversion' within that time period." [CM-DC-2010-001 R. 118](#) (emphasis added). The Coalition further argued that a "post-2000 data set does not accurately portray the Coalition's 'average diversions' or 'average demands.'" *Id.* Therefore, previously, it was the SWC's position that a BLY must be (1) an average year of diversions, and (2) the Director cannot consider diversions after the year 2000 as average because "this time period consists mostly of years of reduced water supplies." *Id.* This position conflicts with the SWC's position on appeal, which argues for a baseline year that had reduced supplies (2012 and 2013).

The SWC's change of position on how the Director should examine its water needs based on whatever data will provide more water is not surprising, and once again shows why use of historical diversions alone cannot be the basis of determining need. To wit, in 2013 the Director reviewed the SWC entities' end of the season diversions and found that Twin Falls Canal Company ("TFCC") in fact diverted more water than its end of season RISD—*i.e.*, TFCC diverted more than the amount of water it was authorized to call for under the Methodology.

[CM-DC-2010-001 R. 1046 n.1](#). Such diversion is without question allowed under Idaho law—a senior can divert up to the amounts in his decree—but it demonstrates that basing the initial prediction of injury on historical diversions alone fails at a fundamental level. Diversions do not have a direct correlation to need, even in a dry year, and do not necessarily represent an average year of need.

C. Pocatello agrees that the SWC entities should be treated individually in administration so that each entities’ actual water needs can be considered separately.

The SWC contends that the different member entities have different water use and demands. SWC’s Opening Brief at 20 (“Indeed, water use and demand varies by entity and year.”). The record in this matter is clear that each entity does indeed have very different water delivery systems and water rights. *See, e.g.,* [CM-DC-2010-001 R. 1369–74](#) (describing the water rights and systems of each entity). At the 2008 hearing, both the SWC and Pocatello presented expert testimony to establish the needs of the SWC entities based on a water budget analysis that examined each entities’ needs on an individual basis. [2008-551 Exhibit 3007a](#); [2008-551 Exhibit 8000, Vol. II, ch. 9](#). The Hearing Officer recognized this:

There are various factors that might be considered that cause difference in the efficiency of diversion and conveyance within the irrigation districts. For example, the North Side Canal Company is very long, requiring more time for water to move from the initial diversion to the end of the system. There will be differences in the amount of evaporation and potentially of conveyance losses. . . . This simply says that there is no precise formula that can be applied from one SWC member to another. Differences exist.

[2008-551 R. 7102](#).

Although the SWC has always proceeded in this matter as a monolith, the record establishes that the likelihood of a shortage varies dramatically between the entities. For example, the former Director evaluated the decreed storage amounts to which Minidoka Irrigation District (“MID”) and Burley Irrigation District (“BID”) are entitled, and concluded

that the chances of shortage in storage water to BID and MID are so small that these entities are not entitled to a reasonable carryover storage amount. [2008-551 R. 1384](#). Similarly, as the SWC admits, the Milner Irrigation District has its own ground water supply. SWC’s Opening Brief at 24. Although the SWC complains about the lack of carryover storage for these entities, it did not challenge this finding of fact in *SWC I*, which is now law of the case.

Rather than demonstrating arbitrariness on the part of the Director, the disparate circumstances of the individual SWC members demonstrate that on remand, the Director should consider future delivery calls on the basis of individual entities’ claims of shortage.

II. THE TIMING OF THE DIRECTOR’S INJURY DETERMINATION AND MITIGATION REQUIREMENTS ARE LIMITED BY PRACTICAL CONSIDERATIONS AND THE LAW OF THE CASE.

Much of the SWC’s Opening Brief is devoted to complaints about timing—generally, the SWC contends that the Methodology Order permits juniors to injure seniors without mitigation, and that mitigation water is not provided at the time it is needed. The SWC raised this issue in *SWC I* with the Director’s former methodology. *See* [2008-551 R. 10742](#), [10756](#), [10759](#) (“In addition to these fundamental flaws in the analysis, the Director’s implementation of the ‘minimum full supply’ concept resulted in no water provided to the Coalition during the irrigation seasons when injury was found.” “No mitigation water was delivered to TFCC at a time when it was needed during the irrigation season.”).

In response, the Idaho Supreme Court stated that in moving forward, the Department may implement an annual forecast and injury determination pursuant to the following steps, in the following order.

1. The Director may develop and implement a pre-season management plan for allocation of water resources that employs a baseline methodology, which methodology must comport in all respects with the requirements of Idaho’s prior appropriation doctrine, be made available in advance of the applicable

irrigation season, and be promptly updated to take into account changing conditions.

2. A senior right holder may initiate a delivery call based on allegations that specified provisions of the management plan will cause it material injury. The baseline serves as the focal point of such delivery call. The party making the call shall specify the respects in which the management plan results in injury to the party. While factual evidence supporting the plan may be considered along with other evidence in making a determination with regard to the call, the plan by itself shall have no determinative role.
3. Junior right holders affected by the delivery call may respond thereto, and shall bear the burden of proving by clear and convincing evidence that the call would be futile or is otherwise unfounded. A determination of the call shall be made by the Director in a timely and expeditious manner, based on the evidence in the record and the applicable presumptions and burdens of proof.

SWC I, 155 Idaho 640, 315 P.3d at 841 (emphasis added).

The SWC argues that the Director’s Methodology Order violates the steps outline above in *SWC I*. First, the SWC argues that the Director’s timing of the initial forecast of injury—which occurs once the United States Bureau of Reclamation (“USBR”) and United States Army Corps of Engineers’ (“USACE”) joint forecast (“Joint Forecast”) is released in April—is “arbitrary” and injurious to the SWC because by that time, the irrigation season has begun. *SWC’s* Opening Brief at 34–35. The SWC ignores the fact that the Director’s Methodology Order is the Department’s “preseason management plan” pursuant to step 1 of the Methodology Order, and that it is available before the irrigation season. Further, with respect to the timing of the initial forecast of injury, the former Director found that the Joint Forecast was the proper tool to predict natural flow:

The USBR and USACE jointly issue forecasts each year for unregulated inflow at the Heise Gage after February 1, for the period February 1 through July 31; after March 1, for the period March 1 through July 31; after April 1, for the period April 1 through July 31; and after May 1, for the period May 1 through July 31. Because the snowpack in the Upper Snake River Basin generally peaks in April, with most of the melting of the snowpack and resulting inflow occurring thereafter, **the later forecasts are generally more accurate than the earlier forecasts, based on comparisons of predicted inflow versus observed inflow,**

although at times the later forecasts are less accurate. The forecast issued soon after April 1 is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.

2008-551 R. 1379 (emphasis added). The Hearing Officer also found that “[t]he Heise Gage is a sufficiently reliable predictor of spring runoff to utilize early in the process” for the initial forecast of injury. 2008-551 R. 7071. Therefore, both the Hearing Officer and the former Director found that in order for the annual initial prediction of injury to consider the best available evidence, the prediction should occur after the Joint Forecast, when more information was available about the season. This finding of fact was not successfully challenged by the SWC in its appeal of *SWC I*, and accordingly this finding is binding on the parties. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007) (issue preclusion precludes relitigation of issues actually litigated and decided in prior litigation); *Swanson v. Swanson*, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000) (citation omitted) (the law of the case “must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal”).

The SWC’s argument that an earlier prediction of injury is possible based on the Director’s actions in 2014—which references evidence not in the record⁶—is therefore precluded. Further, the Director’s January 2014 letter merely states that “there is a 50% chance that no curtailment will be required”—in other words, all the Director could tell based on the information available in January was that there was a 50/50 chance of injury. Attachment A at 2 to SWC’s Opening Brief. Predicting injury based on a 50% likelihood is not technically valid, and further strengthens the practical argument that the Director should wait until the Joint Forecast to make a more reliable and accurate initial prediction of injury.

The SWC also takes issue with the timing of mitigation water pursuant to the Methodology Order. In *SWC I*, the Court addressed the timing of mitigation in the context of

⁶ See Attachment A to the SWC’s Opening Brief.

carryover storage, and made some general findings that are applicable to the timing of mitigation for in-season injury. In *SWC I*, the Court found that a “wait and see” approach to providing mitigation water—that is, waiting to determine the actual amount of material injury, before providing mitigation water—is acceptable, but found that the mitigation plan must also contain “contingency plans” that “identify prospective means by which water will be provided in order to prevent material injury.” *SWC I*, 155 Idaho 640, 315 P.3d at 842. This is exactly what the Methodology Order does—it makes a determination of injury early in the season, requires juniors to secure mitigation water, and provides that mitigation water at the time it is needed. Further, in Water District 01, the Water Master issues allocations to storage space holders after the reservoir system on the “Day of Allocation.” [CM-DC-2010-001 R. 599 n.15](#). Before this date, as a practical matter, storage water secured by juniors for mitigation cannot be provided to the SWC. *Id.* The Director has recognized this practicality in the Methodology Order by stating that he will not require mitigation water to be provided before the Day of Allocation. *Id.* at [584 n.9](#).

Putting aside the legal and practical problems with the SWC’s timing complaints described above, it is important to review what administration would look like if the Director administered the delivery call pursuant to the timing desired by the SWC. In short, the SWC wants:

- A determination of injury made as early as possible in the year—January—when the Department is missing key information about available supply and natural flow projections (SWC’s Opening Brief at 34–36); and
- That mitigation water be instantaneously provided for all predicted injury provided before storage allocations are completed, or immediate curtailment. *Id.* at 45–47.

The Coalition makes clear that the above-outlined process is the only way that the entities can have certainty at the beginning of the irrigation season. However, any process that would

meet the SWC's expectations would, based on the little information available to the Director early in the season, result in annual predictions of injury to the SWC and require delivery of water vastly in excess of what the entities actually require for irrigation. Thus, the SWC's Opening Brief is yet another rehashing of the position taken by the Coalition time and again since 2005—that the only way to administer this delivery call is to curtail juniors unless delivery of the Coalition's full decreed amounts can be guaranteed. The Hearing Officer rejected this exact administration protocol in his Recommendations:

Starting with this protocol the ground water users would know at the beginning of the water season that they would have to stand ready to provide mitigation up to the full extent of SWC's rights or face curtailment when a shortage attributable to them occurred. The surface water users would have maximum protection to their rights. The detriment is that the ground water users might well incur the expense of leasing water that is not needed. If they did not have lease agreements in place the acquisition of water might be exceptionally expensive or they might not be able to obtain replacement water and be curtailed. That would ruin them for the season and possibly fail to get water to the surface users in time of need. Additionally, it would not eliminate mid-season disputes when the surface water users claim they need every acre-foot of their rights and the ground water users maintain that there is no such need so the water would not be applied to a beneficial use.

[2008-551 R. 7091.](#)

CONCLUSION

For the reasons argued above, Pocatello respectfully requests the Court affirm the Director regarding the issues argued above as consistent with the additional arguments in the City's Opening Brief on Judicial Review (Methodology Order).

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

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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 (Methodology Order)** in **SRBA Case No. CV-2010-382, Gooding County** upon the following by the method indicated below:



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