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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,)
)
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 REPLY
BRIEF**

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

In *SWC I*,¹ the Idaho Supreme Court affirmed the district court’s determination that (1) the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) may make a prediction of material injury based on a “baseline demand” calculation, which may be less than a senior’s decreed amount; and (2) that the baseline demand calculation is subject to adjustment as conditions change during the season, and cannot be a fixed amount. [2008-551 R. 10081](#).² At issue before this Court now is whether the Director’s June 23, 2010 *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“2010 Methodology Order”) calculates baseline demand (also referred to as “annual diversion requirements”), and the accompanying prediction of injury, in compliance with the April 29, 2008 *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* (“Hearing Officer’s Recommendations”). [CM-DC-2010-001 R. 564](#), [2008-551 R. 7048](#).

Contrary to the Surface Water Coalition’s (“SWC”) allegations, the City of Pocatello (“City” or “Pocatello”) is not alleging that the SWC wastes water based on the record in this matter—the Hearing Officer’s Recommendations are clear that as of 2008, its diversions were reasonable. *Cf. Surface Water Coalition’s Joint Response Brief (Methodology Appeal)* (“SWC Response Brief”) at 1, 7–8. Similarly, the City is not asking the Director to ignore the priority prong of the prior appropriation doctrine. *Corrected Brief of Respondents Gary Spackman In His Capacity as Director of the Idaho Department of Water Resources, and the Idaho Department of Water Resources* (“IDWR Brief”) at 72. Pocatello is instead asking, *inter alia*,

¹ *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 (2013).

² 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.”

that this Court remand this matter to the Director to issue a Methodology Order that complies with the Hearing Officer’s determination that the initial and in-season predictions of injury must be based on annual diversion requirements necessary for beneficial use during an average year, and not historical diversions in a drier than average year. Simply put, it is law of the case that the SWC entities have the right to call for the amount of water necessary to meet average annual diversion requirements, consistent with Hearing Officer’s Recommendations.

II. STEPS 3 AND 4 OF THE 2010 METHODOLOGY ORDER ARE NOT CONSISTENT WITH THE HEARING OFFICER’S RECOMMENDATIONS BECAUSE THERE HAS BEEN NO MODIFICATION OF THE BASELINE YEAR TO ACCOUNT FOR ANNUAL DIVERSION REQUIREMENTS IN AN AVERAGE, RATHER THAN DRY, YEAR AT THE BEGINNING OF THE IRRIGATION SEASON.

A. The Hearing Officer rejected use of a baseline year of historical diversions alone—1995—because it had the potential to underestimate or overestimate annual diversion requirements.

As this Court is aware, the Hearing Officer’s Recommendations were the result of multi-year litigation between IDWR, the SWC, Idaho Ground Water Appropriators, Inc., the Bureau of Reclamation and Pocatello. At hearing in 2008, the HO was asked to examine the Director’s prior minimum full supply (“MFS”) methodology, and determine whether it complied with Idaho law, including whether the methodology properly balanced the priority of right and beneficial use elements of the prior appropriation doctrine. [2008-551 R. 7090–95](#). Under the Director’s prior MFS methodology, at the beginning of the irrigation season for purposes of predicting injury the Director identified a year of historical diversions—1995—and equated the SWC’s current needs to each entities’ 1995 diversions. *Id.* at 7066. The Director chose 1995 because it was the most recent year that provided “full headgate deliveries”: a year in which “the combination of natural flow and storage water provided a full headgate of water.” *Id.* at 7113. The HO found that the Director’s approach to administration by “project[ing] the amount of

water that is necessary for the members of SWC to fully meet crop needs within the licensed or decreed amounts is an acceptable approach to conjunctive management, but there have been applications of the concept of a minimum full supply that should be modified if the use of the protocol is to be retained.” *Id. at 7091* (emphasis added).

The Hearing Officer rejected the Director’s use of 1995 because it not only had the potential to underestimate injury (1995 was “a wetter than average year . . . underestimating the material injury likely to occur” *Id. at 7092*), but also because the Director had not considered whether the SWC actually needed all the water it diverted in 1995:

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. (emphasis added). In other words, the Hearing Officer rejected the use of diversions from 1995 alone because that would likely underestimate need, but also because the selection of a year of historical diversions with no further analysis did not get at “whether all that water [diverted in 1995] was applied to a beneficial use.” *Id.* The Hearing Officer confirmed that defining the SWC’s demand as being “higher than the amount necessary” “over predict[s] material injury. . . . [and] would not encourage reasonable conservation as required in CM Rule 42.01.” *Id. at 7095* (emphasis added) (explaining rejection of use of decreed amounts to define need).

Accordingly, the approach of using of historical diversions alone was rejected because the Director had conducted no analysis to determine average annual diversion requirements. To wit:

If 1995 could be considered an average irrigation year in all the factors to be considered in establishing a baseline average it would be acceptable in the absence of compelling reasons to accept either the ground water users’ conclusions or SWC’s conclusions. The isolation of a year when there are known facts as to the supply and use may be reasonable if it is subjected to the type of analysis applied by both the surface and ground water users. However, focusing on a single year can only be a starting point, not sufficient without material

adjustments. Those adjustments are reflected in the analyses of the ground water users and the surface water users in attempting to establish annual diversion requirements.

Id. at 7098–99 (emphasis added). As explained in Part II.B below, it is clear that the Hearing Officer was ordering the Director to analyze the amount of water necessary to meet the SWC’s beneficial use needs (“annual diversion requirements”) beyond looking at historical diversions—indeed, even the SWC argued before the Director in the 2010 proceedings that “[c]learly, the Hearing Officer did not recommend selecting a single year as a BLY without subjecting that year to further review, including analyzing monthly precipitation, temperature, and available surface water supply.” [CM-DC-2010-001 R. 119](#). Accordingly, while the Director may base part of his analysis of annual diversion requirements on historical diversions, any such analysis must take into account the factors relevant to need, as identified by the Hearing Officer’s Recommendations (“HO Factors”).³

B. The Hearing Officer directed the Department to consider the HO Factors in the initial determination of injury at the beginning of the irrigation season to account for the SWC’s annual irrigation requirements.

IDWR argues that the Hearing Officer rejected the use of a water budget—this is not correct. IDWR Brief at 72–74. While the Hearing Officer did not adopt either party’s water budget analysis and recommended that the ground water users’ budget not be used, the Hearing Officer clearly called for the analysis of annual diversion requirements to be along the lines of a water budget, considering the HO Factors—for example, he ordered that “[c]alculation of a water budget should be based on acres, not shares.” [2008-551 R. 7100](#) (emphasis added).

While the Hearing Officer declined to adopt either party’s proposed water budget, it is clear that he was assigning that task to the Department. Instead of taking the task on, the Department has refused to do any substantive analysis of annual diversion requirements—in

³ The HO Factors are discussed in detail in Pocatello’s Opening Brief at pages 13–14.

other words, it continues to use historical diversions alone (from a dry, rather than wet year) in defining the SWC's need at the beginning of the season. The Hearing Officer also made clear that the initial prediction of material injury must be modified to include an analysis of annual diversion requirements that considered the HO Factors, *i.e.*, a water budget. The Hearing Officer held that The Director "must modify the minimum full supply analysis as a method of establishing a baseline of predicted water need for projecting material injury." *Id.* at 7098 (emphasis added). Further, such modifications must be "with the benefit of the extended information and analysis offered by the parties and available to its own staff." *Id.* (emphasis added). The Department's adjustments to the injury determination pursuant to Steps 6 and 7, which occur "approximately halfway through the irrigation season," are the Director's attempt to bring the overly pessimistic preseason injury prediction in line with the realities of the conditions in a particular year. [CM-DC-2010-001 R. 599–600](#). Putting aside Pocatello's technical objections to those calculations (*see* Part IV below), the central problem with this approach is the timing of these adjustments.

Simply put, because the 2010 Methodology Order requires that juniors secure the amount of water predicted pursuant to Steps 3 and 4 of the 2010 Methodology Order, the Director's intentional over prediction of injury at the beginning of the irrigation season is injurious to junior water users. The Idaho Supreme Court has made it clear that juniors must secure the amount of water necessary to mitigate injury to seniors—the Directors' decision to require juniors to secure more water than he reasonably thinks is necessary to prevent injury is in violation of the doctrine of beneficial use, and should be rejected.

C. The Hearing Officer expressly considered balancing the principles of prior appropriation and concluded that use of an average year in predicting annual diversion requirements was the correct approach to do so.

The Department argues that in order to properly allocate risks and burdens in a delivery call, its necessary to over predict need—by defining need as diversions in a dry year—and to under predict supply. IDWR Brief at 2. This is in clear conflict with the standard imposed by the Hearing Officer and Idaho law.

First, the Hearing Officer resolved this exact issue in the Recommendations entered after the 2008 hearing. In considering how to balance the priority of right with the doctrine of beneficial use to administer delivery calls consistent with Idaho law, the Hearing Officer found that

[p]redictions 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. . . . [which] retains the value of having senior rights while providing some level of protection against unnecessary curtailment.

2008-551 R. 7096 (emphasis added). Thus, by (1) basing the initial prediction of injury on an average year of need (rather than a wet or dry year), and (2) adjusting that prediction as the season progresses based on “particular water conditions,” the Hearing Officer concluded that the Director is able to protect the value of the SWC’s senior priority date while guarding against curtailment above and beyond what is necessary for beneficial use—in other words, balancing the two prongs of the priority doctrine, “first in time, first in right,” and “beneficial use.” *Cf.* IDWR Brief at 5–8.

Second, the burdens and evidentiary standards that apply in a delivery call are now clear, and these standards operate independently to allocate the risks and burdens of water management. It is undisputed that their purpose is to shift the risk to junior appropriators:

the burden is not on the senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed

water right, but there certainly may be some post-adjudication factors which are relevant to determination of how much water is actually needed.

Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res. (“AFRD#2”), 143 Idaho 862, 878, 154 P.3d 433, 449 (Idaho 2007).⁴ Further, juniors “bear the burden of proving by clear and convincing evidence that [a] call would be futile or is otherwise unfounded.” *Id.* at 841. In order to meet this burden, it requires juniors to spend significant amounts of time and money on delivery calls such as the SWC delivery call, employing attorneys and expert witnesses to investigate the seniors’ water rights, prepare evidence regarding beneficial use needs, and defenses to a delivery call, among many other issues.

Finally, in evaluating a delivery call, the Director must use the “best available science” to predict injury in the most reliable manner possible. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 813–14, 252 P.3d 71, 89, 94–95 (2011). Under the 2010 Methodology Order, the Director does not use the best available evidence, but instead uses an intentionally conservative approach to predicting material injury at the beginning of the irrigation season to effectively stack the deck against juniors. Therefore juniors bear not only a legal burden, but a factual burden as well: they must prove they can provide more mitigation water than the Director actually thinks is necessary to meet SWC’s annual irrigation requirements. In other words, in predicting available supply for the upcoming season, the Director does not use the amount of water he actually thinks will be available, but uses instead, an amount “one standard error below the regression line, which underestimates the available supply.” [CM-DC-2010-001 R. 582](#) (emphasis added). Further, the Director uses an above-average year(s) of historical diversions to define the SWC’s annual irrigation requirements. *Id.* at 570. Using water injury estimates that are intentionally inflated does not meet the best available evidence standard. *Clear Springs*

⁴ The Hearing Officer had the benefit of *AFRD#2* when he issued his Recommendations; accordingly, his decision considered the law announced therein. [2008-551 R. 7072](#).

Foods, 150 Idaho at 813–14, 252 P.3d at 94–95. The Department claims that it is balancing the principles of priority of right and beneficial use, yet admits that its Methodology “favors seniors,” overestimates need, and underestimates supply. IDWR Brief at 18–21. The Director may resolve certain issues within the scope of his discretion, as defined by *AFRD#2* and *Clear Springs*. *AFRD#2*, 143 Idaho at 880, 154 P.3d at 451; *Clear Springs Foods*, 150 Idaho at 810, 252 P.3d at 91. However, it is not within his discretion to intentionally skew the prediction of injury by using a less precise method of evaluating need than is available to him.

Rather than apply the Hearing Officer’s requirement that the Director use an “average” year of need, the Department argues that this requirement is not practical because average years in practice are “rare.” IDWR Brief at 78. Therefore, instead of using the best available scientific methods as required by Idaho law, and applying the average year standard required by the Hearing Officer, the Director choose an above average dry baseline year to predict need at the beginning of the season, and intentionally deflated the prediction of supply, because he concluded that “it is not possible to predict with certainty the amount of actual material injury, or the amount of mitigation that will be necessary for actual beneficial use.” *Id.* at 17. The Director’s Methodology overestimates injury, to the detriment of juniors, and the Director’s desire for “predictability” does not outweigh the Hearing Officer’s clear instructions to develop a methodology that utilizes average annual diversion requirements at the beginning of the season. *Cf.* IDWR Brief at 20.

III. THE HEARING OFFICER’S RECOMMENDATIONS ARE BINDING AS LAW OF THE CASE.

While both the SWC and IDWR argue that the Director is bound by the Hearing Officer’s Recommendations (*see, e.g.*, IDWR Brief at 52–53, SWC Response Brief at 7), both have taken a contrary position regarding the Hearing Officer’s findings on the issue of the initial

determination of injury. The Department explains that Director Spackman chose to ignore the Hearing Officer's determination that an "average" year be used in predicting baseline demand at the beginning of the season because, after he considered the Hearing Officer's Recommendations as a whole, he "discussed [the Hearing Officer's] concerns in the Methodology Order and determined they raised a question of risk allocation, and that using a strictly "average" year as the BLY would not sufficiently protect the seniority of the Coalition's water rights." IDWR Brief at 79. The SWC further argues that the Director is not bound by the Hearing Officer's findings unless those findings were expressly affirmed by the Idaho Supreme Court. SWC Response Brief at 14.

A quick review of the procedural history in this matter shows that the Hearing Officer's Recommendations are binding as the law of the case. The Hearing Officer's Recommendations were adopted by the Director in the September 5, 2008 *Final Order Regarding the Surface Water Coalition Delivery Call* ("Final Order"): "Unless discussed, the recommendations of the Hearing Officer are accepted. If an exception is not discussed herein, the Conclusions of Law entered previously by the Director and recommendations of the Hearing Officer govern." [2008-551 R. 7387](#). On appeal the district court affirmed the Director's Final Order on all grounds except three issues unrelated to the issue of baseline year. [2008-551 R. 10076, 10107](#) ("[T]he actions taken by the Director in this matter are affirmed in part and reversed in part."). The SWC appealed the district court's affirmance of the Director's baseline along with two unrelated issues, and the Idaho Supreme Court affirmed the district court's order. *SWC I*, 155 Idaho 640, 315 P.3d at 844.

The law of the case doctrine holds that "[t]he decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same

litigation. “[L]ike stare decisis it protects against relitigation of settled issues” *Swanson v. Swanson*, 134 Idaho 512, 516, 5 P.3d 973, 977 (2000) (citation omitted). “The law-of-the-case doctrine also prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal, and the challenging of factual findings that were affirmed in the earlier appeal.” *Rockefeller v. Grabow*, 139 Idaho 538, 543, 82 P.3d 450, 455 (Idaho 2003) (internal citation omitted).

The Director had the opportunity, in reviewing the Hearing Officer’s Recommendations, to reject the findings regarding modifications to the initial baseline demand determination and regarding the use of an “average” year, but he did not. Similarly, the SWC had the opportunity to appeal the Hearing Officer’s Recommendations, and did not. One of the SWC’s issues on appeal in *SWC I*—whether the Director could predict injury based on need, rather than decreed amount—questioned the Director’s methodology generally, but did not question any of the Hearing Officer’s specific factors that he required be applied to the Director’s initial baseline methodology. No other party appealed the District Court’s decision. “Therefore, since the issue was not raised at the trial court level nor at the Court of Appeals on the first appeal, it will not be considered by this Court.” *Bouten Const. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 762, 992 P.2d 751, 757 (Idaho 1999).

All parties to this litigation are bound by the Hearing Officer’s Recommendations, even those parts that they find less than favorable to their interests. Accordingly, this Court should remand this matter to the Director to issue an order consistent with the Hearing Officer’s Recommendations.

IV. POCATELLO’S DISAGREEMENT WITH THE USE OF EFFICIENCIES IN THE 2010 METHODOLOGY ORDER RAISES ISSUES NOT PREVIOUSLY ARGUED IN THIS LITIGATION, WHICH POCATELLO SHOULD HAVE BEEN ALLOWED TO PRESENT AT HEARING.

Pocatello has appealed the Director’s determination of “Project Efficiency” in the 2010 Methodology Order. As explained in *Pocatello’s Opening Brief on Judicial Review (Methodology Order)* (“Pocatello’s Opening Brief”), the Director’s 2010 Methodology does not consider the SWC’s water delivery and irrigation application efficiencies in its prediction of injury at the beginning of the irrigation season. Pocatello’s Opening Brief at § IV.B. Efficiencies are not considered in evaluating the SWC’s water needs until Step 6 of the 2010 Methodology Order, which is applied approximately halfway through the irrigation season. Step 6 requires that

Approximately halfway through the irrigation season, but following the [Day of Allocation], the Director will, for each member of the SWC: (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.

This information will be used to recalculate RISD and adjust the projected DS RISD will be calculated utilizing the project efficiency, baseline demand, and the cumulative actual crop water need determined up to that point in the irrigation season. The Director will then issue revised RISD and DS values.

[CM-DC-2010-001 R. 599–600](#). The 2010 Methodology Order explains that the mid-season adjustment attempts to calculate the actual crop water need (“CWN”) based on current climate data, and then divides CWN by the Director’s calculated “project efficiency” to compute an adjusted RISD. For example, in 2010, CWN for each month was calculated and then divided by project efficiency percentage for each month, resulting in a volume of water. Then each monthly volume of water is added up to get a total volume, which is then compared to the SWC’s diversions to date. So RISD, which is initially based on historical diversions, is adjusted mid-season based on crop demand divided by project efficiency. This calculation is intended to

provide an updated estimate of the diversions necessary to provide a full⁵ water supply to the SWC member entities. While this is an appropriate conceptual approach, the Department's implementation is flawed because it does not consider all of the factors contained in the Hearing Officer's Recommendations.

The SWC contends that Pocatello is attempting to re-litigate issues decided against the City in the previous litigation, and that Pocatello's complaints about the Director's mid-season analysis should be affirmed simply because the Director considered and rejected them. SWC Response Brief at 17. The issues Pocatello raised in the 2010 hearing differ from those raised at the 2008 hearing. At the 2008 hearing, the parties presented evidence of the SWC's diversion and application efficiencies. Pocatello's experts and the SWC's experts estimated on-farm efficiencies and conveyance losses in order to determine the amount of water that is needed at the river headgate to meet crop demands. [2008-551 R. Exhibit 3007A](#); [2008-551 R. Exhibit 8000, Vol. II](#). Pocatello argued that on-farm efficiency should be measured by "achievable farm efficiencies." The Hearing Officer ruled that efficiencies are to be considered in evaluating the SWC's water needs, but recommended that the standard be "reasonable" efficiencies, rather than "achievable," the latter of which was supported by Pocatello. [2008-551 R. 7103, 7097](#) ("Reasonableness, not achievable farm efficiency, is the standard in determining whether irrigators are wasting water.").

Pocatello is not re-arguing the "achievable farm efficiency" issue in this matter. At the 2010 hearing, Pocatello took issue with the Director's use of efficiencies on two general grounds: (1) first, that the Director's initial calculation of RISD at the beginning of the irrigation

⁵ Pocatello's Opening Brief described this calculation as involving an "infinite water supply." Pocatello's Opening Brief at 17. To the extent this phrasing was misinterpreted by the SWC in their Response Brief on page 18, Pocatello clarifies that this description was intended to mean that the Director assumes a full supply—in other words, that supply is not a constraint to consumptive use.

season does not account for whether reasonable efficiencies were used in the chosen baseline year,⁶ and (2) from a technical standpoint, the Director’s project efficiency calculation was in error and did not consider “reasonable” efficiencies as required by the Hearing Officer’s Recommendations. *See* [CM-DC-2010-001 R. 204–25](#). In other words, the Director does not include an evaluation of reasonable efficiencies when he calculates the initial RISD, and when he finally considers “project efficiencies” halfway through the irrigation season, he does so in a technically invalid manner.

An examination of the Director’s “project efficiency” concept is illustrative. Instead of determining reasonable efficiencies, the 2010 Methodology Order applies a “project efficiency”—an efficiency which is derived from historical diversions, and does not consider crop water need. [CM-DC-2010-001 R. 578](#). As explained above, the Director’s project efficiency is calculated by dividing crop irrigation demand by historical diversions. *Id.* Using after-the-fact project efficiencies in this manner essentially locks in the historical diversions as the yardstick for the water requirements of the SWC members, instead of considering efficiencies as part of the initial determination of RISD. IDWR’s project efficiency fails to incorporate a “reasonableness” evaluation as required by the Hearing Officer. As a result, the project efficiencies for some of the SWC members are too low, and result in over predicted shortages. [CM-DC-2010-001 R. 221](#).

The evidence in the record, as well as the Hearing Officer’s Recommendations, support considering reasonable conveyance losses and reasonable application efficiencies in calculating the SWC’s water demands. *See* [2008-551 R. 7102–03](#) (“Are the practices in place reasonable in conserving water or are the SWC members claiming and using more water than is necessary to

⁶ “[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).” [CM-DC-2010-001 R. 568–69](#).

develop healthy crops to full maturity utilizing the systems and practices in place.”). Indeed, the Director stated in the 2010 Methodology Order that “[d]uring periods of drought when junior ground water users are subject to curtailment, members of the SWC should exercise reasonable efficiencies in order to promote the optimum utilization of the State’s water resources.” [CM-DC-2010-001 R. 593](#) (emphasis added). Yet the Director’s “project efficiencies” analysis does not evaluate whether the SWC is using reasonable efficiencies in calculating injury, but instead defines efficiencies in a circular manner—efficiencies are set in stone by historical diversions, and as each year passes, the greater the historical diversions, the lower the computed efficiencies, no matter how inaccurate the calculation. Pocatello attempted to proffer the testimony of its expert on the HO Factors and the issue of reasonable efficiencies, and the Director would not permit testimony. As Applied Hearing Tr., May 25, 2010, [CM-DC-2010-001 R. 201:11–24](#). The Director similarly refused to admit an offer of proof regarding the testimony its expert would give on the issue. *Id.* at [202:24–203:16](#).

The Department’s complaints about the complexities of conducting a technical analysis of reasonable efficiencies do not hold water—the Department has proven itself capable of such evaluations in other delivery calls for large irrigation districts. The Department has technical expertise in this area—in the A&B delivery call, the Department did not simply review historical pumping by seniors to define water need. Instead, the Department evaluated whether A&B’s crop water requirements could be satisfied by the available water supply. *See generally* [CM-DC-2010-001 R. Exhibit 4000](#). The Department’s A&B evaluation of need was not based on historical diversions. Instead, it was based on whether the available supply was sufficient to meet crop demands, assuming that farmers would operate at reasonable on farm efficiencies. The Department’s decision to evaluate reasonable efficiencies in the A&B delivery call, and not

in the SWC delivery call, shows unwillingness by the Department to use the best available science and conduct a feasible technical analysis.

V. POCATELLO’S SUBSTANTIAL RIGHTS ARE PREJUDICED.

The SWC argues that Pocatello’s appeal of the As Applied Order⁷ should be denied “for the sole reason the city cannot show any substantial right has been prejudiced.” “Indeed, the Director did not order Pocatello to secure any mitigation water that year. Accordingly, Pocatello has no basis for its appeal on behalf of other ‘junior’ water users.” SWC Response Brief at 1 n.1. The SWC also argues that Pocatello has no right to appeal the 2010 Methodology Order because it strongly favors juniors. *Id.* at 2.

First, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). The SWC did not object at any time to Pocatello’s participation in the As Applied proceedings, including the hearing before the Director. Accordingly, the Court should find that this issue is waived and need not address it on the merits.

Second, Pocatello’s substantial rights have been prejudiced by the Director’s decisions in the As Applied Order. The Director’s annual application of the 2010 Methodology Order, including in 2010, impacts the way Pocatello must plan to use its water rights, particularly Pocatello’s junior ground water rights and storage right in Palisades Reservoir. Pursuant to the 2010 Methodology Order, injury is overestimated, and supply underestimated. Because of this increased chance of curtailment on an annual basis, Pocatello must plan for how it will operate its municipal supply system in the event of such a curtailment, and further restricts its ability to plan for the use, including potential leasing, of its Palisades water. The SWC has not contended

⁷ 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).

that Pocatello lacks a substantial interest in appealing the Methodology Order—Pocatello appealed the As Applied Order in part because it demonstrates the errors of the 2010 Methodology Order when applied in an irrigation season, and because the Director did not follow the 2010 Methodology Order to reach some of his conclusions. Pocatello has been in the curtailment zone in other years (*see* January 28, 2014 letter from the Director Spackman attached to the *Surface Water Coalition’s Joint Opening Brief (Methodology Appeal)* as Attachment A) and has an interest in a Methodology that is consistent with the law of the case and that is applied consistently, and therefore has a substantial interest in the determination of these appeals.

VI. POCATELLO WAS ENTITLED TO A FULL HEARING ON THE 2010 METHODOLOGY ORDER PURSUANT TO THE LAW OF THE CASE AND DUE PROCESS REQUIREMENTS.

When the Director adopted the Hearing Officer’s Recommendations in 2008, he determined to issue a separate order implementing a new methodology that complied with the Hearing Officer’s Recommendations. [2008-551 R. 7386](#) (“Because of the need for ongoing administration, the Director will issue a separate, final order before the end of 2008 detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover for the 2009 irrigation season. An opportunity for hearing on the order will be provided.”) (emphasis added). The change in office—from Director Tuthill to Director Spackman—delayed issuance of the Methodology Order until 2010. That does not change that the parties were entitled to a hearing under Idaho law and the law of the case.

Contrary to the SWC and IDWR’s position, Pocatello is not attempting to re-litigate its positions from the 2008 hearing. In the 2008 hearing, Pocatello presented a proposed water balance analysis. The Hearing Officer recommended that it not be adopted. In the 2010 hearing, Pocatello’s proposed evidence involved a very different issue—why the Director’s 2010

Methodology Order does not comply with the Hearing Officer’s Recommendations. Pocatello’s expert prepared a report to demonstrate the errors in the 2010 Methodology Order:

The BLY methodology described in the Modified Protocol is not appropriate for determining the initial water requirements of the SWC members because it does not contain the modifications and adjustments that are necessary to determine the amount of water that is actually needed by the SWC Members Further, the BLY methodology is not consistent with the Hearing Officer’s mandate that it be based on an average year of need, subject to adjustment

[CM-DC-2010-001 R. 206.](#)

Sullivan’s report also demonstrated the technical problems with the way project efficiencies were calculated mid-season by the Director in the 2010 Methodology Order—an issue that was not litigated in 2008, because the Director had yet to announce how he would implement efficiencies in the new methodology. Pocatello is not rearguing its achievable system efficiencies analysis—Pocatello recognizes that this analysis was rejected by the Hearing Officer in favor of a “reasonable efficiencies” standard. [2008-551 R. 7103.](#) If the City had been permitted to put on its expert’s testimony, or even make an offer of proof, this distinction would be clearer in the record.

Finally, the SWC claims that Pocatello’s due process argument is estopped based on the City’s position before the district court in *SWC I* that the Director may not “hold additional hearings prior to the issuance of a final methodology order on remand.” SWC Response Brief at 20 (quoting [2008-551 R. 10588](#)). The SWC misrepresents Pocatello’s position in *SWC I*—there, Pocatello argued that no hearing should be held before the Director’s Methodology Order was issued, and that the question of injury should not be revisited in any future mitigation plan hearings. [2008-551 R. 10588.](#) The district court noted that the Director had already issued the Methodology Order without a hearing in April of 2010, and concluded that “this issue has been resolved by the proceedings on remand.” *Id.* Pocatello’s position in *SWC I* relied on the

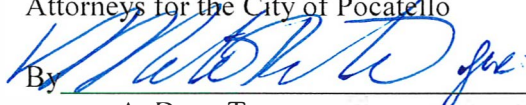
determination of the Director that a hearing would be held after the Methodology Order was issued. 2008-551 R. 7386 (“An opportunity for hearing on the order will be provided”). This determination was not limited in any manner, and was not appealed by any party. Accordingly, the Director’s determination in 2010 to strictly limit the scope of the Methodology and As Applied Hearings, and exclude Pocatello’s issues not previously litigated in 2008, was in error and violated due process.

VII. CONCLUSION

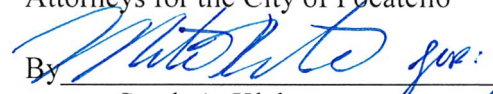
For the reasons explained herein, Pocatello respectfully asks the Court to remand this matter to the Director with instructions to the Director to issue a methodology that complies with the Hearing Officer’s Recommendations as described in Pocatello’s Opening Brief.

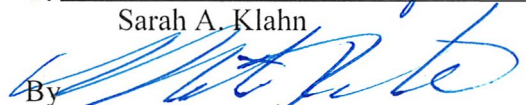
Respectfully submitted, this 4th day of August, 2014.

CITY OF POCATELLO ATTORNEY’S OFFICE
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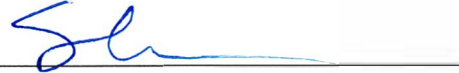
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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2014, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Reply Brief in SRBA Case No. CV-2010-382, Gooding County** upon the following by the method indicated below:



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