

**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.**

Petitioners,

vs.

CITY OF POCA TELLO,

Petitioners,

vs.

**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,**

Petitioners,

vs.

**GARY SPACKMAN, in his capacity as
Director of the Idaho Department of Water
Resources, and THE IDAHO DEPARTMENT
OF WATER RESOURCES,**

Respondents.

Case No. CV-2010-382

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

**SURFACE WATER COALITION'S JOINT RESPONSE BRIEF
(METHODOLOGY APPEAL)**

On Appeal from the Idaho Department of Water Resources

Honorable Eric Wildman, Presiding

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INTRODUCTION

The Idaho Ground Water Appropriators, Inc. (“IGWA”) and the City of Pocatello (“Pocatello”) (collectively the “Groundwater Users”), filed appeals challenging certain aspects of the Director’s Methodology Order.¹ *See generally, IGWA’s Opening Brief (“IGWA Br.”); City of Pocatello’s Opening Brief on Judicial Review (Methodology Order) (“Poc. Br.”)*. The Surface Water Coalition (“Coalition”) responds to those appeals as follows.

The Groundwater Users primarily dispute the order’s “baseline year” and “forecast supply” methods. They complain the Director’s initial predictions rely upon inaccurate methods and overestimate injury. Despite not being required to mitigate for injuries caused by their junior priority diversions, and not being curtailed as required by law, the Groundwater Users claim the methodology is inadequate as to their junior ground water right interests. Central to this argument is the Groundwater Users attempt to resurrect “waste” defenses that were previously rejected by both the Hearing Officer and the Director. While the Groundwater Users allege the Coalition did not beneficially use water diverted in 2006 and 2008, they can point to no facts in the record to support their claim. Just the opposite, the Hearing Officer and Director specifically found the Coalition members operate reasonable and efficient irrigation projects. R. Vol. 3 at 551 (“members of the SWC operate reasonably and without waste”); R. 7103 (“[m]embers of the SWC are employing reasonable conservation practices”). Accordingly, the Court should reject and dismiss any attempts to re-litigate “waste” defenses through this current appeal.

¹ Pocatello also filed an “as applied” brief in support of its appeal. The Court should deny Pocatello’s issues in that appeal for the sole reason the city cannot show any substantial right has been prejudiced. *See e.g., Hawkins v. Bonneville County Bd. of Comm’rs*, 151 Idaho 228, 232-33 (2011) (“The Board does not prejudice Hawkins’ substantial rights merely by incorrectly adjudicating someone else’s application for a variance”). Although Pocatello complains about the Director’s application of the Methodology Order in Steps 3 and 4 in 2010, the city cannot show that it was harmed or prejudiced in any way by those actions. 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. *Poc. As Applied Br.* at 7-8. IGWA did not file a separate “as applied” appeal.

Next, the Groundwater Users claim the Methodology Order fails to follow the guidance and factors recommended by the Hearing Officer. Contrary to this assertion, the Director did evaluate the recommended factors and expressly analyzed the Coalition members' irrigation practices, crop water needs, and project efficiencies. Although the Director erred in refusing to recognize and mitigate for increased injuries later in the irrigation season, he acknowledged and considered the Hearing Officer's recommended factors. R. Vol. 3 at 566-82.

In the end, the Groundwater Users' appeals are irrelevant based upon the process required by the Idaho Supreme Court in *A&B Irr. Dist. v. Spackman*, 315 P.3d 828 (2013). Although IGWA and Pocatello cling to the flawed approach that "caps" a senior's injury at the outset of the irrigation season, the Supreme Court clarified that ignoring in-season injury is unlawful. The Court stated that the Director's "initial" injury determination must be adjusted to account for changes in weather and water supply; hence the Groundwater Users' allegations are without merit.

Moreover, although the Methodology Order does not protect senior water rights as required by law, it certainly does not harm junior ground water rights as IGWA and Pocatello suggest. The Groundwater Users have failed to establish that the Methodology Order prejudices their rights in any way. See *Thompson Mining Co. v. IDWR (In re Amended Final Order Creating Water Dist. No. 170)*, 148 Idaho 200, 205 (2009); *Bell v. Idaho Transp. Dept.*, 151 Idaho 659, 664 (2011) (burden on petitioner to establish that a substantial right has been prejudiced). Since the Director's methodology has protected junior ground water rights at all costs, and has left the Coalition with unmitigated injuries, their appeals fail the required standard of review set forth under Idaho law. See I.C. § 67-5279(4); *Hawkins*, 151 Idaho at 232-33.

In summary, the Groundwater Users' complaints with the Methodology Order are unfounded and not supported by the record. For the reasons set forth below the Court should deny the appeals and issues raised by IGWA and the City of Pocatello.

ARGUMENT

I. The Director's Baseline Year and Forecast Supply Methods Wrongly Injure Senior Surface Water Rights, not Junior Ground Water Rights.

The Groundwater Users assert the initial "reasonable in-season demand" (RISD) calculation wrongly relies upon 2006/08 average diversions and that the initial forecast wrongly underestimates available water supplies. *See IGWA Br.* at 19, 31; *Poc. Br.* at 14, 16. The Groundwater Users take issue with the Director's initial injury evaluation and complain that it does not comply with the Hearing Officer's recommendation.² In the end, these arguments have no bearing on the validity of the Methodology Order.

Importantly, neither IGWA nor Pocatello admits the Methodology Order's fundamental error that "caps" the juniors' mitigation obligations in April. While they complain about the initial forecast method, they take no issue with the injury ceiling created by the Director. Their appeals are mistakenly based on the premise that the Director's "initial" injury evaluation is immutable. Further, neither acknowledges that the Methodology Order violates the Idaho Supreme Court's three-step administrative process set forth in *A&B Irr. Dist. v. Spackman*.

² IGWA even goes so far to suggest the Court should order IDWR to accept an outdated injury analysis set forth by former Director Tuthill in response to the A&B Irrigation District groundwater delivery call. *IGWA Br.* at 29-30. IGWA's attachment to its brief is irrelevant and should be disregarded since it represents information not contained in the administrative record. *See* I.C. § 67-5277; *Idaho Power Co. v. IDWR*, 151 Idaho 266, 279 (2011) ("We decline to address Idaho Power's argument because the past permits and licenses Idaho Power relies on to support its argument are not a part of the record on appeal. This Court reviews an appeal from an agency decision based upon the record created before the agency.") (emphasis added); *see also, Crown Point Development, Inc. v. City of Sun Valley*, 144 Idaho 72, 76-77 (2007). Moreover, the referenced A&B order was subject to an administrative hearing, resulting in a new final order, and subsequent appeal. *See A&B Irr. Dist. v. IDWR*, 153 Idaho 500 (2012). Recently, IDWR vacated its prior order regarding its material injury analysis for A&B's groundwater delivery call. *See Order Vacating the Final Order on Remand Regarding the A&B Irrigation District Delivery Call Entered April 27, 2011* (CM-DC-2011-01; Feb. 18, 2014).

Tellingly, the Groundwater Users avoid any meaningful discussion of *A&B* and the Supreme Court's required administration.³ Whereas the Director's initial evaluation is only a "starting" point in administration, the details of predicting initial water use needs and supplies "have no determinative role." 315 P.3d at 841. Accordingly, any challenge to the initial RISD and Forecast Supply calculations are essentially irrelevant. Regardless, as discussed below, the Groundwater Users mischaracterization of what the Hearing Officer and Director found should be rejected. Since the Coalition members employ reasonable diversions and have highly efficient irrigation projects, the Director has not overestimated water use needs in the Methodology Order. If anything, the Director's under-prediction of the Coalition's water use needs at the beginning of the season injures senior rights, contrary to the prior appropriation doctrine, and gives juniors a "false hope" that further mitigation is unnecessary. The repeated under-prediction of injury only stands to create further problems later in the irrigation season, wherein juniors will be required to mitigate at the peak of the irrigation season when mitigation water supplies and actions may be limited, thus requiring curtailment.⁴

A. 2006/08 Diversions

The Groundwater Users challenge the Director's use of 2006/08 average diversions for purposes of calculating the Coalition members' "reasonable in-season demand" (RISD). *IGWA Br.* at 18-19; *Poc. Br.* at 14-15. The Coalition agrees. However, contrary to the Groundwater Users' assertions, using those years as a "starting point" in administration underestimates the

³ Pocatello references the decision in its procedural history section, but mischaracterizes the issues on appeal in that case. *See Poc. Br.* at 9. The Coalition did not ask the Court to "reverse its ruling in *AFRD#2*," rather the Coalition challenged the prior "minimum full supply" and its failure to follow the established burdens of proof and evidentiary standards. The Supreme Court agreed and held a starting "baseline" was acceptable provided it was "adjustable" and that the Director followed the three-step process for administration. *See* 315 P.3d at 841.

⁴ *IGWA* admits it cannot acquire additional mitigation water later in the irrigation season, thus demonstrating why underestimating injury in April is problematic. *See R. Vol. 1* at 94 ("by which time [July], it is too late for groundwater users to adjust the amount of mitigation water they are to deliver.").

Coalition's water use needs.⁵ *See Coalition As Applied Br.* at 24-25. The Director's insistence to use the same set of outdated years for all Coalition members does not reflect current irrigation requirements, particularly in high demand years. Accordingly, the use of 2006/08 as the baseline year should be set aside.

The Groundwater Users fail to acknowledge how the use of 2006/08 average diversions results in underestimating material injury. Whereas the Director predicted an injury of only 14,200 acre-feet to TFCC in 2013 based on those numbers, his initial estimate grossly underestimated the Director's later finding of the injury suffered by AFRD#2 (54,000 af) and TFCC (51,200 af) that year. Those Coalition members were unlawfully forced to reduce water deliveries and suffer mitigation shortages later in the irrigation season. *See Coalition As Applied Br.* at 14-18. As such, complaints about overestimating injury based upon 2006/08 average diversions are unfounded.

IGWA claims that using a baseline year of actual diversions is inaccurate because it "doesn't account for the SWC's actual water use practices." *IGWA Br.* at 25. While the use of 2006/08 is no longer supportable based upon more current and accurate water use requirements (i.e. "the methodology may need to be adjusted to take into account a different baseline year or years"), the Director did consider the Coalition's water use practices when evaluating those years as an initial baseline in the Methodology Order.⁶

Contrary to IGWA's assertion, the Director did not simply conduct a "desktop review" for purposes of selecting a baseline year. While IGWA and Pocatello made these same claims seeking reconsideration in 2010 (R. Vol. 1 at 79, 94-95), the Director addressed their complaints and described the data and criteria that were reviewed in selecting the initial baseline year:

⁵ IGWA wrongly suggests that the "initial" material injury determination is the "most critical." *IGWA Br.* at 24.

⁶ The Groundwater Users point to no evidence that shows the Coalition "wasted" water in 2006 or 2008.

17. A BLY is selected by analyzing three factors: (1) climate; (2) available water supply; and (3) irrigation practices. R. Vol. 37 at 7098. To capture current irrigation practices, identification of a BLY is limited to years subsequent to 1999. *Id.* at 7096.

* * *

19. For the methods outlined herein, climate is represented by precipitation, ET, and growing degree days.

* * *

24. The joint forecast (“Joint Forecast”) issued by the United States Bureau of Reclamation (“USBR”) and the United States Army Corps of Engineers (“USACE”) for the period April 1 through July 31 “is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.” R. Vol. 8 at 1379, ¶ 98. The predictions made in this forecast are a good indicator of the total available irrigation water supply for a season. R. Vol. 37 at 7071. . . . Recognizing that diversions for each individual member of the SWC are different, since the 2000 irrigation season, 2006 and 2008 are the only years in which water supply was not severely limited.

* * *

25. A BLY must be recent enough to represent current irrigation practices. R. Vol. 37 at 7099-7100. Conditions that should be consistent are the net area of the irrigated crops, farm application methods (flood/furrow or sprinkler irrigation), and the conveyance system from the river to the farm. The type of sprinkler systems should be similar between the BLY and the current year, whether side roll systems, hand lines, or center pivots.

26. Sprinkler systems are currently the predominant application system. *Id.* at 7101-02. In order to ensure that current irrigation practices are captured, selection of a BLY for the SWC should be limited to years subsequent to 1999. *Id.* at 7096; 7099-7100.

* * *

29. The Director finds that using the values of 2006 and 2008 (06/08) to arrive at an average BLY fits the selection criteria for all members of the SWC. The 06/08 average has below average precipitation, near average ET, above average growing degree days, and represents years in which diversions were not limited by availability of water supply. When compared to the average of annual diversions from 1990-2008, the 06/08 diversions were above average. When compared to the average of the annual diversions from 2000-2008, the 06/09 [sic] diversion were average.

R. Vol. 3 at 569-70, 572-74.

As described above, the Director expressly included the Coalition's irrigation practices in selection of the initial baseline year. In addition, the Director evaluated precipitation, ET, and growing degree days. Accordingly, the Groundwater Users' claims that the Director did not consider the Coalition's water use needs in establishing an initial RISD are without merit. Although Pocatello and IGWA complain that the 2006/08 average diversion does not reflect the Coalition's water needs, they completely ignore the factors considered in the Methodology Order.

In essence, the Groundwater Users are alleging the Coalition wasted water in 2006 and 2008. With respect to diversions in 2006 and 2007⁷, the Hearing Officer expressly rejected claims of waste:

3. The existing facilities utilized by the Surface Water Coalition members are reasonable. The evidence does not show substandard facilities for diversion or conveyance. The members of the Surface Water Coalition have improved their conveyance practices since the time the water rights were licensed or decreed. All of the members have changed significant portions of their irrigation practices from gravity flow to sprinkler systems which generally deliver water to the crop more efficiently. . . . There is no evidence of decayed or damaged systems that are allowed to continue or practices that cause water to be wasted in transit. The evidence in this case indicates that each of the SWC members is operating with reasonable diversion and conveyance efficiency.

* * *

3. The members of the Surface Water Coalition are employing reasonable conservation practices. There is evidence that members of SWC monitor the use of water closely. It is very clear that during the drought period they did not apply the full extent of their water rights throughout the irrigation season. They withheld water and rationed it according to conditions. Had they not used the water reasonably they likely would have suffered catastrophic losses.

R. 7101-04 (underline added).

⁷ Although the 2008 diversion data was not included or evaluated at the 2008 hearing, the overall Coalition diversions were approximately 19,500 acre-feet higher in 2007 than 2008. See "DS_ & RISD Calculator" spreadsheet found in the "IDWR 11-27-2013 Background Data" subfolder in the "Bates Stamped OCR Docs" folder on Disc 1 of the record. However, certain entities did divert more water in 2008 than in 2007. The Hearing Officer recognized the high water demands in 2007, "a hot, dry period for humans, beasts, and particularly crops." R. 7093.

These findings were accepted by the Director in the 2008 Final Order and were not appealed by the Groundwater Users.⁸ Accordingly, the Groundwater Users are barred from attempting to re-litigate those same issues now. *See Taylor v. Maile*, 146 Idaho 705, 709 (2009).

Further, the Director rejected the Groundwater Users' repeated waste claims again in 2010:

20. As found by the hearing officer in his recommended order, members of the SWC operate reasonably and without waste. R. Vol. 37 at 7201-04. As stated in the Methodology Order, the Director expects that, during periods of limited water supply, members of the SWC should exercise higher degrees of efficiency that during periods of abundant supply. The Director will not, however, impose greater project efficiencies upon members of the SWC than have been historically realized. . . .

R. Vol. 3 at 551.

In summary, the Court should reject the Groundwater Users' arguments that the Director's use of 2006/08 diversions as an initial RISD does not reflect the Coalition's water use needs. While the Director's initial baseline year number is inadequate to describe what the Coalition requires for irrigation use in certain years, as detailed in the *Coalition Br.* at 19-21, it does not overestimate water needs as alleged by the Groundwater Users. As such the Court should deny the Groundwater Users' appeal on this issue.

B. IGWA Misrepresents Problems with the Methodology Order.

IGWA raises several issues with the Methodology Order that are simply untrue. Notably, IGWA alleges that the methodology does not evaluate non-irrigated lands, crop needs, changes in irrigation practices, water diverted by the SWC for others, water leased by SWC to others, and

⁸ Moreover, the Groundwater Users did not prove, by clear and convincing evidence, that the Coalition wasted water in those years. *See A&B*, 315 P.3d at 841.

conveyance efficiency.⁹ *IGWA Br.* at 25-29. Contrary to IGWA's misrepresentations, each of these issues is specifically addressed in the Methodology Order.

1. **The Methodology Order Evaluates Irrigated Acres**

First, the Methodology Order specifically evaluates irrigated and non-irrigated acres within each Coalition Project. R. Vol. 3 at 597 (Steps 1 and 2). The Methodology Order expressly provides:

1. Step 1: By April 1, members of the SWC will provide electronic shape files to the Department delineating the total irrigated acres within their water delivery boundary or confirm in writing that the existing electronic shape file from the previous year has not varied by more than 5%; provided that the total acreage count does not exceed the number of acres to be irrigated within the decreed place of use. . . .

2. Beneficial use cannot occur on lands that are not described in the SWC's water right. If, however, the acreage count is under reported by more than five percent of the irrigated acreage limit of the water right, then an assessment must be made of the impact of this reduction in use of the water right on any mitigation requirement.

3. Step 2: Starting at the beginning of April, the Department will calculate the cumulative CWN volume for all land irrigated with surface water within the boundaries of each member of the SWC. . . .

R. Vol. 3 at 596.

While the Director has not followed the above steps and has underestimated and ignored the irrigated acreage information submitted by the Coalition, *see Coalition As Applied Br.* at 33-37, it is undisputed that the Methodology Order sets out a factor to consider irrigated lands. Accordingly, IGWA's argument on this issue is without merit and should be rejected.

⁹ IGWA also misinterprets Idaho law by insinuating that seniors must prove injury in administration. *See IGWA Br.* at 20-21. That is not the law or the process set forth by the Idaho Supreme Court. *See A&B*, 315 P.3d at 841; *see also, AFRD#2 v. IDWR*, 143 Idaho 862, 873-74 (2007) ("Nowhere do the Rules state that a senior must prove material injury before the Director will make such a finding. To the contrary, this Court must presume that the Director will act in accordance with Idaho law, as he is directed to do under CM Rule 20.02").

2. The Methodology Order Evaluates Crop Needs

IGWA next alleges the Methodology Order does not consider “crop needs” in consideration of reasonable in-season demand. *IGWB Br.* at 27. IGWA provides no citation to the record to support its claim. Instead, IGWA alleges that some Coalition members only divert water for hydropower uses and that current irrigation practices and cropping patterns are ignored.¹⁰ Again, such assertions are false. A plain reading of the Methodology Order shows that crop water needs are specifically evaluated. R. Vol. 3 at 579.

While the Coalition agrees that the Director has arbitrarily relied upon outdated cropping information, *see Coalition Br.* at 31-33, it is inaccurate to claim that crop water needs are not considered in the methodology. Step 2 specifically analyzes “crop water need” based upon irrigated acres and crop distribution. R. Vol. 3 at 597. Accordingly the Court should reject IGWA’s argument on this issue as well.

3. Water Delivered for Others/Leased by SWC to Others

IGWA alleges the Methodology Order does not consider whether the Coalition members deliver water through their systems to other water users, i.e. wheeled storage for “soft conversions.” *IGWA Br.* at 28. IGWA also claims the methodology fails to account for water leased by the SWC to other water users. *Id.* Again, these claims are false and should be rejected. Tellingly, IGWA provides no support from the record for its claims.

With respect to the use of the 2006/08 baseline year, the Director explained that adjustments were supposed to be made to remove “wheeled water and recharge” from the Coalition’s diversions. R. Vol. 3 at 554. Further, the Director described how IDWR would make adjustments to account for such deliveries, and leases to others, on an annual basis:

¹⁰ IGWA has repeatedly claimed that certain Coalition members “waste” water and that their primary motivation for water diversion is hydropower generation. There is no evidence in the record to support this assertion.

30. . . . Mr. Weaver correctly stated that the only adjustments made by the Department were for wheeled water and recharge. Only wheeled water and recharge were deducted from the SWC diversions because that water passed through SWC headgates and was not beneficially used by the SWC.

31. Adjustments, as they become known to the Department, will be applied during the mid-season updates and in the reasonable carryover shortfall calculation. Examples of adjustments that can only be accounted for later in the season include SWC deliveries for flow augmentation, SWC water placed in the rental pool, and SWC private leases. Adjustments are unique to each irrigation season and will be evaluated each year. *Any natural flow or storage water deliveries to entities other than the SWC for purposes unrelated to the original water right will be adjusted so that the water is not included as a part of the SWC water supply or carryover volume. . . .*

R. Vol. 3 at 554 (emphasis added).

The referenced adjustments have been made by the Director since 2010. R. Vol. 4 at 689 (2010 adjustments); at 720 (2011 adjustments); at 776 (2012 adjustments); Vol. 6 at 1054-55 (2013 adjustments). Accordingly, IGWA has no basis to allege that water which is delivered for or leased to others is not accounted for in the Department's methodology. The Court should reject IGWA's argument on this issue.

4. **Inefficient Irrigation Practices**

Finally, IGWA alleges the methodology does not consider the Coalition's water delivery efficiencies and conservation practices and thus "incentivizes" waste. *IGWA Br.* at 29. Again, IGWA misrepresents the Methodology Order and the record in this case. The Director specifically evaluates project efficiency and irrigation practices in Step 2. R. Vol. 3 at 573, 578. Further, the Hearing Officer specifically found the Coalition employs reasonable diversion and conservation practices. R. 7101-04. These findings and conclusions were accepted by the Director and not appealed by IGWA. Therefore, IGWA cannot re-litigate these issues again in this appeal on remand. *See Taylor*, 146 Idaho at 709 ; *see also, Memorandum Decision on Petition for Judicial Review* at 10 (Minidoka County District Court, Fifth Jud. Dist., Case No.

CV-2011-512) (“Since A&B failed to raise this issue in the prior proceeding it is deemed waived for the limited scope of the purpose of this appeal”). Further, the Director confirmed these findings again in 2010.¹¹ R. Vol. 3 at 551. Again, IGWA’s failure to prove a “waste” defense The Court should reject IGWA’s claim on this issue accordingly.

C. Forecast Supply / Heise Regression and Standard Deviation

Apart from complaints about the use of 2006/08 diversions for the initial baseline year, both IGWA and Pocatello allege the Methodology Order wrongly underestimates the forecasted water supply. *IGWA Br.* at 31-32; *Poc. Br.* at 16-17. Since the Methodology Order fails to include an adjustable baseline to account for changing water conditions, any complaints about the initial forecast are irrelevant. Moreover, the Director’s reliance upon the Joint Forecast for the initial predictor does not comply with the Supreme Court’s mandate for a “pre-season” water management plan. *See A&B*, 315 P.3d at 841. As such, the Groundwater Users’ complaints with the initial forecast supply are similarly irrelevant.

However, should the Court review the Groundwater Users’ issue, the Director explained his reasoning in predicting the water supply as follows:

By using one standard error of estimate, the Director purposefully underestimates the water supply that is predicted in the Joint Forecast. . . . The Director’s prediction of material injury to RISD is purposefully conservative. While it may ultimately be determined after final accounting that less water was owed than was provided, this is an appropriate burden for junior appropriators to carry. Idaho Const. Art XV, § 3, Idaho Code § 42-106.

R. Vol. 3 at 594.

In essence, the Director’s use of one standard deviation below the Heise regression casts some initial water supply uncertainty on the junior water right holder – a burden mandated by Idaho’s prior appropriation doctrine. *See IDAHO CONST.* Art. XV, § 3; I.C. §§ 42-106, 602;

¹¹ The Director also confirmed that AFRD#2’s and TFCC’s diversions were reasonable in 2013. R. Vol. 6 at 1046, n. 1.

AFRD#2 v. IDWR, 143 Idaho 862, 877-78 (2007); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 800 (2011). The Director was trying to guard against inaccurate forecasts to the benefit of the senior water user. Planning for less water at the outset attempts to protect the senior from later shortfalls. While his method was insufficient (*see Coalition Br.* at 19-21), the reasoning was not in error as to junior ground water right holders. Accordingly, the Groundwater Users cannot legitimately complain about a forecasted supply that is one standard deviation lower. Furthermore, as evidenced in the Director's implementation the past four years, not one junior groundwater right was curtailed despite this more "conservative" water supply forecast. As such, even if this initial forecast is found to be in error, the Groundwater Users cannot establish any prejudice to a substantial right. *See Hawkins*, 151 Idaho at 232-33.

Whereas the Director's failure to adjust for changes in water conditions resulted in unmitigated injuries the Coalition's senior water rights, any complaints about issues with the initial forecast harming junior ground water rights are without merit. The Court should reject the Groundwater Users' claims on this issue.

II. The Groundwater Users' Claims Regarding the Director's Failure to Follow the Hearing Officer's Recommendation are Without Merit.

The Groundwater Users generally argue that the Hearing Officer's recommended methodology was accepted and is binding for purposes of the Director's 2010 Methodology Order. *See IGWA Br.* at 24-25; *Poc. Br.* at 9, 11-15. While the Supreme Court accepted the reasoning of an "adjustable" baseline, the Court did not rule on the Director's final methodology.¹² *See A&B*, 315 P.3d at 837, n. 6 ("Since the district court's order on petition for judicial review, which this Court now reviews on appeal, did not address the Director's final order on methodology, the factual basis underlying the final methodology order is not properly

¹² The Director erred in not issuing a single final order in 2008 when he withheld issuing a final decision on the administration methodology. R. 7386; 10,106.

before this Court at this time”). Furthermore, the Supreme Court referenced the district court’s approval of the concept as follows:

Ultimately 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 the process satisfied certain other enumerated conditions.***

Id. at 836 (emphasis added).

Accordingly, the Court accepted: 1) an “adjustable baseline”; and 2) an administrative “process” that satisfied “certain other enumerated conditions.” The Supreme Court then set forth the 3-step “process” that satisfies the required “evidentiary standards, legal presumptions, and burdens of proof” (i.e. the “other enumerated conditions”). *Id.* at 841. Contrary to the Groundwater Users’ assertion, the referenced “process” was not a carte-blanche acceptance of the Hearing Officer’s recommended methodology.¹³ The Court should reject this misstatement of the Supreme Court’s holding in *A&B* accordingly.

Moreover, contrary to the Groundwater Users’ interpretation, the Methodology Order does consider the Hearing Officer’s recommended factors and updated information. R. Vol. 3 at 578-585. Notably, the Methodology Order expressly sets forth the Hearing Officer’s recommended factors. R. Vol. 3 at 566-68. A brief comparison between the two orders shows the Groundwater Users’ arguments on this issue are without merit.

First, the Hearing Officer confirmed that diversions in 1995 were put to beneficial use, and that any use of 1995 as a “baseline” must be adjusted to account for cool and wet conditions experienced that year. R. 7099. Rather than use an adjusted 1995, the Director used average

¹³ The Hearing Officer recognized that the Coalition’s experts’ testimony was “closer to being acceptable,” but he did not recommend a defined methodology. R. 7097. Further, he only recommended “factors to be considered,” R. 7098, not the exact steps to be followed in administration. Contrary to Pocatello’s misunderstanding, the Supreme Court’s reference to the Hearing Officer’s recommended factors in the “Factual and Procedural Background” was not a specific holding or decision that was affirmed in *A&B*. See *Poc. Br.* at 14.

diversions from 2006/08 as his “baseline” year, which represented a “near average” year based upon a review of the 1990-2008 daily Snake River natural flow supply.¹⁴ R. Vol. 3 at 575. The Director further confirmed the Coalition members put that water to beneficial use in those years. *Id.* at 593 (“The years 2000 through 2008 were used to select the initial BLY because it captured current irrigation practices in a dry climate. Based upon evaluation of the record, members of the SWC were exercising more reasonable efficiencies during this time period . . .”). While the Director’s baseline underestimates the Coalition’s actual water needs in certain years, *see Coalition As Applied Br.* at 23-24, it is not deficient when compared to the Hearing Officer’s recommendation.

Second, the Hearing Officer recommended consideration of cropping pattern and irrigation practice changes. R. 7099. While the Director relied upon an average of 1990-2008 for crop distribution, and did not account for the trend to more water consumptive forage crops, *see Coalition Br.* at 31-33, it cannot be said that the Methodology Order is contrary to the Hearing Officer’s recommendation. Further, the Director specifically evaluated irrigation practices and project efficiency (limited to post-1999 years). R. Vol. 3 at 573, 578-79. Accordingly, there is no merit to the Groundwater Users’ complaint as to this factor.

Third, the Hearing Officer recommended consideration of soil conditions to determine how water is retained or lost. R. 7099. Inherent in the Director’s Project Efficiency factor “are the components of seepage loss (conveyance loss), on-farm application losses (deep percolation, field runoff), and system operational losses (return flows).” R. Vol. 3 at 578. Further, the Crop Water Need calculation accounts for “effective precipitation” or “the amount of total

¹⁴ To be clear the Coalition does not advocate for the Director’s 2006/08 baseline as it underestimates the Coalition’s irrigation needs. Further, to properly protect senior rights and protect against shortages, the Director should plan for high demand at the outset. *See Coalition Br.* at 19-21. In this regard it would be more likely that the juniors’ mitigation obligations would be reduced, not increased later in the irrigation season.

precipitation held in the soil horizon available for crop root intake.” *Id.* at 581. The Director considered AgriMet precipitation data from both the Rupert and Twin Falls (Kimberly) stations for the respective Coalition entities. *Id.* Again, this demonstrates the Groundwater Users’ claims on this issue are unfounded.

Finally, the Hearing Officer recommended the Director should only consider irrigated acres in the analysis.¹⁵ The Methodology Order specifically addresses this issue in both Steps 1 and 2. R. Vol. 3 at 597. While the Director has erred in refusing to consider and use the information supplied by the Coalition, *see Coalition As Applied Br.* at 33-37, it cannot be said that this factor is not included in the analysis as the Groundwater Users suggest.

In sum, the Methodology Order accounts for the factors identified by the Hearing Officer. IGWA and Pocatello disagree with the facts, preferring that the Director adopt their proffered theory for administration. Yet, they were unsuccessful with these arguments before the agency. R. 7097 (“The recommendation is that the ground water users’ average diversion budget analysis for the period 1990-2006 not be accepted in determining a baseline supply to predict needs”) (emphasis added). Without any legal or factual basis for their claims, the Court should deny the Groundwater Users’ appeals and requests for relief on this issue. *See Platz v. State*, 154 Idaho 960, 967 (Ct. App. 2013) (“the reviewing court, including the district court on intermediate appeal, does not substitute its judgment for that of the agency as to the weight of the evidence presented”).

¹⁵ The Hearing Officer also recommended that full deliveries for TFCC should only be calculated at 5/8” instead of the decreed 3/4”. This recommendation was ultimately reversed by the District Court. R. 10,105-06. Thereafter, the Director used the 3/4” delivery rate. R. Vol. 3 at 574, n. 5; *see also*, R. 10,116 (“IDWR represented that, upon remand, the Director applied the 3/4 inch per acre for TFCC. *See also Methodology Order* at 11. As such this issue has been resolved by the proceedings on remand”).

III. Pocatello's Specific Complaints Regarding Crop Water Need and Project Efficiency are Without Merit.

Pocatello challenges the methodology's Crop Water Need and Project Efficiency equations. *Poc. Br.* at 17-19. Pocatello raised these same concerns before the Director on reconsideration. *R. Vol. 1* at 81, 208-16. In sum, Pocatello re-alleges its earlier complaint about using historic diversions and further questions the Department's use of monthly project efficiency. *Poc. Br.* at 18-19. A major shortcoming in Pocatello's appeal is the applicable standard of review. Under Idaho law Pocatello must demonstrate the Director's decision is not supported by substantial evidence in the record. *See I.C. § 67-5279(3)(d); A&B Irr. Dist.*, 153 Idaho at 505-506. While Pocatello may disagree with the Director's methods, that technical disagreement is no basis to reverse the agency's decision on this issue.

Notably, Pocatello's technical questions have been repeatedly rejected by the Department at all stages in this litigation. *R. 7097, 7103* ("reasonableness, not achievable farm efficiency, is the standard in determining whether irrigators are wasting water."). While Pocatello originally theorized NSCC diverted 473,217 acre-feet in excess, and TFCC 310,000 acre-feet in excess, the Hearing Officer plainly held "[s]ubtracting that much water from irrigation in a year **would not meet crop needs** utilizing the systems and practices in place."¹⁶ *R. 7097* (emphasis added). The Hearing Officer further concluded the Coalition members operate reasonable and efficient irrigation projects. *R. 7101-04* ("The members of the Surface Water Coalition are employing reasonable conservation practices").¹⁷ Any review of Pocatello's complaints regarding the Crop Water Need and Project Efficiency equations must begin with that premise.

¹⁷ These findings and conclusions were not appealed by Pocatello. Since the City failed to prevail on its "waste" theory, the prior findings and conclusion on this issue are binding on Pocatello. The laws of the case and res judicata doctrines bar Pocatello from re-litigating the same issues now. *See Taylor*, 146 Idaho at 709; *Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, 81-83 (2012).

First, Pocatello mischaracterizes the determination of Project Efficiency (Ep) as being base upon a single year with an infinite supply. *Poc. Br.* at 17. The Director's methodology is clear; the determination of Ep is based upon the average of actual monthly diversions from 2001 through 2008. R. 7093-94; 7103-04; 2008 Tr. Vol. II, p. 375, lns. 1-19 (2008 Hearing). Since these years included multiple drought years with limited water supplies the entire premise for Pocatello's issue is flawed.

Next, the Director expressly rejected Pocatello's allegations concerning these issues on reconsideration:

13. Both of the predicted RISD values computed by Pocatello are much lower than the baseline diversion of 1,045,382 acre-feet (2006/2008 average) established in the Methodology Order. *Methodology Order* at 12, ¶ 29. The difficulty with using either of Pocatello's approaches is two-fold: (1) the CWN is an average CWN from 2000-2008, rather than relying on a baseline value; *see* R. Vol. 37 at 7097, ¶ 4 ("the recommendation is that the ground water users' average diversion budget analysis for the period from 1990-2006 not be accepted in determining a baseline supply to predict needs. . . . [T]he end result would not lead to an acceptable baseline."); and (2) the seasonal average Ep is much higher than any Ep historically realized by TFCC, *see, infra*, Finding of Fact 21 (Seasonal Ep Comparison).

14. Based upon the Department's analysis and the recommendation of the hearing officer, it would be inappropriate to rely on a straight average of historical diversions or CWN values in determining RISD. As described in greater detail in the Methodology Order (Findings of Fact 15-26), reliance on a straight average CWN in a high demand year, similar to reliance on straight average historic diversions, leads to the underprediction of CWN and consequently the underpredictions of RISD and demand shortfalls.

R. Vol. 3 at 550.

The Director's reasoning, rejecting Pocatello's analysis, is supported by substantial evidence in the record. R. Vol. 3 at 548-552. Even assuming a conflict with Pocatello's theory, the Department's decision on this issue should be affirmed on appeal. *See Peckham v. Idaho State Bd. of Dentistry*, 154 Idaho 846, 852 (2013) ("We will not disturb an agency's factual

findings if they are supported by substantial evidence in the record, even if the evidence is conflicting”). Further, since the Hearing Officer confirmed that reasonableness is inherent in the Coalition’s actual diversions, there is no reason to accept Pocatello’s requested substitute of its view of reasonable efficiency into the equation.

In sum, Pocatello has not shown the Director’s rejection of its technical analysis is in error. Under well-established principles of Idaho administrative law, the Court should deny Pocatello’s appeal on this issue accordingly.

IV. The Court Should Deny the Groundwater Users’ Due Process Argument Based Upon Prior Arguments on this Issue.

Finally, the Groundwater Users allege the Director erred in limiting the scope of the May 2010 hearings. *See IGWA Br.* at 16-18; *Poc. Br.* at 23-25. The Groundwater Users admit that a hearing was held but they challenge the Director’s decision to limit the issues to a review of the 2008 data, information not available at the time of the 2008 hearing. Rather than accept the scope of the hearing, the Groundwater Users requested the opportunity to “re-litigate” issues already presented in the 2008 hearing. The Director rejected this effort, consistent with the District Court’s previously ordered remand.

Originally, the Groundwater Users opposed any additional hearings on remand.¹⁸ In their petitions for rehearing the Groundwater Users specifically raised this issue before the District Court. At that time the Groundwater Users requested the Court to clarify that no further hearing was necessary. IGWA specifically requested the Court to “advise the Director that no further or additional hearing is permitted.” R. 10,140. Pocatello agreed and claimed that the injury

¹⁸ Given their prior position on this issue judicial estoppel also applies to bar the Groundwater Users’ argument on appeal. *See McCallister v. Dixon*, 154 Idaho 891, 894 (2013) (“Judicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first”).

determination at the 2008 hearing could not be re-litigated in future proceedings. R. 10,129-130.

The Court agreed with the Groundwater Users and held:

In their petition for rehearing, the Ground Water Users urged this Court to clarify whether the Director may hold additional hearings prior to the issuance of a final methodology order on remand. This Court did not contemplate that the Director would take additional evidence prior to issuing the *Methodology Order* on remand. Further, the Director issued the *Methodology Order* without conducting a hearing. The Director properly relied upon the facts contained in the record in order to formulate the methodology for determining reasonable in-season demand and reasonable carryover. As such, this issue has been resolved by the proceedings on remand.

R. 10,588.

The Groundwater Users did not appeal the District Court's decision on this issue. R. 10,708; 10,718-19. Under both *res judicata* and the law of the case doctrines, the Groundwater Users' failure to appeal the District Court's decision on this issue is fatal to their present challenge. See *Berkshire Investments, LLC*, 153 Idaho at 81; *Taylor*, 146 Idaho at 709 ("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"). Consequently, the Groundwater Users are barred and estopped from re-litigating this issue.

However, once the Director issued the initial Methodology Order in April 2010, dissatisfied with the result, the Groundwater Users changed course. Instead of holding to their prior position on rehearing, the Groundwater Users filed a new motion to augment the record and requested the District Court to order the Director to hold additional hearings on the Methodology Order. Whereas in the fall of 2009 the Groundwater Users advocated for no additional hearings, they performed a 180 in the spring of 2010 and argued the following:

The more expeditious course is for this Court to order the Department to hold a hearing, pursuant to I.C. § 67-5296, to augment the record regarding the technical and factual problems with the Methodology Order, give the Department a chance to revise the Order in accordance with the testimony and evidence

received at hearing, and then proceed onto judicial review through the captioned matter.

R. 10,240.

The District Court denied the Groundwater Users' motion, rejected their "about face" on this issue. R. 10,577. Similar to the order on rehearing, the Groundwater Users did not appeal the court's decision. Consequently, their confusing and contradictory arguments on this issue are foreclosed. While the Groundwater Users were not pleased with the Methodology Order, they cannot legitimately claim they had no opportunity to present their case at the 2008 hearing. The Court should deny their appeal on this issue accordingly.

CONCLUSION

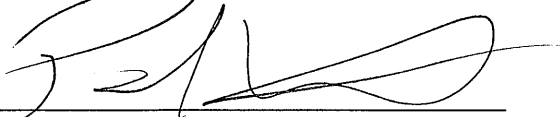
The Groundwater Users dispute the Director's methods for predicting injury and the water supply. While they wrongly rely upon the concept of an immutable initial prediction that caps a senior's injury, they can show no prejudice to a substantial interest. Regardless, in light of the Supreme Court's directive in *A&B Irr. Dist. v. Spackman*, the Groundwater Users' issues are irrelevant.

Further, the record shows the Coalition operates reasonable and efficient irrigation projects. Since the entire premise of the Groundwater Users' argument is based upon an unproven "waste" defense, their challenges fail. Moreover, contrary to their claims, the Methodology Order specifically evaluates the Coalition's water use practices and the factors recommended by the Hearing Officer. Finally, the Groundwater Users' due process arguments contradict their prior position in this case where they specifically requested the Court to order no further administrative hearings.

For the reasons set forth above the Coalition respectfully requests the Court to deny the Groundwater Users' appeals.

Respectfully submitted this 14th day of July, 2014.

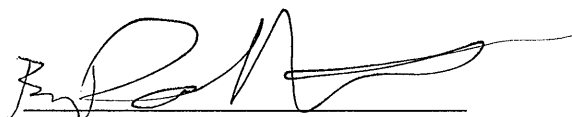
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of July, 2014, I served true and correct copies of the foregoing **SURFACE WATER COALITION'S RESPONSE BRIEF (METHODOLOGY ORDER)** upon the following by the method indicated:

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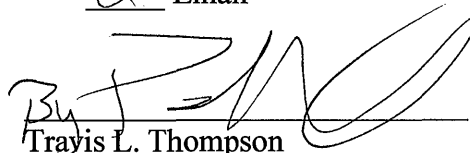
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