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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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	**SURFACE WATER COALITION'S RESPONSE TO IGWA'S AND CITY OF POCATELLO'S PETITIONS FOR RECONSIDERATION / COMMENTS ON TECHNICAL INFORMATION**

COME NOW, 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 Company (collectively hereafter referred to as the "Surface Water

Coalition", "Coalition", or "SWC"), by and through counsel of record, and hereby submit their *Response to IGWA's and City of Pocatello's Petitions for Reconsideration / Comments on Technical Information* pursuant to the Department's Rules of Procedure (IDAPA 37.01.01. *et seq.*). For the reasons set forth below, the Director should deny the petitions filed by IGWA and Pocatello.

I. IGWA's Corrected Petition and Supplemental Information is Untimely.

Although IGWA filed a *Petition for Reconsideration* on April 21, 2010, it later filed a *Corrected Petition* on April 22, 2010 to "correct and substitute" for the petition that was timely filed.[1] In addition, seven days later on April 29, 2010 IGWA filed a document entitled *Supplemental Information to be Considered with the Corrected Petition for Reconsideration* in its mitigation plan proceeding (CM-MP-2009-07). There is no procedure or rule that allows a party to "correct and substitute" a petition for reconsideration of a final order issued by the Idaho Department of Water Resources ("IDWR" or "Department"). Moreover, there is no rule or procedure that allows IGWA to file "supplemental information" with respect to an untimely filed petition. Instead, Idaho's APA and the Department's rules clearly define the time period for filing such petitions:

> (4) Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of any final order issued by the agency head within fourteen (14) days of the issuance of that order. . . .

I.C. § 67-5246(4).

> a. This is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order. . . .

IDAPA 37.01.740.

[1] All references to "*IGWA Pet.*" in this brief refer to IGWA's *Corrected Petition.*

In addition to the above deadlines, the Department's "Explanatory Information to Accompany a Final Order" (Revised April 2009) specifically provides:

> **Note: the petition must be received by the Department within this fourteen (14) day period.**

Explanatory Information at 2 (emphasis in original).

Since IGWA's *Corrected Petition* and its *Supplemental Information* regarding the petition were received by IDWR outside the 14-day period following issuance of the Director's April 7, 2010 *Final Order*, both documents are untimely and cannot be considered by the Department in this matter. *See Erickson v. Idaho Bd. of Registration of Professional Engineers and Professional Land Surveyors*, 146 Idaho 852, 203 P.3d 1251, 1255-56 (2009). Therefore, the Director should deny IGWA's corrected petition for reconsideration and not consider the supplemental information filed in support of the untimely petition.

II. IGWA and Pocatello Did Not Appeal the Director's Material Injury Findings and Their Petitions for Reconsideration Cannot Substitute for a Notice of Appeal.

Although IGWA and Pocatello both ask the Director to reconsider the methodology set forth in the *Final Order*, they further take issue with the foundational "material injury" decision made by former Director Dreher, confirmed by the Hearing Officer, and re-affirmed by former Director Tuthill. In essence, their petitions are attempted "appeals" of those decisions, which are untimely and should be denied at this late date, nearly two years after the original *Final Order* was issued.

First, IGWA wrongly argues that junior ground water pumping does not cause injury to the SWC's senior surface water rights. *IGWA Pet.* at 7. IGWA claims that ground water pumping only affects "base flows" in the Snake River and that reduced water supplies caused by other factors are not IGWA's responsibilities. *Id.* IGWA further takes specific issue with the

injury found for AFRD #2 and argues that junior ground water pumping does not affect AFRD #2's 1921 senior natural flow water right. *Id.* at 16-17.

IGWA alleged these same defenses at hearing and lost. R. Vol. 35 at 6650-54, 62, 75-81. Both the Hearing Officer and the Director rejected these very arguments and IGWA failed to appeal the final order to District Court. R. Vol. 37 at 7033, 7076-78; Vol. 39 at 7382. With respect to material injury to the SWC's senior surface water rights, Hearing Officer Schroeder found:

> **2. A hindrance to reasonable carry-over storage constitutes material injury.**
>
> * * *
>
> **3. Ground water pumping has hindered SWC members in the use of their water rights by diverting water that would otherwise go to fulfill natural flow or storage rights.** . . . The evidence in this case establishes that during recent periods of water shortage ground water pumping has affected the quantity and timing of water available to SWC members. Natural flow rights have been exhausted earlier and storage has been used earlier and more extensively, limiting the application of water during the irrigation season and diminishing the amount of carryover storage to which the surface water users are entitled.
>
> **4. The members of the Surface Water Coalition suffered material injury from ground water pumping in 2004, and it was reasonable to predict material injury in 2005.**

R. Vol. 37 at 7076-77 (emphasis in original).

Accordingly, IGWA's claim that SWC entities have always experienced shortages, and therefore that excuses injury caused by junior ground water pumping is without merit. *IGWA Pet.* at 15-16. Moreover, IGWA cannot collaterally attack the Director's prior decision on this issue now in a petition for reconsideration of the April 7, 2010 *Final Order*. Since IGWA did not appeal the prior decisions confirming that junior ground water users injure the SWC's senior surface water rights, there is no basis to reargue those defenses here on reconsideration. *See*

I.R.C.P. 84(b) (petition for judicial review must be filed within 28 days of agency action). Consequently, IGWA's efforts to have the Director reverse a prior final order now through a petition for reconsideration should be rejected. *See* I.R.C.P. 84(n); *see also*, *Horne v. Idaho State University*, 138 Idaho 700 (2003); *Canyon County Bd. of Equalization v. Amalgamated Sugar Co., LLC*, 143 Idaho 58, 62 (2006).

Moreover, IGWA's argument completely misses the point with respect to conjunctive administration and the fact that both junior surface and ground water rights are subject to administration, including during times of shortage. Idaho Code § 42-607; CM Rule 40. Just because drought conditions may exist, or a streamflow forecast is below normal, that condition does not excuse a junior's injury to a senior water right. Idaho's prior appropriation doctrine demands administration at all times, including during a drought. IDAHO CONST. Art XV, § 3; Idaho Code §§ 42-602, 607; CM Rule 40. Accordingly, the Director should deny IGWA's continued effort to prohibit conjunctive administration in the name of climatic shortages, or allegations that junior ground water pumping does not injure the SWC's senior surface water rights.

Similar to IGWA's untimely appeals, Pocatello now claims that the Director's determination of injury to reasonable carryover storage should be reconsidered despite prior decisions from the Hearing Officer and the Gooding County District Court. *Poc. Pet.* at 5. Although Pocatello claimed at hearing that injury to reasonable carryover need not be determined until the following irrigation season, the Hearing Officer rejected this theory:

> [T]he position advocated by IGWA and Pocatello runs contrary to the Conjunctive Management Rules, the decision of the Idaho Supreme Court, and the history defining the purposes of the elaborate BOR reservoir system.

R. Vol. 37 at 7106.

Although former Director Tuthill refused to follow the Hearing Officer's recommendation as to the timing of providing reasonable carryover storage, Judge Melanson reversed that decision on appeal. *See Order on Petition for Judicial Review* 16-18. Pocatello did not seek re-hearing of that decision and has yet to appeal the District Court's decision. Accordingly, Pocatello has no basis to request reconsideration of this issue now, particularly when its argument has already been rejected by the Hearing Officer and the Gooding County District Court.

In addition, Pocatello's April 29, 2010 *Submission of Supplemental Technical Information* impermissibly proposes to re-litigate issues already decided and not appealed by the City. Similar to its *Petition for Rehearing* before the District Court, Pocatello continues to advance its erroneous theories about irrigation demand for the Coalition even though its ideas were already offered and rejected by the Hearing Officer and Director.

For example, in its *Supplemental Information* Pocatello requests the Director to compute a "reasonable in-season demand" for TFCC by employing a "reasonable on-farm efficiency" number together with its estimated "conveyance loss" number of 12%. *Sullivan Mem.* at 5. Pocatello presented this same method at hearing which the Hearing Officer and Director rejected. Although Pocatello now argues that the Director should use a "reasonable farm efficiency" in its injury determination, it is clear that what is actually proposed by Pocatello is a re-hash of its "achievable farm efficiency" theory that was squarely denied by the Hearing Officer. After considering the concept and the evidence submitted by Pocatello on this issue, Hearing Officer Schroeder succinctly summarized his findings as follows:

> **2. Reasonableness, not achievable farm efficiency, is the standard in determining whether irrigators are wasting water. . . .**

> 3. **The members of the Surface Water Coalition are employing reasonable conservation practices.** There is evidence the 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. Vol. 37 at 7103-04 (emphasis in original).

The Director adopted this finding of the Hearing Officer and Pocatello did not appeal that decision. Although Pocatello claims that a "reasonable farm efficiency" should be adopted, upon further review it is obvious the City has just changed the term "achievable" to "reasonable", and in reality is still advocating its prior theory. Notably, at hearing Pocatello claimed that an "annual average irrigation demand" for TFCC for the record 1990-2006 was "738,750 acre-feet" which incorporated an alleged "achievable farm efficiency" value of 62%. *See* Ex. 3023 at Table 12; see Sullivan Report at 47-49. Now, in its *Supplemental Information*, Pocatello claims that using a "reasonable on-farm application efficiency of 60%" for TFCC results in an annual average irrigation demand of "738,100 acre-feet", about 650 acre-feet less than its estimate using an "achievable farm efficiency". *See Sullivan Memo.* at 5. Despite the different terms, and the reduction in a calculated "on-farm efficiency" of only 2%, it is obvious that Pocatello is still asking the Director to approve its "achievable farm efficiency" concept that was previously rejected by the Department. IGWA also asks the Director to adopt this theory by claiming that the SWC should "operate with the highest project efficiencies that they have historically demonstrated they can achieve".[2] *IGWA Supp.* at 3. Again, IGWA is simply arguing in favor of an "achievable" farm efficiency that was rejected by the Hearing Officer based upon the facts and Idaho law.

[2] In other words, IGWA claims that if the SWC suffered injury before they should suffer injury again, regardless if junior ground water users divert out-of-priority to the detriment of senior surface water rights.

Since the Hearing Officer and Director have already concluded that the SWC operates with reasonable efficiencies and do not waste water under their senior irrigation water rights, the Director should deny the arguments raised by IGWA and Pocatello on reconsideration.

III. Despite Admonishing the Consideration or Use of 2008 Data, Both IGWA and Pocatello Request the Director to Consider and Use Information Outside the Administrative Record.

In their *Petitions for Reconsideration*, both IGWA and Pocatello claim the Director erred when he used 2008 data in the April 7, 2010 *Final Order*. *See IGWA Pet.* at 8-10; *Poc. Pet.* at 5-6. However, despite this admonition, both IGWA and Pocatello urge the Director to consider and use information outside the administrative record, including findings from other cases. First, IGWA, through the guise of its mitigation plan case (CM-MP-2007-07), asks the Director to consider alleged reach gain benefits from other mitigation actions in estimating the SWC forecasted total water supply. *IGWA Supp.* at 2-3. None of the information identified by IGWA is part of the administrative record in this case. Next, Pocatello requests the Director to change his injury methodology for the SWC surface water rights in favor of evidence contained in a wholly separate proceeding, the A&B ground water delivery call case. *Poc. Pet.* at 2, 4; *Sullivan Memo.* at 10-11, 15.

Despite claiming the Director cannot consider "extra-record evidence", IGWA and Pocatello apparently have no problem <u>submitting</u> and urging the Director to consider exactly that type of evidence on reconsideration in this case. The contradiction in such an argument is obvious and should be rejected.

While the Director was unable to find multiple "average" water supply years after 2000 for purposes his analysis, it appears he used 2008 for purposes of finding that type of year. To correct this alleged error about 2008, the Director could and should use <u>2000 data</u> instead.

However, the inclusion of diversion and hydrologic data from Water District 01 on water supply conditions in 2008 is not "new" information or evidence in the context of this proceeding in the sense of what it represents. Although using 2008 data for some purposes and not others in the analysis raises obvious concerns about having a consistent data set, the data represents another year in a multi-year data set for purposes of analyzing water supply and diversions. Contrary to Pocatello's claim, there is no basis to complain about not having an opportunity to examine or present expert testimony regarding the reliability of 2008 data, particularly where the exact type of information for the prior years was reviewed and included in the record. *Poc. Pet.* at 5. Unless Pocatello disputes the measurement method or data supplied in Water District 01 annual report, which to the SWC's knowledge, no case has been filed by Pocatello to challenge that data, its claims are unfounded.

In addition, the SWC has requested the Director to use consistent periods of record for purposes of his analysis, i.e. 1990-2008, for all purposes. *See SWC Petition for Reconsideration* at 7-12. Whereas former Director Dreher used a longer period of record for purposes of his initial analysis, 1990-2004, neither IGWA nor Pocatello challenged the use of a longer data set or period of record at hearing. Moreover, Pocatello even relied upon the 1990-2006 time period to present its irrigation diversion requirement analysis. Ex. 3023. Accordingly, it is clear that all parties support the Director in considering and using a comprehensive, consistent data set for purposes of his injury analysis. If the Director removes 2008 data for purposes of his analysis, and a consistent time period is not adopted for all purposes, then the Director should substitute 2000 for 2008.

Contrary to the consideration and review of an additional year of data and water diversion records that were of the same type of information presented at hearing (i.e. historical Water

District 01 records), IGWA and Pocatello request the Director use extra-record methods and information from separate proceedings. The Director is prohibited from considering this type of information under Idaho's APA and their petitions requesting the same should be denied.

IV. The SWC Employ Reasonable Means of Diversion and Conservation Practices in Beneficially Using Their Senior Surface Water Rights.

Similar to their requests asking the Director to review matters already decided and not appealed, both IGWA and Pocatello allege that SWC "wastes" water and that the waste should be considered for purposes of the injury methodology. Pocatello alleges the Director has improperly relied upon "higher than average year diversions" implying the SWC diverts water not needed for irrigation beneficial use, and its consultant opines that SWC wastes water in years of "adequate water supplies".[3] *Poc. Pet.* at 3, *Sullivan Mem.* at 9-10. IGWA piggybacks on Pocatello's argument and alleges that the Director's efficiency calculations will result in water being wasted by the SWC. *IGWA Pet.* at 18. IGWA then even goes so far to regurgitate its theory that TFCC only diverts water for hydropower generation, not to provide irrigation water for its shareholders. *IGWA Pet.* at 4, 9.

Again, these same defenses were presented and rejected at hearing. With respect to the means of diversion employed by the SWC, and their associated efficiencies and water use by shareholders and landowners, the Hearing Officer found:

> **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. . . . Additionally, at least Twin Falls Canal Company and North Side Canal Company have gone extensively to use of computer monitoring of water use to assure its proper application. . . . There is no evidence of decayed or

[3] Pocatello's consultant further claims that various parts of the Director's Order are "contrary to maximum utilization and full economic development". *Sullivan Mem.* at 2, 7, 10. Pocatello's consultant has no qualification or basis to make such statements. Therefore, the Director should disregard these inappropriate "legal opinions" offered in support of Pocatello's *Petition for Reconsideration.*

> 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 the 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. Vol. 37 at 7101-04 (emphasis in original).

The above findings were adopted by the Director in the Final Order, and neither Pocatello nor IGWA appealed that decision. Accordingly, there is nothing to reconsider on this issue and as such the Director should deny the petitions filed by IGWA and Pocatello.

V. IGWA's Petition Regarding Certain Steps in the Injury Methodology is Unsupported and Should be Denied.

IGWA specifically seeks reconsideration on Steps 1, 4, and 5 of the Director's injury methodology in the April 7, 2010 *Final Order*. *IGWA Pet.* at 19-20. These requests are unsupported based upon the reasons set forth in the SWC *Petition for Reconsideration* and as described further below.

First, with respect to Step 1, IGWA wrongly asserts that the Director should calculate a full headgate delivery to TFCC as only 5/8 inch rather than 3/4 inch. As to this argument, the District Court previously held that the Director exceeded his authority by not recognizing a full headgate delivery of 3/4 inch for TFCC. *See Order on Petition for Judicial Review* at 31. Accordingly, IGWA's argument on this issue has already been decided by the District Court and there is no basis for the Director to reconsider that matter for purposes of his April 7, 2010 *Final Order*.

Next, IGWA disputes the May 1st deadline to provide evidence of storage leases to satisfy its mitigation obligation for projected demand shortfall and reasonable carryover shortfall. *IGWA Pet.* at 19-20. Although the Coalition disputes the timing of when carryover shortage must be provided, there is no basis to grant IGWA's request to further delay the deadline to provide mitigation water to satisfy demand and carryover shortfalls. Although IGWA claims that its lessors, or "storage contract holders", will not make available a specific quantity to lease "until the reservoir allocation is made upon which their supply is know[n] and the rental pool price established", that risk falls squarely on junior ground water users seeking to mitigate for out-of-priority depletions, not senior surface water right holders.

Idaho law requires timely administration to prevent injury to senior water rights, and IGWA's suggestion to move its mitigation deadline back two months is without merit. Moreover, the delay only benefits junior ground water users who would continue to pump out-of-priority during that timeframe while the seniors would bear the burden of further shortage if IGWA's lessors do not provide sufficient water to meet the mitigation obligation. Whereas Idaho law requires juniors to provide mitigation water to <u>prevent injury</u> to senior water rights and secure the benefit of out-of-priority diversions, <u>that obligation must be met before they begin pumping and depleting the water resource</u>. Moving the deadline back to July 1 is untimely and in the event IGWA would not be able to secure water to satisfy their mitigation obligation at that time, the effects of pumping for the first half of an irrigation season would be irreversible at that point. Hearing Officer Schroeder commented on the timing of when water needed to be provided to avoid injury and rejected IGWA's present request: "Whichever process is adopted, it should be in place at the beginning of the time irrigation water will be applied to the fields so that the effect will be the same as would result from curtailment." R. Vol. 37 at 7113.

Therefore, waiting to determine if IGWA can satisfy its mitigation obligation until mid-irrigation season is untimely. Stated another way, the seniors would be left without any mitigation water and would have to suffer further shortage by reason of continued junior ground water diversions that had taken place up until that point. Accordingly, the Director should deny IGWA's request.

Finally, with respect to Step 5, the SWC agrees that the Director should set a date certain for the "Time of Need". However, that date needs to be set early enough in the irrigation season so that the water can be available for use and for purposes of comprehensive water use planning by the SWC managers. As described in the SWC's *Petition for Reconsideration* (pp. 25-26), waiting until late August or September to deliver mitigation water is too late for purposes of lawful conjunctive administration. The timing for the SWC entities is too late based upon the projects' water delivery planning and storage use. This timeframe does not make water available at a time when the SWC managers must make management decisions to ensure water will be available for delivery for the rest of the irrigation season. For example, the SWC managers provided testimony about the careful planning that goes into water delivery for large irrigation projects, the need to have water available early in the season, and how they look to carryover storage for purposes of planning deliveries during an irrigation season. *See* R. Vol. 33 at 6296, 6301-02, 6307 (Ted Diehl Testimony); 6243, 6248-49 (Walt Mullins Testimony); R. Vol. 32 at 6123-26, 6129-31 (Billy Thompson Testimony); 6139 (Lynn Harmon Testimony); *see also*, Tr. Vol. VIII at 1608-09, 1613-20 (Vince Alberdi Testimony); R. Vol. 24 at 4432-4495, 4502-4537 (June 2007 Affidavits of SWC Managers).

Waiting until the end of the irrigation season does not satisfy that management requirement and the need to deliver "wet water" during, not after, the irrigation season.

Accordingly, IGWA's suggestion to set a "Time of Need" as the date when a "SWC entity runs out of storage or the end of the irrigation season" is without merit. Furthermore, this argument demonstrates a complete lack of understanding about what is required to operate a large irrigation project such as the SWC entities. As testified at hearing, all SWC managers explained the indicators they take into consideration when planning for water deliveries throughout the irrigation season, and the importance of carryover storage at the end of the year. Forcing the SWC to "run out of water" would result in an unconstitutional application of the CM Rules and would render conjunctive water right administration meaningless. The Director should deny IGWA's request accordingly.

VI. Additional Comments Regarding Technical Information.

Attached to this *Response* is a memorandum from Dave Shaw (ERO Resources) that provides additional comments regarding the data and technical information supplied by IDWR on April 21, 2010 and the information submitted by IGWA and Pocatello. *See* Exhibit A. The SWC submits this memorandum in support of its *Petition for Reconsideration* and in response to the petitions filed by IGWA and Pocatello.

CONCLUSION

For the above reasons the Director should deny the petitions for reconsideration filed by IGWA and Pocatello.

DATED this 7th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2010, I served a true and correct copy of the foregoing *Surface Water Coalition's Response to IGWA's and City of Pocatello's Petitions for Reconsideration* the following by the method indicated:

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Travis L. Thompson

Exhibit
A

May 5, 2010

To: Travis Thompson, Tom Arkoosh, Kent Fletcher and John Simpson

From: David Shaw

Re: Review and Analysis of IDWR's Backup Data for the April 7 and April 29, 2010 Orders

On April 21, 2010 the Director made available the data reportedly relied upon for the entry of the April 7 and April 29, 2010 Orders (the Orders) defining the procedure to determine material injury to the SWC water users and quantifying his initial determination of material injury for the 2010 irrigation season. At your request I have reviewed those data and some of the analysis apparently used by the Director as well as technical comments from the other parties. A "Methodology Outline" (Outline) was provided with the backup data and this review will follow the sequence of that outline.

Crop Distribution Data Should Match Current Cropping Patterns

Crop distribution is a necessary element in the methodology used by the Director to determine crop water needs (CWN). The Director relies upon crop reporting by the USDA National Agricultural Statistics Service (NASS). This service is designed to report crop acreage by county, by crop type, whether irrigated or non-irrigated and whether harvested or not harvested. At this time, the Director uses these data for crop distribution estimates and not for the determination of acres irrigated by the SWC entities. The data collected by NASS are not measured but are self reported by farmers at the request of NASS. Some variation in both the accuracy and precision of the collected date is expected given the method by which the data are collected.

The Director used NASS data for the 19 year period from 1990 – 2008 in preparation of the Orders. Table 1, attached, shows the composite of all counties receiving Snake River irrigation water from the SWC. Only those years when acreage for all counties for a given crop was reported have acreage amounts reported in Table 1. Stated differently, for each blank in Table 1, one or more counties did not report acreage for that crop in that year. The last year in which all crops selected by the Director were reported in all counties was 1994. The reason this presents a concern is illustrated in Figure 1 attached. Figure 1 shows trends of increasing

acreage for alfalfa and corn but a decreasing trend for beans as has been reported by the SWC managers.[1] The significance of the trends is that alfalfa and corn demand more water than beans. When CWN is estimated based on a 19 year average that, due to lack of data, is probably weighted more toward the crop mix in the earlier period than current crop mix the estimated CWN will understate the actual CWN. If CWN is underestimated the reasonable in-season demand (RISD) will be underestimated and the Directors determination of the SWC's needed water supply will be underestimated and material injury will be underestimated.

To illustrate, ET data for 2007 were taken from the Twin Falls AgriMet station. For 2007 mean alfalfa ET is 39.8 inches and bean ET is 18.8 inches of water. From Table 1 the difference in bean acreage in 2004, the last year reported, and the average of all years in Table 1 is about 38,000 acres or about a 40% reduction. The difference in alfalfa acreage is about 25,000 acres between the average and 2004, the last year reported or about a 10% increase. If these changes were applied to TFCC, for example, the increase in alfalfa would be about 5,000 acres with a comparable decrease in beans. The increase in ET based on 2007 data would be $(39.8-18.8)/12x5000 = 8{,}750ac-ft$. Using TFCC project efficiency of 37.4% the increased diversion requirement would be about 23,400 acre-feet. Had these acreages been applied to an RISD analysis in 2007 the result would show TFCC entitled to about 23,400 acre-feet more in-season water need than currently proposed.

The crop distribution procedure for the SWC entities references the IDWR "Assessment of Lands Served" report series but none of the reports were included with the data provided by the Director. These are not familiar reports and no explanation of how the reports were utilized is included with the Outline or any of the other data provided. The content and significance of these reports is unknown.

The Use of AgriMet for Determination of ET

We commend the Director's use of AgriMet data for ET data to estimate the SWC entities CWN. As stated in the April 7 Order, these data are readily available and commonly used by irrigators and much better understood then the METRIC ET proposed in the past.

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[1] Trends for potatoes and beets also show moderate declines but combined their decline is much less than the increase in either alfalfa or corn.

There does appear to be a discrepancy in how the data from the two referenced stations, Twin Falls (TWFI) and Rupert (RPTI) were used. Finding of Fact 49 in the April 7 Order indicates the CWN for Milner will be based upon data from RPTI, however, the Outline and data and spreadsheets provided show CWN for Milner was computed using data from TWFI. The Director's intentions and basis regarding which station will be used for Milner needs to be clarified.

The determination of effective precipitation is a concern even though USDA technical guidelines were apparently followed. For example, in October 2007 the TWFI station showed ET for some crops approaching 1 inch occurred in the first 9 days of the month. The computations discounted this ET as being met by effective precipitation based solely upon the monthly total effective precipitation greater than the ET that actually occurred in the first 9 days of the month. From the data provided there is no way to determine if the precipitation was actually available at the time required to meet the ET demand of the crops.

Historical Diversion Data for SWC Entities and Baseline Demand

The Outline goes on to explain the location of the diversion data for the SWC entities from IDWR's water right accounting website. In the explanation it describes the diversion data for some entities coming from the "Historic Records" and data for others coming from the "Water Rights Accounting Data." In the case of NSCC, portions of the diversion data come from each of the record sets. No explanation is offered as to why the different sources are to be used. Our understanding is the historic records are simply gage readings and the water rights accounting data reflect the allocation of water by various water rights and storage data. For the purposes of this analysis the Director need to clarify or further explain why the water rights accounting data was not used throughout?

The Outline and computations show the diversion records for the various SWC entities are adjusted to obtain diversion amounts identified as the BD. The adjustments are described as the reduction in the amount of water diverted by some of the entities for water diverted and delivered to another entity and not used for beneficial purposes upon any SWC lands or in-season recharge water. Values in the form of acre-feet per year are provided in the outline and acre-feet per month per year are provided in the accompanying spreadsheet without any reference as to source of those data.

Baseline Crop Water Needs and Efficiencies

After the BD and baseline crop water needs (BCWN) were determined on a monthly basis for each SWC entity for the years 2000 through 2008, monthly project efficiencies are calculated as the BCWN for each month of each year divided by BD for the same month and year. Average monthly project efficiencies are then calculated for the period 2001 through 2008. No explanation is offered why the 2000 efficiencies were not included in the average efficiencies reported in Finding of Fact 44 in the April 7 Order. The use of differing time periods for various parts of the methodology, and the inherent problems that causes for purposes of an injury determination is discussed in detail in the SWC's *Petition for Reconsideration.*

A brief review of the BD data shows inexplicable changes between the values calculated as the BD and the values used in the efficiency calculations. For example, the BD for October 2007 for NSCC is calculated to be 36,702 acre-feet, however, the BD used in the efficiency calculation is 11,512 acre-feet. Time did not permit a thorough review for the consistency of all values throughout the spreadsheets provided by IDWR for all seven SWC entities. However, no explanation is given as to why the spreadsheets were designed to permit such an error to occur. The noted discrepancy raises concerns about the integrity of the computations that the Order is based upon.

Finally, in the spreadsheet "DS & RISD Calculator" tab "Project Efficiencies" contained in the information provided by the Director on April 21 is a table titled "Summary of Corrected Average PE Values – 2001:2008:. Those values differ from the efficiencies in Finding of Fact 44 in the April 7 Order. Data should be provided to support the efficiencies in FF 44 or the difference should be further explained or clarified.

Forecast Water Supply and Reasonable In-season Demand

The initial forecast of available water supply (FS) should be better described to prevent misunderstanding of the process. The April 21 Order is apparently based upon regression equations developed using the actual Heise unregulated discharge for the period 1990 – 2009, not past forecasts, and the natural flow diverted by the various SWC entities. The source of the natural flow diversions is not referenced. The current year natural flow forecast supply is then computed by applying the regression equation of a line one standard error of estimate below the regression line of the actual unregulated Heise discharge and past natural flow diversions by each SWC entity. Finding of Fact 22 and Step 3 of the April 7 Order do not fully describe how the

initial FS will be computed. The limitations of this method as applied to the SWC entities in low water years has been expressed previously and will not be reiterated here. *See SWC Comments on Director's 2007 Injury Calculations and April 14, 2008 Memorandum* at 9, Ex. 2; *SWC Comments and First Questions on Director's 2009 Protocol Order* at 8, attachment at 11.

When determining RISD the Director explains adjustments that may be necessary to the computed RISD for April and October. In his explanation of October adjustments the Director has determined the average RISD will be used if the computed RISD is less than the minimum or more than the maximum historic RISD. The averages are apparently based upon the period 1995 - 2008 with some modifications. There is no explanation for selecting the period 1995 – 2008 to compute average diversions and that period is inconsistent with every other period used in the Orders.

The October minimum used for adjustments is 0 in some cases and is probably based upon the lack of water rather than a legitimate determination of RISD. Since the adjusted RISD for a low computed value in October will only be made if the computed value is less than the minimum, selection of a minimum based upon lack of water rather than need for water will prevent the SWC entity from receiving a legitimate adjusted RISD in the future.

Reasonable Carryover

The Director's evaluation of reasonable carryover based upon the average new water supply of 2 recent years seems to be unsupported. At a minimum, reasonable carryover should be available for the next dry year likely to occur and not be based upon years with Heise discharge less than 15% below the recent average unregulated Heise discharge.[2] The continuing deterioration of the SWC water supply is further illustrated by closer examination of the 2002 and 2004 years selected by the Director. The unregulated discharge at Heise was slightly higher for 2004 than for 2002, yet Finding of Fact 68 in the April 7 Order shows all SWC entities, with one exception[3], accumulated less storage fill in 2004 than in 2002. The Outline at V.C.ii. provides a side by side comparison of new water supply for the SWC entities in 2002 and 2004.

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[2] The average of the 2002 and 2004 unregulated discharge at Heise is only 13.5% below the 2000 – 2009 unregulated discharge at Heise.

[3] Although MID shows better fill in 2004 than in 2002 the total new water supply for MID was about 32,000 acre-feet less in 2004 than in 2002.

The new water supply for 2004 is 14% less than the new supply in 2002 again with higher unregulated Heise discharge in 2004.

At a minimum, the 2004 new water supply for the SWC members should be the basis for a reasonable carryover determination if the current methodology is to be continued. Using the average of 2002 and 2004 new water supply ignores the continuing decline of the water supply for the SWC entities.

Pocatello and IGWA Technical Submissions

Pocatello and IGWA both criticize the Director for using historic diversion amounts to establish the base line year(s) (BLY) and project efficiencies. IGWA argues the "highest project efficiencies that they have historically demonstrated they can achieve" is the correct standard for the Director to use in determining the water supply for the BLY. Pocatello suggests "reasonable project efficiencies" as determined by Pocatello should be the basis for determining the water supply for the SWC.

The findings of the IDWR Hearing Officer, Gerald F. Schroeder in his April 29, 2008 Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations (2008 Opinion) fully support the Director's actions on this issue. In the 2008 Opinion the hearing officer addressed the reasonableness of the amount of water diverted by the SWC as required by Conjunctive Management (CM) Rule 42. The Hearing Officer found "The existing facilities utilized by the Surface Water Coalition members are reasonable." *2008 Opinion at 54, XV 3.* Further, "Reasonableness, <u>not achievable farm efficiency</u>, is the standard in determining whether irrigators are wasting water ...the standard for determining whether water is being applied to beneficial use without waste is whether the district is reasonable in the use of the water with existing diversion and conveyance facilities, consistent with reasonable conservation practices." *2008 Opinion at 56, XVI 2* (emphasis added). Finally, "The members of the Surface Water Coalition are employing reasonable conservation practices." *2008 Opinion at 56, XVI 3.* The prior Director's Final Order adopted these findings and the current Director's April 7 Order makes appropriate application of these findings in determining BLY water needs as the starting point for RISD. Nowhere in the 2008 Decision did the Hearing Officer suggest any member of the SWC was wasting water.

As an alternative to "reasonable efficiencies" as determined by Pocatello, Pocatello suggests a "weighted-average efficiency with the weighting based on monthly CIR or monthly

diversions." *Sullivan Memo at 9.* Pocatello goes on to state "Alternatively, the seasonal or annual after-the-fact project efficiency can be computed as the annual crop water requirement [CWN] divided by the annual diversions. **Both approaches should give similar results.**" *Ibid.* (emphasis added). And, "Computing an after-the-fact- project efficiency based on the CIR [CWN] divided by the volume of water diverted is appropriate when the calculation is performed on a seasonal basis." *Sullivan Memo at 7.*

Computation of project efficiency for TFCC based upon values from Table 1 of the Sullivan Memo, crop water demand of 391,481 acre-feet divided by reasonable in-season demand of 1,045,382 acre-feet, yields an efficiency of 37.4%, not the weighted-average efficiency of 43.6% also shown in Table 1. *Sullivan Memo Table 1.* The results are not similar regardless of Pocatello's assertion.

Pocatello further criticizes the Director's computation of monthly efficiencies beginning at page 7 of the Sullivan Memo. Pocatello asserts water applied in one month may not be used by the crop until the following month making the efficiency of the first month appear too low. Pocatello ignores the fact the efficiency of the remainder of the irrigation season will be increased as the soil moisture is used later in the year.

Pocatello continues that some of the efficiencies are "somewhat nonsensical" apparently because some of the April efficiencies are greater than 100%. This criticism is surprising since Pocatello believes the SWC entities do not fully utilize residual soil moisture. Here is an example of using residual soil moisture from winter and spring precipitation to delay the start of pumping for the season and Pocatello considers the result "somewhat nonsensical".

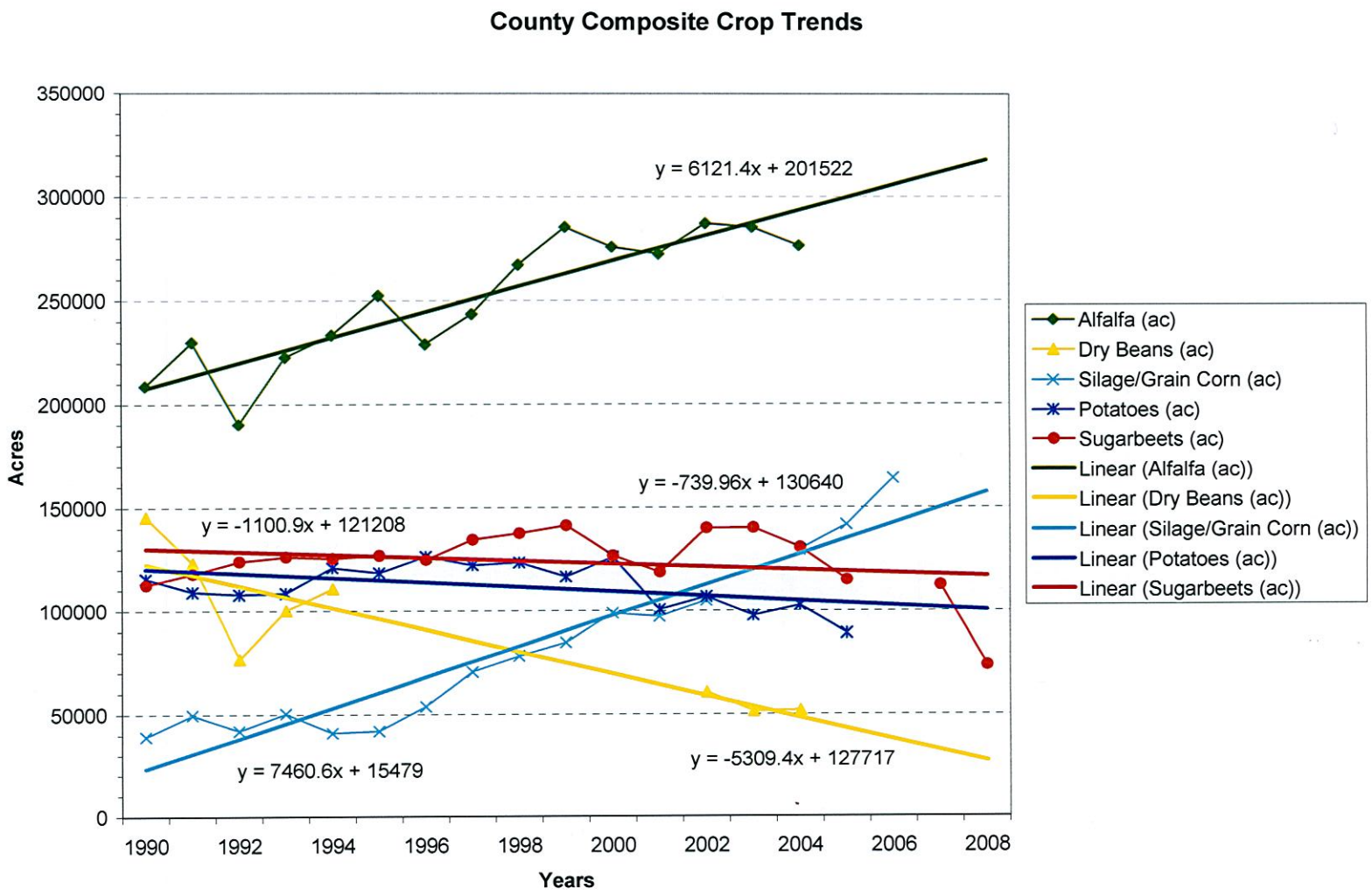
The Director recognized the potential need to adjust the April and October RISD to avoid the concerns raised in the Sullivan Memo such as the 100,000 acre-feet of additional diversion in October for TFCC. The "DS & RISD Calculator" spreadsheet at tab "Min-Max Diversions" shows the average October diversion for TFCC to be 78,715 acre-feet with a minimum diversion of 56,916 acre-feet and a maximum diversion of 103,914 acre-feet. Finding of Fact 56 in the April 7 Order explains how these values will be used to adjust the October RISD for TFCC should the computed RISD be outside of the above maximum – minimum range by changing the out of range RISD to the average RISD. Finding of Fact 55 of the April 7 Order describes how changes will be made to the April RISD when necessary.

Table 1

All County[1] - USDA National Agriculture Statistical Service (http://www.nass.usda.gov/Data_and_Statistics/Quick_Stats/)

Year	Alfalfa (ac)	Barley (ac)	Dry Beans (ac)	Silage/Grain Corn (ac)	Harvested Oats (ac)	Potatoes (ac)	Sugarbeets (ac)	Wheat Spring (ac)	Wheat Winter (ac)	Total Acres
1990	208,900	108,600	145,400	39,000	2,100	115,500	112,300	107,700	138,200	977,700
1991	229,900	110,300	123,100	49,500	5,800	109,000	117,700	82,600	108,600	936,500
1992	190,100	120,000	76,500	41,900	2,600	107,800	123,800	147,200	131,200	941,100
1993	222,800	124,100	100,000	50,200	2,900	108,400	126,100	127,500	133,500	995,500
1994	233,200	123,900	110,500	40,800	2,200	120,900	125,200	135,300	122,900	1,014,900
1995	252,200	133,300		41,700	2,600	118,300	126,600	115,100	141,800	931,600
1996	228,900	115,800		53,600	2,600	126,300	124,500	166,500	147,100	965,300
1997	243,400	119,100		70,300		122,100	134,200	109,600	153,000	951,700
1998	267,000	121,600		77,900	2,500	123,300	137,300	90,000	130,500	950,100
1999	285,300	115,300		84,500	1,700	116,300	141,000	117,300	99,700	961,100
2000	275,500	135,400		98,600	2,600	126,000	126,400	100,100	111,900	976,500
2001	272,100	127,500		96,900		100,300	118,400			715,200
2002	286,900		60,500	104,800	2,800	106,600	139,700			701,300
2003	285,100		51,300		1,800	97,400	139,800			575,400
2004	276,100		51,800	129,500	1,800	102,500	130,300			692,000
2005				141,600	2,400	88,900	114,600			347,500
2006				163,900						163,900
2007							112,100			112,100
2008							73,500			73,500
Average:	250,493	121,242	89,888	80,294	2,600	111,850	123,528	118,082	128,945	1,026,921
% Total:	24.4%	11.8%	8.8%	7.8%	0.3%	10.9%	12.0%	11.5%	12.6%	

Figure 1


County Composite Crop Trends
350000
300000
250000
200000
150000
100000
50000
0
Acres
1990
1992
1994
1996
1998
2000
2002
2004
2006
2008
Years
y = 6121.4x + 201522
y = -739.96x + 130640
y = -1100.9x + 121208
y = 7460.6x + 15479
y = -5309.4x + 127717
Alfalfa (ac)
Dry Beans (ac)
Silage/Grain Corn (ac)
Potatoes (ac)
Sugarbeets (ac)
Linear (Alfalfa (ac))
Linear (Dry Beans (ac))
Linear (Silage/Grain Corn (ac))
Linear (Potatoes (ac))
Linear (Sugarbeets (ac))