

**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 ) Docket No. CM-DC-2010-001  
THE BENEFIT OF A&B IRRIGATION DISTRICT, )  
AMERICAN FALLS RESERVOIR DISTRICT #2, ) **FINAL ORDER**  
BURLEY IRRIGATION DISTRICT, MILNER ) **ESTABLISHING 2011**  
IRRIGATION DISTRICT, MINIDOKA IRRIGATION ) **REASONABLE CARRYOVER**  
DISTRICT, NORTH SIDE CANAL COMPANY, )  
AND TWIN FALLS CANAL COMPANY ) **(METHODOLOGY STEP 9)**  
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**FINDINGS OF FACT**

1. On June 23, 2010, the Director of the Idaho Department of Water Resources (“Director” or “Department”) issued his *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). The Methodology Order established 10 steps for determining material injury to members of the Surface Water Coalition (“SWC”).

2. The Methodology Order described Step 9 as follows:

Step 9: Following the end of the irrigation season (on or before November 30), the Department will determine the total actual volumetric demand and total actual crop water need for the entire irrigation season. This information will be used for the analysis of reasonable carryover shortfall, selection of future baseline years, and for the refinement and continuing improvement of the method for future use.

On or before November 30, the Department will publish estimates of actual carryover and reasonable carryover shortfall volumes for all members of SWC. These estimates will be based on but not limited to the consideration of the best available water diversion and storage data from Water District 01, return flow monitoring, comparative years, and RISD. These estimates will establish the obligation of junior ground water users in providing water to the SWC for reasonable carryover shortfall. Fourteen (14) days following the publication by the Department of reasonable carryover short fall obligations, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to provide a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC. If junior

ground water users cannot provide this information, the Director will issue an order curtailing junior ground water rights.

*Methodology Order* at 37-38.

3. The Department approved CM Rule 43 mitigation plans for the Idaho Ground Water Appropriators, Inc. (“IGWA”) to mitigate for material injury to in-season demand and reasonable carryover. *Final Order Approving Mitigation Credits Regarding SWC Delivery Call*, CM-MP-2009-006 (July 19,2010); *Order Approving Mitigation Plan*, CM-MP-2009-007 (June 3,2010). These final orders of the Department were affirmed on judicial review. *Memorandum Decision and Order on Petition for Judicial Review*, Case No. CV 2010-3822 (Fifth Jud. Dist. April 22, 2011) (affirming the Director’s *Final Order Approving Mitigation Credits Regarding SWC Delivery Call*); *Memorandum Decision and Order on Petition for Judicial Review*, Case No. CV 2010-3075 (Fifth Jud. Dist. January 25, 2011) (affirming the Director’s *Order Approving Mitigation Plan*).

4. The following table summarizes the 2011 irrigation season diversions and crop water need volumes for each entity. These values are used in determining the entity specific season ending reasonable in-season demand (“RISD”) values.

Entity	Demand <sup>1</sup> (AF)	Crop Water Need (AF)
A&B	52,786	32,671
AFRD2	457,861	146,426
BID	221,945	102,913
Milner	46,936	29,267
Minidoka	316,989	159,092
NSCC	978,524	323,229
TFCC	1,054,856	393,611

5. The following table summarizes the calculated 2011 irrigation season ending in-season shortfall values, if any. The values in this table are different from those presented in the *Final Order Regarding April 2011 Forecast Supply (Methodology Steps 1-8)* (April 18, 2011) (“April 2011 Final Order”). These differences are due to changes in total supply and RISD that reflect diversion and ET data not available at the time the previous order was issued. Since the 2011 irrigation season is now complete, calculation of in-season shortfall will not be subject to future revisions. For the 2011 irrigation year, in-season storage adjustments were comprised exclusively of values derived from the application of the Minidoka Credit.<sup>2</sup> See “Attachment A” attached hereto for further information.

<sup>1</sup> The *Final Order Regarding April 2011 Forecast Supply (Methodology Steps 1-8)* (April 18, 2011) determined there was no in-season demand shortfall. This order determines there is no reasonable carryover shortfall. Consequently, there is no need to evaluate whether the 2011 diversions of the SWC were reasonable. The 2011 demand for each SWC entity is equal to each entity’s 2011 diversion.

<sup>2</sup> The Minidoka Credit is a long existing exchange of stored water among AFRD2, BID, MID, NSCC, and TFCC that has been incorporated into an agreement of those entities and accepted by the SRBA district court.

Entity	Natural Flow Diverted through 10/31	Natural Flow Adjustment	Preliminary Storage Allocation	In-Season Storage Adjustment	Total Supply	RISD	Shortfall
A&B	33,194	-	136,087	-	169,281	51,973	-
AFRD2	311,600	-	389,149	1,000	701,465	399,360	-
BID	172,078	(3,011)	223,954	5,130	398,151	230,778	-
Milner	41,035	(3,714)	88,450	-	125,771	48,736	-
Minidoka	241,571	-	362,455	8,370	612,396	333,424	-
NSCC	722,351	-	850,283	(7,750)	1,564,884	986,057	-
TFCC	979,346	-	243,180	(6,750)	1,215,776	1,020,795	-
							0

6. The following table summarizes end of season 2011 carryover shortfall calculation values. The table contains the actual fall 2011 carryover storage and the reasonable carryover quantities from the Methodology Order for each member of the SWC. The storage adjustments in the following table incorporate the in-season adjustments (Minidoka Credits) identified in the above table plus all other adjustments that have occurred. See "Attachment A" attached hereto for further information.

Entity	Preliminary Storage Allocation	Storage Allocation Adjustment	Storage Use	Storage Use Adjustments	Reasonable Carryover	Actual Carryover	Carryover Shortfall
A&B	136,087	-	19,592	-	17,000	116,495	-
AFRD2	389,149	1,000	152,378	5,833	56,000	231,938	-
BID	223,954	5,130	55,906	3,028	-	170,150	-
Milner	88,450	-	16,497	6,881	4,800	65,072	-
Minidoka	362,455	8,370	75,638	220	-	294,967	-
NSCC	850,283	(7,750)	267,673	11,500	57,200	563,360	-
TFCC	243,180	(6,750)	80,116	4,636	29,700	151,678	-
							0

7. The above determinations of actual carryover are based on the water diversion and storage data from Water District 01, which incorporates return flows and RISD. These are necessarily preliminary numbers that are subject to revision after taking into account adjustments of water measurement gages maintained by the USGS. The above determination of reasonable carryover is carried forward from the Methodology Order and takes into account comparative water years.

8. Details of adjustments to quantities in the above tables are set forth in "Attachment A" attached to this order.

9. Actual carryover for each member of the SWC exceeds the reasonable carryover set forth in the Methodology Order.

## CONCLUSIONS OF LAW

1. The Methodology Order states that, on or before November 30, the Director will project the SWC's reasonable carryover shortfall, if any, for 2011. *Methodology Order* at 37-38 (Steps 9 and 10). If the Director projects a reasonable carryover shortfall, IGWA shall have fourteen days to establish its ability to secure "a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC." *Id.* at 38.

2. Recently, the Fifth Judicial District Court, in and for the County of Minidoka, held that the evidentiary standard of proof to apply in conjunctive administration of hydraulically connected water rights is clear and convincing. *Memorandum Decision and Order on Petitions for Judicial Review*, CV-2009-000647 (Fifth Jud. Dist., May 4, 2010); *Memorandum Decision and Order on Petitions for Rehearing*, CV-2009-000647 (Fifth Jud. Dist., Nov. 2, 2010). The issue of which evidentiary standard to apply in conjunctive administration of hydraulically connected water rights is currently on appeal before the Idaho Supreme Court in docket nos. 38191-2010, 38192-2010, 38193-2010, and 38403-2011.

3. "Clear and convincing evidence refers to a degree of proof greater than a mere preponderance." *Idaho State Bar v. Topp*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996) (internal quotations removed). "Clear and convincing evidence is generally understood to be '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468,472 (2008) citing *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006); see also *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 41, 244 P.3d 180, 185 (2010).

4. The Director previously concluded by clear and convincing evidence that, for the 2011 irrigation season, no member of the SWC was materially injured. *April 2011 Final Order* at 4-5.

5. Regarding projected shortfalls to reasonable carryover, the Director concludes by clear and convincing evidence that no member of the SWC is owed reasonable carryover storage in 2011 for use in 2012. CM Rule 42.01.g.

## ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that no member of the SWC was materially injured during the 2011 irrigation season. The determination of no material injury applies both to reasonable in-season demand and reasonable carryover storage in 2011 for use during the 2012 irrigation season.


IT IS FURTHER ORDERED that this final order concludes the application of the Methodology Order to the climatic, hydrologic, and agronomic facts of the 2011 irrigation season.

IT IS FURTHER ORDERED that 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 of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that judicial review of any final order of the Director issued following the hearing may be had pursuant to Idaho Code § 42-1701A(4).

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 29<sup>th</sup> day of November, 2011.

  
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GARY SPACKMAN  
Interim Director

## Attachment A

### 2011 SWC Adjustment

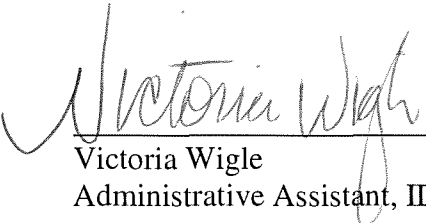
	Adjustments	Description	Included in Total Supply Natural Flow Adjustment	Included in Storage Allocation Adjustment	Included in Storage Use Adjustments	Included in Carryover Adjustment
<b>A&amp;B</b>	-418.5	IPCO	No	No	No	No
		<b>Total A&amp;B</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
<b>AFRD2</b>	5000	IGWA	No	No	Yes	Yes
	1000	Minidoka Credit	No	Yes	No	Yes
	833	Water Mitigation Coalition	No	No	Yes	Yes
		<b>Total AFRD</b>	<b>0</b>	<b>1000</b>	<b>5833</b>	<b>6883</b>
<b>BID</b>	-3011	SWID Natural Flow	Yes	No	No	No
	27.5	Paul Baumgartner	No	No	Yes	Yes
	2000	SWID	No	No	Yes	Yes
	5130	Minidoka Credit	No	Yes	No	Yes
	1000	SWID	No	No	Yes	Yes
		<b>Total BID</b>	<b>-3011</b>	<b>5130</b>	<b>3027.5</b>	<b>8157.5</b>
<b>Milner</b>	-3714	SWID Natural Flow	Yes	No	No	No
	1229	Artesian	No	No	Yes	Yes
	652.1	SWID (Palisades Water User)	No	No	Yes	Yes
	5000	SWID	No	No	Yes	Yes
		<b>Total Milner</b>	<b>-3714</b>	<b>0</b>	<b>6881.1</b>	<b>6881.1</b>
<b>MID</b>	-3000	To SWID via Twin Falls Canal	No	No	No	No
	-2000	To SWID via BID	No	No	No	No
	-10000	To Water Mitigation Coalition	No	No	No	No
	-220	Ardel Wickel	No	No	No	No
	220	Ardel Wickel	No	No	Yes	Yes
	8370	Minidoka Credit	No	Yes	No	Yes
	-2511.2	IPCO	No	No	No	No
		<b>Total MID</b>	<b>0</b>	<b>8370</b>	<b>220</b>	<b>8590</b>
<b>NSCC</b>	5000	IGWA	No	No	Yes	Yes
	-7750	Minidoka Credit	No	Yes	No	Yes
	5000	IGWA	No	No	Yes	Yes
	1500	Water Mitigation Coalition	No	No	Yes	Yes
		<b>Total NSCC</b>	<b>0</b>	<b>-7750</b>	<b>11500</b>	<b>3750</b>
<b>TFCC</b>	43	Straub Dairy	No	No	Yes	Yes
	3000	SWID	No	No	Yes	Yes
	960	Artesian (SWID)	No	No	Yes	Yes
	633	Artesian (Farmland Reserve)	No	No	Yes	Yes
	-6750	Minidoka Credit	No	Yes	No	Yes
		<b>Total TFCC</b>	<b>0</b>	<b>-6750</b>	<b>4636</b>	<b>-2114</b>

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29<sup>th</sup> day of November, 2011, the above and foregoing, was served by the method indicated below, and addressed to the following:

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<p>Kathleen M. Carr          US Dept. Interior          960 Broadway Ste 400          Boise, ID 83706  <a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>
<p>David W. Gehlert          Natural Resources Section          Environment and Natural Resources Division          U.S. Department of Justice          1961 Stout Street, 8<sup>th</sup> Floor          Denver, CO 80294  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>

<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234  <a href="mailto:mhoward@pn.usbr.gov">mhoward@pn.usbr.gov</a></p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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