

1. Step 1

Step 1 of the Methodology Order¹ requires the SWC to “confirm in writing [by April 1] that the existing electronic shape file from the previous year has not varied by more than 5%” *April Forecast Order* at 2 (emphasis added). For the 2012 irrigation season, Minidoka Irrigation District, confirmed its irrigated area in writing with the Department. In addition, after the SWC filed its Petition, the Director discovered that on February 23, 2012, American Falls Reservoir District No. 2 sent a letter to the Director stating: “Based on our records from the previous year we haven’t varied by more than 5% of the number of acres shown in the previous information filed by the District.” The Department received the letter on March 9, 2012.

In its Petition, the SWC states:

Based upon representations by IDWR’s counsel in mid-March, it was the SWC’s understanding that IDWR would use the same shape files that it did in 2011, which were the recommendations for the SWC’s water rights in the SRBA. Based upon IDWR’s actions in 2011, and the representations that it would use the same information in 2012, the SWC believed that Step 1 would be implemented the same way without the requirement to provide further information.

Petition at 2-3.

Counsel for the Department had a conversation with an attorney for the SWC concerning Step 1. Counsel for the Department explained the Step 1 requirement that a document be submitted concerning 2012 irrigated area. Whether or not there was a misunderstanding between counsel is immaterial, as Step 1 requires written documentation of each entity’s irrigated area. Minidoka Irrigation District and American Falls Reservoir District No. 2 understood the requirement for a written response.

To the extent the SWC seeks reconsideration of determinations concerning Step 1, the Director denies the request. Step 1 requires SWC entities to submit a “writing” concerning irrigated area by April 1 of each year.

2. Step 3

i. 2012 Joint Forecast

In order to predict material injury, the Department uses the April forecast (“Joint Forecast”), prepared annually by the United States Bureau of Reclamation (“USBR”) and the United States Army Corp of Engineers (“USCOE”). *Methodology Order* at 9. The Joint

¹ “Methodology Order” refers to the June 23, 2010 *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*. The Methodology Order established 10 steps for determining material injury to members of the SWC. The Methodology Order and subsequent “as-applied” orders are on judicial review before the Fifth Judicial District Court, in and for the County of Gooding, in case nos. CV-2010-382 *et al.* The judicial review proceedings are stayed pending a decision by the Idaho Supreme Court in the SWC delivery call, consolidated before the Idaho Supreme Court in case no. 38191-2010.

Forecast, “for the period April 1 through July 31 is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.” *Id.* (emphasis added). The Joint Forecast is typically issued “within the first week of April.” *Id.* at 19. “The actual natural flow volume that will be used in the Director’s Forecast Supply will be one standard error below the regression line, which underestimates the available supply.” *Id.* (emphasis added). “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 . . . is purposefully conservative.” *Id.* at 31. The regression analyses were included as attachments to the April Forecast Order.

For 2012, the Joint Forecast was issued on April 5, predicting a 91% of average supply of natural flow. *April Forecast Order* at 3. Applying the Joint Forecast to Step 3, and purposefully underestimating natural flow supply by one standard error, the Director found no member of the SWC would be materially injured in 2012. *Id.*

In its Petition, the SWC alleges as follows:

Based upon information and belief, the Director relied upon the wrong, or an outdated joint forecast for the unregulated inflow of the Snake River at Heise (April – July) at the time he issued the April Forecast Supply Order on Friday April 13, 2012. It is the SWC’s understanding that the joint forecast used by the U.S. Bureau of Reclamation and the U.S. Army Corp of Engineers, as well as Water District 01, was only 85% of average, not the 91% used by the Director. Accordingly, the predicted natural flow supply is in error. . . . The April Forecast Order should be revised to use the correct joint forecast, including the most current and accurate information available to the Director at the time he issued the order.

Petition at 3-4.

On April 16, 2012, the USBR and USCOE issued a mid-month forecast, for the period April 16 to July 31. The mid-month forecast predicted 85% of average natural flow. Although not expressly identified as such by the SWC, it appears the mid-month forecast is the “joint forecast” referred to in the SWC Petition.

The Methodology Order requires the Director to use the actual Joint Forecast (April 1 – July 31), not a mid-month forecast (April 16 – July 31). *Methodology Order* at 9. Consistent with the Methodology Order and as stated in the April Forecast Order, the Department used the Joint Forecast, which was issued on April 5. The April Forecast Order was signed and served on April 13, 2012. The mid-month “joint forecast” referred to by the SWC is not the actual Joint Forecast. Moreover, the mid-month “joint forecast” was issued after the April Forecast Order, and was not available for the Director to consider. The SWC is therefore incorrect in stating, “the Director relied upon the wrong, or an outdated joint forecast for the unregulated inflow of the Snake River at Heise (April – July) at the time he issued the April Forecast Order on Friday April 13, 2012.”

Even if the Director were to consider the mid-month “joint forecast” and do an after-the-fact revision to the April Forecast Order, the Director would still predict no material injury, as is shown in the following table:

	Predicted Natural Flow Supply	Predicted Storage Allocation	Minidoka Credit Adjustment	Total Supply	BLY 2006/2008	Shortfall
A&B	9,269	136,167		145,436	58,492	-
AFRD2	90,470	389,376	1,000	480,846	415,730	-
BID	106,567	224,084	5,130	335,781	250,977	-
Milner	13,597	88,502		102,099	46,332	-
Minidoka	152,768	362,666	8,370	523,804	362,884	-
NSCC	435,669	850,778	(7,750)	1,278,697	965,536	-
TFCC	829,798	243,322	(6,750)	1,066,370	1,045,382	-
					Total	0

Compare with April Forecast Order at 3 (finding “0” shortfall).

ii. 2012 Storage Allocation

In its Petition, the SWC states as follows: “[T]he Director’s reliance upon 2011 storage allocations as representing the 2012 storage allocation may also be incorrect.” *Petition* at 4. To predict the storage allocation for each SWC entity the Department “evaluate[s] the current reservoir conditions and the current water supply outlook to determine historical analogous year or years to predict reservoir fill.” *Methodology Order* at 20. At the April 11, 2012 Water Supply Committee Meeting in Boise, the USBR presented that the Upper Snake Reservoir system was at approximately 83% of capacity with approximately 660,600 acre-feet of total space available. Given the Joint Forecast of 91% of average supply of natural flow, the USBR reported it expected the reservoir system to fill. In order to predict each SWC entity’s storage allocation for 2012, the Department examined a recent, analogous year. In 2011, all storage account filled. Given that the system is expected to fill, in the April Forecast Order, the Department used the actual 2011 storage allocation as the predicted 2012 storage allocation.

The Director denies the SWC’s petition for reconsideration as it pertains to Step 3. The Director used the actual Joint Forecast for predicting natural flow and predicted storage allocations consistent with the Methodology Order.

B. Motion to Authorize Discovery

According to the Petition, the SWC “requests the opportunity to discover the factual basis and analysis performed by the Director in issuing the April Forecast Order.” *Petition* at 4. The April Forecast Order followed the requirements of the Methodology Order. The Director therefore denies the request for discovery.

As the Department has done with prior orders, included herewith is a CD with data used by the Department in the April Forecast Order.

C. Request for Hearing

Citing Idaho Code § 42-1701A(3) and IDAPA 37.01.01.740.02.b, the SWC seeks a hearing on the April Forecast Order. Idaho Code § 42-1701A(3) states as follows:

Unless the right to a hearing before the director . . . is otherwise provided by statute, any person aggrieved by any action of the director . . . and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.

Emphasis added.

Parties to this proceeding have previously been afforded hearings—once in 2008 and again in 2010. The Department applied the steps discussed in the Methodology Order, and did not deviate from those steps. Since the steps and processes used in this order did not change from those used in orders that were the subject of previous hearings, the SWC is not entitled to another hearing.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

The Director DENIES the SWC’s petition for reconsideration concerning Methodology Step 1 and Step 3.

The Director DENIES the SWC’s motion to authorize discovery.

The Director DENIES the SWC’s request for hearing.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order may appeal the final order 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 9th day of May, 2012.


GARY SPACKMAN
Interim Director