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	Docket No. CM-DC-2010-001 **FINAL ORDER ESTABLISHING 2013 REASONABLE CARRYOVER** ***(METHODOLOGY STEP 10)***

FINDINGS OF FACT

1. On June 23, 2010, the Director ("Director") of the Idaho Department of Water Resources ("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. Step 9 of the Methodology Order states that, on or before November 30th of each year, the Director will project the SWC's reasonable carryover shortfall, if any. *Methodology Order* at 37. If the Director projects a reasonable carryover shortfall, junior ground water users 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.

3. Step 10 of the Methodology Order goes on to explain, "As an alternative to providing the full volume of reasonable carryover shortfall established in Step 9, junior ground water users can request that the Department model the transient impacts of the proposed curtailment based on the Department's water rights data base and the ESPA Model." *Id.*

4. On November 27, 2013, the Director issued his *Final Order Establishing 2013 Reasonable Carryover (Methodology Step 9)* ("2013 Step 9 Order") in which the Director determined the reasonable carryover shortfall obligation for junior ground water users for 2013. The Director concluded that American Falls Reservoir District No. 2 ("AFRD2") and Twin Falls Canal Company ("TFCC") are the only SWC entities with a reasonable carryover shortfall for 2013, and that their final 2013 adjusted carryover shortfall values are 40,819 acre-feet and 5,176 acre-feet respectively, a combined obligation of 45,995 acre-feet. *2013 Step 9 Order* at 5. Consistent with the Methodology Order, the 2013 Step 9 Order required that junior ground water users establish their

ability to provide 40,819 acre-feet to AFRD2 and 5,176 to TFCC or alternatively, notify the Department of their intention to implement Step 10. *Id.* at 5.

5. On November 27, 2013, the Idaho Ground Water Appropriators Inc. ("IGWA"), on behalf of junior ground water users, requested that the Department implement Step 10 of the Methodology Order and model the transient impacts of the proposed curtailment based on the Department's water rights database and the Eastern Snake Plain Aquifer ("ESPA") Model. Email from Randy Budge, Atty. for IGWA, to Gary Spackman, Dir. of IDWR, *SWC Delivery Call, Docket No. CM-DC-2010-001 – Reasonable Carryover* (Nov. 27, 2013).

6. Step 10 provides, in relevant part:

> The modeling effort will determine total annual reach gain accruals due to curtailment over the period of the model exercise. In the year of injury, junior ground water users would then be obligated to provide the accrued volume of water associated with the first year of the model run. In each subsequent year, junior ground water users would be required to provide the respective volume of water associated with reach gain accruals for that respective year, until such time as the reservoir storage space held by members of the SWC fills, or the entire volume of water from Step 9 less any previous accrual payments is provided. Modeled curtailment shall be consistent with previous Department efforts. The ESPA Model will be run to determine the priority date necessary to produce the required volume within the model boundary of the ESPA. However, because the Director can only curtail junior ground water rights within the area of common ground water supply, CM Rule 50.0 1, junior ground water users will be required to meet the volumetric obligation within the area of common ground water supply, not the full model boundary.

Methodology Order at 38 (citations omitted).

7. Applying Step 10, the ESPA Model[1] is first used to find the latest priority date for curtailment that would produce the combined projected carryover shortfall for AFRD2 and TFCC (45,995 acre-feet) within the 10% trimline for the SWC and excluding Southwest Irrigation District ("SWID") and Goose Creek Irrigation District ("GCID") service areas.[2] Curtailment junior to **July 1, 1985** is predicted to result in accrual of 46,006 acre-feet to the near Blackfoot to Minidoka reaches.[3]

8. The ESPA Model is then used to adjust the volumetric obligation associated with the July 1, 1985 priority date. As described in Step 10 of the Methodology Order, "ground water users will be required to meet the volumetric obligation within the area of common ground water

[1] ESPA Model Version 1.1 was used for the modeling exercises in this order.
[2] The Department recently approved an interim CM Rule 43 mitigation plan for SWID and GCID. *Final Order Approving Interim Mitigation Plan*, CM-MP-2010-01 (November 25, 2013). With the acceptance of the SWID and GCID mitigation plan, material injury to the SWC in association with ground water pumping by SWID and GCID is being mitigated for this year. Accordingly, SWID and GCID's ground water irrigated acres are excluded from the analysis.
[3] See Attachment A.

supply, not the full model boundary." *Id.* Excluding irrigation that is not within the area of common ground water supply, the volumetric obligation is reduced to 42,383 acre-feet.[4]

9. The ESPA Model is then used to calculate the transient impacts of curtailment within the 10% trimline for the SWC, within the area of common ground water supply and excluding the SWID and GCID service areas. The analysis evaluates the impacts of a single year of curtailment, with the annual consumptive use volume applied over a 12-month period at the beginning of the model run. *Methodology Order* at 33. Transient effects were evaluated for a period of 20 years.

10. Table 1 below provides the cumulative volume accrued to near Blackfoot to Minidoka at year end, the yearly obligation for the 2013 combined projected carryover shortfall, and the division of the yearly obligation divided between AFRD2 and TFCC:

Model year[5]	Cumulative volume accrued to near Blackfoot to Minidoka at end of year (AF)	Volume accrued to near Blackfoot to Minidoka during model year (AF)	Volume accrued during model year apportioned to AFRD2 (AF)	Volume accrued during model year apportioned to TFCC (AF)
1	11,924	11,924	10,583	1,341
2	20,947	9,022	8,007	1,015
3	24,771	3,824	3,394	430
4	27,326	2,555	2,268	287
5	29,248	1,922	1,705	216
6	30,775	1,528	1,356	172
7	32,032	1,257	1,116	141
8	33,092	1,060	940	119
9	34,001	909	806	102
10	34,790	789	700	89
11	35,481	691	613	78
12	36,090	610	541	69
13	36,631	541	480	61
14	37,112	481	427	54
15	37,542	430	381	48
16	37,927	385	342	43
17	38,272	346	307	39
18	38,583	311	276	35
19	38,863	280	249	32
20	39,116	253	224	28

Table 1

11. The total volume accrued to the near Blackfoot to Minidoka reaches at the end of the first year is 11,924 acre-feet. Using the proportional relationship between AFRD2 and TFCC established in the table associated with Finding of Fact 8 of the 2013 Step 9 Order, 10,583 acre-

[4] See Attachment B.

[5] In this analysis, the ESPAM1.1 model year begins on April 1 and ends on March 31. While this table extends 20 years, the obligation may terminate before 20 years or may extend past 20 years. The obligation continues until such time as the reservoir storage space held by members of the SWC fills, or the entire volume of water from Step 9 less any previous accrual payments is provided. *Methodology Order* at 38.

feet of the first year volume is apportioned to AFRD2 and 1,341 acre-feet is apportioned to TFCC.

CONCLUSIONS OF LAW

1. The evidentiary standard to apply in conjunctive administration of hydraulically connected water rights is clear and convincing. *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 524, 284 P.3d 225, 249 (2012).

2. "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).

3. Step 10 requires that in the year of injury, junior ground water users are obligated to provide the accrued volume of water associated with the first year of the model run. *Methodology Order* at 38. The Director concludes by clear and convincing evidence that the accrued volume of water associated with the first year of the model run is 11,924 acre-feet and that the appropriate proportional distribution is 10,583 acre-feet to AFRD2 and 1,341 acre-feet to TFCC.

4. Therefore, junior ground water users represented by IGWA have fourteen days to establish, to the satisfaction of the Director, of their ability to provide 10,583 acre-feet of storage water to AFRD2 and 1,341 acre-feet to TFCC to satisfy Methodology Step 10. If IGWA fails to do so, the Department will issue an order curtailing ground water rights junior to July 1, 1985.

5. In each subsequent year, junior ground water users will be required to provide the respective volume of water associated with reach gain accruals for that respective year, until such time as the reservoir storage space held by members of the SWC fills, or the entire volume of water from Step 9 less any previous accrual payments is provided. *Methodology Order* at 38. Any subsequent obligation owed, if any, will be addressed in future carryover orders when issued.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that IGWA has fourteen days from the issuance of this order to establish, to the satisfaction of the Director, of its ability to provide 10,583 acre-feet of storage water to AFRD2 and 1,341 acre-feet to TFCC to satisfy Methodology Step 10. If IGWA fails to do so, the Department will issue an order curtailing junior-priority ground water rights.

IT IS FURTHER ORDERED in subsequent years, junior ground water users are required to provide the respective volume of water associated with reach gain accruals for that respective year as shown in Table 1 until such time as the reservoir storage space held by members of the

SWC fills, or the entire volume of water from Step 9 less any previous accrual payments provided.

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 16th day of December, 2013.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of December, 2013, the above and foregoing, was served by the method indicated below, and addressed to the following:

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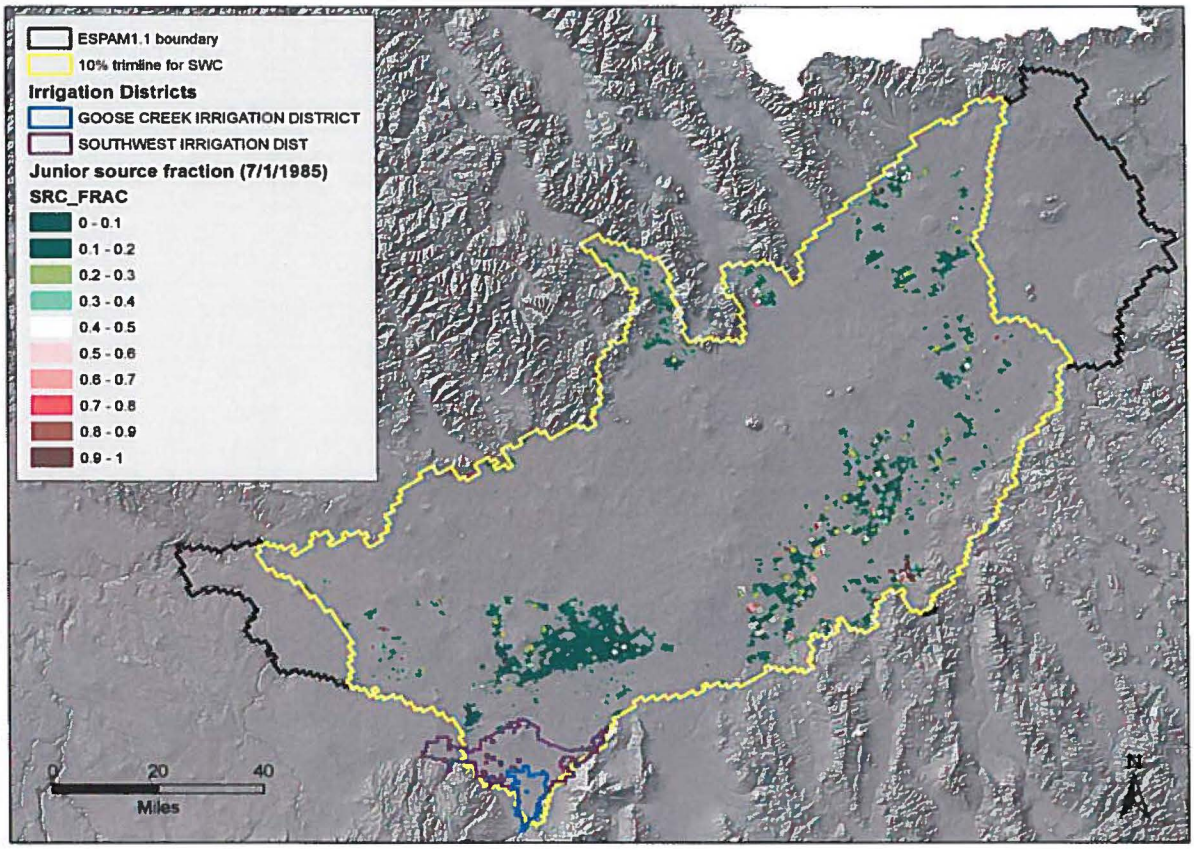
Deborah J. Gibson

Deborah Gibson
Administrative Assistant for the Director

Priority date 1-Jul-1985

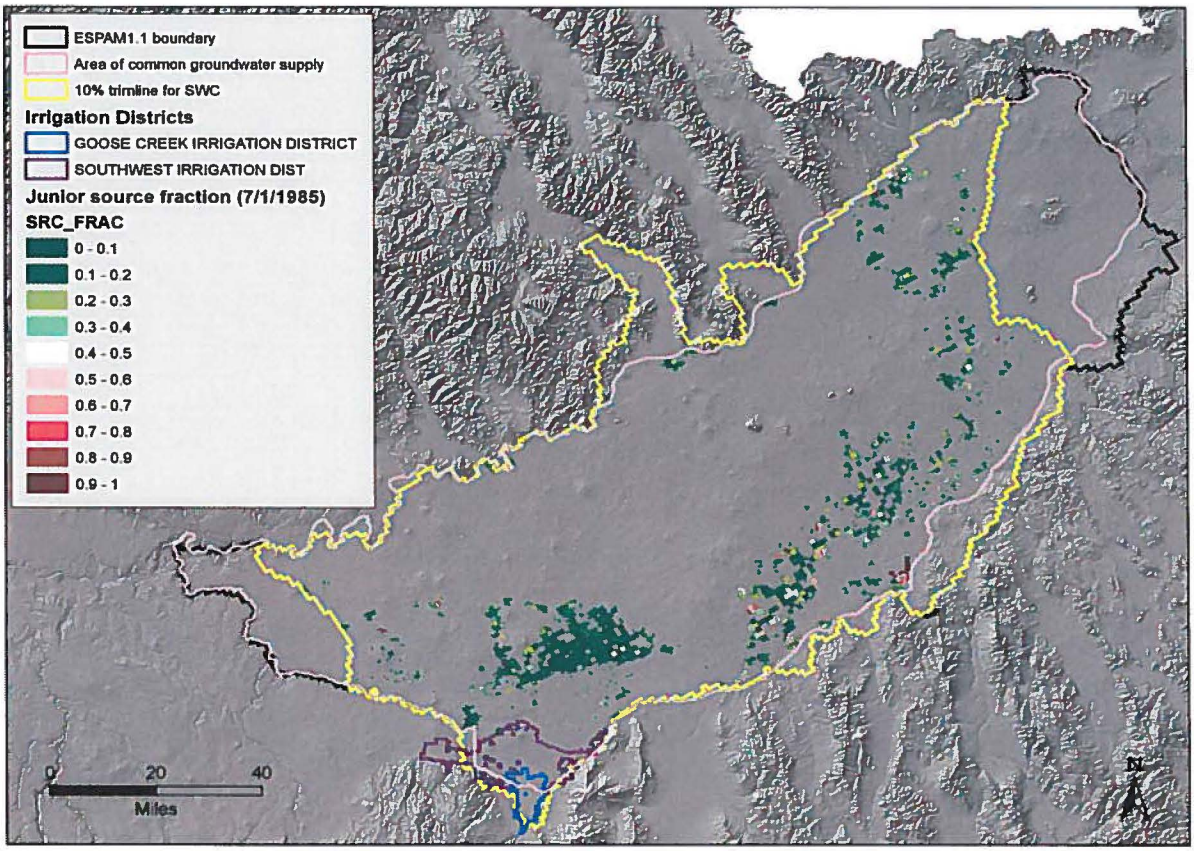


Curtailed Area		Depletions		ft/ac/yr
164294600.1	m**2	9,944,046	ft**3/d	2.05
40,598	ac	83,380	ac-ft/y	

reach	cf/d gain	cfs gain	ac-ft/y
Malad-Bancroft	6678.225	0.1	56
Malad	175431.4	2.0	1,471
Thousand Sp-Malad	20956.14	0.2	176
Thousand Sp	194102.5	2.2	1,628
Buhl-Thousand Sp	309840.2	3.6	2,598
Devils Washbowl-Buhl	837536.1	9.7	7,023
Ashton-Rexburg	683635.6	7.9	5,732
Heise-Shelley	460698.2	5.3	3,863
Shelley-nr Blackfoot	1768441	20.5	14,828
Neeley-Minidoka	575265.4	6.7	4,824
nr Blackfoot-Neeley	4911460	56.8	41,182
sum	9,944,045	115	83,380
nr Blackfoot-Minidoka	5486725.4	63.5	46,006

ATTACHMENT A

Priority date 1-Jul-1985



Curtailed Area		Depletions		ft/ac/yr
151522110	m**2	9,230,246	ft**3/d	2.07
37,442	ac	77,395	ac-ft/y	

reach	cf/d gain	cfs gain	ac-ft/y
Malad-Bancroft	6424.936	0.1	54
Malad	168798.5	2.0	1,415
Thousand Sp-Malad	20183.15	0.2	169
Thousand Sp	187054.2	2.2	1,568
Buhl-Thousand Sp	298700.8	3.5	2,505
Devils Washbowl-Buhl	808298.9	9.4	6,778
Ashton-Rexburg	639297.2	7.4	5,360
Heise-Shelley	426705	4.9	3,578
Shelley-nr Blackfoot	1620136	18.8	13,585
Neeley-Minidoka	540063.5	6.3	4,528
nr Blackfoot-Neeley	4514584	52.3	37,855
Sum	9,230,246	107	77,395
nr Blackfoot-Minidoka	5054647.5	58.5	42,383

ATTACHMENT B

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the 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. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department 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:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. 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 of: a) the service date of the final order, b) the service date 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 section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.