

**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

**ORDER DENYING PETITION FOR
RECONSIDERATION; DENYING
REQUEST FOR HEARING; DENYING
MOTION TO AUTHORIZE
DISCOVERY**

(METHODOLOGY STEPS 1-4)

On May 1, 2013, the Surface Water Coalition (“SWC”) filed a *Petition for Reconsideration and Request for Hearing on Final Order Regarding April 2013 Forecast Supply / Motion to Authorize Discovery* (“Petition”) with the Idaho Department of Water Resources (“Director” or “Department”). The Petition seeks three forms of relief. First, the Petition asks the Director to reconsider findings of fact and conclusions of law related to Step 3 of the April 17, 2013 *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)* (“April Forecast Order”). *Petition* at 4. Second, the Petition “requests a hearing on the Director’s April Forecast Order.” *Id.* at 5. Lastly, the Petition asks the Director to authorize discovery in order “to discover the factual basis and analysis performed by the Director in issuing” the April Forecast Order. *Id.* For the reasons described below, the Director denies the SWC’s Petition.

A. Reconsideration of Step 3

i. Forecast Information Published After Issuance of the April Forecast Order

The April Forecast Order implements Steps 1-4 of the Methodology Order.¹ Step 3 of the Methodology Order provides that, within fourteen days of the issuance of the joint forecast (“Joint Forecast”) prepared by the United States Bureau of Reclamation and the United States

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 and subsequent orders related to the Methodology Order are on judicial review before the Fifth Judicial District Court, in and for the County of Gooding, in case numbers CV-2010-382 *et al.* Those matters are currently stayed pending the Idaho Supreme Court’s decision in the SWC delivery call proceeding, consolidated case number 38191-2010.

Army Corp of Engineers, the Director “will predict and issue an April Forecast Supply for the water year and will compare the April Forecast Supply to the baseline demand (‘BD’) to determine if a demand shortfall (‘DS’) is anticipated for the upcoming irrigation season.” *Methodology Order* at 35. The Joint Forecast “is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.” *Id.*

On April 3, 2013, the Joint Forecast was announced, predicting an 82% average supply of natural flow. *April Forecast Order* at 2. On April 17, 2013, the Director issued the April Forecast Order. This was within the fourteen day time period required by the Methodology Order. Applying the Joint Forecast to Step 3 of the Methodology Order, the Director predicted a demand shortfall to the SWC in the amount of 14,200 acre-feet. *Id.* at 4.

In its Petition, the SWC alleges that the April Forecast Order is “not representative of actual hydrologic conditions” based on information released by Water District 01 on April 30, 2013. *Petition* at 3. In support of this argument, the SWC attaches to its Petition an April 30, 2013 document prepared by Water District 01 and titled “Water Report.” The SWC suggests that the Director must consider new information in the April Forecast Order as it becomes available. *Id.* at 4. The Director rejects this argument for two reasons. First, the notion of continually updating the April Forecast Order is contrary to the very purpose for having an early forecast. Second, even if there was an obligation to update the order, the information from the Water Report quoted by the SWC does not conflict with the April Forecast Order.

The SWC’s argument that the Director has an obligation to update the April Forecast Order as subsequent new information arises is contrary to the Methodology Order and ignores the very purpose of the April Forecast Order. The purpose of the April Forecast Order is to predict the supply of natural flow as early in the season as possible. “Given current forecasting techniques, the earliest the Director can predict material injury to RISD with reasonable certainty is soon after the Joint Forecast is issued.” *Methodology Order* at 19. The Methodology Order requires the Director to use the actual Joint Forecast and to issue his April Forecast Order within two weeks of the Joint Forecast. The Water Report was not available at the time the April Forecast Order was issued. The Water Report was issued thirteen days after the issuance of the April Forecast Order. If the Director were to update the April Forecast Order every time new forecast information became available, there would never be a final decision upon which water users could plan for the upcoming irrigation season. The Director must determine the April forecast based upon the information available at the time the order is issued. The Director’s April Forecast Order followed the steps outlined in the Methodology Order and was based on the best hydrologic information available at the time.

The SWC also argues that the Water Report shows that “the American Falls 1921 storage right is still short of filling....” *Petition* at 3. While the SWC is factually correct that the Water Report does state that American Falls Reservoir has not filled as of April 30, 2013, this statement has no relevancy to the validity of the April Forecast Order. Nowhere does the April Forecast Order say that American Falls Reservoir is going to be full by April 30, 2013. The April Forecast Order provides that it is likely that American Falls Reservoir will fill. *April Forecast Order* at 3. Like the April Forecast Order, the Water Report also anticipates that American Falls

Reservoir will fill as evidenced by the statement that the filling of two junior storage water rights will occur sometime between mid-May and late-June. Attachment A to the *Petition*.

The SWC argues the Water Report “shows that early season storage use, both above and below American Falls Reservoir, is not expected to be cancelled because excess water has not spilled past Milner this year.” *Petition* at 3 (quotations omitted). Again, this statement has no relevancy here. Nowhere in the April Forecast Order does it state that early season storage use is expected to be cancelled this year.

Finally, the SWC also states that the Water Report predicts that “if weather conditions are very dry, it could result in very little new fill in the Palisades and Island Park storage rights.” *Id.* This statement is consistent with the April Forecast Order. The April Forecast Order predicted Palisades 1939 right would only fill to 59%. *April Forecast Order* at 3. The Water Report merely provides a broad overview of fill possibilities depending on weather patterns and does not contradict the April Forecast Order.

ii. TFCC’s predictive tool

In its *Petition*, the SWC states that the April Forecast Order is “not the best available science” because Twin Falls Canal Company (“TFCC”) “has developed a predictive tool to identify estimated available natural flow below American Falls after June 30th.” *Petition* at 4. The Director has previously expressed to TFCC that the Department is willing to work with TFCC to improve the predictors for TFCC for future application in the Methodology Order and Department staff have even met with TFCC consultants on this issue. The Methodology Order requires the Director determine a demand shortfall, if any, by April 1; however, TFCC did not notify the Department of its request to implement the new predictive tool until May 1, 2013. Additionally, TFCC has failed to provide the Department information necessary to be able to evaluate TFCC’s predictive tool. It is unreasonable for TFCC to expect the Department to implement any predictive tool this year when information has yet to be provided to the Department for evaluation and consideration. Moreover, it should be noted that for this year, the difference between TFCC’s predictive tool (256,478 acre-feet) and the sum of the Department’s predicted storage allocation for TFCC and the shortfall (252,752 acre-feet) is small: only 3,726 AF or a 1.5% difference.

B. 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. While the Department did update the regression used for American Falls Reservoir District #2 (“AFRD2”) as a result of new watermaster instructions, as Findings of Fact 16 and 17 of the April Forecast Order establish, the new regression does not change the demand shortfall. Under the new or the old method, there is no change in the demand shortfall. Moreover, this was not an issue raised in the Petition.

C. 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 *Final Order Regarding 2013 Forecast Supply (Methodology Steps 1-4)*.” *Petition* at 5. Because the Director is denying the request for hearing, the request to authorize discovery is moot. The Director therefore denies the request for discovery. The Director notes that all information used by the Department in the April Forecast Order was provided to the parties when the order was issued.

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 3.

The Director DENIES the SWC’s request for hearing.

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

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 22nd day of May, 2013.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May, 2013, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP 195 RIVER VISTA PL STE 204 Twin Falls, ID 83301-3029 jks@idahowaters.com lt@idahowaters.com pla@idahowaters.com</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>C. Thomas Arkoosh ARKOOSH EIGUREN LLC P.O. Box 2900 Boise, ID 83701 tom.arkoosh@aelawlobby.com</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>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org</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>Randall C. Budge Candice M. McHugh Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net tjb@racinelaw.net</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>Kathleen M. Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 kathleenmarion.carr@sol.doi.gov</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 999 18th St. South Terrace, Ste 370 Denver, CO 80202 david.gehlert@usdoj.gov</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 mhoward@usbr.gov</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>Sarah A. Klahn Mitra M. Pemberton WHITE JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com</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>Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205 dtranmer@pocatello.us</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>William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 wparsons@pmt.org</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>Michael C. Creamer Jeffrey C. Fereday GIVENS PURSLEY LLP P.O. Box 2720 Boise, ID 83701-2720 mcc@givenspursley.com jcf@givenspursley.com</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>Lyle Swank IDWR—Eastern Region 900 N. Skyline Dr., Ste A Idaho Falls, ID 83402-1718 lyle.swank@idwr.idaho.gov</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
<p>Allen Merritt Cindy Yenter IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3380 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov</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


Deborah Gibson
Administrative Assistant to the Director