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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 )  
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Docket No. CM-DC-2010-001

**SURFACE WATER COALITION'S  
 PETITION FOR RECONSIDERATION  
 AND REQUEST FOR HEARING ON  
 ORDER REVISING APRIL 2013  
 FORECAST SUPPLY (STEPS 6-8)**

**MOTION TO AUTHORIZE  
 DISCOVERY**

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 Canal Company (collectively hereafter referred to as the "Surface  
 Water Coalition", "Coalition", or "SWC"), by and through counsel of record, and hereby submit

their *Petition for Reconsideration and Request for Hearing on Order Revising April 2013 Forecast Supply (Steps 6-8) / Motion to Authorize Discovery* pursuant to Idaho Code § 42-1701A(3) and the Department's Rules of Procedure (IDAPA 37.01.01. *et seq.*).

### INITIAL REASONS FOR PETITION

On April 17, 2013, the Director issued his *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1 - 4)* ("April Forecast Order"). The April Forecast Order purported to implement Steps 1 – 4 of the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order").<sup>1</sup> The Director predicted an in-season material injury to TFCC in the amount of 14,200 acre-feet.<sup>2</sup> *See April Forecast Order* at 3.

The Coalition disputed the Director's April Forecast Order and requested reconsideration and a hearing on May 1, 2013. The Director denied the requests and refused to provide for an administrative hearing. *See Order Denying Petition for Reconsideration et al.* (May 22, 2013). Consequently, the Coalition filed a petition for judicial review with the district court.

On August 27, 2013 the Director issued an *Order Revising April 2013 Forecast Supply* ("August Order"). The Director purported to implement Steps 6 – 8 of the Methodology Order. The Director admitted he underestimated the April – July unregulated Snake River flow at Heise by nearly 400,000 acre-feet (approximately 15% error). *See August Order* at 2-3. The Director further found that both AFRD #2 and TFCC were expected to suffer in-season material injury in the amounts of 54,000 acre-feet and 51,200 acre-feet respectively. *See id.* at 6.

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<sup>1</sup> The Director's Methodology Order is currently on appeal to the Twin Falls County District Court (consolidated cases CV-2010-382 *et al.*). The district court judicial review proceeding is stayed until the Idaho Supreme Court issues a decision in consolidated appeal no. 38191-2010.

<sup>2</sup> Contrary to the Director's characterization in the August Order, the predicted injury of 14,200 acre-feet was not a predicted shortfall "to the SWC" as a whole, rather it was specific to the Twin Falls Canal Company. *See April Forecast Order* at 3, 4, *see also*, Methodology Order at 35 ("A separate April Forecast Supply and DS will be determined for each member of the SWC.").

The Director's August Order does not comply with the Methodology Order. Pursuant to the Methodology Order, the Director was required to complete the following analysis:

9. Step 6: *Approximately halfway through the irrigation season*, but following the events in Step 5, the Director will, *for each member of the SWC*: (1) evaluate the actual crop water needs up to that point in the irrigation season; (2) estimate the Time of Need date; and (3) issue a revised Forecast Supply.

10. This information will be used to recalculate RISD and adjust the projected DS for *each member of the SWC*. RISD will be calculated utilizing the project efficiency, baseline demand, and the cumulative actual crop water need determined up to that point in the irrigation season. The Director will then issue revised RISD and DS values.

\* \* \*

11. If the Director determines that the estimated Time of Need is reasonably certain, Step 7 will not be implemented for in-season purposes.

14. Step 8: At the Time of Need, junior ground water users are required to provide the lesser of the two volumes from Step 4 (May 1 secured water) and RISD volume calculated at the Time of Need. If the calculations from steps 6 or 7 indicate that a volume of water necessary to meet *in-season projected demand shortfalls* is greater than the volume from Step 4, no additional water is required.

Methodology Order at 36-37 (emphasis added).

Instead of following the Methodology Order, the Director refused to complete the analysis until August 27<sup>th</sup>, well past the approximate "halfway" point in the irrigation season. By that time water management decisions had already been made for purposes of water delivery through the end of the irrigation season. See *Affidavit of Lynn Harmon* and *Affidavit of Brian Olmstead*. The Director's failure to provide timely administration resulted in further injury to AFRD #2 and TFCC. This unlawful administration injured AFRD #2's and TFCC's senior water rights during the 2013 irrigation season.

Next, despite the increased injury to TFCC in quantities over 300% than what was predicted in April, the Director arbitrarily cut the mitigation owed to TFCC in half, from 14,200

acre-feet to 6,900 acre-feet. *See id.* at 7. Further, despite finding no injury to AFRD #2's in-season demand in April, based upon erroneous streamflow forecasting, the Director increased the mitigation obligation owed by IGWA to 7,300 acre-feet. Overall, despite finding in-season injury to AFRD #2 and TFCC in the amount of 105,200 acre-feet, the Director concluded junior priority ground water users would only need to provide 14,200 acre-feet, or about 13% of the total in order to continue to pump their full junior rights. This implementation of the conjunctive management rules and Methodology Order is unlawful. Further, the Director had no authority to reduce the mitigation obligation owed to TFCC and arbitrarily refused to follow the Methodology Order in an attempt to reallocate the mitigation water acquired by IGWA. Contrary to the Director's attempt, the Methodology Order requires an individual analysis for "each member of the SWC."

Further, as noted by the Coalition back in its May petition, the Director's predicted natural flow and storage supplies available to the SWC was incorrect and not based upon the best available hydrologic information. The Director refused to consider updated information provided by the Coalition and consequently underestimated the predicted shortfall to individual SWC members. The Director's underestimate of injury unlawfully shifted the burden of reduced water supplies to the senior water rights of AFRD #2 and TFCC. Notably, while the Director originally predicted AFRD #2 would receive 58,759 acre-feet in natural flow, that estimate was wrong by over 35,000 acre-feet resulting in further injury to AFRD #2. While junior priority ground water rights benefited from the Director's unlawful actions, AFRD #2's landowners and TFCC's shareholders were forced to suffer through reduced water deliveries. *See Affidavit of Lynn Harmon and Affidavit of Brian Olmstead.*

The Director's errors have injured AFRD #2 and TFCC for purposes of water delivery and management throughout the 2013 irrigation season. *See Affidavit of Lynn Harmon and Affidavit of Brian Olmstead.* Both AFRD #2 and TFCC could have used and delivered the mitigation water owed by IGWA. *See id.* The failure of junior ground water users to fully mitigate the injury of the senior water rights held by AFRD #2 and TFCC is an unconstitutional and unlawful implementation of Idaho state law. The Director further violated the law by failing to provide timely administration during the irrigation season.

Finally, the Director's conclusion that IGWA secured 14,200 acre-feet within 14 days of the April Forecast Order has been discovered to be in error and should be addressed through a full and formal accounting. First, IGWA filed its *Notice of Secured Water* along with the *Affidavit of Timothy Deeg* on April 22, 2013. The *Notice* represented that IGWA had leased 50,339 acre-feet for the 2013 irrigation season, including 32,500 acre-feet in 2013 leases and 17,839 acre-feet carried over from 2012.<sup>3</sup> *Notice* at 2. Mr. Deeg filed a sworn affidavit testifying that the summary of IGWA's 2013 leases was true and correct. *See Deeg Aff.* at 2.

Those 2013 storage leases and amounts were represented as follows:

Aberdeen-Springfield Canal Co.	10,000
Enterprise Canal Co.	3,000
Idaho Irrigation Dist.	3,000
Snake River Valley Irrigation Dist.	5,000
New Sweden Irrigation Dist.	3,000
Peoples Canal Co.	3,000
Palisades Water Users	500
State of Wyoming	5,000
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Total	32,500 acre-feet

*See Ex. A to Deeg Aff.*

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<sup>3</sup> IGWA owns no storage space hence it cannot carry over any storage water leased from a prior year. Further, the lessors that IGWA works with cannot carry over any additional water from 2012 beyond what they are finally allocated in 2013. Stated another way, the 17,839 acre-feet that IGWA represented it had access to could only have been part of the lessors' 2013 storage supply, not their 2012 storage. Discovery and a hearing will determine whether or not the lessors actually committed this water to IGWA in 2013.

IGWA failed to provide actual copies of the leases with its filing, however Mr. Deeg represented that they were “on file with the Department and can be confirmed with Lyle Swank.”

*Id.* Apparently the Director never required copies of the actual 2013 leases between IGWA and the lessors to confirm whether the water was actually available.

The Water District 01 published weekly reports typically identify when mitigation water or water for conversions or other uses has been assigned by IGWA, and from which lessor. On June 11, 2013, the WD1 report identified the following assignments<sup>4</sup>:

Enterprise Canal Co.	-3,000 AF private lease to IGWA
Idaho Irrigation	-3,000 AF private lease to IGWA
Snake River Valley	-4,000 AF private lease to IGWA
AFRD #2	+2,500 AF IGWA private lease assignment
North Side Canal	+7,500 AF IGWA private lease assignment

*See Ex. A to Affidavit of Travis L. Thompson*

As of June 11<sup>th</sup>, IGWA only had 22,500 acre-feet remaining from its 2013 leases. On June 13<sup>th</sup>, Randy Budge sent Steve Howser a letter noting that IGWA had released Aberdeen-Springfield Canal Company of its obligation to lease 10,000 acre-feet of storage in 2013. *See Ex. B to Thompson Aff.* Accordingly, as of June 13<sup>th</sup>, IGWA only had 12,500 acre-feet of storage remaining from its 2013 leases to supply for mitigation purposes. Nonetheless, on June 24<sup>th</sup>, Randy Budge sent a letter to Lyle Swank requesting assignment of IGWA’s 14,200 acre-feet “2012 carryover storage” to TFCC. *See Ex. C to Thompson Aff.*

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<sup>4</sup> It is the Coalition’s understandings that all assignments to AFRD #2 and NSCC in June and July were for groundwater conversion projects.

Mr. Swank responded to Mr. Budge's letter on June 25<sup>th</sup> advising the following with respect to IGWA's claimed "2012 carryover storage":

At the Rental Pool meeting held on April 23, 2013 there was considerable discussion regarding the water that was held over for the AFRD#2 carryover obligations and how it should be treated in 2013. It was clear in that meeting use of the storage in 2013 for a 2013 obligation would require a new 2013 private lease with the appropriate fees. Therefore, if Aberdeen-Springfield is going to lease water from its 2013 storage allocation to IGWA, a new 2013 lease with appropriate fees is required.

*See Ex. D to Thompson Aff.*

Accordingly, it was obvious at least on April 23<sup>rd</sup> that IGWA could not use any claimed "2012 carryover" for purposes of a 2013 mitigation obligation. Accordingly, since the 17,389 acre-feet was not represented in a new 2013 lease, it was not available for IGWA to assign for mitigation purposes. On June 25<sup>th</sup>, WD1 reported that IGWA assigned 2,000 acre-feet from its New Sweden lease to the Southwest Irrigation District pump. *See Ex. A to Thompson Aff.*

Accordingly, as of June 25<sup>th</sup>, IGWA only had 10,500 acre-feet remaining from its 2013 storage leases consisting of the following:

Snake River Valley Irr. Dist.	1,000
New Sweden Irr. Dist.	1,000
Peoples Canal Co.	3,000
Palisades Water Users	500
State of Wyoming	5,000
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Total	10,500 acre-feet

Despite not having 14,200 acre-feet as represented as of June 25<sup>th</sup>, IGWA apparently entered into additional leases as referenced in the following WD1 report.<sup>5</sup> The contents and status of these leases is unknown. Again, apparently the Director has not requested actual copies of the new leases to confirm this new storage water either.

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<sup>5</sup> It appears that Enterprise Canal Co. leased IGWA an additional 3,750 acre-feet, New Sweden Irr. Dist. leased IGWA an additional 2,000 acre-feet, and ASCC leased IGWA 8,639 acre-feet sometime before the July 16<sup>th</sup> WD1 report.

On July 16<sup>th</sup>, WD1 reported the following assignments:

- +7,500 AF to North Side Canal from IGWA private leases
- +10,450 AF to Twin Falls Canal from IGWA private lease
- +2,500 AF to AFRD#2 from IGWA private lease
- 1,000 AF from Snake River Valley for IGWA private lease
- 3,000 AF from New Sweden for IGWA private lease
- 8,639 AF from Aberdeen-Springfield for IGWA private lease
- 3,750 AF from Enterprise Canal for IGWA private lease
- 4,061 AF from State of Wyoming for IGWA private lease

*See Ex. A to Thompson Aff.*

Accordingly, on July 16<sup>th</sup> the apparent additional water leased from Enterprise (3,750 af), New Sweden (3,000 af), and ASCC (8,639 af), different than the prior representations to the Director and WD1, was fully assigned. As of this date IGWA only had 3,939 acre-feet available from the Peoples Canal Co. and State of Wyoming based upon the *Notice and Deeg Aff.* filed with the Director in April. Further, despite IGWA's prior request to assign the Peoples Canal Co. storage to TFCC that assignment does not appear in any WD1 weekly reports. *See Ex. A to Thompson Aff.*

Finally, on September 3<sup>rd</sup> WD1 reported the following assignments:

- 1,500 AF storage leased from Snake River Valley Irrigation to IGWA
- 7,300 AF of previously leased IGWA storage assigned to AFRD2

*See Ex. A to Thompson Aff.*

Apparently, sometime between mid-July and early September IGWA leased an additional 1,500 acre-feet from Snake River Valley Irrigation and 3,361 acre-feet from other unknown lessors.

On August 27, 2013 Randy Budge represented that IGWA had assigned additional water to TFCC to ensure the full 14,200 acre-feet was provided. *See Ex. D to Thompson Aff.* Mr. Budge represented that the assignment was completed by Water District 01. However, no

assignment was reported in the WD1 August 27<sup>th</sup> weekly report. *See Ex. A to Thompson Aff.* Despite requesting assignment of the full 14,200 acre-feet of storage to TFCC on two separate occasions during the 2013 irrigation season, it appears the actual assignment was never completed. Discovery and a hearing will determine the circumstances of the assignments and why water was never actually transferred into TFCC's storage account for use during the irrigation season. Moreover, it is clear that IGWA did not have 14,200 acre-feet available at all times during the irrigation season as represented in the *April Notice* and *Deeg Aff.* The lack of mitigation water assigned to TFCC results in further injury and an unlawful implementation of the conjunctive management rules during the 2013 irrigation season.

The Coalition requests a full and complete accounting to discover the timing of leases, when storage water was assigned and for what purposes.

#### **REQUEST FOR HEARING**

The SWC, pursuant to Idaho Code § 42-1701A(3) and Rule 740.02.b of the Department's Rules of Procedure, hereby requests a hearing on the Director's August Order. No administrative hearing has been held on the Director's implementation of the CM Rules and the Methodology Order for the 2013 irrigation season. The SWC reserves the right to amend this petition as necessary.

#### **MOTION TO AUTHORIZE DISCOVERY**

The SWC hereby moves for order authorizing discovery in this matter pursuant to Rule 521 of the Department's Rules of Procedure. The SWC requests the opportunity to discover the factual basis and analysis performed by the Director in issuing the August Order and for the accounting of all storage leases represented to have been entered into by IGWA and assigned during the 2013 irrigation season.

DATED this 6<sup>th</sup> day of September, 2013.

**BARKER ROSHOLT & SIMPSON LLP**

  
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Travis L. Thompson

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**FLETCHER LAW OFFICE**

  
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W. Kent Fletcher

*Attorneys for Minidoka Irrigation  
District and American Falls  
Reservoir District #2*

## CERTIFICATE OF SERVICE

I hereby certify that on this 9<sup>th</sup> day of September, 2013, I served a true and correct copy of the foregoing *Surface Water Coalition's Petition for Reconsideration and Request for Hearing on Order Revising April 2013 Forecast Supply / Motion to Authorize Discovery* on the following by the method indicated:

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