

**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)
(Water District Nos. 34, 110, 120, and 130))
_____)

**SIXTH SUPPLEMENTAL
ORDER AMENDING
REPLACEMENT WATER
REQUIREMENTS AND
ORDER APPROVING
IGWA'S 2007 REPLACEMENT
WATER PLAN**

Background

On May 8, 2007, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed its *Ground Water Districts' Joint Replacement Water Plan for 2007* with the Director of the Department of Water Resources ("Director" or "Department"). Because of possible water shortages to members of the Surface Water Coalition, on May 10, 2007, the Director sent notification letters to affected ground water users warning of potential curtailment of ground water rights hydraulically connected to the Snake River in the American Falls area. On May 15, 2007, the Department received the *Ground Water Districts' Amended Joint Replacement Water Plan for 2007* (hereinafter "2007 Replacement Water Plan"), which increased the amount of water committed by IGWA to mitigate for material injury caused by its member ground water districts.

On May 21, 2007, the Surface Water Coalition filed its *Protest and Motion to Dismiss the Ground Water Districts' Amended Joint Replacement Water Plan for 2007* ("Motion to Dismiss"). In addition, the Surface Water Coalition requested an "immediate hearing" on its Motion to Dismiss. *Motion to Dismiss* at 19.

On May 23, 2007, the Director issued his *Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007* ("May 23 Order"). Among other things, the May 23 Order conditionally approved the Idaho Ground Water Appropriators, Inc.'s ("IGWA") 2007 replacement water plan, as amended ("2007 Replacement Plan"). In addition to conditionally accepting the 2007 Replacement Plan, the Director granted the Surface Water Coalition's request for hearing on the Plan. A scheduling order issued contemporaneously with the May 23 Order set a hearing on the 2007 Replacement Plan for June 21, 2007. *Notice of Status Conference and Notice Setting Hearing* (May 23, 2007). A status conference to discuss the June 21 hearing was set for June 5, 2007.

On June 4, 2007, IGWA and the City of Pocatello ("City") requested that the hearing on the 2007 Replacement Plan be vacated. *Pocatello's and IGWA's Joint Motion to Vacate June*

21, 2007 Hearing on SWC's Motion to Dismiss IGWA's Replacement Plan ("Joint Motion to Vacate"). The Joint Motion to Vacate argued that a hearing was not necessary for various reasons. First, the Joint Motion to Vacate stated that the Surface Water Coalition's previous protest and motion to dismiss the 2007 Replacement Plan are premature or have been mooted by the Director's conditional approval of the Plan. Second, until a hearing has been held on all orders issued by the Director in the overall matter of the Surface Water Coalition's call for delivery of senior natural flow and storage water rights, it would not be possible to have a hearing on the adequacy or lawfulness of the 2007 Replacement Plan. Finally, IGWA and the City stated their concern that the Surface Water Coalition's protest and motion to dismiss the 2007 Replacement Plan is "merely another diversionary tactic down which the SWC would like to take the Department and the ground water users in order to avoid a hearing on the May 2, 2005 Order." *Joint Motion to Vacate* at 2.

As argued, however, by the Surface Water Coalition in its June 4, 2007 *Petition for Reconsideration and Review of Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007*, there are several issues that should be addressed by the Director regarding the 2007 Replacement Plan, particularly the Plan's ability to provide certainty to members of the Surface Water Coalition that replacement water will be made available in a timely manner to mitigate for material injury.

On June 5, 2007, the Director conducted a status conference on the June 21 hearing. During the status conference, the parties requested that the Director provide guidance on the purpose and scope of the June 21 hearing on the 2007 Replacement Plan. The June 21 hearing was later reset to June 22, 2007. *Amended Notice of Hearing* (June 11, 2007).

In an order issued on June 11, 2007, the Director stated that the hearing on the 2007 Replacement Plan was limited in scope to presentation of information regarding the implementation of the Plan by IGWA to demonstrate that timely, in-season replacement water and reasonable carryover water could be provided to members of the Surface Water Coalition. *Order Denying Joint Motion to Vacate Hearing on IGWA's 2007 Replacement Water Plan*. IGWA was informed that it should be prepared to identify with specificity the water it had acquired, the quantities it had acquired, and the means by which such water could be timely delivered to members of the Surface Water Coalition. The scope of the hearing was further limited to not include argument or presentation of evidence on any other orders issued by the Director, or the Director's method and computation of material injury.

On June 21, 2007, the Surface Water Coalition filed its *Request for Updated Material Injury Determination for 2007 Water Right Administration*, accompanied by affidavits from managers of the water delivery and irrigation entities that comprise the Surface Water Coalition and a "Technical Memorandum" regarding "Updated 2007 SWC Water Supply Estimate" produced by Brockway Engineering, Inc. and HDR Engineering, Inc.

On June 22, 2007, a hearing on IGWA's Replacement Plan was held at the Department in which IGWA, the City, and members of the Surface Water Coalition participated.

FINDINGS OF FACT

1. Findings of Fact set forth in the May 2, 2005 Amended Order (“May 2005 Order”), supplemental orders to the May 2005 Order, as well as all other related orders, as applicable, are incorporated into this order by reference.

Updated Material Injury for 2007

2. The Director’s material injury assessment for members of the Surface Water Coalition in the May 23 Order was based upon forecast predictions prepared by the United States Bureau of Reclamation (“USBR”) and the United States Army Corps of Engineers (“USACE”). *May 23 Order* at 9-10. The forecast predictions are issued jointly by USBR and USACE each year for unregulated inflow at the Heise Gage after February 1 for the period February 1 through July 31; after March 1 for the period March 1 through July 31; after April 1 for the period April 1 through July 31; and after May 1 for the period May 1 through July 31. *Id.* at 9. The forecast issued soon after April 1 is generally as accurate a forecast as is possible using current data gathering and forecasting techniques. *Id.*

3. In the May 23 Order, the Directed stated that he would “continue to monitor water supply and climatic conditions through the 2007 irrigation season and issue additional orders regarding replacement water needs . . .” *Id.* at 17, ¶ 8. The following is the Director’s updated analysis of storage water and natural flow supplies that are predicted to be available to members of the Surface Water Coalition for the remainder of the 2007 irrigation season.

Storage

4. When the Director issued his May 23 Order, data provided by USBR and USACE in its joint report resulted in a prediction that reservoirs in Water District 01 would fill. The prediction of fill assumed a reduction for USBR flood control releases equal to what occurred in 2006. In actuality, 2007 flood control releases were twice what occurred in 2006, with releases mainly coming from Palisades and Jackson.

5. Taking into consideration the 2007 flood control releases made by USBR, on May 19, 2007, maximum storage in the Upper Snake River Basin reservoirs accrued as follows:

	2007 Final Maximum Storage	2007 Revised Evaporation	Final 2007 Net Storage	Preliminary 2007 Net Storage	Difference – Final Minus Preliminary
Jackson Lake	770,856.3	20,271.1	750,585.2	811,509	-60,923.8
Palisades WWS	761,386.2	20,022.0	741,364.2	879,143	-137,778.8
Other Palisades	210,182.7	5,527.1	204,655.6	242,738	-38,082.4
Henry's Lake	86,236.6	2,267.8	83,968.8	88,090	-4,121.2
Isl. Park & Grassy Lk.	148,452.2	3,903.8	144,548.4	147,013	-2,464.6
Ririe Reservoir	57,839.1	1,521.0	56,318.1	68,515	-12,196.9
Am. Falls WWS	156,830.0	4,124.1	152,705.9	153,502	-796.1
Other Am. Falls	156,830.0	4,124.1	152,705.9	153,502	-796.1
Lake Walcott	1,515,760.0	39,859.6	1,475,900.4	1,483,600	-7,699.6

TOTAL	3,802,743.1	100,000.00	3,702,743.1	3,967,290	-264,546.9
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6. The estimate in the above table for evaporation in 2007 was increased from 86,000 acre-feet to 100,000 acre-feet based on unprecedented early melting of snowpack this spring, which moved the start of regulation in Water District 01 up to April 16.

7. On May 19, 2007, Water District 01 completed its 2007 draft storage allocations for canal companies. Draft storage allocations for each member of the Surface Water Coalition are shown below. Preliminary storage allocations, which were presented in the May 23 Order, are shown in the second column. As previously stated, the preliminary values were based upon predictions of full reservoirs (except Ririe¹), with a reduction for USBR flood control operations. Because flood control release volumes in 2007 were greater than in 2006, there was a reduction of 97,745 acre-feet in total Surface Water Coalition storage allocation from the preliminary to final values.

	2007 Draft Final Storage Allocation	2007 Preliminary Storage Allocation	Difference - Final Minus Preliminary
A&B Irrig. Dist.	117,177	130,718	-13,541
Am. Falls Res. Dist. #2	383,201	385,200	-1,999
Burley Irrig. Dist.	213,265	219,960	-6,695
Milner Irrig. Dist.	79,008	85,786	-6,777
Minidoka Irrig. Dist.	334,143	353,392	-19,249
North Side Canal Co.	788,362	830,100	-41,738
Twin Falls Canal Co.	230,956	238,701	-7,745
TOTAL	2,146,113	2,243,857	-97,745

Natural Flow

8. In the May 23 Order, the Director predicted material injury to members of the Surface Water Coalition's natural flow diversions based on inflow at the Heise Gage and a regression analysis of the years 1990 through 2006. The predicted material injury was estimated to be one standard deviation below the best-fit trendlines that were established in Attachments A through G for each member of the Surface Water Coalition in the May 23 Order. The use of one standard deviation below the best-fit trendlines resulted in a more conservative estimate of the natural flow than would be available to members of the Surface Water Coalition, causing an increase in the computed amount of predicted shortfall.

9. Since the May 23 Order was issued, members of the Surface Water Coalition have been diverting natural flow for purposes of irrigation. According to the Department's water rights' accounting, as of July 8, 2007, no members of the Surface Water Coalition, other than North Side Canal Company ("NSCC") and Twin Falls Canal Company ("TFCC"), are currently

¹ Ririe fill was assumed equivalent to 1994.

diverting natural flow. It is unlikely that natural flows will increase during the remainder of the irrigation season to a point where additional natural flow will be available to members of the Surface Water Coalition other than NSCC and TFCC. Therefore, it is now known how much natural flow was diverted by each member of the Surface Water Coalition, other than NSCC and TFCC, during the 2007 irrigation season. The following table illustrates how much natural flow in acre-feet was diverted by members of the Surface Water Coalition as of July 8, 2007:

	Actual Natural Flow Diverted as of July 8, 2007 (still on natural flow)
A&B Irrig. Dist.	2,805
Am. Falls Res. Dist. #2	44,208
Burley Irrig. Dist.	60,484
Milner Irrig. Dist.	7,419
Minidoka Irrig. Dist.	85,967
North Side Canal Co.	(233,502)
Twin Falls Canal Co.	(422,376)

10. Because of the physical location of the Heise Gage in the upper reach of the Snake River, data collected at Heise Gage in the early season provides the Director with reasonable data with which to make predictions as to natural flow supplies for the upcoming irrigation season. By using the regression analysis and one standard deviation below the best-fit trendlines, the Director's natural flow predictions result in a more conservative estimate of the natural flow than would be available to members of the Surface Water Coalition.

11. In order to predict natural flow supplies for TFCC for the remainder of the irrigation season, it is no longer appropriate to use data from the Heise Gage, as virtually all reach gains to the Snake River that are available to TFCC are a result of return flows and not flow into the system from springtime runoff. Because NSCC holds significantly more storage water rights than TFCC, *see Finding of Fact 7*, it is not necessary to predict remaining natural flow supplies for NSCC, as NSCC will have sufficient natural flow and storage water rights to meet its irrigation needs during 2007.

12. In the Director's professional judgment, an accurate measure of predicting natural flow available to TFCC from July 9 through October 31 (the end of the irrigation season), is made by comparing 2007 with a previous comparable year. In the Director's judgment, the most comparable year to 2007 is 1992. In 1992, natural flow in the Snake River that was available to TFCC from July 9 to October 31 was 375,639 acre-feet.

13. Adding the natural flow that TFCC has already diverted (422,376 acre-feet) to the Director's prediction of natural flow that is predicted to be available to TFCC through the remainder of the irrigation season (375,639 acre-feet) results in an available supply of 798,015 acre-feet. In the May 23 Order, the regression analysis at one standard deviation below the best-fit trend line used by the Director to predict natural flow available to TFCC during the 2007 irrigation season was 778,285 acre-feet. *May 23 Order* at 10.

Predicted Material Injury

14. According to the May 23 Order, IGWA “shall be required to provide 58,914 acre-feet in replacement water to the Twin Falls Canal Company for its predicted material injury. . . .” *May 23 Order* at 17, ¶ 3.

15. Based on Water District 01’s draft storage allocations for members of the Surface Water Coalition, combined with the natural flow actually diverted by each member of the Surface Water Coalition as of July 8, 2007, and the Director’s natural flow prediction for TFCC for the remainder of the irrigation season, the Director predicts material injury to each member of the Surface Water Coalition in acre-feet as follows:

	Minimum Full Supply 1995	2007 Predicted Supply – Natural Flow + Storage	Estimated Shortfall (overage)	Reasonable Carryover	Estimated 2007 Carryover (shortfall)	Estimated Total Shortfall (shortfall)
A&B Irrig. Dist.	50,000	119,982	(69,982)	8,500	69,982	0
Am. Falls Res. Dist. #2	405,600	427,409	(21,809)	51,200	(29,391)	(29,391)
Burley Irrig. Dist.	220,200	273,750	(53,550)	0	53,550	0
Milner Irrig. Dist.	50,800	86,427	(35,627)	7,200	35,627	0
Minidoka Irrig. Dist.	314,300	420,110	(105,810)	0	105,810	0
North Side Canal Co.	988,200	1,090,360	(102,160)	83,300	102,160	0
Twin Falls Canal Co.	1,075,900	1,028,971	46,929	38,400	(38,400)	(85,329)

16. The predicted material injury to TFCC during the 2007 irrigation season is 46,929 acre-feet. Predicted carryover shortfall to members of the Surface Water Coalition is 67,791 acre-feet.

June 22 Hearing

17. At the outset, Randall C. Budge, on behalf of IGWA, moved to strike the Surface Water Coalition’s June 21 filings because they were irrelevant and outside the scope of the purpose of the June 22 hearing. Mr. Budge’s motion to strike was denied; however, the Director stated that the filings were outside the scope of the June 22 hearing and could not be used by the parties during the proceeding and would not be considered by the Director in ruling on IGWA’s 2007 Replacement Water Plan.

18. Mr. Budge then called IGWA’s first witness, Executive Director Lynn Tominaga, to testify regarding leases for storage water that he had secured on behalf of IGWA for purposes of providing replacement water to TFCC in 2007. The leases secured by Mr. Tominaga, on behalf of IGWA, are summarized in IGWA’s Exhibit 2, which the Director admitted into evidence over objection by attorneys for the Surface Water Coalition. IGWA’s Exhibit 2 may be found on the Department’s website at: <http://www.idwr.idahogov/Calls/Surface%20Coalition%20Call/2007%20Filings/IGWA%20Exhibit%202.pdf> (last visited July 11, 2007).

19. IGWA’s Exhibit 2 is broken into two components. The first component lists the entities from which IGWA has secured, or was in the process of securing, leases and is represented as follows:

Aberdeen-Springfield Canal Co.	20,000 acre-feet
City of Pocatello	10,000 acre-feet
Enterprise Canal Co.	15,000 acre-feet ²
FMC Idaho, LLC	3,992 acre-feet ³
SE Idaho Energy, LLC	6,153.8 acre-feet
Snake River Valley Irrig. Dist.	<u>10,000 acre-feet</u>
Total:	65,145.8 acre-feet

20. According to Mr. Tominaga the second component describes commitments for leases that had not yet been entered into, but could be secured by IGWA if more replacement water is needed. The amount of water for which IGWA has commitments is “up to” 30,000 acre-feet and is represented as follows:

Anonymous	Up to 20,000 acre-feet
Anonymous Irrig. Co.	Up to 5,000 acre-feet
Anonymous Canal Co.	<u>Up to 5,000 acre-feet</u>
Total:	Up to 30,000 acre-feet

21. The second component of IGWA’s Exhibit 2 further states that the Anonymous Irrigation Company and the Anonymous Canal Company are assessing their natural flows and will know the amount of water available for lease after July 1.

22. During cross-examination, Mr. Tominaga stated that his role in the 2007 Replacement Water Plan was limited to securing as much storage water as he could find. Therefore, Mr. Tominaga stated that he did not know how the 2007 Replacement Water Plan would be implemented.

23. After direct and cross-examination of Mr. Tominaga, Mr. Budge called Ronald D. Carlson to discuss implementation of the 2007 Replacement Water Plan. Mr. Carlson was formerly the regional manager of the Department’s eastern region office in Idaho Falls and the watermaster for Water District 01. Mr. Carlson stated his familiarity with the Surface Water Coalition’s delivery call, the orders issued by the Director, and the previous replacement plans submitted by IGWA on behalf of its member ground water districts. Mr. Carlson stated that the 2007 Replacement Water Plan would guarantee any shortage to TFCC’s minimum full supply of 1,075,900 acre-feet. The 2007 Replacement Water Plan would satisfy this guarantee by providing replacement water to TFCC, and by underwriting TFCC’s lease of 40,000 acre-feet from the Water District 01 rental pool.

² While IGWA’s Exhibit 2 states that 12,000 acre-feet of water had been secured from Enterprise Canal Company, it was established at hearing that the correct amount was 15,000 acre-feet.

³ While IGWA’s Exhibit 2 states that 5,000 acre-feet of water had been secured from FMC Idaho, LLC, it has been established by the Director that, because Palisades Reservoir did not fill, the correct amount is 3,992 acre-feet.

24. It was established during the hearing that the 20,000 acre-feet of water leased by IGWA from the Aberdeen-Springfield Canal Company had already been used by IGWA for mitigation purposes in delivery calls in the Thousand Springs area of the Snake River. Therefore, the amount of water under lease by IGWA that could be used as a replacement supply for TFCC was 45,145.8 acre-feet. If IGWA were to enter into leases for storage water with entities with whom it has commitments, the amount of water secured by IGWA could be increased by an additional 30,000 acre-feet.

CONCLUSIONS OF LAW

1. Conclusions of Law set forth in the May 2005 Order, supplemental orders to the May 2005 Order, as well as all orders related thereto, as applicable, are incorporated into this order by reference. All findings of fact in this order later deemed to be conclusions of law are hereby made as conclusions of law.

2. The 2007 Replacement Water Plan states that it will “mitigate any and all material injury by guaranteeing and underwriting Twin Falls Canal Company’s irrigation season supply . . . up to 1,075,900 acre-feet . . .” *2007 Replacement Water Plan* at 9. “The replacement water will be delivered to Twin Falls Canal Company as it is needed during the irrigation season . . .” *Id.* at 10.

3. As established at the June 22 hearing, IGWA has secured 65,145.8 acre-feet of replacement water by lease. Of that amount, IGWA has already used 20,000 acre-feet for purposes of providing replacement water to senior water users in the Thousand Springs area of the Snake River. Therefore, the amount of water presently secured by lease that is available to IGWA is 45,145.8 acre-feet. In addition, IGWA has “up to” an additional 30,000 acre-feet of water committed to it by other entities. If the amount of water secured to it by lease and committed to it by other entities is insufficient to meet its replacement water obligation to TFCC for the 2007 irrigation season, IGWA has agreed to underwrite TFCC’s lease of 40,000 acre-feet from the Water District 01 rental pool.

4. Based on the Director’s updated material injury analysis, TFCC is predicted to experience 46,929 acre-feet in material injury during the 2007 irrigation season.

5. As established at the June 22 hearing, IGWA has secured and pledged sufficient replacement water to mitigate TFCC’s predicted material injury. Additionally, because the 40,000 acre-feet of water purchased by TFCC from the Water District 01 rental pool cannot be carried over from year-to-year, it is appropriate that IGWA be allowed to underwrite the lease entered into by TFCC to assist in mitigating TFCC’s predicted material injury of 46,929 acre-feet.

6. Based on consideration of the 2007 Replacement Water Plan and evidence, testimony, and argument presented at the June 22 hearing, the Director should approve IGWA’s 2007 Replacement Water Plan.

7. While this order does not require IGWA, at this time, to provide replacement water to members of the Surface Water Coalition who are predicted to experience losses in reasonable carryover storage, such replacement water is required prior to the time it is needed during the 2008 irrigation season. Therefore, IGWA should be prepared to address acquisition of carryover water accordingly.

ORDER

Based upon and consistent with the reasons stated in the foregoing Findings of Fact and Conclusions of Law, the Director ORDERS as follows:

IT IS HEREBY ORDERED that, based on the current water supply and climatic conditions, the material injury predicted to occur to the Twin Falls Canal Company during the 2007 irrigation season is 46,929 acre-feet.

IT IS FURTHER ORDERED that the *Ground Water Districts' Amended Joint Replacement Water Plan for 2007* is APPROVED.

IT IS FURTHER ORDERED that the Director will continue to monitor water supply and climatic conditions through the 2007 irrigation season and issue additional orders regarding replacement water needs in 2007 or further instructions to the watermasters for Water District Nos. 34, 110, 120, and 130 should material injury be predicted to occur to rights held by or for the benefit of members of the Surface Water Coalition.

IT IS FURTHER ORDERED that the Director will make a final determination of the amounts of mitigation required and actually provided after the final accounting for surface water diversions from the Snake River for 2007 is complete. To the extent less mitigation is provided than was actually required, a mitigation obligation will carry forward to 2008 and be added to any new mitigation determined to be required for 2008. To the extent more mitigation is provided than was actually required, a mitigation credit will carry forward to 2008 and be subtracted from any new mitigation determined to be required for 2008.

IT IS FURTHER ORDERED that the predicted carryover shortfalls for 2008 are 29,391 acre-feet for the American Falls Reservoir District No. 2, and 38,400 acre-feet for the Twin Falls Canal Company. Providing this carryover water is an obligation that the Idaho Ground Water Appropriators and its member ground water districts must meet in 2008. Mitigation debits and credits resulting from year-to-year mitigation will continue to accrue and carry forward until such time as the storage space held by the members of the Surface Water Coalition under contract with the United States Bureau of Reclamation fills. At that time, any remaining debits and credits will cancel.

IT IS FURTHER ORDERED that pursuant to Idaho Code § 67-5247 this Order is made effective upon issuance due to the immediate danger to the public welfare posed by the lack of certainty existing among holders of water rights for the diversion and use of ground water for irrigation from the Eastern Snake Plain Aquifer as to whether water will be available under the priorities of their respective rights during the 2007 irrigation season.

IT IS FURTHER ORDERED that this is a final order of the agency and all aspects of the order shall be subject to review at the hearing that will take place on November 28, 2007.

DATED this 11th day of July, 2007.

A handwritten signature in cursive script, reading "David R. Tuthill, Jr.", written over a horizontal line.

DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of July, 2007, the above and foregoing, was served by the method indicated below, and addressed to the following:

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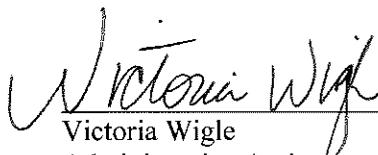
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