

**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)	Docket No. CM-DC-2010-001
THE BENEFIT OF A&B IRRIGATION DISTRICT,)	
AMERICAN FALLS RESERVOIR DISTRICT #2,)	ORDER DENYING PETITION
BURLEY IRRIGATION DISTRICT, MILNER)	FOR RECONSIDERATION;
IRRIGATION DISTRICT, MINIDOKA IRRIGATION)	DENYING MOTION TO
DISTRICT, NORTH SIDE CANAL COMPANY,)	AUTHORIZE DISCOVERY;
AND TWIN FALLS CANAL COMPANY)	DENYING REQUEST FOR
)	HEARING
)	
)	<i>(METHODOLOGY STEPS 6 – 8)</i>

BACKGROUND

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”).

The SWC and other parties filed petitions for judicial review of the Methodology Order in the Fifth Judicial District. By agreement of the parties, including the SWC, the appeals of the Methodology Order were consolidated and stayed pending a decision from the Idaho Supreme Court in Case No. 38193-2010. *Order Granting Motion for Stay*, CV-2010-382 (Fifth Jud. Dist., Dec. 13, 2010). The parties agreed that, during the stay, administration “shall continue as set forth in the Methodology Order.” *Motion for Stay* at 3, filed in CV-2010-382.

Consistent with the stipulation, the Director applied the Methodology Order in 2013. On April 17, 2013, the Director issued his *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)* (“2013 Forecast Supply Order”). The 2013 Forecast Supply Order predicted a 14,200 acre-foot in-season shortfall to the SWC. *2013 Forecast Supply Order* at 4. (“[I]t is predicted, at this time, that the SWC will experience a maximum demand shortfall of 14,200 acre-feet. As established in Step 8 of the Methodology Order, no water shall be owed until the Time of Need. At the Time of Need, the volume of water necessary to mitigate for material injury to the SWC may be less but not greater than 14,200 acre-feet.”). At the time the 2013 Forecast Supply Order was issued, the only member of the SWC predicted to experience material injury during the 2013 irrigation season was the Twin Falls Canal Company (“TFCC”).

The SWC appealed the 2013 Forecast Supply Order and, by agreement of the parties, the matter is currently stayed. *Order Staying Proceeding Pursuant to Stipulation*, CV-2013-2305 (Fifth Jud. Dist., June 28, 2013).

On August 27, 2013, the Director issued his *Order Revising April 2013 Forecast Supply (Methodology Steps 6 – 8)* (“Steps 6 – 8 Order”), implementing Methodology Steps 6 – 8.¹ The Steps 6 – 8 Order revised the predicted in-season shortfall. The revised order predicted a shortfall of 105,200 acre-feet to the SWC. *Steps 6 – 8 Order* at 6. TFCC’s portion of the revised predicted shortfall was 51,200 acre-feet. *Id.* The Steps 6 – 8 Order predicted a shortfall of 54,000 acre-feet for another member of the SWC, American Falls Reservoir District #2 (“AFRD2”), not previously identified as injured by the 2013 Forecast Supply Order. *Id.* However, consistent with the Methodology Order, “junior ground water users are required to provide the lesser of the two volumes from Step 4 (May 1 secured water) [14,200 acre-feet] and the [DS]² volume calculated at the Time of Need [105,200 acre-feet].” *Id.* at 7. The Director ordered the Water District 01 watermaster to assign the 14,200 acre-feet of mitigation storage water secured by the Idaho Ground Water Appropriators, Inc. (“IGWA”) to the accounts of AFRD2 and TFCC. *Id.* at 8. The order apportioned 7,300 acre-feet to AFRD2 and 6,900 acre-feet to TFCC. *Id.*

On September 6, 2013, the Director received *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* (“Petition”). The Petition challenges the Director’s application of the Methodology Order and the Methodology Order itself. The SWC first argues that the Steps 6 – 8 Order fails to comply with the Methodology Order because the Director issued the order after the halfway point in the irrigation season and because the Director divided the mitigation storage water secured by IGWA between TFCC and AFRD2. *Petition* at 3-4. Second, the SWC argues that the Director’s 2013 Forecast Supply Order (which was issued consistent with steps 1-4 of the Methodology Order) was “incorrect and not based upon the best available hydrologic information” and that the Methodology Order is unconstitutional. *Id.* at 4-5. Finally, the SWC alleges that IGWA misrepresented the amount of storage water it secured in its *Notice of Secured Water* and *Affidavit of Timothy Deeg*. *Id.* at 5. The SWC alleges that IGWA failed to secure the 14,200 acre-feet of storage required under the 2013 Forecast Supply Order and requests a hearing on the timing of IGWA’s leases. *Id.*

ANALYSIS

A. Application of the Methodology Order

The SWC first argues that the Steps 6 – 8 Order fails to comply with the Methodology Order because the Director issued the revised forecast order after the halfway point in the irrigation season and because the Director divided the water secured by IGWA to meet the predicted shortfall between TFCC and AFRD2. *Petition* at 3-4.

¹ The Steps 6 – 8 Order was temporarily stayed on August 30, 2013, but the stay was lifted on September 3, 2013. *Order Lifting Stay of the Order Revising April 2013 Forecast Supply (Methodology Steps 6 – 8)*.

² The Director has determined the reference in Methodology Order Step 8 to “RISD” is incorrect and should instead reference “DS.”

Step 6 of the Methodology Order provides:

Step 6: *Approximately* halfway through the irrigation season, but following the events described 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.

Methodology Order at 36 (emphasis added) (internal footnote omitted).

Contrary to the SWC's suggestion, the Methodology Order does not require that the Director issue a revised forecast order exactly halfway through the irrigation season. The Methodology Order provides that the Director will issue a revised forecast order *approximately* halfway through the irrigation season. The irrigation season for the SWC members runs generally from the middle of March to the middle of November – an eight month span. The Steps 6 – 8 Order was issued on August 27, 2013, just over 5 months into the irrigation season. The use of the term *approximately* in Step 6 evidences the intent to provide flexibility regarding the specific date the revised order must be issued. The timing of the Steps 6 – 8 Order is consistent with the requirements of the Methodology Order as it was issued *approximately* halfway through the irrigation season.

The SWC also objects to the division of IGWA's secured mitigation water between TFCC and AFRD2. The SWC argues "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." *Petition* at 4.

The SWC again mischaracterizes requirements of the Methodology Order. Nowhere in the Methodology Order, or in the 2013 Forecast Supply Order implementing the Methodology Order, does it provide that secured mitigation water acquired by IGWA in response to the 2013 Forecast Supply Order is obligated only to TFCC. In fact, by its plain language, the water is obligated to the SWC as a whole, not just one entity. If the Director forecasts an in-season shortfall, the Methodology Order requires that IGWA secure the quantity of water necessary to meet the predicted in-season shortfall for the SWC. *Methodology Order* at 35.

On April 17, 2013, the Director issued his 2013 Forecast Supply Order. The 2013 Forecast Supply Order predicted a 14,200 acre-foot in-season shortfall to TFCC and required IGWA to "secure and provide a volume of storage water or to conduct other approved mitigation activities that will provide water *to the SWC*." *2013 Forecast Supply Order* at 4 (emphasis added). The Methodology Order and the 2013 Forecast Supply Order, by their plain terms, obligate IGWA's secured mitigation water to the SWC as a whole, not to any one entity in the SWC. The reason for this is because, as occurred in this year, a revised forecast may predict a shortfall for more than one member of the SWC. Alternatively, the revised prediction may conclude that a different member of the SWC is being injured than was originally predicted. If more than one member of the SWC is predicted to have a shortfall, it is appropriate to divide the secured water among the members of the SWC who are predicted to have a shortfall. Likewise, if a revised order predicts a shortfall for a different member of the SWC than was originally

predicted, it is appropriate to provide the secured water to the entity now predicted to have a shortfall. In this circumstance, while the 2013 Forecast Supply Order originally predicted the shortfall for TFCC, the revised forecast in the Steps 6 – 8 Order predicts that AFRD2 will also have a shortfall. The Director’s division of the secured water between TFCC and AFRD2 is not contrary to the Methodology Order.

B. Constitutionality of the 2013 Forecast Supply Order and the Methodology Order

The SWC argues that the Director’s 2013 Forecast Supply Order (which was issued consistent with the Methodology Order) was “incorrect and not based upon the best available hydrologic information” and that the Methodology Order is unconstitutional. *Id.* at 4- 5. The constitutionality of the 2013 Forecast Supply Order and the Methodology Order has been raised in the SWC’s appeals of the Methodology Order and the 2013 Forecast Supply Order. The Methodology Order has been appealed and is currently stayed. The parties to the Methodology Order agreed that, during the stay, administration “shall continue as set forth in the Methodology Order.” *Motion for Stay* at 3, filed in CV-2010-382. The Director’s application of the Methodology Order is consistent with the stipulation. Issues related to the constitutionality of the Methodology Order will be addressed in case CV-2010-382.

C. IGWA’s Leases

Finally, the SWC alleges that IGWA misrepresented the amount of storage water it secured in its *Notice of Secured Water* and *Affidavit of Timothy Deeg*. The SWC alleges that IGWA failed to secure the 14,200 acre-feet of storage required under the 2013 Forecast Supply Order and requests a hearing on the timing of IGWA’s leases. *Petition* at 5. Questions regarding IGWA’s leases are not within the scope of the Steps 6 – 8 Order. The Water District 01 watermaster has complied with the Steps 6 – 8 Order and provided the ordered amounts of mitigation water to TFCC and AFRD2. As such, the watermaster has satisfied the requirements of the Steps 6 – 8 Order. The SWC’s complaint about leases rests not with this order, but is focused on whether IGWA complied with the Director’s 2013 Forecast Supply Order when IGWA submitted *IGWA’s 2013 Notice of Secured Water*. As this order did not establish the requirement for securing mitigation water, the SWC is not entitled to a hearing on that issue in the context of this order and the Director declines to address this issue in the context of this order.

D. Request for Hearing

Citing Idaho Code § 42-1701A(3) and IDAPA 37.01.01.740.02.b, the SWC seeks a hearing on the Steps 6 – 8 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.

As discussed above, the SWC is not entitled to a hearing in this proceeding on IGWA's leases. As to the other issues raised, the 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. Because 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.

E. 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 [Steps 6 – 8 Order] and for the accounting of all storage leases represented to have been entered into by IGWA” *Petition* at 9. Because the Director denies the request for hearing, the Director also denies the request for discovery.

ORDER

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

The Director DENIES the SWC's petition for reconsideration concerning the Steps 6 – 8 Order.

The Director DENIES the SWC's request for a 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 27th day of September, 2013.

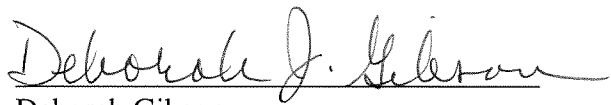

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of September, 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 Place, Ste. 204 Twin Falls, ID 83301-3029 jks@idahowaters.com tlt@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>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 Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@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 U.S. 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 Street South Terrace, Suite 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 U.S. Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@usbr.gov</p>	<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>

<p>Sarah A. Klahn Mitra 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 A. 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, LLP 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 Drive, Ste. A Idaho Falls, ID 83402 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 83301-3033 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, IDWR

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION

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

(Required by Rule of Procedure 740.02)

The accompanying order is an **Order Denying Petition for Reconsideration** of the "final order" or "amended final order" issued previously in this proceeding by the Idaho Department of Water Resources ("department") pursuant to section 67-5246, 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.