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DEPARTMENT OF
WATER RESOURCES

IDAHO DEPARTMENT OF WATER RESOURCES

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

IGWA’s Petition for Reconsideration and Clarification of the *Third Methodology Order*; Motion to Vacate or Stay; and Request for Hearing

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, through counsel, hereby petitions the Director to reconsider and clarify the *Third Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* issued April 17, 2015 (“*Third Methodology Order*”).

INTRODUCTION

On June 23, 2010, the Director of the Idaho Department of Water Resources (IDWR) issued the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Second Methodology Order*”). The parties filed petitions for judicial review, and on September 26, 2014, the district court is-

sued its *Memorandum Decision and Order on Petitions for Judicial Review* (“*Remand Order*”) which affirmed in part and set aside in part the *Second Methodology Order*.¹ The *Remand Order* instructs the Director to reconsider the following issues:

- 1) Supplemental Groundwater Rights. Although the Director must account for supplemental ground water rights, the Director’s use of groundwater fractions was set aside because it was based on information that was not in the record. (*Remand Order* at 20.)
- 2) Water Supply for TFCC. The Court found the Joint Forecast and its use of the Heise gage does not accurately predict the water supply for Twin Falls Canal Company (“TFCC”), and instructed the Director to develop an alternative method of predicting injury to TFCC.²
- 3) Area of Common Ground Water Supply. The Court found the Director’s use of the ESPA Model boundary to determine the priority date for curtailment was not proper, and instructed the Director to use the boundary of the area of common groundwater supply or adjust the curtailment date to provide the required amount of water to the Coalition when applied to the area of common groundwater supply.³
- 4) Step 10, Transient Model Runs. The Court found the use of transient modelling in Step 10 was improper, and instructed the Director to consider whether after-the-fact curtailment would be consistent with Idaho law and the purpose of reasonable carryover.⁴
- 5) Mid-Season Adjustment. The Court found that Step 8 improperly capped juniors’ mitigation obligation, and instructed the Director to adjust the prediction of material injury to reasonable in-season demand to account for changing seasonal conditions.⁵
- 6) Irrigated Acreage Information. The Court found the Director must use the Surface Water Coalition’s irrigation acreage information in determining crop water need under steps 1 and 2.⁶
- 7) Lack of Hearings. The Court found the Director had improperly de-

¹ *Remand Order* at 48.

² *Remand Order* at 20.

³ *Remand Order* at 25-26.

⁴ *Remand Order* at 28.

⁵ *Remand Order* at 12, 37-39.

⁶ *Remand Order* at 40-41.

nied the Coalition the opportunity for hearings on the application of the *Second Methodology Order*.⁷

On December 19, 2015, IGWA requested a status conference on the matters remanded to the Director. A status conference was held January 28, 2015. Following the status conference the Director requested that a committee of experts be convened to provide recommendations to the Director on the following topics:

1. Revise natural flow forecast methods for TFCC.
2. Identify more accurate and current crop data to determine crop water need for all Coalition members.
3. Improve mid-season reasonable in-season demand forecast.⁸

The Director asked that the committee prioritize topics one and two, then address supplemental ground water use.⁹ It was understood by the parties that this process was implemented with the hope of developing an alternative methodology for TFCC for use during the 2015 irrigation season, but there was no guarantee that an alternative could be finalized and fully vetted prior to the 2015 irrigation season. IGWA expected that absent a stipulation between the parties there would be an opportunity for a hearing to create a record on how to more accurately determine water need and supply for TFCC.

On March 16, 2015, IDWR staff provided a memorandum (“Staff Memo”) to the Director outlining “Recommended revisions to the Surface Water Coalition Methodology.” Experts for the various parties were permitted to append comments to the Staff Memo; however, no evidence has been submitted and no hearing has been held on any of the issues remanded or on the recommendations in the Staff Memo. Shortly thereafter the Director issued the *Third Methodology Order* and the *Final Order Regarding April 2015 Forecast Supply (Methodology Steps 1-3)* issued April 16, 2015 (“*April 2015 As-Applied Order*”). The *Third Methodology Order* and the *April 2015 As-Applied Order* are referred to collectively herein as the “2015 Orders.”

⁷ *Remand Order* at 43-44.

⁸ *Order Setting Deadline for Submission of Expert Reports* at 1.

⁹ *Id.*

RECONSIDERATION AND CLARIFICATION

A. The 2015 Orders do not comply with the *Remand Order*.

1. Supplemental Water Rights. Although the Court remanded this issue, the *Third Methodology Order* does not account for supplemental water rights used by Coalition members, but merely states it is a factor the Director can consider.¹⁰ Further, the *April 2015 As-Applied Order* does not explain how or if supplemental water rights were considered. Supplemental water rights materially impact the amount of surface water needed by Coalition members to grow crops; thus, it materially affects the amount of mitigation owed by IGWA to avoid curtailment. Therefore, IGWA requests clarification of how supplemental groundwater use was accounted for in the 2015 Orders. If it wasn't, IGWA requests the *Third Methodology Order* be amended to account for supplemental groundwater use, and the *April 2015 As-Applied Order* be amended accordingly.

2. Prediction of Supply for Other SWC Members. The 2015 Orders go beyond the *Remand Order* and revise the prediction of supply for AFRD2, BID, Minidoka and NSCC using the new methodology adopted for TFCC.¹¹ Other than for TFCC, predicted supply was not remanded to the Director and cannot be revised under the guise of the *Remand Order*. Therefore, IGWA requests the *Third Methodology Order* be amended to apply the *Second Methodology Order* methodology for predicting supply to all Coalition members other than TFCC, and the *April 2015 As-Applied Order* be amended accordingly.

3. Step 10, Transient Model Run. Rather than determine whether there is an alternative to the original Step 10, which allowed junior groundwater users to request transient model runs to adjust mitigation obligations to reasonable a carryover shortage, or exploring timing of when such an adjustment might be considered, the *Third Methodology Order* simply deletes any use of transient model runs to adjust mitigation obligation of junior users for injury to reasonable carryover storage. IGWA requests reconsideration and a hearing on this issue.

4. Adjustment to Reasonable In-Season Demand. The Staff Memo states: "With the limited timeframe the committee was given, we were unable to conclude an analysis of methods to improve RISD forecasts . . . we cannot currently recommend any changes to the current Methodology re-

¹⁰ *Third Methodology Order* at 10.

¹¹ *Id.*

garding this issue.”¹² The *Third Methodology Order* states reasonable in-season demand will be “corrected during the season to account for variations in climate and water supply between the BLY and actual conditions.”¹³ The *Third Methodology Order* then states on page 34 in Step 6 that “[u]pon a determination of an additional mitigation obligation, junior ground water users will be required to establish . . . their ability to secure a volume of water”

While the Court found the Director must adjust his prediction of material injury to reasonable in-season demand to account for changing seasonal conditions, the Court set aside the Director’s *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* and remanded the matter for further proceedings.¹⁴ The Director then revised Steps 6 and 7 even though the Staff Memo specifically stated it could not recommend any changes to these steps.¹⁵ Specifically, the Director included crop water need volumes, determined that year-to-date actual natural flow diversion will be used, stated he will predict preliminary storage allocations if BOR and Water District 1 have not predicted the allocations yet, and stated he will arrive at a Time of Need date by “predicting the day in which the remaining in storage allocation will be equal to reasonably carryover, or the difference between the 06/08/12 average demand and the 02/04 supply.”¹⁶

There is no record support of the Director’s changes to Steps 6-8, or a revision to RISD. Therefore, IGWA requests reconsideration and a hearing on this issue.

B. The *Third Methodology Order* introduces and relies upon information not contained in the record.

The Director’s decision on remand must be based on evidence in the record.¹⁷ There has been no hearing to add evidence to the record, yet the *Third Methodology Order* introduces and relies upon data and information not presented in the Coalition delivery call hearings in 2008 and 2010. The following decisions do not appear to be based solely on evidence in the agency record:

¹² *Staff Memo* at 6.

¹³ *Third Methodology Order* at 28.

¹⁴ *Third Methodology Order* at 38.

¹⁵ Cf. Steps 6,7 at 34-35 of *Third Methodology Order* with Steps 6-7 of *Second Methodology Order*.

¹⁶ *Third Methodology Order* at 34.

¹⁷ Idaho Code § 67-5279.

1. New Box Canyon Springs Data. The *Third Methodology Order* states the “pre-irrigation season supply forecast for AFRD2, BID, Minidoka, NSCC and TFCC will currently be predicted from both the Joint Forecast and from flow data at Box Canyon.”¹⁸ Box Canyon Springs flow data is not contained in the record.

2. New Multi-Linear Regressions for the April Forecast. The *Third Methodology Order* introduces new “multi-linear regression equations” into the methodology.¹⁹ None of the data for these questions is in the record.

3. New Data for July 1 Forecast. The *Third Methodology Order* compares the “July 1 snow water equivalent . . . at the Two Oceans Plateau SNOTEL site to the natural flow diversions.”²⁰ In addition, for TFCC, Spring Creek data has been introduced in addition to the Heise natural flow and the Two Oceans Plateau SNOTEL data.²¹

4. Use of ESPAM 2.1. While ESPA Model 2.1 was used in the Rangen delivery call, its reliability with respect to the Coalition has not been vetted. No record has been developed as to whether it can or should be used in the Coalition delivery call. Until an agency record is developed, ESPAM 1.1 must continue to be used.

Until there is a hearing and additional evidence submitted into the agency record, the Director must either apply the methodology set forth in the *Second Methodology Order* or adopt a new methodology confined to the data presently contained in the agency record.

MOTION TO STAY OR VACATE

IGWA requests that the *Third Methodology Order* be vacated or stayed until the issues raised above are properly addressed.

REQUEST FOR HEARING

IGWA requests a hearing on the issues raised in this petition.

¹⁸ *Third Methodology Order* at 29-30; *2015 As-Applied Order* at 2-3.

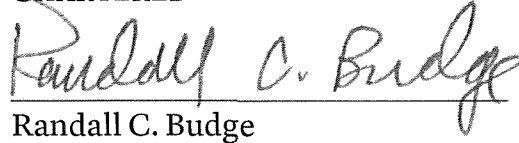
¹⁹ *Id.* at 16; *2015 As-Applied Order* at 3.

²⁰ *Third Methodology Order* at 17-18.

²¹ *Id.* at 18.

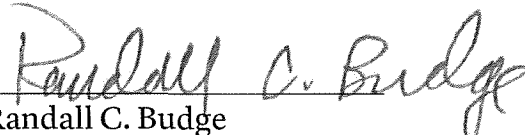
RESPECTFULLY SUBMITTED this 30th day of April, 2015.

RACINE OLSON NYE BUDGE & BAILEY,
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Randall C. Budge

CERTIFICATE OF SERVICE

I certify that on this 30th day of April, 2015, a true and correct copy of the foregoing was served on the following persons in the manner indicated:


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