

**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,)	FINAL ORDER
BURLEY IRRIGATION DISTRICT, MILNER)	DENYING A&B IRRIGATION
IRRIGATION DISTRICT, MINIDOKA IRRIGATION)	DISTRICT'S PETITION FOR
DISTRICT, NORTH SIDE CANAL COMPANY,)	RECONSIDERATION
AND TWIN FALLS CANAL COMPANY)	
_____)	

BACKGROUND

On April 19, 2016, the Director ("Director") of the Idaho Department of Water Resources ("Department") issued his *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order"). The Methodology Order established nine steps for determining material injury to members of the Surface Water Coalition ("SWC").

On April 19, 2016, the Director also issued the *Final Order Regarding April Forecast Supply (Methodology Steps 1-3)* ("As-Applied Order") predicting an in-season demand shortfall ("DS") of 44,200 acre-feet. *As-Applied Order* at 3-4. The Director ordered that, ground water users with consumptive water rights "junior to February 8, 1989, within the Eastern Snake Plain Aquifer area of common ground water supply shall establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 44,200 acre-feet in accordance with an approved mitigation plan" or the junior ground water rights would be subject to curtailment. *Id.* at 6.

On June 14, 2016, A&B submitted a letter to the Director stating "it has elected to not deliver groundwater pursuant to its enlargement water rights that are subject to the [As-Applied Order]" and requesting that the Director "rescind any mitigation obligation attributed to [A&B]." On June 30, 2016, the Director issued a response to A&B's June 14, 2016, letter stating that A&B "may voluntarily curtail its enlargement ground water rights for this irrigation season" and that A&B "will not have a mitigation obligation for this year if A&B curtails the enlargement ground water rights and if the priority date for curtailment for 2016 remains junior to A&B's other ground water rights."

On November 29, 2016, the Director issued a *Final Order Establishing 2016 Reasonable Carryover (Methodology Step 9)* ("Step 9 Order"), which applied step nine, the final step of the Methodology Order. The Director concluded "by clear and convincing evidence that there is a 39,500 AF volume of material injury to [Twin Falls Canal Company's] reasonable carryover."

Step 9 Order at 5. The Director ordered that “junior ground water users holding consumptive ground water rights within the Eastern Snake Plain Aquifer area of common ground water supply bearing priority dates junior to June 20, 1989, must mitigate for their proportionate share of the reasonable carryover shortfall of 39,500 AF in accordance with an approved mitigation plan” or the junior ground water rights will be subject to curtailment. *Id.* at 6. The Director identified that, “A&B must establish to the satisfaction of the Director its ability to mitigate for its proportionate share of the reasonable carryover shortfall, which is 2,122 AF.” *Id.* at n.12.

On December 1, 2016, A&B filed with the Department *A&B Irrigation District’s Petition for Reconsideration of Final Order Establishing Reasonably Carryover (Step 9)* (“Petition”). “A&B requests reconsideration of the Director’s determination that A&B has an obligation related to the reasonably carryover injury finding.” *Petition* at 2.

ANALYSIS

As discussed above, in the As-Applied Order the Director predicted an in-season DS of 44,200 acre-feet. *As-Applied Order* at 3-4. Rather than mitigate for its proportionate share of the predicted DS, A&B stated it would voluntarily curtail its affected junior ground water rights during the 2016 irrigation season.¹ Because of its agreement to voluntary curtail its junior ground water rights, A&B did not have to demonstrate it could mitigate for its proportionate share of the predicted DS of 44,200 acre-feet.²

In the Step 9 Order, the Director determined “there is a 39,500 AF volume of material injury to [Twin Falls Canal Company’s] reasonable carryover.” *Step 9 Order* at 5. The Director identified that “A&B must establish to the satisfaction of the Director its ability to mitigate for its proportionate share of the reasonable carryover shortfall, which is 2,122 AF.” *Id.* at 6, n.12.

“It is A&B’s position that it has no obligation for injury caused by its junior ground water rights (water right nos. 36-15127B, 36-15193B, 36-15194B, 36-15195B, and 36-15196B) subject to the [Step 9 Order] since [A&B] did not exercise those water rights during the 2016 irrigation season” and the curtailment priority date in the Step 9 Order remains junior to A&B’s other ground water rights. *Petition* at 2-3.

A&B suggests that, if it did not exercise its enlargement ground water rights during the 2016 irrigation season, A&B should not be subject to curtailment as a result of a reasonable carryover shortfall identified in the Step 9 Order. A&B’s position conflates the obligations of affected junior ground water right holders to mitigate or curtail to address the predicted DS and to mitigate or curtail to address injury to reasonable carryover. The two obligations are separate. The predicted DS is based on reasonable in-season demand and the forecast supply for a

¹ Based upon information the Department received from the watermaster for water district 130, it appears A&B diverted approximately 21 AF pursuant to its junior ground water rights during the 2016 irrigation season. The Department will evaluate A&B’s diversions further and may address this issue through a separate enforcement action.

² The Step 6 revised mid-season predicted DS was 21,300 AF. *Order Revising April 2016 Forecast Supply and Amending Curtailment Order (Methodology Step 6)* (Jul. 22, 2016) (“Step 6 Order”). Accordingly, the Director amended the curtailment date from February 8, 1989, to April 12, 1991. *Id.* at 9-10. A&B’s enlargement ground water rights are junior to the curtailment date established in the As-Applied Order and junior to the curtailment date established in the Step 6 Order.

particular irrigation season. *Methodology Order* at 4. The reasonable carryover shortfall is determined following completion of the irrigation season and calculated by subtracting reasonable carryover from actual carryover. *Id.* at 21, 28. Mitigation or curtailment for a short period of time during one irrigation season to address the predicted in-season DS is not mitigation or curtailment that also addresses injury to reasonable carryover. If junior ground water users could simply curtail to address the predicted DS and then, because of that curtailment, escape any obligation for a reasonable carryover shortfall and resume pumping their junior-priority rights, the SWC could be left without any redress for injury to its reasonable carryover. Such a result is untenable. This underscores that junior ground water users must mitigate or curtail to address the predicted DS and must separately mitigate or curtail to address injury to reasonable carryover. A&B's compliance with the curtailment of its affected ground water rights to address the predicted DS during the 2016 irrigation season does not obviate A&B's obligation to mitigate or curtail to address its obligation for the reasonable carryover shortfall identified in the Step 9 Order.³

The Director is required to issue a curtailment order this year to address injury to reasonable carryover. *See Order on Petition for Judicial Review*, Case No. 2008-551 (Fifth Jud. Dist. Jul. 24, 2009). As the Step 9 Order states, "junior ground water users holding consumptive ground water rights within the Eastern Snake Plain Aquifer area of common ground water supply bearing priority dates junior to June 20, 1989, must mitigate for their proportionate share of the reasonable carryover shortfall of 39,500 AF in accordance with an approved mitigation plan" or the junior ground water rights will be subject to curtailment. *Step 9 Order* at 6. A&B must comply with the Step 9 Order by continuing to curtail its enlargement ground water rights or establishing to the satisfaction of the Director its ability to mitigate for its proportionate share of the reasonable carryover shortfall, which is 2,122 AF.

ORDER

Based on and consistent with the foregoing, IT IS HEREBY ORDERED that A&B's Petition is DENIED.

IT IS FURTHER ORDERED that, within five (5) business days following issuance of this order, A&B must establish to the satisfaction of the Director its ability to mitigate for its proportionate share of the reasonable carryover shortfall in accordance with an approved mitigation plan or A&B will be subject to a curtailment order issued by the Director.

Dated this 20th day of December, 2016.


GARY SPACKMAN
Director

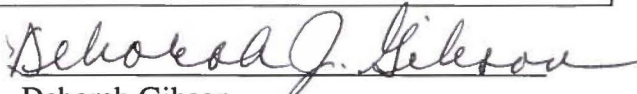
³ A&B also states that, because it did not exercise its junior ground water rights in 2016 and the Step 9 Order establishes a curtailment priority date of June 20, 1989, "[b]oth criteria identified by the Director in [the] June 30th letter are still satisfied." *Petition* at 2. A&B concludes that, "[a]s such, A&B does not have a mitigation obligation for the reasonable carryover identified in the" Step 9 Order. *Id.* at 3. First, it appears A&B did exercise its junior ground water rights in 2016 contrary to its letter. Second, the Director's letter addressed A&B's mitigation obligation pursuant to the As-Applied Order and did not address A&B's obligation pursuant to the Step 9 Order. As discussed herein, the obligation of the As-Applied Order is separate from the obligation of the Step 9 Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of December 2016, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P. O. Box 63 Twin Falls, ID 83303-0063 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com	<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
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org	<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
Randall C. Budge Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net	<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
Kathleen Marion Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 kathleenmarion.carr@sol.doi.gov	<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
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18 th St., South Terrace, Suite 370 Denver, CO 80202 david.gehlert@usdoj.gov	<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
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@usbr.gov	<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
Sarah A. Klahn Mitra Pemberton WHITE & JANKOWSKI 511 16 th St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com	<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

A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205 dtranmer@pocatello.us	<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
Chris M. Bromley MCHUGH BROMLEY, PLLC 380 South 4 th Street, Suite 103 Boise, ID 83702 cbromley@mchughbromley.com	<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
Robert E. Williams WILLIAMS, MESERVY, & LOTHSPREICH, LLP P.O. Box 168 Jerome, ID 83338 rewilliams@cableone.net	<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
Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com	<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
Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 rfife@idahofallsidaho.gov	<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
Lyle Swank IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 lyle.swank@idwr.idaho.gov	<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
Corey Skinner Nathan Erickson IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 corey.skinner@idwr.idaho.gov nathan.erickson@idwr.idaho.gov	<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
Cindy Yenter IDWR-Salmon Field Office 102 S. Warpath Salmon ID 83467-4435 cindy.yenter@idwr.idaho.gov	<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
COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 wparsons@pmt.org	<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


Deborah Gibson
Administrative Assistant for the Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

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

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), 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.