

Travis L. Thompson, ISB #6168  
Jonas A. Reagan, ISB #10566  
Nicole L. Swafford, ISB #10642  
**BARKER ROSHOLT & SIMPSON LLP**  
163 Second Ave. West  
P.O. Box 63  
Twin Falls, Idaho 83303-0063  
Telephone: (208) 733-0700  
Facsimile: (208) 735-2444  
Email: [tlt@idahowaters.com](mailto:tlt@idahowaters.com)  
[jreagan@idahowaters.com](mailto:jreagan@idahowaters.com)  
[nls@idahowaters.com](mailto:nls@idahowaters.com)

RECEIVED  
APR 23 2019  
DEPARTMENT OF  
WATER RESOURCES

*Attorneys for A&B Irrigation District*

**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 )  
\_\_\_\_\_ )

Docket No. CM-DC-2010-001

**A&B IRRIGATION DISTRICT'S  
PETITION FOR RECONSIDERATION  
AND REQUEST FOR HEARING RE:  
APRIL 2019 AS APPLIED ORDER**

**NOTICE OF NON-USE**

COMES NOW, A&B Irrigation District (hereafter referred to as "A&B" or "District"),  
by and through counsel of record, and hereby petitions for reconsideration and requests a hearing  
on the Director's *Final Order Regarding April 2019 Forecast Supply (Methodology Steps 1-3)*  
("April Order") issued on April 11, 2019. The petition is filed pursuant to Idaho Code § 67-  
5246, Idaho Code § 42-1701A(3), and the Department's rules of procedure (IDAPA  
37.01.740.02). Further, A&B provides notice of non-use of its junior priority groundwater

rights<sup>1</sup> subject to curtailment pursuant to the order for the 2019 irrigation season.

## **BACKGROUND**

The Director issued the *April Order* implementing Steps 1 - 3 of the SWC conjunctive administration methodology on April 11, 2019. The Director predicted Twin Falls Canal Company (TFCC) would suffer an in-season material injury in the amount of 20,900 acre-feet. The Director identified A&B's "proportionate share" of the predicted injury to be "2,121 acre-feet." *April Order* at 5, n. 4. No explanation is given in the order regarding the method and calculation of the "proportionate share." IDWR has yet to publish any "background data" on its website concerning the apportioned shortfall between junior priority ground water rights subject to the order. The issue was addressed with IDWR without litigation and A&B reserved all rights as to its future application.

## **PETITION FOR RECONSIDERATION**

A&B requests reconsideration of the Director's calculation that A&B's "proportionate share of the predicted DS of 20,900 acre-feet is 2,121 acre-feet." *April Order* at 5, n.4. A&B is unclear as to the basis for the Director's method and calculation to determine the "proportionate impact" of A&B's ground water rights junior to August 25, 1991 as compared to other junior ground water rights.

A&B should only be responsible for the predicted injury caused by its junior priority ground water rights subject to the *April Order* on the Near Blackfoot to Minidoka reaches of the Snake River. A&B has five "enlargement" water rights affected by the *April Order* that authorize the irrigation of 2,063.1 acres (water right nos. 36-15127B, 36-15193B, 36-15194B, 36-15195B, and 36-15196B).

---

<sup>1</sup>The following groundwater rights held by A&B are junior to August 25, 1991: 36-15127B, 36-15193B, 36-15194B, 36-15195B, and 36-15196B.

Consequently, A&B requests the Director to reconsider and re-calculate the “proportionate impact” based upon the predicted impact of A&B’s ground water rights junior to August 25, 1991 on the Near Blackfoot to Minidoka reaches of the Snake River.

Finally, the Director failed to consider the impacts caused by hydraulically connected junior ground water rights tributary to the Snake River but that are not within the defined “area of common ground water supply.” Rule 50. Irrespective of the rule, the Director has the duty and obligation to use the best available science in water right administration, which he acknowledges is ESPAM 2.1. *See April Order* at 4, n.3. ESPAM 2.1 defines the Eastern Snake Plain Aquifer differently than the CM Rules, which was promulgated over 20 years ago. *See CM Rule 50.01*. The rule admittedly fails to account for the best available science to the detriment of junior ground water users like A&B.<sup>2</sup> By excluding certain juniors from administration the Director has artificially enlarged the mitigation obligation of A&B contrary to Idaho’s constitution and water distribution statutes. Stated another way, if all hydraulically connected juniors were being appropriately administered, A&B’s “proportionate share” of the mitigation obligation would be lower. The application of the CM Rules in such a manner is unconstitutional and should be reconsidered.

### **REQUEST FOR HEARING**

To the extent the Director denies the above request for reconsideration to identify an accurate “proportionate share” regarding A&B’s junior priority ground water rights with respect to the predicted demand shortfall, including appropriately identifying all hydraulically connected junior ground water rights, A&B requests a hearing on the same pursuant to Idaho Code § 42-1701A(3).

---

<sup>2</sup> The Director attempted to repeal Rule 50 in a prior legislative session. Although the Legislature rejected the Director’s proposed rule change that does not excuse unconstitutional water right administration. Even the Legislature cannot override what the constitution requires.

Further, in order to avoid unnecessary delay and further litigation, A&B and its consultants are available and would be willing to participate in an informal meeting with IDWR the other parties to review and better understand the Director's findings and methods used regarding this issue.

#### **NOTICE OF NON-USE**

In addition to the above requests, A&B provides notice of non-use of its junior ground water rights subject to the *April Order* for the 2019 irrigation season. As the Director may be aware, A&B has converted approximately 3,573.6 acres formerly irrigated with groundwater to surface water as supplies are available. A&B successfully delivered approximately 8,344.8 acre-feet of surface water to these acres in 2018. A&B intends to deliver surface water to these acres again in 2019, which more than accounts for the acres covered by the junior priority water rights (2,063.1) subject to the *April Order*. In other words, A&B will not deliver groundwater pursuant to its referenced ground water rights subject to the *April Order* this irrigation season. Consistent with the Director's June 30, 2016 letter concerning this same issue, A&B presumes that the referenced water rights will be removed from the curtailment list as A&B will not deliver groundwater pursuant to these rights this irrigation season.

DATED this 23<sup>rd</sup> day of April, 2019.

**BARKER ROSHOLT & SIMPSON LLP**

  
\_\_\_\_\_  
Travis L. Thompson

*Attorneys for A&B Irrigation District*

## CERTIFICATE OF SERVICE

I hereby certify that on this 23<sup>rd</sup> day of April, 2019, I served a true and correct copy of the foregoing *A&B Irrigation District's Petition for Reconsideration and Request for Hearing re: April 2019 As Applied Order / Notice of Non-Use* on the following by the method indicated:

<p>Director Gary Spackman c/o Kimberle English State of Idaho Dept of Water Resources 322 E Front St Boise, ID 83720-0098 *** service by electronic mail</p> <p><a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:kimberle.english@idwr.idaho.gov">kimberle.english@idwr.idaho.gov</a></p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only</p> <p><a href="mailto:mhoward@pn.usbr.gov">mhoward@pn.usbr.gov</a> <a href="mailto:emcgarry@pn.usbr.gov">emcgarry@pn.usbr.gov</a></p>	<p>IDWR – Eastern Region 900 N. Skyline Dr., Suite A Idaho Falls, ID 83402-1718 *** service by electronic mail only</p> <p><a href="mailto:lyle.swank@idwr.idaho.gov">lyle.swank@idwr.idaho.gov</a></p>
<p>Randy Budge T.J. Budge Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only</p> <p><a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:tjb@racinelaw.net">tjb@racinelaw.net</a></p>	<p>Sarah A. Klahn Somach Simmons &amp; Dunn 2701 Lawrence St., Suite 113 Denver, CO 80205 *** service by electronic mail only</p> <p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a></p>	<p>David Gehlert ENRD – DOJ 999 18<sup>th</sup> St. South Terrace, Suite 370 Denver, CO 80202 *** service by electronic mail only</p> <p><a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>
<p>Kirk Bybee City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only</p> <p><a href="mailto:kibybee@pocatello.us">kibybee@pocatello.us</a></p>	<p>William A. Parsons Parsons, Smith &amp; Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only</p> <p><a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>	<p>IDWR – Southern Region 1341 Fillmore St., Suite 200 Twin Falls, ID 83301-3380 *** service by electronic mail only</p> <p><a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a> <a href="mailto:nathan.erickson@idwr.idaho.gov">nathan.erickson@idwr.idaho.gov</a></p>
<p>W. Kent Fletcher Fletcher Law Offices P.O. Box 248 Burley, ID 83318 *** service by electronic mail only</p> <p><a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<p>Kathleen Carr US Dept Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway Ste 400 Boise, ID 83706 *** service by electronic mail only</p> <p><a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a></p>	<p>Chris M. Bromley McHugh Bromley, PLLC 380 South 4<sup>th</sup> Street, Suite 103 Boise, ID 83702 *** service by electronic mail only</p> <p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a></p>

<p>Robert E. Williams Williams, Mesurvey &amp; Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only</p> <p><a href="mailto:rewilliams@cableone.net">rewilliams@cableone.net</a></p>	<p>Robert L. Harris Holden, Kidwell, Hahn &amp; Crapo, PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only</p> <p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>	<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only</p> <p><a href="mailto:rfife@idahofallsidaho.com">rfife@idahofallsidaho.com</a></p>
<p>Cindy Yenter IDWR – Salmon Field Office 102 Warpath Salmon, ID 83467-4435 *** service by electronic mail only</p> <p><a href="mailto:cindy.yenter@idwr.idaho.gov">cindy.yenter@idwr.idaho.gov</a></p>		

  
 \_\_\_\_\_  
 Travis L. Thompson