

Sarah A. Klahn (ISB# 7928)  
SOMACH SIMMONS & DUNN  
*Attorneys for City of Pocatello*

Robert L. Harris (ISB# 7018)  
HOLDEN KIDWELL HAHN & CRAPO  
*Attorneys for City of Idaho Falls*

Candice M. McHugh (ISB# 5908)  
Chris M. Bromley, ISB # 6530  
MCHUGH BROMLEY, PLLC  
*Attorneys for the Cities of Bliss, Burley,  
Carey, Declo, Dietrich, Gooding, Hazelton,  
Heyburn, Jerome, Paul, Richfield, Rupert,  
Shoshone, and Wendell*

Thomas J. Budge (ISB# 7465)  
Elisheva M. Patterson (ISB# 11746)  
RACINE OLSON, PLLP  
*Attorneys for Idaho Ground Water  
Appropriators, Inc. (IGWA)*

Skyler C. Johns (ISB# 11033)  
Nathan M. Olsen (ISB# 7373)  
Steven L. Taggart (ISB# 8551)  
OLSEN TAGGART PLLC  
*Attorneys for Bonneville-Jefferson Ground  
Water District*

Dylan Anderson (ISB# 9676)  
DYLAN ANDERSON LAW  
*Attorney for Bingham Groundwater 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

**MOTION FOR RECONSIDERATION**

COME NOW, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (“Coalition of Cities”), by and through their attorneys of record, Candice M. McHugh and Chris M. Bromley, the City of Idaho Falls, by and through its attorney of record, Robert L. Harris, and the City of Pocatello by and through its attorney of record Sarah A. Klahn (collectively the “Cities”), the Idaho Ground Water Appropriators (“IGWA”), Bingham Ground Water District,

Bonneville-Jefferson Ground Water District (collectively the “Groundwater Users”), and pursuant to IDAPA 37.01.01.711 of the Department’s rules of procedure and hereby move for reconsideration of the Director’s April 21, 2023 *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand* (“Methodology Order”) and *Reasonable Carryover and Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (“As-Applied Order”), (collectively the “2023 Orders”).

## INTRODUCTION

On April 21, 2023, at 6:45 p.m., the Director caused to be served on the parties to the Surface Water Coalition (“SWC”) delivery call the above-referenced orders.<sup>1</sup> This Motion asks the Director to reconsider his finding of material injury of 75,200 acre-feet to Twin Falls Canal Company (“TFCC”) based on the fact that if the irrigated acres for TFCC that was discussed during the Technical Working Group (“TWG”) were used in the 2023 Orders, the Director would not have found material injury.

## ARGUMENT

According to the Idaho Supreme Court, when the Director uses a baseline methodology for considering and determining material injury:

the Director has the duty and authority to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority of water be extended only to those using the water.

*A&B v. Idaho Dept. of Water Res.*, 155 Idaho 640, 652, 315 P.3d 828, 840 (2013) (emphasis added).

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<sup>1</sup> The 2023 Orders were not served until 6:45 p.m. Because of this the fourteen-day period to file for reconsideration should run until May 8, 2023. In an abundance of caution, the Groundwater Users are filing this *Motion for Reconsideration* on May 5, 2023, which will be timely supplemented with a technical declaration on May 8, 2023.

According to the *Methodology Order*, members of the SWC are required to “submit electronic shape files to the Department delineating the total anticipated irrigated acres for the upcoming year within their water delivery boundary or confirm in writing that the existing electronic shape file submitted by SWC has not varied by more than five percent.” *Methodology Order* at 39. According to the *As-Applied Order*, on March 10, 2023, “the Department received a letter from . . . Twin Falls Canal Company . . . stating that their total number of acres for 2023 will not vary by more than five percent from the electronic shapefiles submitted in prior years.” *As-Applied Order* at 1. The total number of irrigated acres for TFCC was calculated as “194,732.” *Id.* at 2. The number of irrigated acres is critical in the *Methodology Order* because acres are used as an input in the Director’s quantification of material injury.

As the Director is aware, the SWC delivery call was commenced in 2005. In the intervening eighteen years, the number of irrigated acres has changed. For instance, in 2008, Hearing Officer Gerald Schroeder stated that TFCC claimed it was irrigating “196,162 acres,” and that IGWA had identified “at least 6,600 acres claimed by TFCC in its district are not irrigated.” *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* at 9, 53 (Apr. 29, 2008). The Director acknowledged the same: “Estimates of irrigated acres from the hearing show a trend of decreasing irrigated acres. According to the Hearing Officer, beneficial use cannot occur on acres that have been hardened or are otherwise not irrigated.” *Methodology Order* at 8. Despite these findings and statements, the number of irrigated acres asserted by TFCC has changed very little considering population growth and hardening of acres in Twin Falls County.

When questioned at the April 28, 2023 *Pre-Hearing Conference* why he was proceeding

so quickly to curtail junior ground water users with no time given to develop a record that would account for changes over the last eighteen years, the Director stated that factual issues should have been raised with the TWG:

So again, I understand your arguments, but I have little sympathy for them at this point in time. . . . And I guess I could present facts about the time period within which the facts that you're talking about and the preparation and presentations to the Department took a period of time, but there's also been a period of time of four months, I think, since the last presentation by Department staff to the technical working group, and within which the experts and the parties anticipating the issuance of a Methodology Order certainly could have been preparing for the inevitable.

*Pre-Hearing Conference Transcript* p. 25:18-25; p. 26:1-2 (emphasis added).

In fact, the irrigated area for TFCC was discussed during a TWG meeting on December 21, 2022. During that meeting, IDWR provided the participants with the findings that TFCC is irrigating 180,956 acres. The Director should have used the TWG irrigated acres in his determination of injury – certainly that is what the TWG participants were anticipating. If he had done so, the reduction in demand would be as follows:

<u>TFCC Acres</u>	
Methodology:	194,732 acres (Fifth Methodology Order at 10)
<u>NRT Metric:</u>	<u>180,956 acres (12/21/2022 IDWR Presentation to TWG at 19)</u>
Difference:	13,776 acres

TFCC Average CIR: 2.2 AF/ac (IDWR Spreadsheet - DS RISD Calculator\_2022\_August 15.xlsx; Tab: "Crop Water Need)

TFCC Average PE: 35% (Fifth Methodology Order at 14)

Demand Reduction = (13,776 acres x 2.2 AF/ac) / 0.35

Demand Reduction = **86,600 AF**

*Declaration of Greg Sullivan.*<sup>2</sup>

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<sup>2</sup> As stated in footnote 1, and because of when IDWR served the 2023 Orders, the *Declaration of Greg Sullivan* will be filed on May 8, 2023.

The reduction in TFCC’s diversion demand of 86,600 acre-feet is computed using the reduction in TFCC acres indicated by IDWR’s NRT Metric analysis, which is greater than the predicted 2023 diversion shortage for the TFCC in 2023 of 75,200 acre-feet. In other words, if IDWR’s analysis to remove the non-irrigated acres in the TFCC service area is used in the 2023 Orders, there would be no predicted shortage to the TFCC in 2023.

### CONCLUSION

Idaho’s prior appropriation doctrine does not condone curtailment for acres that are not irrigated. Because the Director’s quantification of material injury was based on flawed data, material injury should not have been predicted. The prediction of material injury has forced the Groundwater Users to secure mitigation that they otherwise would not have been required to obtain. Based on the foregoing, the Groundwater Users request that the Director reconsider his finding of material injury to TFCC based on the fact that if he used the irrigated area that was discussed during the TWG, no injury would have been calculated.

Submitted this 5<sup>th</sup> day of May, 2023.

/s/ Sarah A. Klahn  
Sarah A. Klahn  
SOMACH SIMMONS & DUNN  
Attorneys for City of Pocatello

/s/ Candice M. McHugh  
Candice M. McHugh  
MCHUGH BROMLEY  
Attorneys for Coalition of Cities

/s/ Robert L. Harris  
Robert L. Harris  
HOLDEN KIDWELL HAHN & CRAPO  
Attorneys for City of Idaho Falls

/s/ Chris M. Bromley  
Chris M. Bromley  
MCHUGH BROMLEY  
Attorneys for Coalition of Cities

/s/ T.J. Budge  
Thomas J. Budge  
Elisheva M. Patterson  
RACINE OLSON, PLLP  
*Attorneys for Idaho Ground Water  
Appropriators, Inc. (IGWA)*

/s/ Skyler C. Johns  
Skyler C. Johns  
OLSEN TAGGART PLLC  
*Attorneys for Bonneville-Jefferson Ground  
Water District*

/s/ Dylan Anderson  
Dylan Anderson  
DYLAN ANDERSON LAW  
*Attorney for Bingham Groundwater District*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5<sup>th</sup> day of May, 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

Idaho Dept. of Water Res.  
322 E. Front St.  
Boise, ID 83702  
[file@idwr.idaho.gov](mailto:file@idwr.idaho.gov)  
[gary.spackman@idwr.idaho.gov](mailto:gary.spackman@idwr.idaho.gov)  
[garrick.baxter@idwr.idaho.gov](mailto:garrick.baxter@idwr.idaho.gov)

Kathleen Marion Carr  
US Dept. Interior 960 Broadway Ste 400  
Boise, ID 83706  
[kathleenmarion.carr@sol.doi.gov](mailto:kathleenmarion.carr@sol.doi.gov)

John K. Simpson  
MARTEN LAW LLP  
P.O. Box 2139 Boise, ID 83701-2139  
[jsimpson@martenlaw.com](mailto:jsimpson@martenlaw.com)

David W. Gehlert  
Natural Resources Section Environment and  
Natural Resources Division U.S. Department  
of Justice  
999 18th St., South Terrace, Suite 370  
Denver, CO 80202  
[david.gehlert@usdoj.gov](mailto:david.gehlert@usdoj.gov)

Travis L. Thompson  
MARTEN LAW LLP P.O. Box 63  
Twin Falls, ID 83303-0063  
[tthompson@martenlaw.com](mailto:tthompson@martenlaw.com)  
[jnielsen@martenlaw.com](mailto:jnielsen@martenlaw.com)

Matt Howard  
US Bureau of Reclamation  
1150 N Curtis Road Boise, ID 83706-1234  
[mhoward@usbr.gov](mailto:mhoward@usbr.gov)

W. Kent Fletcher  
FLETCHER LAW OFFICE  
P.O. Box 248 Burley, ID 83318  
[wkf@pmt.org](mailto:wkf@pmt.org)

Sarah A Klahn  
Somach Simmons & Dunn  
1155 Canyon Blvd, Ste. 110 Boulder, CO  
80302 [sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)  
[dthompson@somachlaw.com](mailto:dthompson@somachlaw.com)

Thomas J. Budge  
Elisheva M. Patterson  
RACINE OLSON  
P.O. Box 1391 Pocatello, ID 83204-1391  
[tj@racineolson.com](mailto:tj@racineolson.com)  
[elisheva@racineolson.com](mailto:elisheva@racineolson.com)

Rich Diehl  
City of Pocatello  
P.O. Box 4169 Pocatello, ID 83205  
[rdiehl@pocatello.us](mailto:rdiehl@pocatello.us)

Candice McHugh  
Chris Bromley  
MCHUGH BROMLEY, PLLC  
380 South 4th Street, Suite 103 Boise, ID  
83702 [cbromley@mchughbromley.com](mailto:cbromley@mchughbromley.com)  
[cmchugh@mchughbromley.com](mailto:cmchugh@mchughbromley.com)

Robert L. Harris  
HOLDEN, KIDWELL, HAHN & CRAPO,  
PLLC  
P.O. Box 50130 Idaho Falls, ID 83405  
[rharris@holdenlegal.com](mailto:rharris@holdenlegal.com)

Robert E. Williams  
WILLIAMS, MESERVY, & LOTHSPREICH,  
LLP P.O. Box 168 Jerome, ID 83338  
[rewilliams@wmlattys.com](mailto:rewilliams@wmlattys.com)

Skyler C. Johns  
Nathan M. Olsen Steven L. Taggart  
OLSEN TAGGART PLLC P.O. Box 3005  
Idaho Falls, ID 83403  
[sjohns@olsentaggart.com](mailto:sjohns@olsentaggart.com)  
[nolsen@olsentaggart.com](mailto:nolsen@olsentaggart.com)  
[staggart@olsentaggart.com](mailto:staggart@olsentaggart.com)

Randall D. Fife City  
Attorney, City of Idaho Falls  
P.O. Box 50220 Idaho Falls, ID 83405  
[rfife@idahofallsidaho.gov](mailto:rfife@idahofallsidaho.gov)

Corey Skinner  
IDWR—Southern Region  
1341 Fillmore St., Ste. 200 Twin Falls, ID  
83301-3033  
[corey.skinner@idwr.idaho.gov](mailto:corey.skinner@idwr.idaho.gov)

Tony Olenichak IDWR—Eastern Region  
900 N. Skyline Drive, Ste. A Idaho Falls, ID  
83402  
[Tony.Olenichak@idwr.idaho.gov](mailto:Tony.Olenichak@idwr.idaho.gov)

William A. Parsons  
PARSONS SMITH & STONE  
P.O. Box 910 Burley, ID 83318  
[wparsons@pmt.org](mailto:wparsons@pmt.org)

/s/ Chris M. Bromley  
Chris M. Bromley