

APR 29 2022

DEPARTMENT OF
WATER RESOURCES

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**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)

IN THE MATTER OF IGWA'S)
SETTLEMENT AGREEMENT)
MITIGATION PLAN)

Docket No. CM-DC-2010-001
Docket No. CM-MP-2016-001

**SURFACE WATER COALITION'S
REQUEST FOR STATUS
CONFERENCE**

COME NOW, 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 (collectively hereafter referred to as the “Surface Water Coalition”, “Coalition”, or “SWC”), by and through counsel of record, and hereby request a status conference in the above-captioned matters on the issues identified below.

I. Status of Implementation of January 11, 2022 Curtailment Order

The Director identified a final carryover injury of 64,647 acre-feet based upon Step 9 of the *Methodology Order*. The Director then issued a curtailment order on January 11, 2022, identifying a list of ground water rights that were to be curtailed beginning on January 13, 2022. The list was later amended on January 12, 2022.

The Coalition requests an update on the status of IDWR’s and the respective water districts’ actions to curtail diversions pursuant to those water rights as ordered by the Director.

II. Ground Water Districts’ Compliance with Approved Mitigation Plan

The Director approved the stipulated mitigation plan submitted by SWC and IGWA on May 2, 2016. *See Final Order Approving Stipulated Mitigation Plan*. Pursuant to the plan the signatory¹ ground water districts and their members agreed to “a total ground water diversion reduction of 240,000 acre-feet annually.” *See Order* at 2. On Friday April 1, 2022, counsel for IGWA submitted the districts’ 2021 performance report.² As detailed in that report, the signatory ground water districts only performed 56,953 acre-feet in diversion reductions and 65,831 acre-feet in recharge for a total of 122,784 acre-feet.

¹ The nine signatory ground water districts are Aberdeen-American Falls, Bingham, Bonneville-Jefferson, Carey Valley, Fremont Madison Irrigation District, Jefferson-Clark, Madison, Magic Valley, and North Snake. A&B Irrigation District and Southwest Irrigation District are not part of the districts’ obligation under the settlement agreement or mitigation plan. IGWA has erroneously included A&B and SWID as part of its 240,000 af calculations every year, but until this year the nine districts have exceeded the 240,000 af reduction requirement. The Director should clarify this for IGWA accordingly.

² IDWR has until July 1, 2022 to provide its verification report.

The nine signatory ground water districts' 2021 actions were approximately 117,216 acre-feet short of what is required by the stipulated mitigation plan and the Director's order approving the same. Consequently, IGWA and its junior priority ground water right members are not operating in accordance with the approved plan and are failing to mitigate the material injury to the Coalition members. *See* CM Rule 40.05.

The Surface Water Coalition requests the Director to address what actions he intends to take in 2022 in response to this non-compliance and enforcement of the order approving the mitigation plan.

III. Water District 01 Rental Pool Procedures / Non-Participants

The Director is aware of the proposed changes to the Water District 01 2022 Rental Pool Procedures as adopted at the annual meeting on March 1, 2022. As noted by Resolution 21, spaceholders had until April 7, 2022 to opt out of the new procedures. In light of forecasted water supplies, significant changes in how rental water would be supplied, and a "last to fill" condition for that water for 2023, approximately 50% of the contracted space opted out of the new procedures. Certain members of the SWC were part of the list of spaceholders that opted out (A&B, AFRD#2, BID, NSCC, and TFCC).

On April 13, 2022 the Committee of Nine held a special meeting and approved the following changes to the procedures:

- Lowered the quantity of Large Common Pool rental to be supplied in 2022 from 100,000 AF to zero AF.
- Removed the 2023 last-to-fill obligation for participant allocations reduced this year to supply 2021 Common Pool rentals.
- Extended the deadline to May 13th for spaceholders to change their participation status in the rental pool process.

See Ex. A (Water Report April 20, 2022).

At that same meeting the Watermaster indicated that pursuant to his interpretation of the procedures, the water district would likely preclude spaceholders that opt out from having rented water assigned to their points of diversion for delivery in 2022. It is the Watermaster's position that non-participating spaceholders cannot "divert or receive leased/rental storage delivered to their headgate" regardless of the purpose or the lands it is to be used on. *See Ex. B* (Tony Olenichak April 15, 2022 email to John Simpson).

If a Coalition member opts out of participating in the Water District 01 rental pool, the Watermaster may preclude delivery of mitigation water pursuant to IGWA's mitigation plan, or other operating and approved mitigation plans. Whereas the Director has already identified a preliminary injury to certain Coalition members totaling 162,600 acre-feet (*see* Steps 1-3 Final Order issued April 20, 2022), delivery of mitigation water to address that injury is critical for this irrigation season. In addition, the Director required ground water users with priority dates junior to December 25, 1979 to establish how they can mitigate for their share of the demand shortfall by May 1, 2022. With the uncertainty in the Water District 01 rental pool that deadline raises uncertainty and additional questions for junior ground water right holders.

Finally, several Coalition members wheel water for various entities for irrigation and recharge purposes. Notably, Artesian Irrigation Company has wheeled its storage water to shareholders' lands through both Milner Irrigation District and Twin Falls Canal Company for decades. Artesian does not rent this water and has no physical means to deliver its water to its shareholders. Various ground water districts and Southwest Irrigation District have also wheeled water, including rental water, for groundwater conversion projects through American Falls Reservoir District #2, Burley Irrigation District, Twin Falls Canal Company, and Northside Canal Company for decades as well. Finally, various Coalition members have diverted water for

groundwater recharge purposes pursuant to the Idaho Water Resource Board's water rights for several years as well. It is unknown if that program would subject to the same prohibition as is indicated for rented or leased storage water.

The Watermaster's interpretation has created great uncertainty as to how rented or other non-spaceholder water will be handled for water right administration in 2022. Given the pending deadlines for juniors regarding the Director's Steps 1-3 Order (May 1st) and spaceholders for participation status (May 13th), the Director should address this issue and provide clarification as soon as possible. *See* I.C. 42-602.

REQUEST FOR STATUS CONFERENCE

The Coalition respectfully requests the Director set a status conference to address the above stated issues for the 2022 irrigation season. Given the uncertainty with the rental pool and the Coalition's and others' reliance upon leased water for conversions and other projects, the Coalition would request a status conference be set as soon as possible.

DATED this 27th day of April, 2022.

BARKER ROSHOLT & SIMPSON LLP



John K. Simpson
Travis L. Thompson

*Attorneys for A&B Irrigation District,
Burley Irrigation District, Milner Irrigation
District, North Side Canal Company, and
Twin Falls Canal Company*

FLETCHER LAW OFFICE



for
W. Kent Fletcher

*Attorneys for Minidoka Irrigation
District and American Falls
Reservoir District #2*

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2022, I served a true and correct copy of the foregoing *Surface Water Coalition's Request for Status Conference* on the following by the method indicated:

<p>Director Gary Spackman c/o Sarah Tschohl State of Idaho Dept of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail</p> <p>gary.spackman@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov</p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only</p> <p>mhoward@usbr.gov emcgarry@usbr.gov</p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only</p> <p>tony.olenichak@idwr.idaho.gov</p>
<p>Randy Budge T.J. Budge Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only</p> <p>randy@racineolson.com tjb@racineolson.com</p>	<p>Sarah A. Klahn Dylan Thompson Somach Simmons & Dunn 2033 11th Street, Ste. 5 Boulder, CO 80302 *** service by electronic mail only</p> <p>sklahn@somachlaw.com dthompson@somachlaw.com</p>	<p>David Gehlert ENRD – DOJ 999 18th St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only</p> <p>david.gehlert@usdoj.gov</p>
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<p>Robert L. Harris Holden, Kidwell, Hahn & Crapo. PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only</p> <p>rharris@holdenlegal.com</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>kathleenmarion.carr@sol.doi.gov</p>	<p>Candice McHugh Chris Bromley McHugh Bromley, PLLC 380 South 4th Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only</p> <p>cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>

<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only rfife@idahofallsidaho.gov</p>	<p>COURTESY COPY TO: William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only wparsons@pmt.org</p>	
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Travis L. Thompson

Exhibit A

WATER REPORT – April 20, 2022

The Committee of Nine at their April 13, 2022, meeting decided to re-draft the 2022 Rental Pool Procedures after approximately half of the reservoir system space opted out of participating in the procedures approved at the March 1st Water District #1 Annual Meeting. Procedure 5.2.101 said, “If after April 7 less than seventy-five percent (75%) of the contracted storage space is committed to the common pool by participants, the Committee may revise the rental pool procedures as necessary prior to April 21.”

When approximately half of the system space requested not to participate in the 2022 Rental Pool by the April 7th deadline, and after listening to criticism by various spaceholders, the Committee made the following revisions to the Rental Pool Procedures to encourage additional participation in this year’s rental pool:

- Lowered the quantity of Large Common Pool rental to be supplied in 2022 from 100,000 AF to zero AF.
- Removed the 2023 last-to-fill obligation for participant allocations reduced this year to supply 2021 Common Pool rentals.
- Extended the deadline to May 13th for spaceholders to change their participation status in the rental pool process.

Spaceholders have until May 13th to notify the Water District #1 Office whether they wish to change their participation status concerning the revised rental pool procedures. If a spaceholder does not send in notification to change their participation status by the May 13th deadline, it will be assumed that the spaceholder wishes to continue their status chosen at the previous April 7th opt in/out deadline. The revised Rental Pool Procedures have been posted on the www.waterdistrict1.com webpage under the REPORTS & EVENTS tab and **2022 Rental Pool Procedures Revised** heading.

The whole purpose of revising the procedures and extending the opt in/out deadline is to encourage additional spaceholders to participate supplying flow augmentation and other Common Pool rentals. One of the primary goals of the rental pool procedures established at least since 2005 was that all contracted spaceholders should share in supplying flow augmentation rental under the *2004 Water Rights (Nez Perce) Agreement* and assure that participants have priority over non-participating spaceholders and non-spaceholders in renting storage through the rental pool.

The next Committee of Nine Meeting has been rescheduled to occur on May 16th following the May 13th rental pool participation deadline. The time and place for the May 16th meeting has yet to be determined.

Recent storms have improved the water supply outlook but the supply is still expected to be below average this year. The snowpack in the higher elevations has yet to begin melting, natural flow is at low levels, and priorities are anticipated to drop quickly when several canals begin diverting water over the next few weeks. Once warmer weather arrives and peak runoff begins in late-May or early-June, some reservoir priorities may be restored at that time.

The projected priorities and current water right accounting posted on the www.waterdistrict1.com webpage will begin to be updated more frequently over the next few weeks as more diversions begin diverting water and priorities begin to drop.

Exhibit B

Travis Thompson

From: John Simpson
Sent: Friday, April 15, 2022 1:32 PM
To: Travis Thompson; Kent Fletcher
Subject: FW: Participation

From: Olenichak, Tony <Tony.Olenichak@idwr.idaho.gov>
Sent: Friday, April 15, 2022 1:30 PM
To: John Simpson <jks@idahowaters.com>
Cc: Jerry Rigby (jrigby@rex-law.com) <jrigby@rex-law.com>
Subject: RE: Participation

John,

In the past, when essentially everyone but the Tribe and BOR were participants, my perspective didn't matter. Now that a significant number of placeholders have become non-participants, I think I need the Co9 to clarify the intent of their procedures. My understanding up until now has been simple:

"Non-participating" placeholders can't supply leased/rental storage from the non-participant's storage allocation to other water user diversions.....nor can a non-participant placeholder divert or "receive" leased/rental storage delivered to their headgate, regardless of where (or to what purpose) the leased/rental storage originated or lands it is to be used upon. It doesn't matter if the storage was from the small pool, large pool, assignment pool, or private lease, nor does it matter where the place-of-use resides nor does it matter the purpose of the rental storage usage. Only the point-of-diversion matters because it is the only thing that can be regulated and measured by the Watermaster.

Some may say that a non-participant canal can divert rental pool storage if the rental storage is used by someone other than a canal shareholder or used on grounds outside of the canal's decreed place-of-use. However, the Watermaster cannot regulate how much of, or where, the rental storage is used within the non-participant canal's distribution system. The Watermaster is limited to only regulating the amount of rental storage delivered through the canal's headgate.

If Rental Pool storage is assigned to a "participating" placeholder canal. The Watermaster delivers that rental or leased storage to the participating canal's headgate. It then becomes the canal's responsibility to distribute that rental through or within their canal system. Otherwise, the participating canal shouldn't have signed the Rental Pool Application or carrying agreement agreeing to deliver the storage through, or within, their canal's system.

According to Procedure 5.2.106, the Tribes shall be "treated" as non-participants in the WD1 Rental Pool. The Tribes have neither considered themselves participants nor non-participants in the WD1 Rental Pool, but in some respects, they sometimes receive the benefits of both. If the Tribe leases their storage through the Tribal Rental Pool to be delivered to a canal that is a non-participant in the WD1 Rental Pool, I think the WD1 Watermaster is obligated to deliver the Tribal storage rented through the Tribal Rental Pool to the canal, regardless of the canal's participation status with the WD1 Rental Pool.

Procedure 5.2.101 says the BOR is non-participant but may rent flow augmentation storage. Other than the Tribe and BOR, I think all other placeholders clearly fall into the category of either being a participant or a non-participant to determine whether or not WD1 Rental Pool storage can be supplied by, or delivered to, a WD1 canal.

Tony

From: John Simpson <jks@idahowaters.com>
Sent: Friday, April 15, 2022 10:43 AM
To: Olenichak, Tony <Tony.Olenichak@idwr.idaho.gov>
Cc: Jerry Rigby (jrigby@rex-law.com) <jrigby@rex-law.com>
Subject: Participation

Tony,

I believe it is important to fully understand your perspective on the non-participant prohibition on leased water under procedures 6.1, 10.3 or any other Rental Pool procedure addressing the rights or limitations associated with participation in the Common Pool. I fully understand that the Committee of Nine may or may not adopt your perspective but you do have a level of influence on motions being made.

1. May a non-participating spaceholder receive water rented through the large pool (50,000 ac-ft)? The word "receive" as used in these questions, is interpreted as the ability to divert and put to beneficial use on decreed lands of the spaceholder.
2. May a non-participating spaceholder receive water rented through the small pool (5,000 ac-ft)?
3. May a non-participating spaceholder receive water assigned and delivered to the spaceholder's headgate. Assigned water would originate from a private lease (Procedure 6.0) or through the assignment pool (Procedure 10).
4. May a non-participating spaceholder convey assigned or leased water to a wateruser within the spaceholder's decreed boundary, if the spaceholder is not a party to the lease or assignment?
5. May a non-participating spaceholder convey assigned or leased water to a wateruser outside of the spaceholder's decreed boundary where the wateruser pays for such request?
6. Does the rental of water, by a non-spaceholder or a non-participating spaceholder from the Shoshone Bannock Tribes have the same restrictions/interpretations applicable to private leased water and common pool water received or conveyed by non-participants?

Thanks for your input.

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