

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

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| 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 | CM-DC-2010-001 CM-MP-2015-003 ORDER DETERMINING DEFICIENCY IN A&B IRRIGATION DISTRICT'S NOTICE OF MITIGATION |
| IN THE MATTER OF THE MITIGATION PLAN FILED BY A&B IRRIGATION DISTRICT FOR THE DISTRIBUTION OF WATER TO WATER RIGHTS HELD BY THE SURFACE WATER COALITION | |

FINDINGS OF FACT

1. On April 19, 2016, the Director ("Director") of the Idaho Department of Water Resources ("Department") issued the *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").¹

2. On April 19, 2016, the Director issued the *Final Order Regarding April Forecast Supply (Methodology Steps 1-3)* ("As-Applied Order"), which applied steps 1, 2, and 3 of the Methodology Order. The Director predicted an in-season demand shortfall ("DS") of 44,200 acre-feet. *As-Applied Order* at 3-4. The Director ordered that, by May 3, 2016, 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." *Id.* at 6. The Director also ordered that, if such a junior ground water user cannot establish they can mitigate for their proportionate share of the

¹ The SWC is comprised of A&B District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

predicted DS “in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user.” *Id.*

3. In the As-Applied Order, the Director noted that A&B Irrigation District (“A&B”) has an approved mitigation plan in place for its ground water rights (filed in Docket No. CM-MP-2015-003) and determined that A&B’s “proportionate share of the predicted DS of 44,200 acre-feet is 3,463 acre-feet.” *Id.* at 5, n.4.

4. On May 2, 2016, A&B submitted to the Department *A&B Irrigation District’s Petition for Reconsideration and Request for Hearing Re: April 2016 As Applied Order*. The Director subsequently issued an *Order on Petition for Reconsideration and Request for Hearing* (“Order on Petition”) granting A&B’s request to re-calculate its proportionate share as set forth in the As-Applied Order. The Director determined A&B’s proportionate share of the predicted DS is 2,122 acre-feet, not 3,463 acre-feet. *Order on Petition* at 2.

5. On May 2, 2016, A&B submitted to the Department *A&B Irrigation District’s Notice of Mitigation* (“Notice”), identifying “various mitigation actions” to “mitigate for its ‘proportionate share’ of the predicted in-season [DS].” *Notice* at 2-3. A&B states that: (a) its landowners enrolled 98 acres into the federal conservation reserve enhancement program (“CREP”), which the Department previously estimated resulted in a response of 103 acre-feet to the Near Blackfoot to Minidoka reaches of the Snake River; (b) A&B previously converted 1,378 acres under senior water right no. 36-2080 from a ground water to surface water supply, which the Department previously estimated resulted in a response of 1,409 acre-feet to the Near Blackfoot to Minidoka reaches of the Snake River; (c) A&B is “capable of” delivering surface water to 1,478.5 acres of land and an additional 535.1 acres of land irrigated with ground water, “will likely be able to deliver surface water to all or part of these lands in the shoulder months,” but “does not have the information yet to determine what the estimated response of these conversions will be in the Near Blackfoot to Minidoka reaches of the Snake River,” and (d) “A&B has available storage water from its own space in American Falls and Palisades Reservoirs, as well as access to the Water District 01 Rental Pool, and likely some portion of the storage water provided to the SWC by the [Idaho Ground Water Appropriator’s, Inc.], the Processors, and the Cities.” *Id.*

6. A&B “requests the Director to account for the predicted responses to the Near Blackfoot to Minidoka reaches of the Snake River resulting from these actions and adjust the ‘proportionate share’ determination accordingly.” *Notice* at 3-4. A&B states: “In the event A&B still has an outstanding obligation that is not mitigated for, A&B will have available storage water to provide to injured [SWC] members if needed.” *Id.* at 4. “A&B requests the Director accept” its Notice “and remove A&B’s affected groundwater rights from any curtailment order.” *Id.*

CONCLUSIONS OF LAW

1. Idaho Code § 42-602 authorizes the Director to supervise water distribution within water districts:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

2. By May 3, 2016, ground water users with consumptive water rights “junior to February 8, 1989, within the Eastern Snake Plain Aquifer area of common ground water supply” had to “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.” *As-Applied Order* at 6. Junior ground water users unable to establish they can mitigate for their proportionate share of the predicted DS in accordance with an approved mitigation plan will be subject to an order curtailing the junior-priority ground water use. *Id.*

3. A&B requests the Director account for predicted responses “to the Near Blackfoot to Minidoka reaches of the Snake River resulting from [its aquifer enhancement activities, i.e. enrollment of acres in CREP and conversions] and adjust the ‘proportionate share’ determination accordingly.” *Notice* at 3-4.

4. The predicted DS is the shortfall predicted after the benefits of ongoing aquifer enhancement activities performed by A&B and other entities have already been realized. In other words, the predicted DS already accounts for the benefits of ongoing aquifer enhancement activities performed by A&B and other entities. At this time, the Director will not reduce the predicted DS, or any entity’s proportionate share thereof, because of the effects of aquifer enhancement activities. However, the Director will construe A&B’s request to account for predicted responses to the Near Blackfoot to Minidoka reaches of the Snake River resulting from its aquifer enhancement activities and to reduce its proportionate share accordingly as a motion pursuant to the Department’s Rule of Procedure 260 requesting the agency to take action in a contested case. *See* IDAPA 37.01.01.260. Pursuant to the Department’s Rule of Procedure 563, the Director will set and hear oral argument on the issue of whether A&B’s proportionate share should be reduced because of its aquifer enhancement activities.

5. With respect to A&B’s notice that it “will have available storage water to provide to injured [SWC] members if needed,” A&B must “provide the Director with legally enforceable contracts, options or similar documentation to establish that it has secured the water necessary to” mitigate for its proportionate share of the predicted DS. *See Order Determining Deficiency*

in IGWA's Notice of Secured Water; Curtailing Ground Water Rights Junior to July 1, 1985, Docket No. CM-DC-2010-001 (Jan. 10, 2014).

6. A&B's statements that it "has available storage water from its own space in American Falls and Palisades Reservoirs, as well as access to the Water District 01 Rental Pool, and likely some portion of the storage water provided to the SWC by the [Idaho Ground Water Appropriator's, Inc.], the Processors, and the Cities," are insufficient documentation to establish, to the satisfaction of the Director, that A&B can mitigate for its proportionate share of the predicted DS (2,122 acre-feet).

7. Because A&B owns storage water in American Falls and Palisades Reservoirs, A&B does not need to contract for water. To establish to the satisfaction of the Director that A&B will have available storage water to mitigate for A&B's proportionate share of the predicted DS, A&B must document that it has communicated to the watermaster its written commitment of 2,122 acre-feet of storage water to be deducted from A&B's 2016 storage allocation and to be controlled, assigned, and delivered by the watermaster to mitigate injury to other members of the SWC.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Notice submitted by A&B is insufficient to satisfy the Director that A&B can mitigate for its proportionate share of the predicted DS (2,122 acre-feet). Therefore, consistent with the As-Applied Order, A&B's affected ground water rights will be subject to an order issued by the Director curtailing junior-priority ground water users.

IT IS FURTHER ORDERED that, pursuant to the Department's Rule of Procedure 563, the Director will set and hear oral argument on the issue of whether A&B's proportionate share of the predicted DS should be reduced because of its aquifer enhancement activities. The setting of this hearing will not stay the effectiveness of the Methodology Order or As-Applied Order. The Director will shortly issue a subsequent order scheduling a pre-hearing conference.

IT IS FURTHER ORDERED that, if by **May 13, 2016**, A&B submits to the Department adequate documentation establishing it has secured the water necessary to mitigate for its proportionate share of the predicted DS (2,122 acre-feet), A&B's affected ground water rights will not be subject to the Director's curtailment order.

Dated this 11th day of May 2016.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of May 2016, the above and foregoing, was served by the method indicated below, and addressed to the following:

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