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**DISTRICT COURT OF THE STATE OF IDAHO
FIFTH JUDICIAL DISTRICT
GOODING COUNTY**

IDAHO GROUND WATER APPROPRIATORS, Inc.

Petitioner,

vs.

CITY OF POCATELLO,

Petitioner,

vs.

TWIN FALLS CANAL COMPANY, NORTH SIDE CANAL COMPANY, A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, and MINIDOKA IRRIGATION DISTRICT,

Petitioners,

vs.

GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents.

Consolidated Case No. CV-2010-382

Gooding County Cases:

CV-2010-382

CV-2010-383

CV-2010-384

CV-2010-387

CV-2010-388

Twin Falls County Cases:

CV-2010-3403

CV-2010-5520

CV-2010-5946

**IGWA's Brief in Support of
Petition for Rehearing**

IN THE MATTER OF THE 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.

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, submits this brief, pursuant to rules 84(t)(2)(b) and 84(r) of the Idaho Rules of Civil Procedure and rule 42(b) of the Idaho Appellate Rules, in support of *IGWA's Petition for Reconsideration and Clarification* filed October 10, 2014, concerning the Court's *Memorandum Decision and Order on Petitions for Judicial Review* ("Memorandum Decision") issued September 26, 2014.

1. For purposes of Idaho Code § 42-1701A, the RISD methodology should not be considered the same as the MFS methodology.

Idaho Code § 42-1701A states: "any person aggrieved by any 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." IGWA contends the Director violated this statute by refusing to allow IGWA to present evidence challenging the new methodology for determining material injury to the Surface Water Coalition (SWC), referred to herein as the reasonable in-season demand (RISD) methodology, set forth in the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (the "*Methodology Order*").¹ The Court declined to accept this argument, ruling that the hearing on the prior methodology (minimum full supply (MFS) methodology) qualifies as an opportunity for hearing on the RISD methodology.² IGWA respectfully asks the Court to reconsider this ruling.

Two important factors warrant reconsideration. First, the RISD methodology is different than the MFS methodology. It did not exist at the time of the hearing on the MFS

¹ See IGWA's Opening Brief 16-18.

² Memorandum Decision and Order on Petitions for Judicial Review 35-36.

methodology, but was adopted later in a separate final order. The Director acknowledged it is “not based on the methods . . . that were proposed or the processes that were proposed by the parties in the hearing itself (referring to the hearing on the MFS methodology).”³ Thus, IGWA had no opportunity to critique or challenge the RISD methodology in the hearing on the MFS methodology.

Second, the new RISD methodology will be implemented prospectively on an ongoing basis. This is not a situation where an aggrieved party challenges a penalty imposed by IDWR, IDWR hears evidence and adjusts the penalty, and the matter is closed. The adoption of a new methodology, rather, has future application. It is akin to rulemaking.

With rulemaking, anytime an agency proposes a rule change, interested parties are entitled to “submit data, views and arguments, orally or in writing.”⁴ Because of the prospective application of rules, due process entitles affected parties to weigh in on proposed revisions. It matters not that a party may have submitted data and argument concerning the prior version of the rule. For changes to the methodology for determining injury, due process likewise requires “a hearing before the director to contest the action.”⁵

While the evidence presented at the hearing on the MFS methodology certainly informed the Director’s development of the RISD methodology, the RISD methodology is still a different method for determining material injury—one that was unknown at the time of the hearing on the MFS methodology. If parties are not given the chance to challenge the RISD methodology here, they will never have the opportunity.

Therefore, IGWA respectfully asks the Court to allow the Director to consider evidence challenging the RISD methodology on remand.

2. The RISD methodology violates Idaho law by ordering curtailment based on unreliable predictions of material injury.

IGWA objects to the RISD methodology because it orders curtailment based on past water diversions and unreliable predictions of storage water supplies, as opposed to current crop water needs and known storage supplies.⁶ The Court refused to set aside the

³ Tr. 17:20.

⁴ Idaho Code § 67-5222(1).

⁵ Idaho Code § 42-1701A(3).

⁶ IGWA’s Opening Brief 25-33.

RISD methodology on this basis because it provides for a re-calculation of material injury midway through the irrigation season based on current water needs and supplies.⁷ The problem is that the re-calculation does not take place until *after* the Director orders curtailment.

Under Step 3 of the RISD methodology, the Director predicts material injury in April by assuming senior's water needs for that year will be equal to the amount of water the SWC diverted in prior dry years. As noted on pages 10 of the *Memorandum Decision*, the Director does not at this stage consider current irrigated acres, crop water needs, or water use efficiencies.

Meanwhile, the Director attempts to predict the SWC's water supplies before the reservoir system is done filling up and before spring rains have been realized. He uses early water supply data and a mathematical equation to deliberately under-predict how much water will be available to the SWC.⁸

This early prediction of supply before storage allocations are known, combined with an over-prediction of need that ignores irrigated acres, produces extremely unreliable predictions of material injury. For example, in 2010 the Director predicted 84,500 acre-feet of material injury to the SWC in April (under Step 3), and ordered curtailment of all groundwater rights junior to 1982—nearly 74,000 acres.⁹ However, after taking into account the SWC's current crop water needs and known water supplies under Step 6 of the RISD methodology, the material injury prediction was reduced to zero. Thus, juniors were curtailed to provide water the senior didn't need.¹⁰

This would not be problematic if the Step 3 prediction were used only for planning purposes. It is, however, utilized to order curtailment. Juniors have until May 1st or shortly thereafter to acquire sufficient mitigation water to meet the faulty April prediction, or be curtailed, even though the SWC does not risk material injury occurring until August or September.¹¹

⁷ *Memorandum Decision* at 30.

⁸ R. Vol. III, p. 598 ¶ 4; see also *id.* at 581 ¶ 55 (“At the start of the irrigation season, RISD is equal to baseline demand When calculated in-season, RISD is calculated by Equation 4 below.”)

⁹ R. Vol. 1, p. 187-88.

¹⁰ R. Vol. 4, p. 632.

¹¹ R. Vol. III, p. 598 ¶ 5.

The *Memorandum Decision* does not find this problematic because, at the time the Step 3 prediction is made, “junior users only need establish their *ability* to secure mitigation water to be provided to the Coalition at a later date.”¹² The inference is that juniors are not required to actually secure mitigation water at this stage; the Director simply needs to be confident they will be able to secure and deliver mitigation water before any senior suffers injury, if material injury is still expected to occur after considering account current irrigated acres and known storage water supplies under Step 6 of the methodology.

However, this is not how the Director interprets an “ability to secure mitigation water.” He requires juniors to have mitigation water *under contract* to meet the Step 3 prediction, or be curtailed. In other words, he requires that mitigation be actually secured to meet the April prediction of material injury under Step 3.

This highlights the fundamental failing of the RISD methodology: it orders curtailment long before senior water users face material injury, based on an extremely unreliable prediction of injury. This is contrary to the Conjunctive Management Rules, which authorize curtailment “upon a finding by the Director as provided in Rule 42 that material injury is occurring.”¹³ While this may not demand a real-time analysis to determine the instant material injury begins, it certainly requires a reliable prediction of material injury before juniors are ordered to provide mitigation or suffer curtailment.

Indeed, this is the rationale behind this Court’s decision to set aside Step 8 of the RISD methodology that caps mitigation based on the material injury prediction in Step 3. The Court reasoned that juniors should be required to mitigate for actual injury, based on actual crop water needs and water supplies, as opposed to the faulty April prediction. For the same reason, curtailment should be based on actual material injury, based on actual crop water needs and water supplies, not the faulty April prediction.

This can be done by calculating material injury after the Day of Allocation of storage water (the day the reservoir system peaks and storage water is allocated to spaceholders), which typically occurs in late May or June. At this point, the SWC’s storage water supplies

¹² Memorandum Decision at 11 (emphasis added), referring to Step 4 of the RISD Methodology (R. Vol. III, p. 598, ¶ 5).

¹³ IDAPA 37.03.11.040.01.

are known, spring rains have largely been realized, and crop water needs can be reliably calculated. The Day of Allocation occurs when irrigation demand is low and storage water levels are at their peak—well before the “Time of Need” which does not occur until August or September—providing ample time for mitigation to be secured and delivered before the SWC faces material injury.

There is another critical reason for not requiring juniors to lease mitigation water until the Day of Allocation, and that is because the holders of storage water from whom IGWA regularly leases water for mitigation, recharge, and conversions are no longer willing to sign leases before the Day of Allocation, even during years of abundant snowpack. While IGWA initially had some success obtaining leases prior to the Day of Allocation, all of those leases have since been cancelled, with spaceholders advising IGWA they will no longer sign leases prior to the Day of Allocation. It is not that they will not lease water at all—IGWA leases storage water every year for conversions and recharge—it is that they won’t commit to a quantity or price until the Day of Allocation.

The Director assumed juniors could simply secure options to lease mitigation water that may be needed, but this has not worked in practice. IGWA has for many years tried to obtain options, yet only one spaceholder has been willing. Essentially all storage water IGWA acquires for conversions, recharge, and mitigation is secured through annual leases secured on or soon after the Day of Allocation.

By ordering curtailment in April, before surface water supplies can be reliably calculated, when no injury is occurring, and without considering actual crop water needs, the RISD methodology will frequently cause curtailment in years when seniors do not suffer material injury. This is arbitrary, capricious, and contrary to the Conjunctive Management Rules.

Accordingly, IGWA respectfully renews its request that this Court remand the methodology order with an instruction to modify the RISD methodology to ensure curtailment is based on actual crop water needs and storage water allocation. At a minimum, the Director must retain discretion to allow IGWA to secure mitigation leases after the Day of Allocation.

3. Since the mitigation obligation of juniors may be adjusted upward, the Director need not inflate demand or deflate supply.

If this Court remands this matter to require that curtailment and mitigation are based on a reliable calculation of material injury that considers current crop water needs and known storage allocations, then the April material injury prediction becomes a planning tool instead of a curtailment tool, alleviating IGWA's concerns with the biases built into Step 3 that over-predict material injury. If, however, the Court requires that curtailment be ordered in April based on the Step 3 prediction, it should instruct the Director to remove the biases from the prediction.

The Director's rationale for deliberately over-predicting injury in April stems from the RISD methodology capping the mitigation obligation of juniors based on the April prediction. Now that this Court has been removed, allowing mitigation to adjust upward, there is no need to over-predict material injury in April.

Therefore, if the Court declines to grant the remand requested in part 2 above, IGWA asks the Court, in light of its removal of the cap on mitigation, to instruct on remand that the Step 3 material injury prediction be based on the best science available and the Director's best judgment, without deliberately over-predicting need or under-predicting supply.

4. The provision of replacement carryover the following irrigation season protects against material injury to carryover.

Carryover water is not a supply of water that SWC members are entitled to forever maintain in storage without using. Idaho law prohibits hoarding of storage water, requiring carryover to be put to beneficial use periodically during dry years. Accordingly, the *Memorandum Decision* properly requires the SWC to utilize their carryover water if a late-season hot spell causes RISD water supplies to come up short, as long as juniors lease storage water from other spaceholders to replace carryover shortfalls of the SWC.¹⁴ However, the *Memorandum Decision* deviates from the *Methodology Order* by requiring juniors to secure leases or options to replace carryover as soon as it is utilized. IGWA respectfully asks the Court to reconsider the timing in which a shortfall to reasonable carryover must be replaced.

¹⁴ *Memorandum Decision* at 16.

As the Court is aware, injury to the SWC from a carryover shortfall is not realized until the following irrigation season, when the carryover may be needed to meet irrigation demand. By requiring juniors to immediately secure leases or options to replace carryover shortfalls, juniors will be required to lease water toward the end of the irrigation season that will not potentially be needed by the SWC until the following season, and that more often than not be replaced by winter snowpack, eliminating the need for mitigation at all. This is water that could have been put to beneficial use for irrigation or recharge in Idaho, but is instead held in storage for carryover, only to be flushed down the Snake River and out of the State the following spring.

The *Memorandum Decision* expresses the concern that “curtailment the following season may not provide sufficient water in storage to remedy the injury to storage, particularly if curtailment will also be required as a result of a demand shortfall to reasonable in-season demand the following season.”¹⁵ This concern can be remedied by requiring junior groundwater users to replace carryover shortfalls the following season (if the shortfall is not eliminated by winter snows) before any storage water is allocated to mitigate RISD. This assures the SWC’s reasonable carryover is sustained, without unnecessary curtailment or wasted storage water.

The *Memorandum Decision* also cites the Court’s prior ruling that “assurances be in place such that replacement water can be acquired and will be transferred in the event of a shortage.”¹⁶ The ruling offered an “option for water” as an “example,” but ultimately left it to the Director to evaluate what assurances may be satisfactory. This discretion must be preserved, as the history of juniors meeting all mitigation obligations, combined with extraordinary pressure to meet mitigation obligations due to the enormous damage that would accrue from curtailment, may enable the Director to reasonably determine it is not necessary for shortfalls to carryover storage be secured the season before the carryover mitigation may be needed by the SWC.

Therefore, IGWA respectfully asks the Court to preserve the Director’s discretion to allow juniors to secure leases the following season to replace shortfalls to reasonable car-

¹⁵ *Memorandum Decision* at 16.

¹⁶ *Id.* at 26 (quoting *Order on Petitions for Judicial Review*, Gooding County Case NO. CV-2008-551, p. 19 (July 24, 2009)).

ryover, after it is known whether a shortfall actually exists, provided any mitigation water secured by juniors the following season is allocated to replace carryover shortfall before mitigating RISD.

RESPECTFULLY SUBMITTED this 31st day of October, 2014.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED



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CERTIFICATE OF SERVICE

I certify that on this 31st day of October, 2014, a true and correct copy of the foregoing document was served on the following persons in the manner indicated:



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