

Director of the Idaho Department of Water Resources, and **THE IDAHO DEPARTMENT OF WATER RESOURCES,**

Respondents.

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

COME NOW, Petitioners, A&B Irrigation District (“A&B”), American Falls Reservoir District #2 (“AFRD#2”), Burley Irrigation District (“BID”), Milner Irrigation District (“Milner”), Minidoka Irrigation District (“MID”), North Side Canal Company (“NSCC”), and Twin Falls Canal Company (“TFCC”) (collectively hereafter referred to as the “Surface Water Coalition”, “Coalition”, or “SWC”), by and through their undersigned counsel, and hereby file this Petition seeking judicial review of a final agency action by the Idaho Department of Water Resources.

STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code §§ 67-5270 and 67-5279 seeking judicial review of a final order issued by the Interim Director of the Idaho Department of Water Resources, Gary Spackman, on June 23, 2010 (*Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*) (“*Final Methodology Order*”).

2. The *Final Methodology Order* was issued following a remand by the Honorable John M. Melanson in this case *A&B Irr. Dist. v. IDWR*, Gooding County District Court, Fifth Jud. Dist., Case No. 2008-551. The Court issued an *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order* on March 4, 2010. Pursuant to that decision the Court ordered that it would “hold in abeyance any final decision on rehearing until such an order is issued and the time periods for filing a motion for reconsideration and petition for judicial review of the new order have expired.” *March 4, 2010 Order* at 3.

3. A hearing before the agency was held in the matter on May 24, 2010. The original administrative hearing in the record in this case was held in January-February 2008.

JURISDICTION AND VENUE

4. This petition is authorized by Idaho Code §§ 67-5270 and 67-5279.

5. This Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1701A(4) and 67-5272.

6. Venue lies in this Court pursuant to Idaho Code § 67-5272 because Petitioners AFRD #2 and NSCC conduct business in Gooding County, Idaho and certain water rights, which are the subject of the agency action, are delivered to the district’s landowners and company’s shareholders that own property located in Gooding County.

7. Pursuant to the Idaho Supreme Court’s *Administrative Order* issued on December 9, 2009 “all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District.” The SRBA Court’s procedures instruct the clerk of the district court in which the petition is filed to issue a *Notice of*

Reassignment. The Coalition has attached a copy of the SRBA Court's *Notice of Reassignment* form for the convenience of the clerk.

8. The Director's June 23, 2010 *Final Methodology Order* is a final agency action subject to judicial review pursuant to Idaho Code § 67-5270(3).

PARTIES

9. Petitioner, A&B Irrigation District is a duly organized irrigation district under the laws of the State of Idaho.

10. Petitioner, AFRD#2 is a duly organized reservoir district under the laws of the State of Idaho and conducting business in Gooding County.

11. Petitioner, Burley Irrigation District is a duly organized irrigation district under the laws of the State of Idaho.

12. Petitioner, Milner Irrigation District is a duly organized irrigation district under the laws of the State of Idaho.

13. Petitioner, Minidoka Irrigation District is a duly organized irrigation district under the laws of the State of Idaho.

14. Petitioner, NSCC is a non-profit Idaho corporation organized under the laws of the State of Idaho and conducting business in Gooding County.

15. Petitioner, TFCC is a non-profit Idaho corporation organized under the laws of the State of Idaho.

16. Respondent, Idaho Department of Water Resources is a state agency with its main office located at 322 E. Front St., Boise, Idaho. Respondent, Gary Spackman, is the Interim Director of the Idaho Department of Water Resources.

STATEMENT OF INITIAL ISSUES

17. The Petitioners intend to assert the following issues on judicial review:
- a. Whether the Director's *Final Methodology Order* is supported by substantial evidence?
 - b. Whether the Director's *Final Methodology Order* complies with Idaho law and the CM Rules?
 - c. Whether the Director erred in establishing a "reasonable in-season demand" and "reasonable carryover" standard for determining the extent of material injury rather than giving the water right decree the presumptive weight required by *AFRD#2, et al. v. IDWR, et al.*, 143 Idaho 863 (2007)?
 - d. Whether the Director's methodology is unconstitutional and arbitrary and capricious where it establishes a mitigation obligation threshold early in the irrigation season (April) that may be adjusted downward based on precipitation and water use during that irrigation season but that cannot be adjusted upward regardless of the exigencies of the irrigation season demand?
 - e. Whether the establishment of a methodology that allows mitigation obligations to be adjusted downward based on precipitation and water use during the irrigation season but not upward based on the same criteria violates the Equal Protection Clause of the Constitution?
 - f. Whether the Director's "reasonable carryover" scheme, that does not determine shortfall until after the irrigation season and does not require that any shortfall to reasonable carryover be made-up until the following irrigation, is contrary to law?

g. Whether the Director's *Final Methodology Order* complies with this Court's *Order on Petition for Judicial Review* (Case No. 08-551) issued on July 24, 2009?

h. Whether the Director failed to issue a single final order in compliance with Idaho Code §§ 67-5244 and 5246?

18. Pursuant to I.R.C.P. 84(d)(5), the Coalition reserves the right to assert additional issues and/or clarify or further specify the issues for judicial review stated herein which become later discovered.

AGENCY RECORD

19. Judicial review is sought of the Director's June 23, 2010 *Final Methodology Order*.

20. The administrative record in this case (Case No. 08-551) is on file with the Court and should be made a part of the record in this proceeding.

21. The Department held the original hearing in the matter for the administrative record in this case in January-February 2008, and a hearing in this matter on May 24, 2010, which was recorded and a transcript created, which transcript should be made a part of the agency record in this matter. The person who may have a copy of such transcript is Victoria Wigle, Director's Administrative Assistant, Idaho Department of Water Resources, 322 E. Front St., P.O. Box 83720, Boise, Idaho 83720-0098, Telephone: (208) 287-4803, Facsimile: (208) 287-6700, email: victoria.wigle@idwr.idaho.gov.

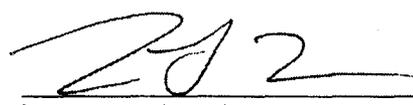
22. The Coalition anticipates that it can reach a stipulation regarding the agency record with the Respondents and the other parties, and will pay its necessary share of the fee for preparation of the record at such time.

23. Service of this Petition for Judicial Review of Agency Action has been made on the Respondents at the time of the filing of this Petition.

DATED this 21st day of July, 2010.

CAPITOL LAW GROUP, PLLC

FLETCHER LAW OFFICE



C. Tom Arkoosh

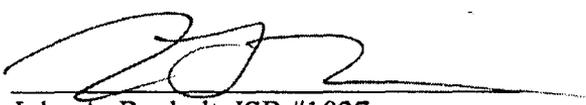


W. Kent Fletcher

*Attorneys for American Falls Reservoir
District #2*

Attorneys for Minidoka Irrigation District

BARKER ROSHOLT & SIMPSON LLP



John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of July, 2010, I served true and correct copies of the *Notice of Appeal and Petition for Judicial Review of Final Agency Action* upon the following by the method indicated:

Gooding County District Court
624 Main St.
P.O. Box 417
Gooding, ID 83330

- U.S. Mail, Postage Prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Courtesy Copy
Snake River Basin Adjudication
427 Shoshone Street N.
P.O. Box 126
Twin Falls, ID 83303

- U.S. Mail, Postage Prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Garrick Baxter
Chris Bromley
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
garrick.gaxter@idwr.idaho.gov
chris.bromley@idwr.idaho.gov

- U.S. Mail, Postage Prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Randy Budge
Candice McHugh
P.O. Box 1391
Pocatello, Idaho 83204-1391

- U.S. Mail, Postage Prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Sarah Klahn
William A. Hillhouse II
Kelly Snodgrass
511 16th St., Suite 500
Denver, CO 80202

- U.S. Mail, Postage Prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello, Idaho 83205

- U.S. Mail, Postage Prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Kathleen Carr
U.S. Dept. of Interior
960 Broadway Ste. 400
Boise, Idaho 83706

U.S. Mail, Postage Prepaid
 Hand Delivery
 Overnight Mail
 Facsimile
 Email

Matt Howard
U.S. Bureau of Reclamation
1150 N. Curtis Road
Boise, Idaho 83706-1234

U.S. Mail, Postage Prepaid
 Hand Delivery
 Overnight Mail
 Facsimile
 Email

Lyle Swank
IDWR
900 N .Skyline Dr.
Idaho Falls, Idaho 83402-6105

U.S. Mail, Postage Prepaid
 Hand Delivery
 Overnight Mail
 Facsimile
 Email

Allen Merritt
Cindy Yenter
IDWR
1341 Fillmore St., Suite 200
Twin Falls, Idaho 83301

U.S. Mail, Postage Prepaid
 Hand Delivery
 Overnight Mail
 Facsimile
 Email

William A. Parsons
Parsons, Smith & Stone, LLP
P.O. Box 910
Burley, ID 83318

U.S. Mail, Postage Prepaid
 Hand Delivery
 Overnight Mail
 Facsimile
 Email

Michael C. Creamer
Jeffrey C. Fereday
601 W. Bannock
P.O. Box 2720
Boise, Idaho 83701-2720

U.S. Mail, Postage Prepaid
 Hand Delivery
 Overnight Mail
 Facsimile
 Email

David W. Gehlert
Natural Resources Section
U.S. Department of Justice
1961 Stout Street, 8th Floor
Denver, CO 80294

U.S. Mail, Postage Prepaid
 Hand Delivery
 Overnight Mail
 Facsimile
 Email


Travis L. Thompson