

**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	CM-DC-2010-001 ORDER ON PETITION FOR RECONSIDERATION AND REQUEST FOR HEARING
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BACKGROUND

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

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 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.

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* (“Petition”). On May 9, 2016, the City of Pocatello (“Pocatello”) submitted *Pocatello’s Response to A&B’s Motion for Reconsideration* (“Response”).

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.

ANALYSIS

1. A&B's Proportionate Share Should be Adjusted.

A&B asserts the Director miscalculated A&B's proportionate share of the predicted DS and requests the Director "recalculate the 'proportionate impact' based upon the predicted impact of A&B's ground water rights junior to February 8, 1989 on the Near Blackfoot to Minidoka reaches of the Snake River." *Petition* at 2-3.

A&B's proportionate share of the predicted DS of 44,200 acre-feet was miscalculated. In the As-Applied Order, the Director estimated that A&B's proportionate share is 3,463 acre-feet. The calculation of this volume was based on the incorrect assumption that A&B's approved mitigation plan mitigates for all ground water irrigation diversions within A&B's place of use boundary. However, A&B's mitigation plan only mitigates for specific diversions authorized by ground water rights held by A&B (nos. 36-2080, 36-15192, 36-16749, 36-15127A, 36-15193A, 36-15194A, 36-15195A, 36-15196A, 36-15127B, 36-15193B, 36-15194B, 36-15195B, and 36-15196B). A number of other irrigation water rights are appurtenant to lands located within A&B's district boundaries, but are owned by other water right holders. Because of the inclusion of these other water rights, the As-Applied Order's A&B mitigation obligation of 3,463 acre-feet was calculated based on curtailment of 3,419 acres, which was excessive. As A&B asserts in the *Petition*, A&B's junior water rights affected by the As-Applied Order only authorize irrigation of 2,063.1 acres. *Petition* at 2.

The Director recalculated the obligation assuming curtailment of only the 2,063.1 acres authorized by junior water rights held by A&B. In ESPAM2.1, the Director applied a stress equal to the average crop irrigation requirement for 2,063.1 acres and distributed the stress among the 184 points of diversion for A&B's junior water rights. The average annual crop irrigation requirement, based on data from the last ten years of the ESPAM2.1 model calibration period (November 1998 through October 2008), was 2.48 acre-feet/acre.² Based on the revised analysis, A&B's proportionate share of the predicted DS should be 2,122 acre-feet.³

2. The Director will Grant A&B's Request for Hearing on the Scope of Junior-Priority Ground Water Rights That Should be Subject to Administration.

A&B asserts that the Director erroneously excluded "certain juniors from administration" and, therefore, "artificially enlarged the mitigation obligation of A&B contrary to Idaho's constitution and water distribution statutes." *Petition* at 3-4. Specifically, A&B asserts "the Director failed to consider the impacts caused by hydraulically connected junior ground water rights tributary to the Snake River but that are not within" the area of common ground water supply defined by Rule 50 of the Department's Rules for Conjunctive Management of Surface

² While A&B notes that Brockway Engineering previously modeled A&B's impact using an annual crop irrigation requirement of 2.1 acre-feet/acre, this value is lower than the ESPAM2.1 data used to calculate the February 8, 1989, priority date for the As-Applied Order. The Director will use the ESPAM2.1 data for the analysis of A&B's impact to be consistent with the calculation of impact for all junior ground water users.

³ Supporting files for the Department's revised analysis are posted at:
<http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/>.

and Ground Water Resources, IDAPA 37.03.11 *et seq.* (“CM Rules”). *Id.* at 3. A&B notes that ESPAM 2.1 defines the Eastern Snake Plain Aquifer differently than the CM Rules and asserts that CM Rule 50 “fails to account for the best available science to the detriment of junior ground water users like A&B.” *Id.* A&B asserts that, “if all hydraulically connected juniors were being appropriately administered,” A&B’s proportionate share of the predicted DS would be lower and that “application of the CM Rules in such a manner is unconstitutional and should be reconsidered.” *Id.* at 4. A&B requests a hearing on this issue pursuant to Idaho Code § 1701A(3).

Pocatello argues the Director should reject A&B’s argument “that the Director should have evaluated injury without regard to the area of common ground water identified in Rule 50 to reduce A&B’s proportional obligation to satisfy SWC’s injury amount.” *Response* at 2. Pocatello states the Department “is not authorized to disregard lawfully enacted and maintained [CM Rules] in administering delivery calls.” *Id.*

Idaho Code § 42-1701A(3) states: “Unless the right to a hearing before the director . . . is otherwise provided by statute, 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.” The Director will grant A&B’s request for a hearing because the law creates the right to a hearing. A threshold issue is whether the Director can and should determine the constitutionality of a rule establishing an area of common ground water supply.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that:

1) A&B’s request for re-calculation of its proportionate share of the predicted DS set forth in the As-Applied Order is GRANTED. A&B’s proportionate share of the predicted DS is 2,122 acre-feet, not 3,463 acre-feet.

2) A&B’s request for hearing on the issue of the scope of junior-priority ground water rights that should be subject to administration in response to the SWC delivery call is GRANTED. The granting of this hearing does 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.

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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