

**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) Docket No. CM-DC-2010-001
THE BENEFIT OF A&B IRRIGATION DISTRICT,)
AMERICAN FALLS RESERVOIR DISTRICT #2,) **ORDER ADOPTING IGWA’S**
BURLEY IRRIGATION DISTRICT, MILNER) **AMENDED NOTICE OF**
IRRIGATION DISTRICT, MINIDOKA IRRIGATION) **SECURED WATER**
DISTRICT, NORTH SIDE CANAL COMPANY,)
AND TWIN FALLS CANAL COMPANY)
)
)
)
)
) **(METHODOLOGY STEP 10)**
)

FINDINGS OF FACT

1. On June 23, 2010, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued his *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). The Methodology Order established ten steps for determining material injury to members of the Surface Water Coalition (“SWC”).

2. Step 9 of the Methodology Order states that, on or before November 30th of each year, the Director will project the SWC’s reasonable carryover shortfall, if any. *Methodology Order* at 37. If the Director projects a reasonable carryover shortfall, junior ground water users shall have fourteen days to establish their ability to secure “a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for injured members of the SWC.” *Id.* at 38.

3. Step 10 of the Methodology Order further explains, “As an alternative to providing the full volume of reasonable carryover shortfall established in Step 9, junior ground water users can request that the Department model the transient impacts of the proposed curtailment based on the Department’s water rights data base and the ESPA Model.” *Id.*

4. On November 27, 2013, the Director issued his *Final Order Establishing 2013 Reasonable Carryover (Methodology Step 9)* (“2013 Step 9 Order”) in which the Director determined the reasonable carryover shortfall obligation for junior ground water users for 2013. The Director concluded that American Falls Reservoir District No. 2 (“AFRD2”) and Twin Falls

Canal Company (“TFCC”) are the only SWC entities with a reasonable carryover shortfall for 2013, and that their final 2013 adjusted carryover shortfall values are 40,819 acre-feet and 5,176 acre-feet respectively, a combined obligation of 45,995 acre-feet. *2013 Step 9 Order* at 5. Consistent with the Methodology Order, the 2013 Step 9 Order required that junior ground water users establish their ability to provide 40,819 acre-feet to AFRD2 and 5,176 to TFCC or alternatively, notify the Department of their intention to implement Step 10. *Id.* at 5.

5. On November 27, 2013, the Idaho Ground Water Appropriators, Inc. (“IGWA”), on behalf of junior ground water users, requested that the Department implement Step 10 of the Methodology Order and model the transient impacts of the proposed curtailment based on the Department’s water rights database and the Eastern Snake Plain Aquifer Model. Email from Randy Budge, Atty. for IGWA, to Gary Spackman, Dir. of IDWR, *SWC Delivery Call, Docket No. CM-DC-2010-001 – Reasonable Carryover* (Nov. 27, 2013).

6. On December 16, 2013, the Director issued the *Final Order Establishing 2013 Reasonable Carryover (Methodology Step 10)* (“2013 Step 10 Order”). The 2013 Step 10 Order concluded that IGWA’s obligation pursuant to Step 10 for 2013 is 11,924 acre-feet and that the appropriate proportional distribution is 10,583 acre-feet to AFRD2 and 1,341 acre-feet to TFCC.

7. The 2013 Step 10 Order further provided:

[J]unior ground water users represented by IGWA have fourteen days to establish, to the satisfaction of the Director, of their ability to provide 10,583 acre-feet of storage water to AFRD2 and 1,341 acre-feet to TFCC to satisfy Methodology Step 10. If IGWA fails to do so, the Department will issue an order curtailing ground water rights junior to July 1, 1985.

8. On December 31, 2013, IGWA filed with the Department *IGWA’s Notice of Secured Water Supply Re 2013 Methodology Order (Step 10)* (“Notice”) informing the Department that it had secured 11,924 acre-feet of storage water to fully satisfy its 2013 Step 10 reasonable carryover obligation.

9. The Notice explained that IGWA has 10,879 acre-feet of storage water remaining from its 2013 leases to meet the Step 10 reasonable carryover shortfall. *Notice* at 2. Because IGWA does not own storage space in any reservoir, it needs to assign its remaining storage water to another entity to utilize it the next season. IGWA’s Notice explained that it had assigned 6,500 acre-feet to the State of Wyoming and the remaining balance of 4,379 acre-feet to TFCC. *Id.* IGWA also explained that it had “a verbal commitment from Fremont-Madison Irrigation District to lease the shortfall of 1,045 acre-feet which will satisfy the full 2013 reasonable carryover obligation.” *Id.*

10. On January 10, 2014, the Director issued his *Order Determining Deficiency in IGWA’s Notice of Secured Water; Curtailing Ground Water Rights Junior to July 1, 1985* (“Deficiency Order”). The Deficiency Order concluded that IGWA failed to satisfy the 2013 Step 10 Order because its Notice did not provide the Director with adequate documentation

establishing that it had secured the water necessary to meet the carryover obligation.¹ *Deficiency Order* at 4.

11. Due to IGWA's failure to satisfy the 2013 Step 10 Order, the Deficiency Order also ordered the curtailment of certain ground water users with consumptive water rights bearing priority dates junior to July 1, 1985, commencing on February 18, 2014, at 12:01 a.m. A list of the affected water rights was attached to the Deficiency Order. The Deficiency Order afforded IGWA with the opportunity to lift the curtailment by providing the Director with the appropriate documentation of its secured water supply.

12. On January 14, 2014, IGWA's *Amended Notice of Storage Water Supply Re 2013 Methodology Order (Step 10)* ("Amended Notice"), was filed with the Department. IGWA's Amended Notice states that on January 10, 2014, the Water District 1 Rental Pool Subcommittee approved its request for an extension of time to assign its remaining storage water. The Amended Notice also states that IGWA adjusted the assignments of water made earlier and has now assigned its 10,879 AF of storage water to TFCC and AFRD2 as follows:

1,341 AF to TFCC
9,538 AF to AFRD2
10,879 AF

As to the remaining 1,045 AF that IGWA is required to supply pursuant to the 2013 Step 10 Order, IGWA provided a copy of a signed letter agreement between IGWA and North Fork Reservoir Company ("North Fork"). The agreement provides that North Fork will:

make available up to a maximum of 1,045 AF of storage water to IGWA for assignment by IGWA to AFRD2 and/or Twin Falls Canal Company as may be necessary to comply with the Director's December 16, 2013 Step 10 Methodology Order. IGWA may make this assignment in its discretion to comply with the Order by notifying Water District 1 Water Master Lyle Swank to make the assignment and providing North Fork Reservoir Company Notice thereof. Within thirty days of the date the assignment is made, IGWA will pay to North Fork Reservoir Company \$20 per AF on the water assigned up to the maximum of 1,045 AF, and will also pay all administrative fees thereon to Water District 1.

Amended Notice at 29.

13. On January 17, 2014, AFRD2 submitted *AFRD2's Response and Objection to IGWA's Amended Notice of Storage Water Supply Re 2013 Methodology Order (Step 10)* ("Response"). In its Response, AFRD2 argues that the letter agreement is not valid because (1) the letter has not been filed with Water District 1; (2) the administrative fees and board surcharges have not been paid; (3) IGWA does not have the right to pay administrative fees within thirty days of the date of the assignment of storage; (4) IGWA's assertion that "IGWA

¹ "IGWA is required to provide the Director with legally enforceable contracts, options or similar documentation to establish that it has secured the water necessary to meet the carryover obligation. See *Order on Petition for Judicial Review*, Case No. 2008-551, Gooding County, at 19 (July 24, 2009)." *Deficiency Order* at 3.

may make this assignment in its discretion to comply with the Order...” does not provide reasonable certainty that storage water will be provided. *Response* at 3.

CONCLUSIONS OF LAW

1. The Director has confirmed with the Water District 01 Watermaster that IGWA has assigned 1,341 AF to TFCC and 9,538 AF to AFRD2.

2. The Director concludes that IGWA’s letter agreement with North Fork is adequate to satisfy IGWA’s obligation pursuant to the 2013 Step 10 Order. First, the Director has communicated with the Water District 01 Watermaster. The letter agreement has been provided to Water District 01. Second, it is unnecessary for IGWA to immediately pay the rental pool administrative fees because IGWA is not required to lease the water at this time. IGWA’s specific carryover obligation is not fixed until after the day of allocation. *Methodology Order* at 33. It is at this point that the water must be assigned. Options to lease water are satisfactory if they are not subject to revocation by the lessor. *See Order on Petition for Judicial Review*, Case No. 2008-551, Gooding County, at 19 (July 24, 2009). The Director views the letter agreement with North Fork as an option to lease water should IGWA be required to provide water to AFRD2 after the day of allocation. At that point, the option will be exercised by IGWA and the water leased through the rental pool to IGWA for assignment to AFRD2. No fees are owed until that time. Finally, AFRD2 also takes issue with language in the North Fork letter agreement about how “IGWA may make this assignment in its discretion...” AFRD2 argues “it is not within IGWA’s discretion to provide the storage water if IGWA desires to use storage for mitigation.” *Response* at 3. The Director does not view the quoted assignment language intending to give IGWA the option of complying with the Director’s order. The Director views the language as ensuring that the decision to exercise the option rests with IGWA and not North Fork. In fact, if the discretion to exercise the option was ambiguous or otherwise subject to withdrawal by North Fork, the agreement would be unsatisfactory. As recognized in the letter agreement itself, the water will be made available to AFRD2 if “necessary to comply with the Director’s December 16, 2013 Step 10 Methodology Order.” *Amended Notice* at 29.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that, IGWA has satisfied the requirements of the 2013 Step 10 Order and that the curtailment required by the Deficiency Order is hereby REVOKED.

Dated this 3rd day of February, 2014.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of February, 2014, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP 195 River Vista Place, Ste. 204 Twin Falls, ID 83301-3029 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
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<p>David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th Street South Terrace, Suite 370 Denver, CO 80202 david.gehlert@usdoj.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
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Deborah Gibson
Administrative Assistant for the Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the 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 person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.