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JUN 27 2013

DEPARTMENT OF
WATER RESOURCES

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Attorneys for Petitioner American Falls Reservoir District #2

**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.

DOCKET NO. CM-DC-2010-001

**REQUEST FOR
RECONSIDERATION OF ORDER
RELEASING IGWA FROM 2012
REASONABLE CARRYOVER
SHORTFALL OBLIGATION**

(METHODOLOGY STEP 5)

COMES NOW American Falls Reservoir District #2 by and through its counsel of record, C. Tom Arkoosh of Arkoosh Law Offices, and hereby requests reconsideration of the *Order Releasing IGWA from 2012 Reasonable Carryover Shortfall Obligation (Methodology Step 5)*.

This request is made for the following reasons:

1. On or about April 7, 2010, the Director, then Interim Director, signed the *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*, which contained the following provisions:

As stated by the Hearing Officer, “There must be adjustments as conditions develop if any baseline supply concept is to be used.” R. Vol. 37 at 7093.

¶ 57 at p. 20.

In early to mid-July, the Forecast Supply will be adjusted. The reservoirs will typically have filled to their peak capacity for the season and the storage water will have been allocated. The Department’s water rights accounting model will be used to compute the natural flow diverted by each member of the SWC as of the new forecast date. The natural flow diversion for the remainder of the irrigation season will be estimated based on a historical year with similar gains in the Blackfoot to Milner reach. Reach gains are graphed below, using 2004 as an example. In this case, 2003 had similar reach gains and is appropriately conservative. Therefore, the natural flow diverted in 2003 would be used to predict the natural flow diversions for the remainder of the 2004 season. The adjusted Forecast Supply in the sum of the actual natural flow diversions, the predicted natural flow diversions, and the storage allocation.

¶ 60 at p. 20.

Step 6: Approximately halfway through the irrigation season, but following the events described in Step 5, the Director will, for each member of the SWC: (1) evaluate the actual crop water needs up to that point in the irrigation season; (2) estimate the Time of Need date; and (3) issue a revised Forecast Supply.

This information will be used to recalculate RISD and adjust the projected DS for each member of the SWC. RISD will be calculated utilizing the project efficiency, projected demand, and the cumulative actual crop water need determined up to that point in the irrigation season. The Director will then issue RISD and revised DS values.

¶ 7-8 at p. 35.

2. On or about June 23, 2010, the Director, then Interim Director, signed the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*, which contained the following provision:

Just as members of the SWC should have certainty at the start of the irrigation season that junior ground water users will be curtailed, in whole or in part, unless they provide the required volume of mitigation water, in whole or in part, junior ground water users should also have certainty entering the irrigation season that the predicted injury determination will not be greater than it is ultimately determined at the Time of Need (defined in footnote 8, *supra*). If it is determined at the time of need that the Director under-predicted the demand shortfall, the Director will not require that junior ground water users make up the difference, either through mitigation or curtailment. This determination is based upon the Director's discretion and his balancing of the principal of priority of right with the principals of optimum utilization and full economic development of the State's water resources. Idaho Const. Art. XV, § 3; Idaho Const. Art. XV § 7; Idaho Code § 42-106; Idaho Code § 42-226. Because the methodology is based upon conservative assumptions and is subject to refinement, the possibility of under-predicting material injury is minimized and should lessen as time progresses. The methodology should provide both the SWC and junior ground water users certainty at the start of the irrigation season.

¶ 18 at p. 31.

3. Ironically, while the Interim Director declined to adapt the estimation upward in the event of senior water shortages, the Director did expressly reserve the opportunity to adjust the demand downward in the event of excess water:

If, at any time prior to the Director's final determination of the April Forecast Supply, the Director can determine with certainty that any member of the SWC has diverted more natural flow than predicted, or has accrued more storage than predicted, the Director will revise his initial, projected demand shortfall determination.

¶ 6 at p. 36.

4. That no explanation was given, or hearing offered, on the change from the adaptability of providing water to seniors from juniors, except as provided in ¶ 18 of the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*, quoted above.
5. *Clear Springs Foods v. Spackman*, 150 Idaho 790 (2011) was published March 17, 2011, nearly three months prior to the *Second Amended Final Order Regarding*

Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover, and soundly rejected the use of the concepts of optimal utilization and full economic development in conjunctive management. Thus, notwithstanding the statements set forth in ¶ 18 of p. 31 of the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*, quoted above, there exists no discretion on the part of the Director to abandon the adaptability of the reasonable in-season demand.

6. Although the Director's April estimate predicted American Falls Reservoir District #2 would receive a supply of 441,503 acre-feet to meet a baseline year of 415,730 acre-feet, American Falls Reservoir District #2 will not receive the predicted amount.
7. Constitutionally, therefore, the Director must administer water adaptively as required by both the priority doctrine and conjunctive management rules.
8. In the *Order Releasing IGWA from 2012 Reasonable Carryover Shortfall Obligation (Methodology Step 5)*, the Director has determined that the storage allocation held by American Falls Reservoir District #2 filled. Given the operation of the American Falls right, had American Falls Reservoir filled, the storage right of American Falls Reservoir District #2 would have filled. As it was, on the day of allocation, American Falls Reservoir had not filled subsequent to April 30, 2013, and therefore American Falls Reservoir District #2's storage space did not fill, resulting in significantly less water than initially predicted by the Director in Step 4, which prediction was based upon the estimation that American Falls Reservoir would fill subsequent to April 30, 2013.

9. Therefore, American Falls Reservoir District #2 respectfully prays the Director for reconsideration reversal of the release of the water owed to American Falls Reservoir District #2 from junior water right users pursuant to Idaho Code § 42-106.

DATED this 24th day of June, 2013.

ARKOOSH LAW OFFICES



C. Tom Arkoosh
*Attorneys for American Falls Reservoir
District #2*

CERTIFICATE OF MAILING

I hereby certify that on this 21st day of June, 2013, the above and foregoing, was sent to the following in the manner indicated below:

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