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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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,**	**Case No. CV-2013-2305**
Petitioners,	**SURFACE WATER COALITION'S JOINT MOTION TO LIFT STAY / JOINT MOTION TO EXPEDITE**
vs.	**(April 2013 Forecast Supply Order)**
GARY SPACKMAN, in his capacity as 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")[1], by and through their undersigned counsel, and hereby file this *Joint Motion to Lift Stay / Motion to Expedite* in the above-captioned matter.

BACKGROUND

The Coalition requested administration of hydraulically connected junior ground water rights in January 2005. After a series of orders the Department held an administrative hearing in early 2008, with former Chief Justice Gerald F. Schroeder presiding. The Director issued a final order in September 2008. The Coalition and U.S. Bureau of Reclamation appealed the decision to district court. Judge John Melanson issued his decision on judicial review in July 2009. IGWA and the City of Pocatello filed petitions for rehearing. Thereafter, the court issued its decision denying the petitions in August 2010. The parties appealed the district court's decision to the Idaho Supreme Court in the fall of 2010. Briefing concluded in the fall of 2011 and the case was heard by the Court on June 13, 2012. As of the filing of this motion the Supreme Court has yet to issue a decision.

[1] The term "Surface Water Coalition" is a shorthand reference to the seven individual canal companies and irrigation districts that requested conjunctive administration of hydraulically connected ground water rights in 2005. Each entity holds and relies upon their individual natural flow and storage water rights to deliver water to their respective shareholders and landowners. The "Coalition" does not own water rights collectively or share water supplies.

During that time, the Director issued his *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (June 23, 2010) ("Methodology Order"). The parties appealed that order and others implementing the new protocol for administration to district court. Based on the Coalition's information, the following cases have been filed and are now pending before the district court:

IGWA v. IDWR (Case No. 2010-382) (Gooding County District Court)

IGWA v. IDWR (Case No. CV-2010-383) (Gooding County District Court)

TFCC et al. v. IDWR (Case No. CV-2010-384) (Gooding County District Court)

City of Pocatello v. IDWR (Case No. CV-2010-387) (Gooding County District Court)

City of Pocatello v. IDWR (Case No. CV-2010-388) (Gooding County District Court)

TFCC et al. v. IDWR (Case No. CV-2010-3403) (Twin Falls County District Court)

TFCC et al. v. IDWR (Case No. CV-2010-5520) (Twin Falls County District Court)

TFCC et al. v. IDWR (Case No. CV-2010-5946) (Twin Falls County District Court)

TFCC et al. v. IDWR (Case No. CV-2012-2096) (Twin Falls County District Court)

TFCC et al. v. IDWR (Case No. CV-2013-2305) (Twin Falls County District Court)

AFRD #2 v. IDWR (Case No. CV-2013-155) (Lincoln County District Court)

The Coalition and other parties have filed various motions to consolidate and stipulated motions requesting the court to stay further proceedings "until a decision has been entered by the Idaho Supreme Court in the SWC Supreme Court Appeal [Case No. 38193-2010]." *See Motion for Stay* at 2 (Dec. 10, 2010). The court entered an *Order Granting Motion for Stay* on December 13, 2013. The Court and the parties recognized that the outcome of the SWC Supreme Court Appeal "may affect the consideration and/or resolution" of the various petitions for judicial review. *Order* at 2.

Concurrent with the filing of this motion, the Coalition is also filing a *Notice of Appeal and Petition for Judicial Review of Agency Action* regarding the Director's recent *Order Revising April 2013 Forecast Supply* (August 27, 2013) ("August Order") and subsequent *Order Denying Petition for Reconsideration; Denying Motion to Authorize Discovery; Denying Request for Hearing* (September 27, 2013) ("September Order"). *See* Exhibits A, B.

MOTION TO LIFT STAY

The Coalition submits lifting the stay is appropriate for the following reasons. First, the extraordinary time (nearly 16 months since oral argument in June 2012) in receiving a decision from the Idaho Supreme Court warrants reconsideration of the current ordered stay. Although the parties agreed that conjunctive administration would proceed under the Methodology Order in the interim, that timeframe has now spanned four irrigation seasons. Lifting the stay is warranted to address the merits of the Coalition's petition in a timely manner prior to the 2014 irrigation season. Since the beginning of the irrigation season is only 6 months away, finalizing the agency records and setting an expedited briefing schedule will ensure the cases are heard and decided in time to implement proper conjunctive administration next year.

Regardless of when the Supreme Court issues a decision, the procedural steps and schedule can be established to ensure a timely decision on the Methodology Order prior to the 2014 irrigation season. If the Supreme Court issues a decision in the interim, the parties can incorporate and address the impact of that decision in the briefing (or supplemental filings if necessary). Alternatively, if the decision requires further action by IDWR the parties can address those issues with this court at that time.

Next, lifting the stay is necessary due to the Director's improper implementation of the Methodology and ongoing material injury. Despite the Coalition's requests for administrative

hearings on the Director's actions, he has repeatedly denied those petitions, denying the Coalition due process under the law.[2] Instead, the Director has insulated his rulings from further review behind this court's ordered stay. *See* Ex. B; September Order at 4 ("The Methodology Order has been appealed and is currently stayed. . . . The Director's application of the Methodology Order is consistent with the stipulation."). Accordingly, the Coalition is subject to the Director's decisions without any further recourse or ability to seek relief due to the ordered stay.

For example, the Director failed to follow and properly implement the Methodology Order in 2013. In April, the Director failed to recognize then current hydrologic conditions and determined only TFCC would be injured in the amount of 14,200 acre-feet during the irrigation season. That amount established a "ceiling" on the amount of mitigation required by junior priority ground water users for the 2013 irrigation season.

The hot and dry conditions continued from the spring throughout the summer without any further action by the Director. Finally, just a few days before Labor Day, the Director revised his April Forecast Supply and attempted to implement steps 6 – 8 of the Methodology Order. The Director concluded AFRD #2 suffered material injury in the amount of 54,000 acre-feet and TFCC suffered material injury in the amount of 51,200 acre-feet. *See* Ex. A; *August Order* at 6. Despite the increased injury, the Director cut the mitigation owed to TFCC <u>by over 50%</u> of what was previously ordered. *See id.* at 7. The Director's unlawful and untimely action forced both AFRD #2 and TFCC to reduce water deliveries to their water users over the summer. *See* Ex. C; *Affidavit of Lynn Harmon* and *Affidavit of Brian Olmstead.* While junior ground water users

[2] The Director refuses to hold an administrative hearing on his actions implementing conjunctive administration despite the plain language in I.C. § 42-1701A(3) ("Unless the right to a hearing before the director of the water resource board is otherwise provided by statute, any person aggrieved <u>by any action of the director</u>, including any decision, determination, order or other action, . . . and who has not previously been afforded an opportunity for a hearing on the matter <u>shall be entitled to a hearing before the director to contest the action</u>").

diverted their full rights throughout the irrigation season, AFRD #2 and TFCC suffered unmitigated injury to their senior surface water rights.

The Coalition submitted the managers' affidavits to the Director and requested the opportunity for an administrative hearing. The Director ignored this information, refused to reconsider his decision, and denied the request for hearing. *See* Ex. B; September Order.

In addition, the Director failed to analyze the discrepancies in the leased water IGWA claimed it had acquired for the 2013 irrigation season. Although IGWA represented it had 32,500 acre-feet to avoid curtailment back in April, that number proved incorrect based upon information supplied by Water District 01 and others later. *See* Exs. D, E. Moreover, while IGWA requested assignment of 14,200 acre-feet to TFCC on two separate occasions, that assignment was never completed by the Watermaster.

The lack of oversight by the Director to require timely assignment of the mitigation water resulted in an unlawful implementation of the Methodology Order. Although the Director accepted the representations by IGWA back in April, he failed to ensure the water was actually available for assignment throughout the irrigation season. The Coalition requested the opportunity to further discover the facts surrounding the leases and failed assignments, but again, the Director denied the Coalition's request for a hearing and inquiry into these issues. *See* Ex. B. Instead, the Director claimed such matters were "not within the scope of the Steps 6 – 8 Order." *Id.*; September Order at 4. The ongoing material injury caused by junior priority ground water rights, without sufficient mitigation, is further reason to lift the stay and hear the Coalition's petition for judicial review.

Given the Director's implementation of the *Methodology Order* in 2013 and his repeated denial of the Coalition's requests for administrative hearings on his actions, the Coalition has no

choice but to proceed with judicial review to ensure timely relief for the 2014 irrigation season. The Coalition respectfully requests the Court to lift the ordered stay in these proceedings. The Coalition requests oral argument on this motion.

MOTION TO EXPEDITE

The Coalition further requests the Court to expedite consideration of this motion so that it may be heard and decided as soon as possible. The Coalition requests oral argument on this motion.

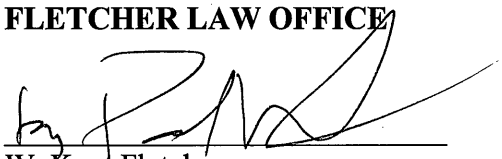
DATED this 29th day of October, 2013.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson
Paul L. Arrington

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

FLETCHER LAW OFFICE



W. Kent Fletcher

Attorneys for American Falls Reservoir District #2 and Minidoka Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of October, 2013, I served true and correct copies of the foregoing upon the following by the method indicated:

SRBA District Court 253 3rd Ave. N. P.O. Box 2707 Twin Falls, Idaho 83303-2707	_____ U.S. Mail, Postage Prepaid __X__ Hand Delivery _____ Overnight Mail _____ Facsimile _____ Email
Garrick Baxter Deputy Attorney General Idaho Department of Water Resources P.O. Box 83720	__X__ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile

Boise, Idaho 83720-0098	K Email
Randy Budge T.J. Budge P.O. Box 1391 Pocatello, Idaho 83204-1391	_____ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile X Email
Sarah Klahn Mitra Pemberton 511 16th St., Suite 500 Denver, CO 80202	_____ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile X Email
Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, Idaho 83205	_____ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile X 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 X 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 X Email
Lyle Swank IDWR 900 N. Skyline Dr. Idaho Falls, Idaho 83402-6105	_____ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile X Email
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William A. Parsons Parsons, Smith & Stone, LLP P.O. Box 910 Burley, ID 83318	____ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile X 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 X 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 X Email

Travis L. Thompson

Exhibit
A

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 **ORDER REVISING APRIL 2013 FORECAST SUPPLY** ***(METHODOLOGY STEPS 6 – 8)***

FINDINGS OF FACT

A. Background

1. On June 23, 2010, the Director of the Idaho Department of Water Resources ("Director" or "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 10 steps for determining material injury to members of the Surface Water Coalition ("SWC"). This order will examine steps 6, 7, and 8 from the Methodology Order.

2. Step 6 states as follows:

> 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.

Methodology Order at 36 (internal footnote omitted).

3. Step 7 states as follows:

> Shortly before the estimated Time of Need, but following the events described in Steps 5 and 6, 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) issue a revised Forecast Supply; and (3) establish the Time of Need.

> This information will be used to recalculate RISD [Reasonable In Season Demand] and adjust the projected DS [Demand Shortfall] for each member of the SWC. . . . The Director will then issue revised RISD and DS values.

Id. at 37.

4. According to the Methodology Order, "If the Director determines that the estimated Time of Need is reasonably certain, Step 7 will not be implemented for in-season purposes." *Id.*

5. Step 8 states as follows:

> At the Time of Need, junior ground water users are required to provide the lesser of the two volumes from Step 4 (May 1 secured water) and the [DS][[1]] volume calculated at the Time of Need. If the calculations from steps 6 or 7 indicate that a volume of water necessary to meet in-season projected demand shortfalls is greater than the volume from Step 4, no additional water is required.
>
> The Director will review, at the end of the season, the volume and efficiencies of application of surface water, the amount of mitigation water provided by junior ground water users, and may, in the exercise of his professional judgment, readjust the reasonable carryover shortfalls to reflect these considerations.

Id. (internal footnote omitted).

6. On April 17, 2013, the Director issued his *Final Order Regarding April 2013 Forecast Supply (Methodology Steps1 – 4)* ("April Forecast Supply Order"). The April Forecast Supply Order predicted a demand shortfall to the SWC of 14,200 acre-feet for the 2013 irrigation season. *April Forecast Supply Order* at 3. At that time, the only member of the SWC predicted to experience material injury during the 2013 irrigation season was the Twin Falls Canal Company ("TFCC").

7. The Director previously approved CM Rule 43 mitigation plans for the Idaho Ground Water Appropriators, Inc. ("IGWA"). IGWA secured 14,200 acre-feet of storage water to mitigate material injury to the SWC. *Order Confirming IGWA's Notice of Secured Water* (May 22, 2013).

B. April – July Climate

8. The April 2013 Joint Forecast prepared by the United States Army Corps of Engineers and the United States Bureau of Reclamation predicted 2,650,000 acre-feet of natural

---

[1] The Director has determined the reference in Methodology Order Step 8 to "RISD" is incorrect and should instead reference "DS." As such, the Director has removed RISD from the above quotation and replaced it with DS.

flow at the Heise gage for the period April – July, 2013. *April Forecast Supply Order* at 2. The Joint Forecast "is generally as accurate a forecast as is possible given current data gathering and forecasting techniques." *Methodology Order* at 9.

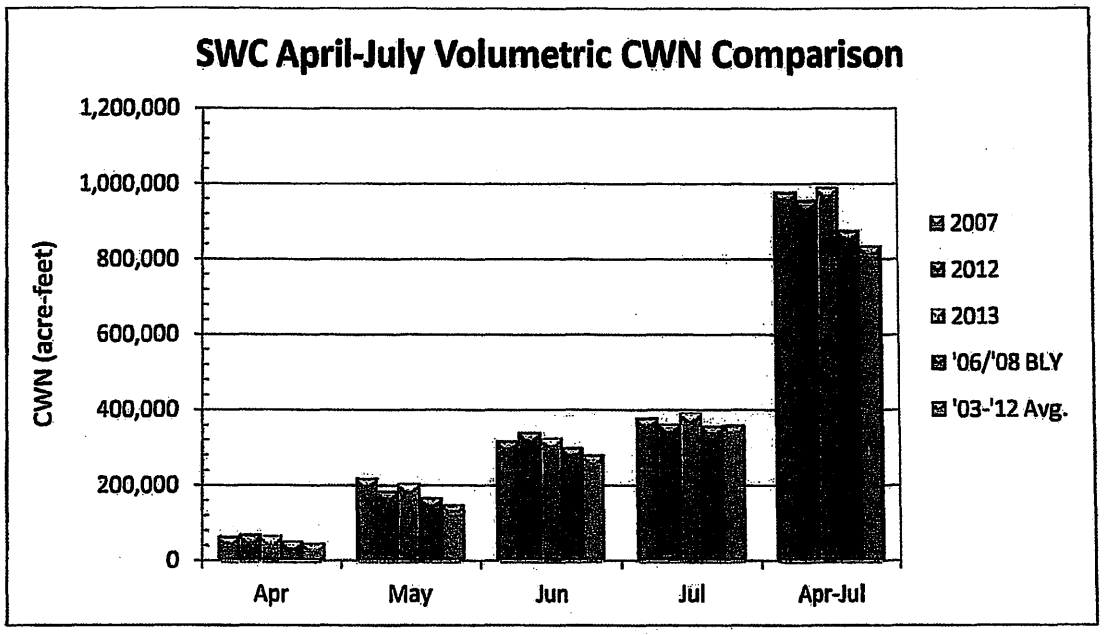
9. The months of May and June were dry. According to NRCS Snotel sites, the Upper Snake received 73% and 24% of average precipitation in May and June, respectively. The National Weather Service's Twin Falls weather station reported 26% and 19% of normal precipitation in May and June, respectively. Twin Falls temperatures were near normal for April, were 1.6 degrees above normal for May, were 3.7 degrees above normal for June, and were 5.7 degrees above normal for July.[2] Because of the hot, dry spring, water supply conditions were less than predicted. The actual Heise natural flow for April – July was 2,279,000 acre-feet, or 371,000 acre-feet less than the April 2013 Joint Forecast.

C. Crop Water Need

10. Crop water need ("CWN") is the project wide volume of irrigation water required for crop growth such that crop development is not limited by water availability. CWN is the difference between the fully realized consumptive use associated with crop development, or evapotranspiration, and effective precipitation. CWN is used as input for calculating reasonable in-season demand ("RISD") for those months of the irrigation season that are complete. It is combined with monthly baseline demands for the remaining months of the irrigation season to arrive at a season total RISD volume. Demand shortfall is then calculated as the difference between the adjusted forecast supply and the RISD. For specifics regarding determination of CWN, *see Methodology Order* at 16. Included with this order is a CD with background calculations.

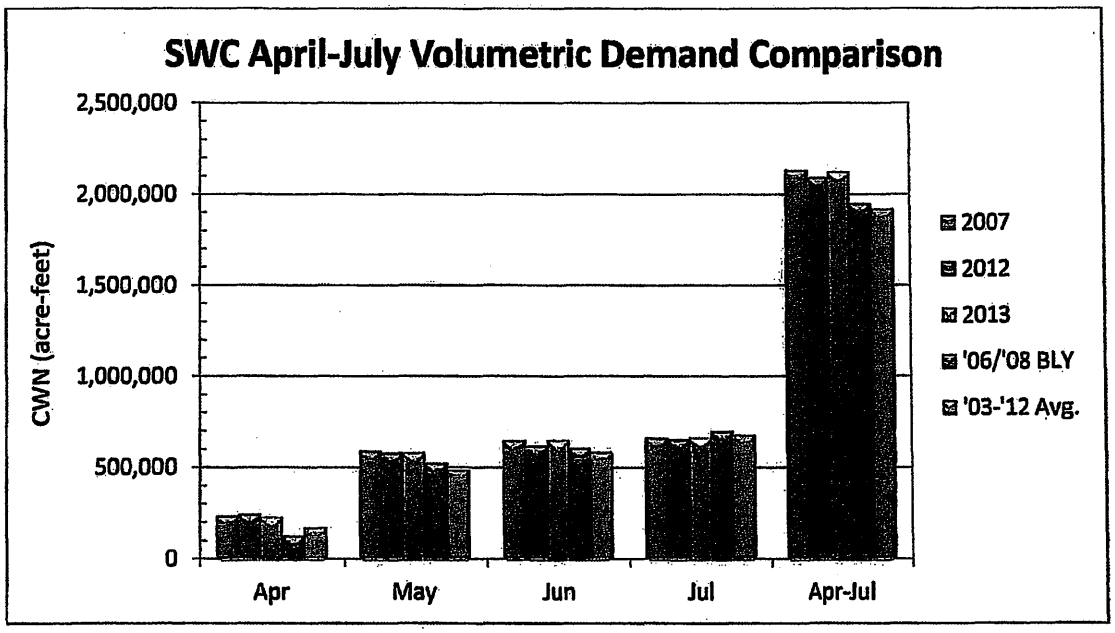
11. As calculated from the beginning of the irrigation season (April 1), the SWC's volumetric CWN for the current water year through the month of July is 991,078 acre-feet. This volume is 118.6% of the April 1 – July 31 ten-year average CWN from 2003 – 2012 and 113.2% of the baseline year CWN (2006/2008). As calculated from April 1 to July 31, from the year 2000 until this year, 2013 has the largest CWN volume of any irrigation season. Over the last ten years (2003 – 2012), the 2007 and 2012 water years have the most similar accumulations of CWN over the same period of the irrigation season. The graph on the following page summarizes April through July monthly volumetric CWN values for 2007, 2012, 2013, the 2003 – 2012 average, and the baseline year (2006/2008).

[2] Precipitation and temperature data obtained from the NOAA National Weather Service Preliminary Monthly Climate Data for the Twin Falls 3SE weather station (Twin Falls Airport).



D. SWC Demand

12. As calculated from the beginning of the irrigation season (April 1), the SWC's 2013 demand, or total irrigation diversion for the current water year through the month of July, is 2,122,426 acre-feet. This volume is 110.6% of the April 1 – July 31 ten-year average demand from 2003 – 2012, and 109.0% of the baseline year demand (2006/2008). Over the last ten years (2003 – 2012), the 2007 and 2012 water years have the most similar demand over the April 1 – July 31 period of the irrigation season. The following graph summarizes April through July monthly volumetric demand values for 2007, 2012, 2013, the 2003 – 2012 average, and the baseline year (2006/2008).



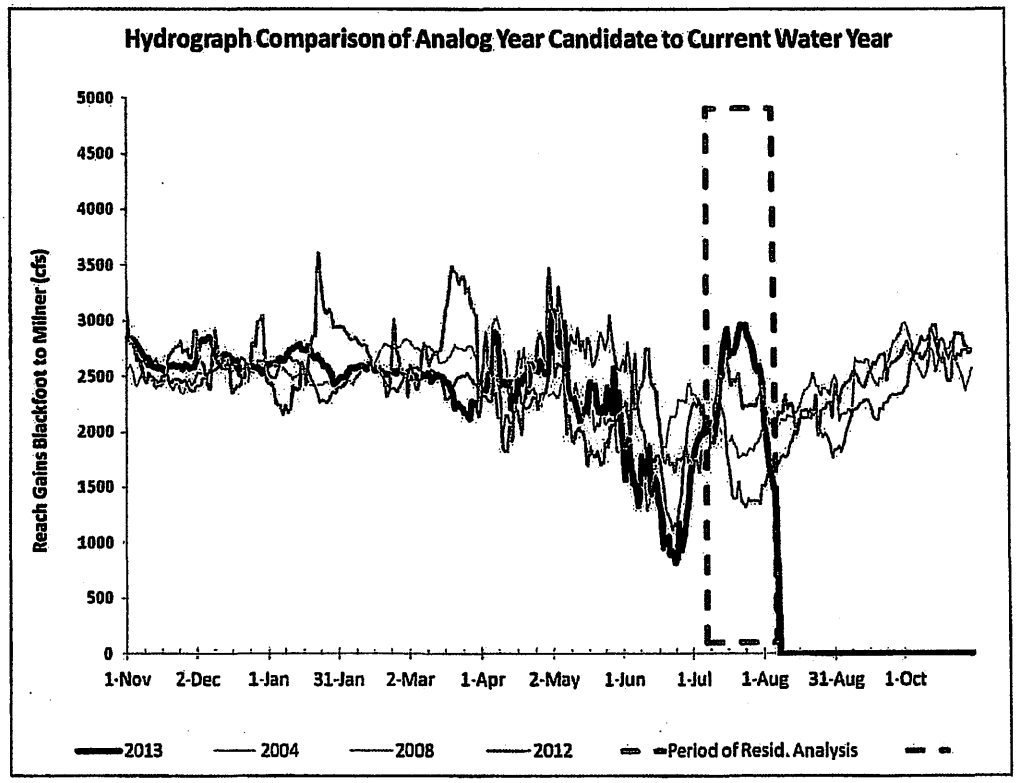
E. Selection of an Analogous Year to Predict Remaining Natural Flow

13. Natural flow diversions for the remainder of the irrigation season were predicted by choosing an analogous year. The Department used a residual analysis[3] carried out at a daily time step to compare the reach gains from July 8 to August 7 for the current water year to historical reach gains for the same time period for the 1991 – 2012 water years. From the residual analysis, four candidate water years were selected: 2012, 2008, 2004, and 1994. These years represent the four years with the smallest average daily residual over the analysis period as summarized in the following table:

Summary of Residual Analysis of Candidate Years

Time Period	2012	2008	2004	1994
11/1-10/31	-7.2%	-1.2%	-3.6%	-10.1%
7/8-8/7	3.5%	25.6%	14.8%	9.5%

14. The following hydrograph compares the current water year to the four candidate years with the most similar reach gains as determined by the residual analysis. The natural flow diversions for each of the candidate years were examined and 2012 was selected as the analog year to predict natural flow diversions for the remainder of the irrigation season. The year 2012 was chosen because the residual analysis showed 2012 was most similar to 2013 conditions when considering the reach gains since November 1 and most recent 31 days.



[3] The daily residual is expressed as a percentage and defined as the difference between the current water year reach gain (CY) and the historical reach gain (HY) divided by the current water year reach gain. R = (CY – HY)/CY.

F. Adjustments to Total Supply

15. Adjustments were made to both the natural flow and storage water supplies, as shown on the following page. Adjustments to natural flow include 6,725 acre-feet of natural flow wheeled to Southwest Irrigation District through Burley Irrigation District and Milner Irrigation District. Preliminary adjustments to the storage water supply that were used in this analysis were published by Water District 01 in its weekly water reports dated June 11, 2013 – July 30, 2013. The only adjustments made to the stored water supply in the table below were for the Minidoka Credit. Adjustments for wheeled storage water were not included in the storage adjustment because the water is not available for use by the SWC. Adjustments for wheeled storage water that were published in the weekly reports were not included as an adjustment because wheeled water does not actually increase the amount of water available for use by the SWC. Water supplied to or from the rental pool were not included in the adjustments. An adjustment for water supplied to or from the rental pool would artificially increase or decrease the shortfall obligation.

G. Revised Shortfall Prediction

16. DS, or Demand Shortfall, is calculated as the difference between RISD and the forecast supply. When determined during the irrigation season, the adjusted forecast supply is the sum of the actual natural flow diversions having already occurred, the predicted natural flow diversions as established by an analog year, and the actual storage allocation. Actual natural flow diversions having already occurred are determined by the Department's water rights accounting model. The natural flow diversions for the remainder of the irrigation season are estimated based on a historical analog year with similar gains in the Blackfoot to Milner reach. The year 2012 is the analog year selected to estimate natural flow diversions for the remainder of the irrigation season as discussed above in Section E. Storage allocation is determined by Water District 01 on the day of allocation.

17. Based on the above, and as summarized in the table below, the Director predicts, at this time, that AFRD2 and TFCC are expected to experience material injury.

	Natural Flow Diverted through 8/7	Predicted Natural Flow 8/8 to 10/31	Natural Flow Adjustment	Preliminary Storage Allocation	Minidoka Credit Adjustment	Total Supply	RISD	Shortfall
A&B	0	0	0	107,790		107,790	64,796	0
AFRD2	23,006	0		383,334	1,000	407,340	461,373	54,000
BID	75,811	4,008	(3,714)	213,604	5,130	294,839	291,737	0
Milner	7,356	0	(3,011)	78,597		82,941	54,089	0
Minidoka	106,340	5,621		306,026	8,370	426,357	419,324	0
NSCC	270,139	54,431		808,260	(7,750)	1,125,080	1,117,188	0
TFCC	563,521	309,078		239,546	(6,750)	1,105,394	1,156,605	51,200
							Total	105,200

18. At this time, the current, predicted shortfall to the SWC's RISD is 105,200 acre-feet. However, consistent with the Methodology Order, "junior ground water users are required to provide the lesser of the two volumes from Step 4 (May 1 secured water) [14,200 acre-feet] and the [DS] volume calculated at the Time of Need [105,200 acre-feet]." *Methodology Order* at 37.[4] IGWA has secured 14,200 acre-feet of storage water for mitigation. *Order Confirming IGWA's Notice of Secured Water.*

19. Based on current information, the Time of Need is predicted to occur on August 29, 2013. Because the Time of Need is reasonably certain, the Director will not implement Step 7 for this irrigation season. *Methodology Order* at 37. No later than August 29, 2013, the 14,200 acre-feet of mitigation water secured by IGWA must be provided to AFRD2 and TFCC, as explained in the following paragraph.

20. The current, predicted shortfall to the SWC is 105,200 acre-feet. AFRD2's portion of the shortfall is 54,000 acre-feet, or 51.4% of the current, predicted shortfall. TFCC's portion of the shortfall is 51,200 acre-feet, or 48.6% of the current, predicted shortfall. Using the above percentages to allocate the 14,200 acre-feet of mitigation water, 7,300 acre-feet shall be provided to AFRD2, and 6,900 acre-feet shall be provided to TFCC.

CONCLUSIONS OF LAW

1. Based on the above, it is reasonably certain that AFRD2 and TFCC are materially injured. Based on current information, it is reasonably certain that the Time of Need is expected to occur on August 29, 2013. Because the Time of Need is reasonably certain, the Director will not implement Step 7 for this irrigation season. *Methodology Order* at 37.

2. The 14,200 acre-feet of mitigation storage water secured by IGWA shall be allocated by the Watermaster for Water District 01 as follows:

AFRD2	7,300 acre-feet
TFCC	6,900 acre-feet

3. Upon the issuance of this order, but no later than August 30, 2013, the Director instructs the watermaster for Water District 01 to distribute the mitigation storage water secured by IGWA to the accounts of AFRD2 and TFCC, as described, above.

4. As stated previously, the current, predicted shortfall to the SWC's RISD is 105,200 acre-feet. The Methodology Order requires junior ground water users to "provide the lesser of the two volumes from Step 4 (May 1 secured water [14,200 acre-feet]) and the [DS] volume calculated at the Time of Need [105,200 acre-feet]." *Methodology Order* at 37. The Director concludes, as stated previously, that Step 8 incorrectly references "RISD" in the above quoted sentence, when it should reference "DS." For purposes of clarity, Step 8 should read as follows:

[4] As stated previously in footnote 1, the Director has determined the reference in Methodology Order Step 8 to "RISD" is incorrect and should instead reference "DS." As such, the Director has removed RISD from the above quotation and replaced it with DS.

> At the Time of Need, junior ground water users are required to provide the lesser of the two volumes from Step 4 (May 1 secured water) and the ~~RISD~~ DS volume calculated at the Time of Need. If the calculations from steps 6 or 7 indicate that a volume of water necessary to meet in-season projected demand shortfalls is greater than the volume from Step 4, no additional water is required.

Methodology Order at 37 (strikethrough and underline added).

5. The second paragraph of Step 8 also provides:

> The Director will review, at the end of the season, the volume and efficiencies of application of surface water, the amount of mitigation water provided by junior ground water users, and may, in the exercise of his professional judgment, readjust the reasonable carryover shortfalls to reflect these considerations.

Id. at 37.

6. The Director will consider the above when determining reasonable carryover shortfalls, if any, to the SWC.

ORDER

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

AFRD2 and TFCC are materially injured. Because the Time of Need is reasonably certain, the Director orders the Watermaster for Water District 01, upon issuance of this order, but no later than August 30, 2013, to assign the mitigation storage water secured by IGWA to the accounts of AFRD2 and TFCC. The Watermaster for Water District 01 shall allocate 7,300 acre-feet to AFRD2, and 6,900 acre-feet to TFCC.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order may appeal the final order to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or 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: (a) of the service date of the final order; (b) 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* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 27th day of August, 2013.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of August, 2013, the above and foregoing, was served by the method indicated below, and addressed to the following:

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	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
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Deborah J. Gibson

Deborah Gibson
Administrative Assistant, IDWR

Exhibit
B

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 **ORDER DENYING PETITION FOR RECONSIDERATION; DENYING MOTION TO AUTHORIZE DISCOVERY; DENYING REQUEST FOR HEARING** ***(METHODOLOGY STEPS 6 – 8)***

BACKGROUND

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 10 steps for determining material injury to members of the Surface Water Coalition ("SWC").

The SWC and other parties filed petitions for judicial review of the Methodology Order in the Fifth Judicial District. By agreement of the parties, including the SWC, the appeals of the Methodology Order were consolidated and stayed pending a decision from the Idaho Supreme Court in Case No. 38193-2010. *Order Granting Motion for Stay*, CV-2010-382 (Fifth Jud. Dist., Dec. 13, 2010). The parties agreed that, during the stay, administration "shall continue as set forth in the Methodology Order." *Motion for Stay* at 3, filed in CV-2010-382.

Consistent with the stipulation, the Director applied the Methodology Order in 2013. On April 17, 2013, the Director issued his *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)* ("2013 Forecast Supply Order"). The 2013 Forecast Supply Order predicted a 14,200 acre-foot in-season shortfall to the SWC. *2013 Forecast Supply Order* at 4. ("[I]t is predicted, at this time, that the SWC will experience a maximum demand shortfall of 14,200 acre-feet. As established in Step 8 of the Methodology Order, no water shall be owed until the Time of Need. At the Time of Need, the volume of water necessary to mitigate for material injury to the SWC may be less but not greater than 14,200 acre-feet."). At the time the 2013 Forecast Supply Order was issued, the only member of the SWC predicted to experience material injury during the 2013 irrigation season was the Twin Falls Canal Company ("TFCC").

The SWC appealed the 2013 Forecast Supply Order and, by agreement of the parties, the matter is currently stayed. *Order Staying Proceeding Pursuant to Stipulation*, CV-2013-2305 (Fifth Jud. Dist., June 28, 2013).

On August 27, 2013, the Director issued his *Order Revising April 2013 Forecast Supply (Methodology Steps 6 – 8)* ("Steps 6 – 8 Order"), implementing Methodology Steps 6 – 8.[1] The Steps 6 – 8 Order revised the predicted in-season shortfall. The revised order predicted a shortfall of 105,200 acre-feet to the SWC. *Steps 6 – 8 Order* at 6. TFCC's portion of the revised predicted shortfall was 51,200 acre-feet. *Id.* The Steps 6 – 8 Order predicted a shortfall of 54,000 acre-feet for another member of the SWC, American Falls Reservoir District #2 ("AFRD2"), not previously identified as injured by the 2013 Forecast Supply Order. *Id.* However, consistent with the Methodology Order, "junior ground water users are required to provide the lesser of the two volumes from Step 4 (May 1 secured water) [14,200 acre-feet] and the [DS][2] volume calculated at the Time of Need [105,200 acre-feet]." *Id.* at 7. The Director ordered the Water District 01 watermaster to assign the 14,200 acre-feet of mitigation storage water secured by the Idaho Ground Water Appropriators, Inc. ("IGWA") to the accounts of AFRD2 and TFCC. *Id.* at 8. The order apportioned 7,300 acre-feet to AFRD2 and 6,900 acre-feet to TFCC. *Id.*

On September 6, 2013, the Director received *Surface Water Coalition's Petition for Reconsideration and Request for Hearing on Order Revising April 2013 Forecast Supply (Steps 6-8) / Motion to Authorize Discovery* ("Petition"). The Petition challenges the Director's application of the Methodology Order and the Methodology Order itself. The SWC first argues that the Steps 6 – 8 Order fails to comply with the Methodology Order because the Director issued the order after the halfway point in the irrigation season and because the Director divided the mitigation storage water secured by IGWA between TFCC and AFRD2. *Petition* at 3-4. Second, the SWC argues that the Director's 2013 Forecast Supply Order (which was issued consistent with steps 1-4 of the Methodology Order) was "incorrect and not based upon the best available hydrologic information" and that the Methodology Order is unconstitutional. *Id.* at 4-5. Finally, the SWC alleges that IGWA misrepresented the amount of storage water it secured in its *Notice of Secured Water* and *Affidavit of Timothy Deeg*. *Id.* at 5. The SWC alleges that IGWA failed to secure the 14,200 acre-feet of storage required under the 2013 Forecast Supply Order and requests a hearing on the timing of IGWA's leases. *Id.*

ANALYSIS

A. Application of the Methodology Order

The SWC first argues that the Steps 6 – 8 Order fails to comply with the Methodology Order because the Director issued the revised forecast order after the halfway point in the irrigation season and because the Director divided the water secured by IGWA to meet the predicted shortfall between TFCC and AFRD2. *Petition* at 3-4.

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[1] The Steps 6 – 8 Order was temporarily stayed on August 30, 2013, but the stay was lifted on September 3, 2013. *Order Lifting Stay of the Order Revising April 2013 Forecast Supply (Methodology Steps 6 – 8).*

[2] The Director has determined the reference in Methodology Order Step 8 to "RISD" is incorrect and should instead reference "DS."

Step 6 of the Methodology Order provides:

> 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.

Methodology Order at 36 (emphasis added) (internal footnote omitted).

Contrary to the SWC's suggestion, the Methodology Order does not require that the Director issue a revised forecast order exactly halfway through the irrigation season. The Methodology Order provides that the Director will issue a revised forecast order *approximately* halfway through the irrigation season. The irrigation season for the SWC members runs generally from the middle of March to the middle of November – an eight month span. The Steps 6 – 8 Order was issued on August 27, 2013, just over 5 months into the irrigation season. The use of the term approximately in Step 6 evidences the intent to provide flexibility regarding the specific date the revised order must be issued. The timing of the Steps 6 – 8 Order is consistent with the requirements of the Methodology Order as it was issued approximately halfway through the irrigation season.

The SWC also objects to the division of IGWA's secured mitigation water between TFCC and AFRD2. The SWC argues "the Director had no authority to reduce the mitigation obligation owed to TFCC and arbitrarily refused to follow the Methodology Order in an attempt to reallocate the mitigation water acquired by IGWA." *Petition* at 4.

The SWC again mischaracterizes requirements of the Methodology Order. Nowhere in the Methodology Order, or in the 2013 Forecast Supply Order implementing the Methodology Order, does it provide that secured mitigation water acquired by IGWA in response to the 2013 Forecast Supply Order is obligated only to TFCC. In fact, by its plain language, the water is obligated to the SWC as a whole, not just one entity. If the Director forecasts an in-season shortfall, the Methodology Order requires that IGWA secure the quantity of water necessary to meet the predicted in-season shortfall for the SWC. *Methodology Order* at 35.

On April 17, 2013, the Director issued his 2013 Forecast Supply Order. The 2013 Forecast Supply Order predicted a 14,200 acre-foot in-season shortfall to TFCC and required IGWA to "secure and provide a volume of storage water or to conduct other approved mitigation activities that will provide water *to the SWC*." *2013 Forecast Supply Order* at 4 (emphasis added). The Methodology Order and the 2013 Forecast Supply Order, by their plain terms, obligate IGWA's secured mitigation water to the SWC as a whole, not to any one entity in the SWC. The reason for this is because, as occurred in this year, a revised forecast may predict a shortfall for more than one member of the SWC. Alternatively, the revised prediction may conclude that a different member of the SWC is being injured than was originally predicted. If more than one member of the SWC is predicted to have a shortfall, it is appropriate to divide the secured water among the members of the SWC who are predicted to have a shortfall. Likewise, if a revised order predicts a shortfall for a different member of the SWC than was originally

predicted, it is appropriate to provide the secured water to the entity now predicted to have a shortfall. In this circumstance, while the 2013 Forecast Supply Order originally predicted the shortfall for TFCC, the revised forecast in the Steps 6 – 8 Order predicts that AFRD2 will also have a shortfall. The Director's division of the secured water between TFCC and AFRD2 is not contrary to the Methodology Order.

B. Constitutionality of the 2013 Forecast Supply Order and the Methodology Order

The SWC argues that the Director's 2013 Forecast Supply Order (which was issued consistent with the Methodology Order) was "incorrect and not based upon the best available hydrologic information" and that the Methodology Order is unconstitutional. *Id.* at 4- 5. The constitutionality of the 2013 Forecast Supply Order and the Methodology Order has been raised in the SWC's appeals of the Methodology Order and the 2013 Forecast Supply Order. The Methodology Order has been appealed and is currently stayed. The parties to the Methodology Order agreed that, during the stay, administration "shall continue as set forth in the Methodology Order." *Motion for Stay* at 3, filed in CV-2010-382. The Director's application of the Methodology Order is consistent with the stipulation. Issues related to the constitutionality of the Methodology Order will be addressed in case CV-2010-382.

C. IGWA's Leases

Finally, the SWC alleges that IGWA misrepresented the amount of storage water it secured in its *Notice of Secured Water* and *Affidavit of Timothy Deeg*. The SWC alleges that IGWA failed to secure the 14,200 acre-feet of storage required under the 2013 Forecast Supply Order and requests a hearing on the timing of IGWA's leases. *Petition* at 5. Questions regarding IGWA's leases are not within the scope of the Steps 6 – 8 Order. The Water District 01 watermaster has complied with the Steps 6 – 8 Order and provided the ordered amounts of mitigation water to TFCC and AFRD2. As such, the watermaster has satisfied the requirements of the Steps 6 – 8 Order. The SWC's complaint about leases rests not with this order, but is focused on whether IGWA complied with the Director's 2013 Forecast Supply Order when IGWA submitted *IGWA's 2013 Notice of Secured Water*. As this order did not establish the requirement for securing mitigation water, the SWC is not entitled to a hearing on that issue in the context of this order and the Director declines to address this issue in the context of this order.

D. Request for Hearing

Citing Idaho Code § 42-1701A(3) and IDAPA 37.01.01.740.02.b, the SWC seeks a hearing on the Steps 6 – 8 Order. Idaho Code § 42-1701A(3) states as follows:

> Unless the right to a hearing before the director . . . is otherwise provided by statute, any person aggrieved by any action of the director . . . <u>and</u> 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.

Emphasis added.

As discussed above, the SWC is not entitled to a hearing in this proceeding on IGWA's leases. As to the other issues raised, the parties to this proceeding have previously been afforded hearings—once in 2008 and again in 2010. The Department applied the steps discussed in the Methodology Order, and did not deviate from those steps. Because the steps and processes used in this order did not change from those used in orders that were the subject of previous hearings, the SWC is not entitled to another hearing.

E. Motion to Authorize Discovery

According to the Petition, the SWC "requests the opportunity to discover the factual basis and analysis performed by the Director in issuing the [Steps 6 – 8 Order] and for the accounting of all storage leases represented to have been entered into by IGWA … ." *Petition* at 9. Because the Director denies the request for hearing, the Director also denies the request for discovery.

ORDER

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

The Director DENIES the SWC's petition for reconsideration concerning the Steps 6 – 8 Order.

The Director DENIES the SWC's request for a hearing.

The Director DENIES the SWC's motion to authorize discovery.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order may appeal the final order to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or 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: (a) of the service date of the final order; (b) 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* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 27th day of September, 2013.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of September, 2013, the above and foregoing, was served by the method indicated below, and addressed to the following:

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Deborah J. Gibson

Deborah Gibson
Administrative Assistant, IDWR

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION

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

(Required by Rule of Procedure 740.02)

The accompanying order is an **Order Denying Petition for Reconsideration** of the "final order" or "amended final order" issued previously in this proceeding by the Idaho Department of Water Resources ("department") pursuant to section 67-5246, 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.

Exhibit
C

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Attorney for American Falls Reservoir District No. 2 and Minidoka Irrigation District

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 **AFFIDAVIT OF LYNN HARMON**

STATE OF IDAHO)
)ss.
County of Lincoln)

I, Lynn Harmon, being first duly sworn upon oath, depose and say:

1. I am over the age of 18 and make this affidavit based upon my personal knowledge.

2. I am the manager of the American Falls Reservoir District No. 2 (AFRD2).

3. In his *Final Order Establishing 2012 Reasonable Carryover (Methodology Step 9)* dated November 26, 2012 the Director determined that AFRD2 was injured by a 17,318 AF

shortfall to carryover storage. This was later revised by the Director in his *Final Order Regarding 2013 Forecast Supply (Methodology Steps 1-4)* dated April 17, 2013 to a 14,605 AF carryover shortfall and was revised to no carryover shortfall by the *Order Releasing IGWA From 2012 Reasonable Carryover Shortfall Obligation (Methodology Step 5)* dated June 17, 2013.

4. The Director predicted no in-season material injury to AFRD2 in his April 17, 2013 *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)*. AFRD2 and the other members of the Surface Water Coalition disagreed with the Director's assessment of injury for the 2013 irrigation season and requested reconsideration of the order. AFRD2 further requested the Director consider updated hydrologic information for purposes of assessing the 2013 water supply conditions. AFRD2 specifically requested the Director consider updated modeling for purposes of predicting available natural flow below Blackfoot during the irrigation season. Based upon my experience and knowledge of the Upper Snake water supply conditions, the predicted unregulated flow of the Snake River at Heise for the period of April – July is not a reliable or accurate indicator of expected natural flow below Blackfoot, particularly after any runoff period.

5. AFRD2's water management goal is always to provide adequate water to the District's water users to grow an optimum crop with the available water. However, we also manage conservatively whenever possible to protect carryover storage for the following year.

6. At the date of final storage allocation in June, AFRD2 received a full storage allocation for its water rights in American Falls Reservoir, minus evaporation.

7. When the 2013 irrigation season started, the Board of AFRD2 hoped to be able to deliver 5/8" to its water users during the season, which is needed by our water users to fully irrigate crops. Since, after the irrigation season began, the Director changed the amounts that

would be supplied to AFRD2, it became apparent that AFRD2 could not rely upon the amounts that the Director ordered as mitigation. Flows in and into the Snake River deteriorated very quickly in 2013. There was no large runoff past Blackfoot and it was obvious to me in the spring and early summer that the available water supply would be less than what the Director predicted in his orders. After the issuance of his April 17, 2013 and June 17, 2013 Orders and because of the deteriorating water conditions, the Board of AFRD2 was very concerned about water supplies. On July 1, 2013, the Board made a determination to cut water deliveries to AFRD2 water users by 20% to ½" commencing July 15, 2013 for the rest of the season or until water supplies ran out. Since July 15, 2013, AFRD2 has been delivering 1/2" to its water users, which has stressed crops and reduced yields. Meanwhile, junior ground water users have irrigated without reduction.

8. If weather and demand conditions remain anywhere near previous dry year patterns and even if we continue with very conservative operations as forced upon us by reduced water supply conditions, I am estimating that AFRD2 will finish the irrigation season with little or no carryover storage.

9. In the *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* dated August 27, 2013, the Director revised our predicted material injury for the 2013 irrigation season from nothing to 54,000 acre-feet, but because of his methodology is only requiring junior ground water users to supply 7,300 AF of mitigation water. By the Director's own calculations, AFRD2 has been injured by 46,700 AF that will not be mitigated, even though AFRD2 has a water right senior to the junior ground water users' rights who have been diverting the entire 2013 irrigation season.

10. In his August 27, 2013 Order, the Director also found that the "Time of Need"

occurred on August 29, 2013. The real time of need for any mitigation water was early in the irrigation season so that AFRD2 water users could make appropriate plans concerning 2013 crops. By waiting until the end of August or early September to supply a previously unknown amount of mitigation water, the Director fails to afford AFRD2's water users and its Board adequate time and any reasonable opportunity to plan for the 2013 crop year and to properly adjust deliveries during the season. Had the 54,000AF been provided to AFRD2 early in the irrigation season, it would have been used to irrigate crops and AFRD2 could deliver additional water to our shareholders with our normal 5/8" deliveries for a much longer time.

11. I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 6 day of September, 2013.

Lynn Harmon
Manager, American Falls Reservoir District No. 2

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
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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 **AFFIDAVIT OF BRIAN OLMSTEAD**

STATE OF IDAHO)
)ss.
County of Twin Falls)

I, BRIAN OLMSTEAD, being first duly sworn upon oath, depose and say:

1. I am over the age of 18 and make this affidavit based upon my personal knowledge.

2. I am the manager of the Twin Falls Canal Company (TFCC).

3. The Director predicted an in-season material injury to TFCC in the amount of 14,200 acre-feet in his April 17, 2013 *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)*. TFCC and the other members of the Surface Water Coalition disagreed with the Director's assessment of injury for the 2013 irrigation season and requested reconsideration of the order. TFCC further requested the Director to consider updated hydrologic information for purposes of assessing the 2013 water supply conditions. TFCC specifically requested the Director to consider updated modeling provided by TFCC for purposes of predicting available natural flow below Blackfoot during the irrigation season. Based upon my experience and knowledge of the Upper Snake water supply conditions, the predicted unregulated flow of the Snake River at Heise for the period of April – July is not a reliable or accurate indicator of expected natural flow below Blackfoot, particularly after any runoff period.

4. It was my understanding at that time, based upon representations and filings by IGWA, that IGWA had obtained and would assign 14,200 acre-feet to TFCC for use during the irrigation season. I relied upon this representation and the Director's order for purposes of my recommendations to the TFCC Board and the company's water management decisions for the 2013 irrigation season.

5. TFCC's water management goal is always to provide adequate water to the company's shareholders to grow an optimum crop with the available water. However, we also manage conservatively whenever possible to protect carryover storage for the following year. Since TFCC holds some of the hardest storage space to fill in the upper half of Jackson Lake, carryover is vitally important to protect against future dry years.

6. At the date of final storage allocation in June, TFCC received a full storage allocation for its water rights in Jackson and American Falls Reservoirs, minus evaporation and storage assigned for the Minidoka Return Flow credit, decreed by the SRBA Court. The net storage allocation was 239,545.6 according to Water District 01's preliminary allocation dated June 10, 2013.

7. Natural flow in the Snake River deteriorated very quickly in 2013. There was no large runoff past Blackfoot and it was obvious to me in the spring and early summer that the available water supply would be less than what the Director predicted in his order. With this in mind TFCC began discussions with IGWA to ensure the full 14,200 acre-feet, if not more, would be provided in a timely manner during the irrigation season.

8. On about June 15th, natural flow in the Snake River began to recede rapidly, and TFCC began drawing heavily on storage. On June 17th, after consultation with the Board of Directors, TFCC cut water deliveries from 3/4" to 5/8" per share, even though our shareholders demand the full 3/4" for irrigation beneficial use. We were really hoping to hold 3/4" deliveries pursuant to our water rights for another couple weeks for farmers to get through the peak demand period in early July, but we simply couldn't wait any longer without risking severe shortages in late August as had happened in 2001 and 2004. As of July 1st, TFCC had diverted and used approximately 64,000 acre-feet of storage and our natural flow was near record low at 1,000 to 1,200 cfs. Continuing this rate of storage use we would have run out of storage by mid-August thus causing extreme duress to the shareholders. Accordingly, the Board and I began to discuss cutting deliveries to 1/2" per share which results in very expensive repackaging of pivot systems, and even further deficit irrigation of all crops from that point forward.

9. Somewhat inexplicably from about July 5th until the end of July, natural flow rebounded into the 2,000 cfs range and we began to think our supply would hold out without having a disastrous cut in deliveries to 1/2" per share. Also on July 16th, the Water District Report showed that 10,450 acre-feet was assigned by IGWA to the TFCC storage account. We finished July with 114,000 acre-feet of storage remaining. This amount was not sufficient for planning the rest of the irrigation season, but appeared to be an amount we could stretch to late September when our natural flow usually rebounds and keeps up with demand at that time.

10. Again inexplicably on about August 5th, natural flow gains crashed from the 2,000 cfs range to the 1,200 cfs range and with record heat across the project our shareholder irrigation demand was still extremely high. At that point we had 100,000 acre-feet of storage remaining (including the 10,450 from IGWA) so we were expecting to completely run out of storage by August 28th. I again called the Board in to assess the water supply conditions and recommended a cut to 1/2". The company made preparations for such a reduction at that time. Without the 10,450 from IGWA in our storage account that cut would have been made and we would certainly have caused severe crop damage as temperatures were still near 100 degrees every day. Fortunately, on about August 13th, just when we had issued the 1/2" order to the ditchriders, the natural flow rebounded back towards the 2,000 cfs range, and we cancelled the cut.

11. Since about August 16th natural flows have appeared more reliable, and our crop demand has been slowly coming down so that I am now confident we will make it through the remainder of the season at 5/8" deliveries. However, due to the lack of available storage TFCC cannot deliver 3/4" even though we have shareholder demand for that quantity.

12. Without the 10,450 acre-feet storage assignment from IGWA, the month of August would have been a disaster for TFCC management and stockholders. We relied upon the

10,450 acre-feet as it was the first storage used for the year, and were expecting 14,200 acre-feet all along. We planned for the full assignment of 14,200 acre-feet and I was assured by Lynn Tominaga (executive director for IGWA) that it would be assigned to TFCC. The full assignment has yet to occur as promised.

13. If weather and demand conditions remain anywhere near previous dry year patterns and we continue with very conservative operations I am estimating that TFCC will finish the irrigation season with between 0 and 15,000 acre-feet of storage for carryover based upon preliminary accounting. TFCC's management decisions and water deliveries this year have been altered due to reduced water supply conditions, unreliable reach gains, and the lack of mitigation water provided by junior ground water users. Shareholders have also been denied water they have requested pursuant to TFCC's senior water rights.

14. The Director apparently revised our predicted material injury for the 2013 irrigation season from 14,200 acre-feet to 51,200 acre-feet. Although the methodology used by the Director is contested, had the 51,200 acre-feet been provided to TFCC during the irrigation we would have been able to deliver additional water to our shareholders for irrigation use. Many shareholders reminded the Board and me that they needed more water throughout the irrigation season. Instead of cutting deliveries to 5/8" we would have been able to deliver our full water right through the season to meet irrigation demands.

15. I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this ____ day of September, 2013.

Brian Olmstead

Brian Olmstead Manager (TFCC)

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2013, I served a true and correct copy of the foregoing *Affidavit of Brian Olmstead* on the following by the method indicated:

Director Gary Spackman c/o Deborah Gibson State of Idaho Dept. of Water Resources 322 E Front St Boise ID 83720-0098 *** service by electronic mail facsimile – 208-287-6700 gary.spackman@idwr.idaho.gov deborah.gibson@idwr.idaho.gov	Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise ID 83706-1234 *** service by electronic mail only mhoward@pn.usbr.gov emcgarry@pn.usbr.gov	IDWR – Eastern Region 900 N. Skyline Dr., Suite A Idaho Falls, ID 83402-1718 *** service by electronic mail only lyle.swank@idwr.idaho.gov
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Travis L. Thompson

Exhibit
D

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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 **SURFACE WATER COALITION'S PETITION FOR RECONSIDERATION AND REQUEST FOR HEARING ON *ORDER REVISING APRIL 2013 FORECAST SUPPLY (STEPS 6-8)*** **MOTION TO AUTHORIZE DISCOVERY**

COME NOW, 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 (collectively hereafter referred to as the "Surface Water Coalition", "Coalition", or "SWC"), by and through counsel of record, and hereby submit

their *Petition for Reconsideration and Request for Hearing on Order Revising April 2013 Forecast Supply (Steps 6-8) / Motion to Authorize Discovery* pursuant to Idaho Code § 42-1701A(3) and the Department's Rules of Procedure (IDAPA 37.01.01. *et seq.*).

INITIAL REASONS FOR PETITION

On April 17, 2013, the Director issued his *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1 - 4)* ("April Forecast Order"). The April Forecast Order purported to implement Steps 1 – 4 of the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order").[1] The Director predicted an in-season material injury to TFCC in the amount of 14,200 acre-feet.[2] *See April Forecast Order* at 3.

The Coalition disputed the Director's April Forecast Order and requested reconsideration and a hearing on May 1, 2013. The Director denied the requests and refused to provide for an administrative hearing. *See Order Denying Petition for Reconsideration et al.* (May 22, 2013). Consequently, the Coalition filed a petition for judicial review with the district court.

On August 27, 2013 the Director issued an *Order Revising April 2013 Forecast Supply* ("August Order"). The Director purported to implement Steps 6 – 8 of the Methodology Order. The Director admitted he underestimated the April – July unregulated Snake River flow at Heise by nearly 400,000 acre-feet (approximately 15% error). *See* August Order at 2-3. The Director further found that both AFRD #2 and TFCC were expected to suffer in-season material injury in the amounts of 54,000 acre-feet and 51,200 acre-feet respectively. *See id.* at 6.

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[1] The Director's Methodology Order is currently on appeal to the Twin Falls County District Court (consolidated cases CV-2010-382 *et al.*). The district court judicial review proceeding is stayed until the Idaho Supreme Court issues a decision in consolidated appeal no. 38191-2010.

[2] Contrary to the Director's characterization in the August Order, the predicted injury of 14,200 acre-feet was not a predicted shortfall "to the SWC" as a whole, rather it was specific to the Twin Falls Canal Company. *See* April Forecast Order at 3, 4, *see also*, Methodology Order at 35 ("A separate April Forecast Supply and DS will be determined for each member of the SWC.").

The Director's August Order does not comply with the Methodology Order. Pursuant to the Methodology Order, the Director was required to complete the following analysis:

> 9. Step 6: ***Approximately halfway through the irrigation season,*** but following the events 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.
>
> 10. 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, baseline demand, and the cumulative actual crop water need determined up to that point in the irrigation season. The Director will then issue revised RISD and DS values.
>
> * * *
>
> 11. If the Director determines that the estimated Time of Need is reasonably certain, Step 7 will not be implemented for in-season purposes.
>
> 14. Step 8: At the Time of Need, junior ground water users are required to provide the lesser of the two volumes from Step 4 (May 1 secured water) and RISD volume calculated at the Time of Need. If the calculations from steps 6 or 7 indicate that a volume of water necessary to meet ***in-season projected demand shortfalls*** is greater that the volume from Step 4, no additional water is required.

Methodology Order at 36-37 (emphasis added).

Instead of following the Methodology Order, the Director refused to complete the analysis until August 27th, well past the approximate "halfway" point in the irrigation season. By that time water management decisions had already been made for purposes of water delivery through the end of the irrigation season. *See Affidavit of Lynn Harmon* and *Affidavit of Brian Olmstead.* The Director's failure to provide timely administration resulted in further injury to AFRD #2 and TFCC. This unlawful administration injured AFRD #2's and TFCC's senior water rights during the 2013 irrigation season.

Next, despite the increased injury to TFCC in quantities over 300% than what was predicted in April, the Director arbitrarily cut the mitigation owed to TFCC in half, from 14,200

acre-feet to 6,900 acre-feet. *See id.* at 7. Further, despite finding no injury to AFRD #2's in-season demand in April, based upon erroneous streamflow forecasting, the Director increased the mitigation obligation owed by IGWA to 7,300 acre-feet. Overall, despite finding in-season injury to AFRD #2 and TFCC in the amount of 105,200 acre-feet, the Director concluded junior priority ground water users would only need to provide 14,200 acre-feet, or about 13% of the total in order to continue to pump their full junior rights. This implementation of the conjunctive management rules and Methodology Order is unlawful. Further, the Director had no authority to reduce the mitigation obligation owed to TFCC and arbitrarily refused to follow the Methodology Order in an attempt to reallocate the mitigation water acquired by IGWA. Contrary to the Director's attempt, the Methodology Order requires an individual analysis for "each member of the SWC."

Further, as noted by the Coalition back in its May petition, the Director's predicted natural flow and storage supplies available to the SWC was incorrect and not based upon the best available hydrologic information. The Director refused to consider updated information provided by the Coalition and consequently underestimated the predicted shortfall to individual SWC members. The Director's underestimate of injury unlawfully shifted the burden of reduced water supplies to the senior water rights of AFRD #2 and TFCC. Notably, while the Director originally predicted AFRD #2 would receive 58,759 acre-feet in natural flow, that estimate was wrong by over 35,000 acre-feet resulting in further injury to AFRD #2. While junior priority ground water rights benefited from the Director's unlawful actions, AFRD #2's landowners and TFCC's shareholders were forced to suffer through reduced water deliveries. *See Affidavit of Lynn Harmon* and *Affidavit of Brian Olmstead.*

The Director's errors have injured AFRD #2 and TFCC for purposes of water delivery and management throughout the 2013 irrigation season. *See Affidavit of Lynn Harmon* and *Affidavit of Brian Olmstead.* Both AFRD #2 and TFCC could have used and delivered the mitigation water owed by IGWA. *See id.* The failure of junior ground water users to fully mitigate the injury of the senior water rights held by AFRD #2 and TFCC is an unconstitutional and unlawful implementation of Idaho state law. The Director further violated the law by failing to provide timely administration during the irrigation season.

Finally, the Director's conclusion that IGWA secured 14,200 acre-feet within 14 days of the April Forecast Order has been discovered to be in error and should be addressed through a full and formal accounting. First, IGWA filed its *Notice of Secured Water* along with the *Affidavit of Timothy Deeg* on April 22, 2013. The *Notice* represented that IGWA had leased 50,339 acre-feet for the 2013 irrigation season, including 32,500 acre-feet in 2013 leases and 17,839 acre-feet carried over from 2012.[3] *Notice* at 2. Mr. Deeg filed a sworn affidavit testifying that the summary of IGWA's 2013 leases was true and correct. *See Deeg Aff.* at 2. Those 2013 storage leases and amounts were represented as follows:

Aberdeen-Springfield Canal Co.	10,000
Enterprise Canal Co.	3,000
Idaho Irrigation Dist.	3,000
Snake River Valley Irrigation Dist.	5,000
New Sweden Irrigation Dist.	3,000
Peoples Canal Co.	3,000
Palisades Water Users	500
State of Wyoming	5,000
Total	32,500 acre-feet

See Ex. A to *Deeg Aff.*

[3] IGWA owns no storage space hence it cannot carry over any storage water leased from a prior year. Further, the lessors that IGWA works with cannot carry over any additional water from 2012 beyond what they are finally allocated in 2013. Stated another way, the 17,839 acre-feet that IGWA represented it had access to could only have been part of the lessors' 2013 storage supply, not their 2012 storage. Discovery and a hearing will determine whether or not the lessors actually committed this water to IGWA in 2013.

IGWA failed to provide actual copies of the leases with its filing, however Mr. Deeg represented that they were "on file with the Department and can be confirmed with Lyle Swank." *Id.* Apparently the Director never required copies of the actual 2013 leases between IGWA and the lessors to confirm whether the water was actually available.

The Water District 01 published weekly reports typically identify when mitigation water or water for conversions or other uses has been assigned by IGWA, and from which lessor. On June 11, 2013, the WD1 report identified the following assignments[4]:

Enterprise Canal Co.	-3,000 AF private lease to IGWA
Idaho Irrigation	-3,000 AF private lease to IGWA
Snake River Valley	-4,000 AF private lease to IGWA
AFRD #2	+2,500 AF IGWA private lease assignment
North Side Canal	+7,500 AF IGWA private lease assignment

See Ex. A to *Affidavit of Travis L. Thompson*

As of June 11th, IGWA only had 22,500 acre-feet remaining from its 2013 leases. On June 13th, Randy Budge sent Steve Howser a letter noting that IGWA had released Aberdeen-Springfield Canal Company of its obligation to lease 10,000 acre-feet of storage in 2013. *See* Ex. B to *Thompson Aff.* Accordingly, as of June 13th, IGWA only had 12,500 acre-feet of storage remaining from its 2013 leases to supply for mitigation purposes. Nonetheless, on June 24th, Randy Budge sent a letter to Lyle Swank requesting assignment of IGWA's 14,200 acre-feet "2012 carryover storage" to TFCC. *See* Ex. C to *Thompson Aff.*

[4] It is the Coalition's understandings that all assignments to AFRD #2 and NSCC in June and July were for groundwater conversion projects.

Mr. Swank responded to Mr. Budge's letter on June 25th advising the following with respect to IGWA's claimed "2012 carryover storage":

> At the Rental Pool meeting held on April 23, 2013 there was considerable discussion regarding the water that was held over for the AFRD#2 carryover obligations and how it should be treated in 2013. It was clear in that meeting use of the storage in 2013 for a 2013 obligation would require a new 2013 private lease with the appropriate fees. Therefore, if Aberdeen-Springfield is going to lease water from its 2013 storage allocation to IGWA, a new 2013 lease with appropriate fees is required.

See Ex. D to *Thompson Aff.*

Accordingly, it was obvious at least on April 23rd that IGWA could not use any claimed "2012 carryover" for purposes of a 2013 mitigation obligation. Accordingly, since the 17,389 acre-feet was not represented in a new 2013 lease, it was not available for IGWA to assign for mitigation purposes. On June 25th, WD1 reported that IGWA assigned 2,000 acre-feet from its New Sweden lease to the Southwest Irrigation District pump. *See* Ex. A to *Thompson Aff.* Accordingly, as of June 25th, IGWA only had 10,500 acre-feet remaining from its 2013 storage leases consisting of the following:

Snake River Valley Irr. Dist.	1,000
New Sweden Irr. Dist.	1,000
Peoples Canal Co.	3,000
Palisades Water Users	500
State of Wyoming	5,000

Total	10,500 acre-feet

Despite not having 14,200 acre-feet as represented as of June 25th, IGWA apparently entered into additional leases as referenced in the following WD1 report.[5] The contents and status of these leases is unknown. Again, apparently the Director has not requested actual copies of the new leases to confirm this new storage water either.

[5] It appears that Enterprise Canal Co. leased IGWA an additional 3,750 acre-feet, New Sweden Irr. Dist. leased IGWA an additional 2,000 acre-feet, and ASCC leased IGWA 8,639 acre-feet sometime before the July 16th WD1 report.

On July 16th, WD1 reported the following assignments:

+7,500 AF to North Side Canal from IGWA private leases
+10,450 AF to Twin Falls Canal from IGWA private lease
+2,500 AF to AFRD#2 from IGWA private lease
-1,000 AF from Snake River Valley for IGWA private lease
-3,000 AF from New Sweden for IGWA private lease
-8,639 AF from Aberdeen-Springfield for IGWA private lease
-3,750 AF from Enterprise Canal for IGWA private lease
-4,061 AF from State of Wyoming for IGWA private lease

See Ex. A to *Thompson Aff.*

Accordingly, on July 16th the apparent additional water leased from Enterprise (3,750 af), New Sweden (3,000 af), and ASCC (8,639 af), different than the prior representations to the Director and WD1, was fully assigned. As of this date IGWA only had 3,939 acre-feet available from the Peoples Canal Co. and State of Wyoming based upon the *Notice* and *Deeg Aff.* filed with the Director in April. Further, despite IGWA's prior request to assign the Peoples Canal Co. storage to TFCC that assignment does not appear in any WD1 weekly reports. *See* Ex. A to *Thompson Aff.*

Finally, on September 3rd WD1 reported the following assignments:

1,500 AF storage leased from Snake River Valley Irrigation to IGWA
7,300 AF of previously leased IGWA storage assigned to AFRD2

See Ex. A to *Thompson Aff.*

Apparently, sometime between mid-July and early September IGWA leased an additional 1,500 acre-feet from Snake River Valley Irrigation and 3,361 acre-feet from other unknown lessors.

On August 27, 2013 Randy Budge represented that IGWA had assigned additional water to TFCC to ensure the full 14,200 acre-feet was provided. *See* Ex. D to *Thompson Aff.* Mr. Budge represented that the assignment was completed by Water District 01. However, no

assignment was reported in the WD1 August 27th weekly report. *See* Ex. A to *Thompson Aff.* Despite requesting assignment of the full 14,200 acre-feet of storage to TFCC on two separate occasions during the 2013 irrigation season, it appears the actual assignment was never completed. Discovery and a hearing will determine the circumstances of the assignments and why water was never actually transferred into TFCC's storage account for use during the irrigation season. Moreover, it is clear that IGWA did not have 14,200 acre-feet available at all times during the irrigation season as represented in the April *Notice* and *Deeg Aff.* The lack of mitigation water assigned to TFCC results in further injury and an unlawful implementation of the conjunctive management rules during the 2013 irrigation season.

The Coalition requests a full and complete accounting to discover the timing of leases, when storage water was assigned and for what purposes.

REQUEST FOR HEARING

The SWC, pursuant to Idaho Code § 42-1701A(3) and Rule 740.02.b of the Department's Rules of Procedure, hereby requests a hearing on the Director's August Order. No administrative hearing has been held on the Director's implementation of the CM Rules and the Methodology Order for the 2013 irrigation season. The SWC reserves the right to amend this petition as necessary.

MOTION TO AUTHORIZE DISCOVERY

The SWC hereby moves for order authorizing discovery in this matter pursuant to Rule 521 of the Department's Rules of Procedure. The SWC requests the opportunity to discover the factual basis and analysis performed by the Director in issuing the August Order and for the accounting of all storage leases represented to have been entered into by IGWA and assigned during the 2013 irrigation season.

DATED this 6th day of September, 2013.

BARKER ROSHOLT & SIMPSON LLP

Travis L. Thompson

Attorneys for A&B Irrigation District, Burley Irrigation District, Miler Irrigation District, North Side Canal Company, and Twin Falls Canal Company

FLETCHER LAW OFFICE

W. Kent Fletcher

Attorneys for Minidoka Irrigation District and American Falls Reservoir District #2

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2013, I served a true and correct copy of the foregoing *Surface Water Coalition's Petition for Reconsideration and Request for Hearing on Order Revising April 2013 Forecast Supply / Motion to Authorize Discovery* on the following by the method indicated:

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Exhibit
E

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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 **AFFIDAVIT OF TRAVIS L. THOMPSON IN SUPPORT OF SURFACE WATER COALITION'S PETITION RE: AUGUST ORDER**

STATE OF IDAHO)
)ss.
County of Twin Falls)

I, Travis L. Thompson, being first duly sworn upon oath, depose and say:

1. I am over the age of 18 and make this affidavit based upon my personal knowledge. I am one of the attorneys representing A&B Irrigation District, Burley Irrigation

District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company in this matter.

2. Attached hereto as **Exhibit A** are true and correct copies of excerpts of the weekly report published by Water District 01 throughout the 2013 irrigation season.

3. Attached hereto as **Exhibit B** is a true and correct copy of Randy Budge's June 13, 2013 letter to Steve Howser, Manager of the Aberdeen-Springfield Canal Company.

4. Attached hereto as **Exhibit C** is a true and correct copy of Randy Budge's June 24, 2013 letter to Lyle Swank, Water District 01 Watermaster.

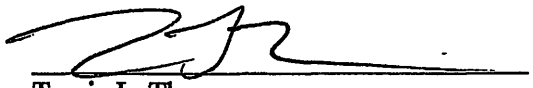
5. Attached hereto as **Exhibit D** is a true and correct copy of Lyle Swank's June 25, 2013 letter to Randy Budge and Steve Howser.

6. Attached hereto as **Exhibit E** is a true and correct copy of Randy Budge's August 27, 2013 email to me.

7. I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 6th day of September, 2013.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

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

CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of September, 2013, I served a true and correct copy of the foregoing *Affidavit of Travis L. Thompson in Support of the Surface Water Coalition's Petition* and the *Affidavit of Lynn Harmon* on the following by the method indicated:

Director Gary Spackman c/o Deborah Gibson State of Idaho Dept. of Water Resources 322 E Front St Boise ID 83720-0098 *** service by electronic mail facsimile – 208-287-6700 gary.spackman@idwr.idaho.gov deborah.gibson@idwr.idaho.gov	Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise ID 83706-1234 *** service by electronic mail only mhoward@pn.usbr.gov emcgarry@pn.usbr.gov	IDWR – Eastern Region 900 N. Skyline Dr., Suite A Idaho Falls, ID 83402-1718 *** service by electronic mail only lyle.swank@idwr.idaho.gov
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A. Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 *** service by electronic mail only facsimile – 208-234-6297 dtranmer@pocatello.us	William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only wparsons@pmt.org	IDWR – Southern Region 1341 Fillmore St., Suite 200 Twin Falls, ID 83301-3380 *** service by electronic mail only allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov
Michael C Creamer Jeffrey C. Fereday Givens Pursley 601 W Bannock St Ste 200 PO Box 2720 Boise ID 83701-2720 *** service by electronic mail only mcc@givenspursley.com jcf@givenspursley.com	Kathleen Carr US Dept Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway Ste 400 Boise ID 83706 *** service by electronic mail only facsimile – 208-334-1918 kathleenmarion.carr@sol.doi.gov	

Travis L. Thompson

Exhibit
A

WATER REPORT – June 11, 2013

The 1906-09-24 priority is currently being filled for diversions above Blackfoot and the 1903-03-26 priority is currently being filled for diversions below Blackfoot. Priorities began to rise this weekend as the record high temperatures have resulted in rapid melting of the remaining high-elevation snow. Priorities may continue to rise slightly for a short time but, as the remaining snowpack quickly dissipates over this next week, priorities are expected to eventually begin receding for the remainder of the season, excepting those times when significant rain events occur.

Approximately 3.1 million dollars of proceeds collected from the rental pool will be distributed to all participating spaceholders this week. In addition, participating spaceholders whose allocations were impacted from last year's common pool and flow augmentation rentals will receive an impact rental payment. Impacts to storage allocations this year totaled 179,635 AF but, because there wasn't sufficient money in the Impact Fund to pay the full rental price to impacted spaceholders, they will receive an impact payment of $13.26 for each acre-foot of their space failing to fill as a result of last year's rentals. If you have any questions concerning your rental payment or the amount of your space impacted, please call the water district office at 208-525-7171.

Impacted spaceholders will have the first opportunity to rent storage from the 50,000 AF common pool, up to the amount of impact. If rental applications from impacted spaceholders total less than 50,000 acre-feet, the remaining portion of the 50,000 AF supply will be available to applicants with unfilled space. If any rental supply remains after impacted spaceholder and unfilled spaceholder applications have been filled, it will be rented to other spaceholder applicants above Milner followed by non-spaceholder applicants until the supply runs out.

Storage allocations have been published in today's water right accounting. **Applications to rent storage from the 50,000 AF common pool must be received in the Water District #1 Office by Wednesday, June 26, 2013.** The rental price and fees for this year's storage rental is $17.00 per acre-foot. The reservoir space, fill, and evaporation allocations can be viewed in the STORAGE ALLOCATIONS tab on the www.waterdistrict1.com webpage. Palisades Water User spaceholder allocations and assignments have been added to the AF RMNG values in the daily water right accounting. A listing of the Palisades Water User assignment should be is posted in the STORAGE ALLOCATIONS section of the water district's webpage tomorrow. Storage rentals from the common pool will be added to the water right accounting following the June 26, 2013 application deadline.

The AF RMNG values currently shown in the daily water right accounting include the following adjustments for private leases and other storage assignments:

Enterprise Canal Co.	-3,000 AF	private lease to IGWA
Bear Island Pump	+9 AF	non-participant impact from 2007 Rental Pool
Idaho Irrigation	-3,000 AF	private lease to IGWA
Snake River Valley	-4,000 AF	private lease to IGWA
Falls Irrigation	-5,000 AF	private lease to Southwest Irrigation District (SWID)
Minidoka Irr Dist	-5,000 AF	private lease to SWID
Minidoka Irr Dist	+8,370 AF	Minidoka Return Flow Credit
Burley Irr Dist	+7,000 AF	SWID private lease assignment water
Burley Irr Dist	+5,130 AF	Minidoka Return Flow Credit

(continued on next page)

Milner Irrigation	+5,000 AF	SWID private lease assignment
Milner Irrigation	+1,188 AF	Artesian Irrigation assigned storage
SWID Pump	+5,000 AF	private lease assignment
AFRD#2	+2,500 AF	IGWA private lease assignment
AFRD#2	+1,000 AF	Minidoka Return Flow Credit
North Side Canal	+7,500 AF	IGWA private lease assignment
North Side Canal	-7,750 AF	supply for Minidoka Return Flow Credit
Twin Falls Canal	+3,000 AF	SWID private lease assignment
Twin Falls Canal	+928 AF	Artesian Irrigation assignment to Murtaugh Lake
Twin Falls Canal	+612 AF	Artesian Irrigation assignment to Farmland Reserve
Twin Falls Canal	-6,750 AF	supply for Minidoka Return Flow Credit
City of Pocatello	-10,000 AF	private lease to SWID
Artesian Irrigation	+255 AF	non-participant impact from 2007 Rental Pool
Artesian Irrigation	-1,188 AF	storage transfer to Milner Irrigation shareholders
Artesian Irrigation	-928 AF	storage transfer to Murtaugh Lake shareholders (TFCC)
Artesian Irrigation	-612 AF	storage transfer to Farmland Reserve (TFCC)

In addition to the storage rentals and assignments shown above, Southwest Irrigation District has assigned its 77.9 cfs of natural flow to the following canals beginning on May 10th and continuing until the volume limitations are reached; 44.12 cfs (3,714 AF limit) to Burley Irrigation District and 34.88 cfs (3,714 AF limit) to Milner Irrigation District.

Calendar

The Idaho Water Users Association Summer Water Law and Resource Issues Seminar will be held June 17 & 18 at the Sun Valley Resort in Sun Valley, Idaho. For further information, see the IWUA website at www.iwua.org .

The next Committee of Nine Meeting will be held in Sun Valley following the June 17th session of the Idaho Water Users Association Water Law Seminar.

WATER REPORT – June 25, 2013

All Snake River natural flow arising upstream from where the Blackfoot River enters the Snake River is currently being used. All water passing Blackfoot is storage water being delivered to lower valley diversions. The contribution from tributary and spring inflows between Blackfoot and Milner are sufficient to partially fill the 3400 cfs 1900-10-11 priority water right held by Twin Falls and North Side Canals. This situation will continue until the end of the irrigation season when diversions above Blackfoot are no longer diverting all the natural flow that arises upstream.

Natural flow above Blackfoot has been gradually decreasing each day. Currently, there is sufficient natural flow to fill up to the 1894-08-18 priority for diversions above Blackfoot. The 1894-08-18 priority is expected to be cut completely within a day or two and fall to 1893 and 1892 priorities later this week. Projected priorities are updated each weekday afternoon on the www.waterdistrict1.com website.

Storage transfers and adjustments that have been recently updated in the water right accounting include a 2,000 AF private lease by IGWA from New Sweden Irrigation District assigned to the SWID pump diversion. Also, 288 AF of the 928 AF of Artesian Irrigation allocation previously assigned to Twin Falls Canal and documented on the 6/11/2013 Water Report has been corrected and moved from Twin Falls Canal to Milner Irrigation.

Calendar

Applications to rent storage from the 50,000 AF common pool must be received in the Water District #1 Office by **Wednesday, June 26, 2013.**

The National Water Resources Association (NWRA) is holding their 30th Annual Western Water Seminar at the Skamania Lodge in Stevenson, Washington on **July 29-31, 2013.** Additional information can be obtained from the NWRA website www.nwra.org .

WATER REPORT – July 16, 2013

Projected priorities today are 1885-06-01 for the Teton River, 1900-10-11 for the Snake River below Blackfoot, and 1890-06-30 for the Snake River above Blackfoot, Henrys Fork, Falls River, and North Fork Teton River below the Teton Island Feeder.

The following adjustments were made today to canal AF RMNG values in the water right accounting:

- +7,500 AF to North Side Canal from IGWA private leases
- +10,450 AF to Twin Falls Canal from IGWA private lease
- +2,500 AF to AFRD#2 from IGWA private lease
- +100 AF to AFRD#2 for Fred Brossy from Common Pool rental
- -1,000 AF from Snake River Valley for IGWA private lease
- -3,000 AF from New Sweden for IGWA private lease
- -8,639 AF from Aberdeen-Springfield for IGWA private lease
- -3,750 AF from Enterprise Canal for IGWA private lease
- -4,061 AF from State of Wyoming for IGWA private lease
- +55.5 AF PWUI storage assigned to Palisades Canal for Dick Clayton
- +100 AF PWUI storage assigned to Farmers Friend Canal for Danny Ferguson
- +7.7 AF PWUI storage assigned to Burgess Canal for City of Rigby (Roger Warner)
- +100 AF PWUI storage transfer to Farmers Friend Canal for Fosters (Chappel)
- -100 AF PWUI storage transfer from B Foster Pump to Farmers Friend Canal
- +25.6 AF PWUI storage transfer to Sunnydell Canal for K. Sutton (J Winder)
- -25.6 AF PWUI storage transfer from Rudy Canal to Sunnydell Canal for K. Sutton
- -287.2 AF PWUI storage adjustment to Sunnydell Canal from previous allocation
- -35.1 AF PWUI storage adjustment to East Labelle Canal from previous allocation
- +235.1 AF PWUI storage adjustment to West Labelle/Long Is Canal from previous allocation.

In addition to the storage assignments and transfers shown above, Fremont-Madison Irrigation District has adjusted its storage allocation distribution to Fremont-Madison spaceholders whose spaceholder assessments were delinquent. The Fremont-Madison Irrigation District rental distributed to their spaceholders was also included in today's water right accounting.

The Bureau of Reclamation made corrections to the American Falls Reservoir contents June 11th through July 1st. When these corrections were added to the water right accounting, it resulted in changes to some storage usage and reach-gains below Blackfoot.

Calendar

The USBR is hosting a two-hour meeting at their new office at 470 22nd St., Heyburn, ID, on August 7, 2013, beginning at 9:30 AM to discuss calendar year 2013 expenses-to-date and projected O&M costs for calendar year 2014 covering all the Minidoka Project facilities. RSVP if you plan to attend by calling Mr. Cody Sibbet at 208-678-0461 extension 10. Additional information can be obtained from Jerry Cheek 208-678-0461 extension 20 or from Keith Brooks at extension 33.

WATER REPORT – August 27, 2013

Priority cuts above Blackfoot reached a low point last week cutting into the 1889-04-06 priority water right. Since that time, diversions have declined and natural flow has increased slightly because of the recent rain showers. The 1889-05-11 priority is currently being filled for the Snake River and Henrys Fork above Blackfoot for the amounts of water that are currently being diverted. The 1885-10-17 priority is being partially filled on the lower North Fork of the Teton River below the Teton Island Feeder Canal. The 1884-05-22 priority is being partially filled for all other areas of the Teton River. The 1900-10-11 priority is being partially filled for the Snake River below Blackfoot.

The following storage adjustments were made this week to the AF RMNG values in the water right accounting:

- +50 AF PWUI storage transfer to New Sweden for Brad Reed.
- -42.6 AF PWUI storage transfer from the Bybee Pump to the R Grover Pump.
- +200 AF storage transfer to the Russell Grover Pump consisting of 42.6 AF PWUI storage from the Bybee Pump, 57.4 AF of previously unassigned PWUI storage, and 100 AF of Common Pool rental.
- +20 AF Common Pool rental to A Wilde pump.
- +21.9 AF PWUI storage transfer to Harrison Canal from John Price.
- +3,000 AF private lease water to Enterprize Canal from IGWA.

Calendar

The next **Committee of Nine Meeting** will be held September 12th, beginning at 10:00 AM at the Pocatello Airport.

The USBR has tentatively planned a public meeting concerning Ririe Reservoir Operations for September 19th. Please mark your calendars to hold this date for an evening meeting to support a change to the Ririe Reservoir flood control rule curve. The exact time and location will be included as additional information is available.

WATER REPORT – September 3, 2013

Priorities fell to 1889-04-15 for the Snake River above Blackfoot over the Labor Day Weekend. Rain received on Monday yesterday has increased natural flow and will likely increase priorities over the next couple days. Projected priorities for the Snake River and Henrys Fork above Blackfoot are 1889-05-01 for tomorrow. The 1885-06-01 priority is partially being filled on the Teton River above the Teton Island Feeder. The 1885-06-01 priority is partially being filled on the North Fork Teton River below the Teton Island Feeder. The 1900-10-11 priority is partially filled for the Snake River below Blackfoot.

Releases from Palisades and American Falls Reservoirs will begin decreasing today as downstream irrigation demand is beginning to decrease. Releases from Ririe Reservoir have been increased today from 100 cfs to 350 cfs to reduce the physical contents of the reservoir to meet flood-control requirements at the end of the season. The USBR has scheduled a September 19th meeting in Idaho Falls to discuss the Ririe Reservoir Operations and possible modifications to the flood-control requirements. The location and meeting time are yet to be scheduled. Water users concerned about the winter time levels in Ririe Reservoir and the amount of storage being released from Ririe Reservoir for flood-control operations at the end of the season are encouraged to attend. Further information can be obtained by contacting the USBR in Burley at 208-678-0461.

The following storage adjustments were made to this week's AF RMNG values in the water right accounting:

- 50 AF PWUI storage transferred from M&M Cattle to Harrison Canal.
- 1,500 AF storage leased from Snake River Valley Irrigation to IGWA.
- 7,300 AF of previously leased IGWA storage assigned to AFRD2.

The 7,300 AF of IGWA leased storage was assigned to AFRD2 in accordance with the IDWR Director's *Order Revising April 2013 Forecast Supply*, dated 8/27/2013. The order also required 6,900 AF of mitigation from IGWA to Twin Falls Canal. The 6,900 AF of mitigation had been previously included in the 10,450 AF of IGWA leased storage previously assigned to Twin Falls Canal and documented in previous water reports.

Calendar

The public ribbon cutting ceremony for the new USBR Upper Snake Field Office will be held 10 AM to 11:30 AM at 470 22nd Street, Heyburn, ID. Although all are welcome, the USBR would appreciate an RSVP. To RSVP or for questions, contact Mr. Cody Sibbett at ssibbett@usbr.gov or 208-678-0461, extension 10.

The next **Committee of Nine Meeting** will be held September 12th, beginning at 10:00 AM at the Pocatello Airport.

The USBR has tentatively planned a public meeting concerning Ririe Reservoir Operations for September 19th in Idaho Falls. Please mark your calendars to hold this date for an evening meeting to support a change to the Ririe Reservoir flood control rule curve. The exact time and location will likely be included in next week's report.

Exhibit
B

IDAHO GROUND WATER APPROPRIATORS, INC.

P.O. Box 1391
Pocatello, Idaho 83201

Officers:

Tim Deeg, President
American Falls, Idaho 83211
208-226-2562

Craig Evans, Vice President
1523 W. 300 N.
Blackfoot, Idaho 83211
208-680-3527

Randall C. Budge, Gen. Counsel/ Secretary
P. O. Box 1391
Pocatello, Idaho 83204-1391
208-232-6101

Lynn Tominaga, Executive Director
IGWA
P.O. Box 2624
Boise, Idaho 83701
208-381-0294

Members:

American Falls-Aberdeen GW District
Bingham GW District
Bonneville-Jefferson GW District
Jefferson-Clark GW District
Madison GW District
Magic Valley GW District
North Snake GW District
Southwest Irrigation District
Busch Agricultural Resources, Inc.
Jerome Cheese
United Water, Inc.
City of American Falls
City of Blackfoot
City of Chubbuck
City of Heyburn
City of Jerome
City of Paul
City of Post Falls
City of Rupert

June 13, 2013

Steve Howser, Manager
Aberdeen-Springfield Canal Company
P.O. Box 857
Aberdeen, Idaho 83210

Re: 2013 Storage Water Lease

Dear Steve:

This letter will confirm that IGWA approves of the request made by Aberdeen-Springfield Canal Company that it be released from its obligation to supply the lease minimum amount of 10,000 AF of storage for 2013. This is approved in consideration for the 8,639 AF of storage water carried over from 2012 and available to meet IGWA's 2013 mitigation obligations.

IGWA recognizes and appreciates the long-time good working relationship with Aberdeen-Springfield which has been most helpful in enabling the Ground Water Users to meet their mitigation obligations in times of need and is happy to be able to provide reciprocal benefit to meet the needs of Aberdeen-Springfield.

Sincerely,

RANDALL C. BUDGE

RCB:rr
Cc: Lyle Swank, Water Master
IGWA Board

Exhibit
C

LAW OFFICES OF

RACINE OLSON NYE BUDGE & BAILEY
CHARTERED

W. MARCUS W. NYE
RANDALL C. BUDGE
JOHN A. BAILEY, JR.
JOHN R. GOODELL
JOHN B. INGELSTROM
DANIEL C. GREEN
BRENT O. ROCHE
KIRK B. HADLEY
FRED J. LEWIS
ERIC L. OLSEN
CONRAD J. AIKEN
RICHARD A. HEARN, M.D.
LANE V. ERICKSON
FREDERICK J. HAHN, III
PATRICK N. GEORGE
SCOTT J. SMITH
JOSHUA D. JOHNSON
STEPHEN J. MUHONEN
DAVID E. ALEXANDER
CAROL TIPPI VOLYN
JONATHAN M. VOLYN
THOMAS J. BUDGE
BRENT L. WHITING
DAVE BAGLEY
JASON E. FLAIG
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SENDER'S E-MAIL ADDRESS: rcb@racinelaw.net

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ALL OFFICES TOLL FREE
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LOUIS F. RACINE (1917-2003)
WILLIAM D. OLSON, OF COUNSEL
JONATHON S. BYINGTON, OF COUNSEL

June 24, 2013

Lyle Swank, Water Master
Water District 1
900 N. Skyline Drive, Suite A
Idaho Falls, Idaho 83402
Email: lyle.swank@idwr.idaho.gov

Re: 2013 Storage Water Assignment to Twin Falls Canal Company

Dear Lyle:

Pursuant to the Director's *Final Order Regarding April 2013 Forecast Supply* dated April 17, 2013 ("2013 Order"), IGWA has a predicted in-season demand shortfall of 14,200 AF to Twin Falls Canal Company ("TFCC"). IGWA now desires to fully satisfy this mitigation obligation by assigning 14,200 AF of storage water to TFCC from its 2012 carryover storage released pursuant to the Director's *Order Releasing IGWA from 2012 Reasonable Carryover Shortfall Obligation* dated June 17, 2013, as follows:

LESSOR:	VOLUME:
Enterprise Canal Company	3750 AF
Peoples Canal Company	3750 AF
Aberdeen-Springfield Canal Company	6700 AF (leaving 2239 unassigned balance)
TOTAL:	14,200 AF

By copy of this letter I am advising the Director, TFCC, and the Lessors of the foregoing. Should any of you have any questions, please don't hesitate to contact me. Thank you for your assistance.

Sincerely,

RANDALL C. BUDGE

RCB:rr

cc: Gary Spackman, Director/IDWR
Twin Falls Canal Company:
Brian Olmstead, Manager
Travis Thompson, Attorney
IGWA Board
Aberdeen-Springfield Canal Company:
Steve Howser, Manager
Enterprise Canal Company
Darrell Kerr, President
Peoples Canal Company
Steven H. Murdock, Secretary

Exhibit
D

LYLE SWANK
WATERMASTER
Phone (208) 525-7172
Fax (208) 525 7177

IDWR DIRECTOR
GARY SPACKMAN

State of Idaho
Water District 1
900 N Skyline Dr., Suite A
Idaho Falls, Idaho 83402-1718

June 25, 2013

Steve Howser, Manager
Aberdeen-Springfield Canal Company
PO Box 857
Aberdeen, ID 83210

Randy Budge
Racine Olson Nye Budge & Bailey
PO Box 1391
Pocatello, ID 83204-1391

Dear Sirs:

Water District 1 has received a letter from IGWA dated June 13, 2013 releasing Aberdeen-Springfield Canal Company of their 2013 obligation to supply 10,000 AF of storage for 2013 and a letter dated June 24, 2013 assigning the water held from the 2012 season for the AFRD#2 reasonable carryover. The Director did release IGWA from the 2012 carryover obligation in his order dated June 17, 2013.

At the Rental Pool meeting held on April 23, 2013 there was considerable discussion regarding the water that was held over for the AFRD#2 carryover obligations and how it should be treated in 2013. It was clear in that meeting use of the storage in 2013 for a 2013 obligation would require a new 2013 private lease with the appropriate fees. Therefore, if Aberdeen-Springfield is going to lease water from its 2013 storage allocation to IGWA, a new 2013 lease with appropriate fees is required. Be aware that any 2013 lease between Aberdeen-Springfield and IGWA will result in the Aberdeen-Springfield space becoming last-to-fill for 2014. Also, any new 2013 private lease could jeopardize Aberdeen-Springfield's eligibility to rent storage from the 2013 Common Pool this year.

Please let me know if you have any questions regarding this matter.

Sincerely,

Lyle Swank

Lyle Swank
Watermaster

Exhibit
E

Travis Thompson

From: Randy Budge <rcb@racinelaw.net>
Sent: Tuesday, August 27, 2013 11:54 AM
To: Travis Thompson
Cc: Randy Budge; T. J. Budge; Lynn Tominaga (lynn_tominaga@hotmail.com); (csearle@pmt.org); (pisom@ida.net); binghamgroundwtr@cableone.net; carlquil@yahoo.com; Craig Evans; Dale L. Swensen; Dean Stevenson (desteve@pmt.org); Deegt@aol.com; Don E. Parker (parkerdp6@msn.com); Emily Haynes; Jason Webster; Kirk Jacobs; Nic Behrend; nsfinc@safelink.net; nsgwd@safelink.net; Pamela Warner; thewatkinsco@cs.com; William A Parsons; wmurphy@srv.net
Subject: IGWA - TFCC

Travis,

The transfer by IGWA of the additional storage water to TFCC to bring the total to 14,200 was authorized last week and I believe completed yesterday by WD01.

Randy

Randall C. Budge
Racine Olson Nye Budge & Bailey, Chtd
201 E. Center St.
P.O. Box 1391
Pocatello, ID 83204
(208) 232-6101
rcb@racinelaw.net