



Twin Falls

163 Second Ave. West
P.O. Box 63
Twin Falls, Idaho 83301
p. 208.733.0700
f. 208.735.2444

Attorneys

Albert P. Barker
John K. Simpson
Travis L. Thompson
Scott A. Magnuson
Sarah W. Higer

John A. Rosholt
(1937-2019)

Travis L. Thompson

EMAIL: tlt@idahowaters.com
PHONE: 208.733.0700
WEB: idahowaters.com

April 23, 2021

VIA EMAIL & U.S. MAIL

Director Gary Spackman
Idaho Department of Water Resources
322 E. Front St., Ste. 648
P.O. Box 83720
Boise, Idaho 83720-0098

Re: Administration of Surface Water Rights in Basin 29

Dear Director Spackman:

I am writing on behalf of our clients A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company and I am joined by Kent Fletcher on behalf of his clients American Fall Reservoir District #2 and Minidoka Irrigation District (collectively "Surface Water Coalition" or "Coalition").

2021 is forecasted to be a below average water year for the Upper Snake River Basin. As noted in your recent *Final Order Regarding April 2021 Forecast Supply* ("April Order"), the U.S. Bureau of Reclamation and U.S. Army Corps Engineers' joint forecast for the Snake River near Heise for April through July is only 80% of average (2,600,000 kaf). *See* April Order at 2. Sentinel well measurements for the Eastern Snake Plain Aquifer (ESPA) are taking place as we speak, and we do not know what the groundwater index will show as far as the state of groundwater supplies and associated reach gains that will result for this year.

In your April Order you predict TFCC to have an initial demand shortfall of 40,500 acre-feet. *See id.* at 3. You also predict AFRD#2 to receive approximately 51,795 acre-feet of natural flow. *See id.* Based on current conditions, TFCC's injury could increase and AFRD#2 may very well likely suffer a demand shortfall as well. Notably, Water District 1 reported this week that the 1921 American Falls storage water right is approximately 66,000 acre-feet short of full and irrigation entities are currently drafting their storage accounts as irrigation demand outpaces available natural flow supplies. *See Ex. A.*

Despite these predicted shortages, and the fact the 1921 American Falls storage water right (01-2064) has yet to fill, it is the Coalition's understanding that you do not have any intention of requiring surface water right administration in Basin 29 together with water rights on the Snake River. Since the Portneuf River was not decreed as a "separate stream" in the Snake River Basin Adjudication (SRBA), there is no legal basis for junior priority water rights to divert water out-of-priority vis-à-vis downstream senior water rights on the Snake River. *See Malad Valley Irr. Co. v. Campbell*, 2 Idaho 411, 415 (1888); *Josslyn v. Daly*, 15 Idaho 137, 149 (1908); *Independent Irr. Co. v. Baldwin*, 43 Idaho 371, 374-76 (1926). While this issue has surfaced in various contexts within the last few years, it was the Coalition's belief that you were planning on implementing administration of these water rights this year.

Our clients, as well as other spaceholders in American Falls and upriver reservoirs¹, may suffer reduced water supplies because of ongoing and future junior surface water diversions in Basin 29. Recognizing that predicament, we witnessed you request the Committee of Nine to make provision in the Water District 01 rental pool procedures to accommodate rentals for mitigation for those junior priority diversions.

Water District 01 staff, the rental pool committee, and Committee of Nine all expended considerable time and resources last year in furtherance of your request. With the approval of a new Assignment Pool under Procedure 10 at the district's March annual meeting, water users in the Portneuf Basin now have an opportunity to rent assignment water to mitigate their out-of-priority surface water diversions, if it is available. Based on previous year estimates from IDWR, it is our understanding those diversions could total between 5,600 and 6,000 acre-feet.

As you can appreciate, the Coalition is concerned about their 2021 irrigation water supply and the prospect of losing up to an additional 6,000 acre-feet due to out-of-priority surface water diversions. Based upon clear legal precedent and unambiguous statutory duties, we do not see how you can disregard requiring basic surface water right administration by priority. *See I.C. §§ 42-602, 607*. To be clear, this letter does not implicate the Department's Conjunctive Management Rules (37.03.11 et seq.), as our clients only seek clarification on whether or not you will instruct the watermasters in Basin 29 to perform routine statutory surface water administration duties during the 2021 irrigation season.

To that end, and if necessary, the Coalition requests that IDWR and the respective water districts fulfill the mandatory duties imposed by law and ensure that all senior surface water rights in Water District 01 are properly protected throughout the 2021 irrigation season and beyond.

¹ The sooner American Falls Reservoir fills the more likely additional upstream reservoirs (i.e. Palisades, Island Park, and Ririe Reservoirs) will be able to store and accrue more water this year. If junior diversions out of the Portneuf River Basin inhibit or slow the rate of American Falls fill, that action has the potential effect of injuring the entire storage system apart from downstream natural flow rights.

Director Gary Spackman (IDWR)
April 23, 2021
Page - 3

Please instruct the appropriate watermasters in Basin 29 to ensure surface water supplies in the Snake River are not diminished by unlawful out-of-priority diversions. Please call me at (208) 733-0700 or Kent Fletcher at (208) 678-3250 if you have any questions.

The Surface Water Coalition looks forward to your immediate response on this matter.

Sincerely,

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

Enc.

cc: Garrick Baxter, Deputy Attorney General
Tony Olenichak, Watermaster (Water District 01)
Darrell Kerr, Chairman (Committee of Nine)
Brent Bowen, Chairman (Rental Pool Subcommittee)
Brian Olmstead, TFCC
Alan Hansten, NSCC
Dan Temple, A&B
Jeff Warr, Milner
Dan Davidson, MID
David Stephenson, AFRD#2
John Lind, BID
Kent Fletcher
John Simpson

EXHIBIT A

WATER REPORT – April 20, 2021

The total reservoir system contents began decreasing this past weekend as irrigation diversions began exceeding the total natural flow in the basin. Currently, there's only enough natural flow in the river system to partially fill the 10-07-1905 priority for canals currently diverting water. Diversions without water rights senior to 10-07-1905 (or diversions exceeding their water rights senior to 10-07-1905) are currently diverting storage water being released from the reservoir system.

The 1921-priority American Falls Reservoir has not yet accrued 100% fill to its storage water right. The American Falls storage right is still 66,200 AF short of filling but will resume filling its remaining water-right volume as natural flow will eventually increase and exceed senior diversions during the peak runoff within the next couple months. The junior storage water rights of Palisades, Ririe, Island Park, and Grassy Lake Reservoirs won't begin accruing new storage to their junior water-right volumes until after the 1921 priority has been restored and American Falls Reservoir has achieved 100% accrual to its water right volume.

Cutting below the 1921 priority in late-April and early-May isn't an uncommon occurrence, especially in years with a below-average snowpack and low soil moisture. In some years, priorities are cut down to the 10-11-1900 priority during the early weeks of the irrigation season until the higher-elevation snowpack begins to melt, providing additional natural flow, restoring water right priorities, and adding more storage accrual to the reservoir system during the peak runoff.

Canal managers often don't pay much attention to the priorities being filled near the beginning of the irrigation season when they first turn their canals on because water is often spilling, or eventually spills, past Milner Dam resulting in the cancellation of any canal storage usage prior to Milner Spill ceasing. However, there's a possibility this year excess water won't spill past Milner Dam, meaning any storage diverted by diversions prior to the Day of Allocation will be deducted from the diversions' upcoming storage allocations if the entire reservoir system doesn't completely physically fill.

Eventually, the higher elevation snowpack will begin to melt and total natural flow will rise as we get closer to the peak runoff in late-May or June resulting in filling priorities junior to 1921. Until that time, canal managers are cautioned to pay attention to the water right priorities being posted on the PROJECTED WATER RIGHTS tab on the www.waterdistrict1.com webpage. Canals should be managed accordingly so as not to unintentionally use a significant amount of the canal's storage allocation early in the irrigation season if excess water doesn't spill past Milner Dam this year.

Canal managers are strongly encouraged to continue calling the Water District #1 Office at 208-525-7161 at least 24 hours in advance of turning on their canals or increasing their diversions over the next few months. Notifying the district in advance of increases to canal diversions allows for the release of additional water from Palisades Reservoir to satisfy downstream diversion demand while continuing to maximize storage held in the reservoir without drying up the downstream Snake River channel.