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DEPARTMENT OF
WATER RESOURCES

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA**

A&B IRRIGATION DISTRICT,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES and GARY SPACKMAN in his
official capacity as Director of the Idaho
Department of Water Resources,

Respondents,

and

THE IDAHO GROUND WATER
APPROPRIATORS, INC. and THE CITY OF
POCATELLO,

Respondents-Intervenors.

CASE NO. CV 2011-000512

**A&B IRRIGATION DISTRICT'S
SECOND AMENDED NOTICE OF
APPEAL AND PETITION FOR
JUDICIAL REVIEW OF AGENCY
ACTION**

IN THE MATTER OF THE PETITION FOR
DELIVERY CALL OF A&B IRRIGATION
DISTRICT FOR THE DELIVERY OF
GROUND WATER AND FOR THE
CREATION OF A GROUND WATER
MANAGEMENT AREA

COMES NOW, the Petitioner, A&B Irrigation District (“A&B”), by and through its undersigned counsel, and pursuant to I.R.C.P. 84(r), I.A.R. 17(m), hereby files this Second Amended Notice of Appeal and Petition for Judicial Review, as follows:

STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code §§ 67-5270 and 5279 seeking judicial review of the ~~Amended~~ *Final Order on Remand Regarding the A&B Irrigation District Delivery Call* (“~~Amended~~ *Final Order*”), issued by the ~~Interim~~ Director of the Idaho Department of Water Resources (“IDWR” or “Department”) on ~~June 30, 2011~~ April 27, 2011. ~~Given the Director’s recent order granting A&B’s petition for reconsideration of the Remand Order it is A&B’s position that an appeal is unnecessary. However, in order to preserve its legal rights, A&B is filing this petition for judicial review.~~

2. On April 27, 2011, the Director issued the *Final Order on Remand Regarding A&B Irrigation District Delivery Call* (“~~Remand~~ *Final Order*”). Pursuant to Idaho Code § 67-5246(4), A&B petitioned the ~~Interim~~ Director to reconsider the *Remand Order* on May 11, 2011. By law, the Director was required to dispose of A&B’s petition within 21 days, otherwise it was deemed denied. *See* I.C. § 67-5246(4), (5). Given the Director’s failure to act and issue an order on A&B’s May 11, 2011 *Petition for Reconsideration* within 21 days, as required by Idaho Code § 67-5246, the *Final Order* is a final appealable decision of the Director of IDWR. ~~On June 1, 2011 the Director issued an *Order Granting Petition for Reconsideration to Allow Time for Further Review*. *See Ex. A*. In that order, the Director stated A&B’s petition was granted “for the sole purpose of allowing additional time for the Department to respond to the Petition” and that he would issue an order by June 9, 2011. Based upon the plain terms of the order, A&B’s petition has been granted and the Director is obligated to revise his *Remand Order* consistent~~

with A&B's requested relief. Consequently, the Director has a duty to immediately administer hydraulically connected junior water rights that are injuring A&B's senior water right 36-2080 during the 2011 irrigation season. A&B is in the process of making that request with the Director and will withdraw this notice of appeal once the Director confirms he is proceeding in accordance with A&B's request.

3. The Director later issued an *Amended Order Granting Petition for Reconsideration to Allow Time for Further Review* on June 9, 2011. See **Ex. B**. In that order the Director stated that "an order responding to the merits of the Petition shall issue no later than June 30, 2011." In effect, the Director has unlawfully attempted to delay his response to A&B's petition until the middle of the 2011 irrigation season. Since the Director "granted" A&B's petition by order of June 1st, this attempted delay is unavailing. Nothing in Idaho's APA or IDWR's Rules of Procedure (37.01.01 *et seq.*) authorizes the Director to "grant" a petition for reconsideration solely for the purpose of "allowing additional time for the Department to respond" to A&B's petition for reconsideration. The Director finally issued the *Amended Final Order on Remand Regarding A&B Irrigation District Delivery Call* on June 30, 2011. Alternatively, if the Director's order results in a failure to dispose of A&B's petition by June 1, 2011, the petition would be deemed denied by operation of law on that day. A&B is filing the present petition for judicial review to protect its right to appeal in the event the Director's June 1, 2011 order is deemed to deny A&B's petition by operation of law.

On June 27, 2011, A&B filed a *Notice of Appeal and Petition for Judicial Review* with respect to the Director's April 27, 2011 *Remand Final Order*. On August 11, 2011, this Court granted IDWR's Motion to Dismiss A&B's Appeal. On September 14, 2012, the Idaho Supreme Court held that, after June 1, 2011, "IDWR no longer had jurisdiction in the matter, and

the order issued on June 30, 2011, is a nullity.” See 2012 Opinion No. 121, at p. 7. A&B maintains that the Director’s April 27, 2011 order is the proper order to appeal in this matter. The Department filed a motion to dismiss A&B’s Notice of Appeal, asserting that the *Remand Order* was not an appealable order and that any appeal must be taken from the *Amended Final Order*. The Court granted IDWR’s motion on August 11, 2011, and further authorized A&B to file this amended notice of appeal.

4.2. A hearing before the agency on the underlying administrative matter was held in the matter from December 3 - 18, 2008. After judicial review on the Director’s initial final order, the case was remanded to IDWR which resulted in the *Remand- Final Order*. A&B requested a hearing on the *Remand- Final Order* pursuant to Idaho Code § 42-1701A(3), and that request was denied has yet to be addressed by the Interim-Director.

3. A Statement of Issues which A&B intends to assert in this matter will be filed with the Court within 14 days. Pursuant to I.R.C.P. 84(d)(5), A&B reserves the right to assert additional issues and/or clarify or further specify the issues for judicial review stated in this petition or which become later discovered.

JURISDICTION AND VENUE

5.4. This second amended petition is authorized by Idaho Code §§ 67-5270 and 5279, I.R.C.P. 84(r) and I.A.R. 17(m), and this Court’s August 11, 2011, *Order on Motion to Dismiss and Motion to Strike*.

6.5. This Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1401D and 67-5272.

7.6. Venue lies in this Court pursuant to Idaho Code §§ 42-17401D and 67-5272. A&B’s principal place of business is located in Minidoka County and real property (water right

number 36-2080) which was the subject matter of the agency action is appurtenant to lands located in Minidoka County.

~~8.7.~~ Pursuant to the Idaho Supreme Court's *Administrative Order* issued on December 9, 2009 "all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District." The SRBA Court's procedures instruct the clerk of the district court in which the petition is filed to issue a *Notice of Reassignment*. ~~A&B has attached a copy of the SRBA Court's *Notice of Reassignment* form for the convenience of the clerk.~~

~~9.8.~~ The Director's ~~*Amended Final Order*~~ *Remand Final Order* is a final agency action subject to judicial review pursuant to Idaho Code § 67-5270.

PARTIES

~~10.9.~~ Petitioner A&B is an Idaho irrigation district, which its principal office located in Minidoka County, specifically Rupert, Idaho.

~~11.10.~~ Respondent Idaho Department of Water Resources, is a state agency with its main office located at 322 E. Front Street, Boise, Idaho. Respondent Gary Spackman is the ~~interim~~ director of the Idaho Department of Water Resources.

STATEMENT OF INITIAL ISSUES

12. The Petitioner intends to assert the following issues on judicial review:

a. Whether the Director erred by failing to provide for timely and lawful administration of junior priority ground water rights to satisfy A&B's decreed senior ground water right.

b. Whether the Director unconstitutionally applied the Department's Conjunctive Management Rules (IDAPA 37.03.11 *et seq.*) and erred in failing to recognize and honor A&B's decreed senior ground water right for purposes of administration.

- c. Whether the Director erred in finding that A&B could not beneficially use the quantity of its decreed water right, and whether that decision is supported by clear and convincing evidence.
- d. Whether the Director erred in not finding material injury to A&B's senior water right because A&B has 11 unused wells or points of diversion "that may be put into production at any time or the wells may be reconstructed at another location."
- e. Whether the Director erred in finding that the "inherent hydrogeologic environment" for certain wells represents an unreasonable means of diversion.
- f. Whether the Director erred in applying CM Rule 20.03, parts of which have been determined to be invalid by the Idaho Supreme Court in *Clear Springs Foods, Inc., et al. v. Spackman, et al.*, 150 Idaho 790 (2011).
- g. Whether the Director erred in forcing A&B to curtail or regulate its 1994 enlargement water rights as a precondition to the administration of other junior water rights.
- h. Whether the Director erred in using pre-decree information as a basis to disregard A&B's decreed quantity of 1,100 cfs (0.88 miner's inch per acre).
- i. Whether the Director erred in concluding that A&B could divert additional water for irrigation purposes during the peak season.
- j. Whether the Director erred in failing to apply CM Rules 20.03 and 40.05 for purposes of evaluating whether junior ground water right holders were "wasting" water.
- k. Whether the Director erred in finding that A&B could not beneficially use 0.88 miner's inch per acre even though the Director authorized surrounding water users with junior ground water rights to use 0.88 miner's inch per acre of water, and more.
- l. Whether the Director erred in using a "crop maturity" standard for purposes of water right administration.
- m. Whether the Director erred by addressing issues that are beyond the scope of the Court's remand order.
- n. Whether the Director's decision is supported by substantial evidence in the record.
- o. ~~Whether, if A&B's senior water right is subject to the Ground Water Act, the Director erred in refusing to establish a "reasonable ground water pumping level" for purposes of administration pursuant to Idaho Code § 42-226.~~

p. — Whether the Director's attempt to "grant" A&B's petition for reconsideration of the Remand Order for the sole purpose of allowing IDWR more time to dispose of A&B's petition violates Idaho Code § 67-5246(4) and Department Rule 730.02(a).

13. Pursuant to I.R.C.P. 84(d)(5), A&B reserves the right to assert additional issues and/or clarify or further specify the issues for judicial review stated herein which later become discovered.

AGENCY RECORD

14.11. Judicial review is sought of the Director's ~~June 30, 2011~~ April 27, 2011 *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call.*

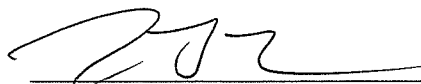
15.12. The agency held a hearing on the underlying administrative matter from December 3 – 18, 2008, which was recorded and a transcript created, which transcript should be made a part of the agency record in this matter. The transcript exists and is part of the record in *A&B Irrigation Dist. v. IDWR*, Minidoka County Dist Ct. Case No. 2009-000647. The parties to the administrative case previously paid for the creation of the transcript of the hearing.

16.13. A&B anticipates that it can reach a stipulation regarding the agency record with the Respondents and the other parties, and will pay its necessary share of the fee for preparation of the record at such time.

17.14. Service of this Notice of Appeal and Petition for Judicial Review of Agency Action has been made on the Respondents at the time of the filing of this Petition.

DATED this 36th day of October 2012 ~~August June 2011~~.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson
Attorneys for A&B Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of October, 2012, I served true and correct copies of this **A&B IRRIGATION DISTRICT'S SECOND AMENDED NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF AGENCY ACTION** upon the following by the method indicated:


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 Twin Falls, Idaho 83303-2707

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