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Attorneys for Respondents

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

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, )

Petitioners, )

vs. )

DAVID R. TUTHILL, JR., in his capacity as Director )  
of the Idaho Department of Water Resources, and THE )  
IDAHO DEPARTMENT OF WATER RESOURCES, )

Respondents. )

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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 )

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Case No. CV-2008-0000551

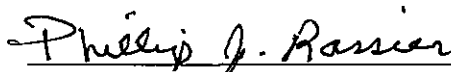
**NOTICE OF AGENCY ORDER**  
**DENYING PETITION FOR**  
**RECONSIDERATION**

TO: CLERK OF THE ABOVE-ENTITLED COURT AND TO ALL COUNSEL OF RECORD:

YOU ARE HEREBY NOTIFIED that on October 10, 2008 the Director of the Idaho Department of Water Resources ("Director" or "IDWR") issued *Order Denying USBR Petition for Reconsideration and Pocatello's Response* (copy appended as Attachment "A"). The order was issued in response to a petition for reconsideration of IDWR's *Final Order Regarding the Surface Water Coalition Delivery Call* issued on September 5, 2008, which is the subject of the present action for judicial review before the district court.

DATED this 15<sup>th</sup> day of October 2008.

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CLIVE J. STRONG  
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CHIEF, NATURAL RESOURCES DIVISION

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below in the manner indicated on this 15<sup>th</sup> day of October, 2008.

Document Served: **NOTICE OF AGENCY ORDER DENYING PETITION FOR RECONSIDERATION**

Deputy Clerk Gooding County District Court 624 Main St. P.O. Box 27 Gooding, ID 83330	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
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*Phillip J. Rassier*  
PHILLIP J. RASSIER  
Deputy Attorney General

**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, )	<b>ORDER DENYING</b>
AMERICAN FALLS RESERVOIR DISTRICT #2, )	<b>USBR PETITION FOR</b>
BURLEY IRRIGATION DISTRICT, MILNER )	<b>RECONSIDERATION</b>
IRRIGATION DISTRICT, MINIDOKA IRRIGATION )	<b>AND POCATELLO'S</b>
DISTRICT, NORTH SIDE CANAL COMPANY, )	<b>RESPONSE</b>
AND TWIN FALLS CANAL COMPANY )	
_____ )	

**USBR Petition for Reconsideration**

On September 5, 2008, the Director of the Department of Water Resources (“Director” or “Department”) issued his *Final Order Regarding the Surface Water Coalition Delivery Call* (“Final Order”). On September 19, 2008, the United States Bureau of Reclamation (“USBR”) timely filed a *Petition for Reconsideration* (“Petition”), asserting that the Final Order violates the provisions of Idaho Code § 67-5248(1), which “requires that a final order of the agency include ‘a reasoned statement in support of the decision’ and ‘a concise and explicit statement of the underlying facts of record supporting the findings.’” *Petition* at 1-2 citing Idaho Code § 67-5248(1). Because of the perceived procedural deficiencies, USBR “requests that . . . the Director issue a Final Order consistent with the requirements of Idaho Code § 67-5248(1).” *Petition* at 4.

USBR’s primary concern appears to stem from the “voluminous” nature of this proceeding and the Director’s decision to issue a Final Order that does not address and reconcile each and every perceived inconsistency or issue that USBR asserts can be found in the “306 pages” of “interlocutory orders issued in this case, including the Final Order . . .” *Id.* at 2. USBR cites two Idaho Supreme Court cases in support of its position that the Final Order violates Idaho Code § 67-5248: *Mercy Medical Center v. Ada County*, 2008 WL 3905434 (Aug. 26, 2008) and *Intermountain Health Care, Inc. v. Board of County Commissioners of Caribou County*, 108 Idaho 757, 702 P.2d 795 (1985). While both cases provide reasoning for an administrative body making findings of fact upon which judicial review can be had, neither case analyzes or cites Idaho Code § 67-5248.

Idaho Code § 67-5248 states in full:

- (1) An order must be in writing and shall include:

(a) a reasoned statement in support of the decision. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.

(b) a statement of the available procedures and applicable time limits for seeking reconsideration or other administrative relief.

(2) Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.

(3) All parties to the contested case shall be provided with a copy of the order.

According to the Idaho Supreme Court, “[T]he requirement for administrative decisions based on substantial evidence and reasoned findings--which provide the basis for effective judicial review--would become meaningless if material facts known to or relied upon by the agency did not appear in the record.” *Laurino v. Board of Professional Discipline of Idaho State Bd. of Medicine*, 137 Idaho 596, 602, 51 P.3d 410, 416 (2002) (footnote omitted citing Idaho Code § 67-5248). “The ultimate question is whether the director’s order is supported by findings of fact which are based exclusively on the evidence in the record and on matters officially noticed in that proceeding. I.C. § 67-5248.” *Northern Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 440, 926 P.2d 213, 216 (Ct. App. 1996). *See also Woodfield v. Board of Professional Discipline of Idaho State Bd. of Medicine*, 127 Idaho 738, 747, 905 P.2d 1047, 1056 (Ct. App. 1995).

Here, the Final Order represents the culmination of an administrative proceeding that was initiated in January 2005 with the filing of a delivery call by the Surface Water Coalition. The record developed in this matter is technical and voluminous, consisting mainly of orders (interlocutory and final) that were issued by two Directors and an independent hearing officer over the course of three years; pleadings filed by parties and intervenors over that same period of time; and the record developed during the January 2008 hearing. Clearly, a record exists in this case upon which to base findings of fact for effective judicial review. *Laurino* at 602, 51 P.3d at 416; *Northern Frontiers* at 440, 926 P.2d at 216.

While the Final Order does not review each finding and conclusion entered during the course of this proceeding, it explicitly discusses the findings and conclusions reached in previous orders that the Director modified in the Final Order. The remaining findings and conclusions were left undisturbed by the Director and are supported by the record. *See Final Order* at 2, ¶ 8 and 7, ¶ 1. The Final Order therefore complies with Idaho Code § 67-5248. To the extent USBR believes there are discrepancies in the Final Order with the previously issued orders, the proper forum for addressing those points is on judicial review.

### **Pocatello Response to USBR Petition**

On October 3, 2008, the City of Pocatello (“Pocatello”) filed its *Response to Reclamation’s Petition for Reconsideration of the Director’s Final Order* (“Response”). “Pocatello does not agree with Reclamation’s assessment that the Order fails the statutory standard; however, it does assert that judicial economy and policy reasons support amending the

Order to address certain concerns of the substantive issues described in Reclamation's Petition." *Id.* at 2. Pocatello's Response goes beyond the scope of USBR's Petition and to that extent should be treated as a petition for reconsideration of the Director's Final Order. Petitions for reconsideration are to be filed "within fourteen (14) days of the service date of this order." IDAPA 37.01.01.740.01. The Final Order was issued on September 5, 2008; Pocatello's pleading is therefore untimely.

### ORDER

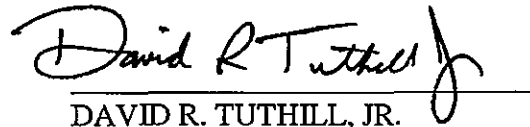
Based upon and consistent with the foregoing, the Director hereby orders as follows:

USBR's *Petition for Reconsideration* is DENIED.

Pocatello's *Response to Reclamation's Petition for Reconsideration* is DENIED to the extent it raises issues beyond the scope of USBR's Petition.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter 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 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 10<sup>th</sup> day of October 2008.

  
\_\_\_\_\_  
DAVID R. TUTHILL, JR.  
Director



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 10<sup>th</sup> day of October 2008, the above and foregoing, was served by the method indicated below, and addressed to the following:

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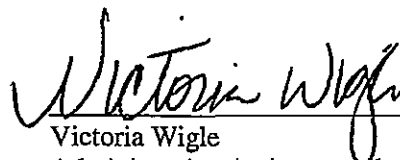
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