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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 PETITION FOR  
RECONSIDERATION FILED  
BEFORE THE AGENCY**

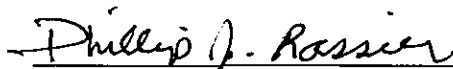
TO: CLERK OF THE ABOVE-ENTITLED COURT AND TO ALL COUNSEL OF RECORD:

YOU ARE HEREBY NOTIFIED THAT the Idaho Department of Water Resources ("IDWR") received a timely petition for reconsideration on September 19, 2008 to the *Final Order Regarding the Surface Water Coalition Delivery Call* issued by the IDWR Director on September 5, 2008, which is the subject of the present action for judicial review before the district court. See Attachment "A" (*Reclamation's Petition for Reconsideration*). Pursuant to I.C. § 67-5246(4), the Director shall act on the petition for reconsideration within twenty-one (21) days of its receipt, or the petition is deemed denied by operation of law.

IDWR will provide further notification to the Court and the parties when action is taken on the petition. Parties intending to respond to the petition should do so within fourteen (14) days of the filing of the petition.

DATED this 25<sup>th</sup> day of September 2008.

LAWRENCE G. WASDEN  
Attorney General  
CLIVE J. STRONG  
Deputy Attorney General  
CHIEF, NATURAL RESOURCES DIVISION

  
\_\_\_\_\_  
PHILLIP J. RASSIER  
CHRIS M. BROMLEY  
Deputy Attorney General  
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

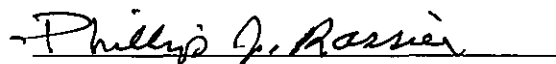
I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 25<sup>th</sup> day of September, 2008.

Document Served: **NOTICE OF PETITION FOR RECONSIDERATION FILED BEFORE THE AGENCY**

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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<p>Terry Uhling  JR SIMPLOT CO  999 Main Street  Boise, ID 83702  tuhling@simplot.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>James Tucker  IDAHO POWER CO  1221 W. Idaho St.  Boise, ID 83702  jamestucker@idahopower.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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PHILLIP J. RASSIER  
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RECEIVED

SEP 19 2008

DEPARTMENT OF WATER RESOURCES

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*U.S. Department of the Interior, Bureau of Reclamation*

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

<b>IN THE MATTER OF DISTRIBUTION</b>	)	
<b>OF WATER TO VARIOUS WATER RIGHTS</b>	)	
<b>HELD BY OR FOR THE BENEFIT OF</b>	)	
<b>A&amp;B IRRIGATION DISTRICT, AMERICAN</b>	)	<b>RECLAMATION'S PETITION</b>
<b>FALLS RESERVOIR DISTRICT #2, BURLEY</b>	)	<b>FOR RECONSIDERATION</b>
<b>IRRIGATION DISTRICT, MILNER</b>	)	
<b>IRRIGATION DISTRICT, MINIDOKA</b>	)	
<b>IRRIGATION DISTRICT, NORTH SIDE</b>	)	
<b>CANAL COMPANY, and TWIN FALLS</b>	)	
<b>CANAL COMPANY</b>	)	
_____	)	

**INTRODUCTION**

The United States Bureau of Reclamation, by and through its attorney and duly authorized representative, Kathleen Marion Carr, Office of the Field Solicitor, pursuant to Idaho Code § 67-5246(4), hereby petitions for reconsideration of the *Final Order Regarding the Surface Water Coalition Delivery Call* (hereafter "Final Order") dated September 5, 2008. Reclamation reserves the right to raise on appeal any other issues raised in the administrative proceedings.

- 1. THE DIRECTOR'S FINAL ORDER DOES NOT COMPLY WITH THE REQUIREMENTS OF IDAHO CODE § 67-5248(1).**

Idaho Code § 67-5248(1) 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.” In *Intermountain Health Care, Inc. v. Board of County Commissioners of Caribou County*, the Idaho Supreme Court explained the rationale for requiring agencies to make findings in contested cases:

We note at the outset the rationale for requiring an agency to make findings in contested cases: . . . The Court's most frequent reason for requiring findings or findings and reasons has been to facilitate judicial review; Mr. Justice Cardozo is often quoted: 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' *United States v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 510-11 [55 S.Ct. 462, 467, 79 L.Ed. 1023] (1935). Mr. Justice Frankfurter explained that the requirement 'is merely part of the need for courts to know what it is that the Commission has really determined in order that they may know what to review. . . . The motivating reason usually is that a reviewing court cannot understand the agency's action unless findings and reasons are stated; an additional reason that alone should suffice to support the requirement is that a statement of findings and reasons is usually an effective protection against arbitrariness." Davis, ADMINISTRATIVE LAW TREATISE, Vol. 3 (2d ed. 1980), p. 102.

108 Idaho 757, 760-61 (1985) (internal citations omitted). The Court recently reaffirmed the reasoning of *Intermountain Health Care, Inc.*, in the context of a decision issued pursuant to the Idaho Administrative Procedures Act: “Under the APA ‘specificity in the findings and reasons of the lower tribunal is vital.’” *Mercy Medical Center v. Ada County*, 2008 Ida. LEXIS 161 at \*14 (Aug. 26, 2008) (internal citation omitted).

The present case involves a complex set of legal and technical issues. Over the period of more than three years, the agency has issued numerous interlocutory orders leading up to the Final Order. As a result, a voluminous number of highly technical and detailed findings of fact and conclusions of law are currently spread out over a large landscape of prior interlocutory orders issued by the Director, the former Director, and the Hearing Officer. For purposes of illustration, a sampling of only eleven of the interlocutory orders issued in this case, including the Final Order, total 306 pages.<sup>1</sup>

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<sup>1</sup> There were more than eleven orders issued in this case, but for purposes of the above illustration, the following orders are referenced: *Amended Order* (May 2, 2005); *Supplemental Order Amending*

The Final Order briefly addresses only four issues raised in this case: replacement water plans, timing of reasonable carryover, prediction of material injury, and the ESPA ground water model. In an attempt to address the remaining issues in the case, the Final Order includes a catch-all provision intended to incorporate all the prior findings of fact and conclusions of law made in prior orders:

That the findings of fact and conclusions of law entered herein, and the findings of facts [*sic*] and conclusions of law entered by the former Director and the Hearing Officer in these matters, unless discussed and modified in this FINAL ORDER are hereby accepted.

*Final Order at 12.*

The problem with this catch-all provision is that it makes no attempt to reconcile the discrepancies and inconsistencies between the various prior orders' findings of fact and conclusions of law. It simply indicates that the Director "accepts" the findings of fact and conclusions of law of both the former Director and the Hearing Officer. *Id.* This creates a problem on judicial review. How are the reviewing courts and parties on appeal supposed to ascertain the factual and/or legal basis for the Director's final ruling on an issue, where the prior orders (which the Director incorporates and accepts) contain discrepancies or inconsistencies?

For example, in his recommended order, the Hearing Officer ruled that the "principle [of first in time, first in right] is subject to consideration of the public interest" and that "the public interest affects determination of . . . carryover storage."

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*Replacement Water Requirements* (July 22, 2005); *Second Supplemental Order Amending Replacement Water Requirements* (Dec. 27, 2005); *Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006* (June 29, 2006); *Fourth Supplemental Order on Replacement Water Requirements* (July 17, 2006); *Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007* (May 23, 2007); *Sixth Supplemental Order Amending Replacement Water Requirements and Order Approving IGWA's 2007 Replacement Water Plan* (July 11, 2007); *Seventh Supplemental Order Amending Replacement Water Requirements* (Dec. 20, 2007); *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* (Apr. 29, 2008); *Eighth Supplemental Order Amending Replacement Water Requirements Final 2007 & Estimated 2008* (May 23, 2008); and *Final Order Regarding the Surface Water Coalition Delivery Call* (Sept. 5, 2008).



*Recommended Order* at 39. The former Director made findings and conclusions on the issue of reasonable carryover but did not articulate the same legal basis as the Hearing Officer. The Final Order does not expressly accept or reject either the Hearing Officer's or the former Director's findings and conclusions on this issue, except on the question of the timing of reasonable carryover. Unless the Final Order is amended, the reviewing courts and parties on appeal will be unable to determine the Director's basis for limiting carryover.

There are numerous other examples of inconsistencies and discrepancies between the prior orders. However, it is the Director's task to set out a "reasoned statement" in support of his final decision. *Idaho Code* § 67-5248(1). To the extent the Director wishes to use a catch-all provision to incorporate the voluminous number of findings and conclusions contained in literally hundreds of pages of prior orders, it is incumbent upon him to reconcile the inconsistencies and discrepancies among the various orders so the reviewing courts and parties can properly ascertain the basis of the Director's final decision on the many issues in this case.

#### CONCLUSION

Based on the foregoing, Reclamation requests that its *Petition for Reconsideration* be granted and that the Director issue a Final Order consistent with the requirements of *Idaho Code* § 67-5248(1).

DATED this 19<sup>th</sup> day of September 2008.

  
Kathleen Marion Carr

## CERTIFICATE OF SERVICE

I hereby certify on this 19<sup>th</sup> day of September 2008 I caused to be served a true and correct copy of the foregoing **Reclamation's Petition for Reconsideration** via first-class United States Mail email, and additional methods of service where specifically indicated, to the individuals listed below.

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 Kathleen Marion Carr