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**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, 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

Case No.: CV-2008-551

**GROUND WATER USERS' PETITION
FOR REHEARING**

IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND WATER DISTRICT, and MAGIC VALLEY GROUND WATER DISTRICT, acting for and on behalf of their members (collectively, the "Ground Water Users"), through counsel, respectfully petition the Court for re-hearing pursuant to Idaho Appellate Rule 42 in response to the Court's *Order on Petition for Judicial Review* dated July 24, 2009 (the "*Order*"), on the following issues:

1. The Court should order the Director to immediately decide the issue and methodology for determining material injury and reasonable carryover for future years and incorporate that method into one Final Order as instructed by the Court on pp. 32-33 of the *Order*. Such order should require the Director to do this timely, by a date certain and based upon the evidence as established in the record and without further hearing.

On page 33 of the *Order* the Court remands the matter for further proceedings consistent with this decision. Among the issue for remand was the Court's conclusion that the Director abused his discretion by issuing two Final Orders in response to the Hearing Officer's Recommended Order, to wit:

The process for determining material injury and reasonably carryover is an integral part of the Hearing Officers' Recommended Order, and the issues raised in the delivery all, The Director abused his discretion by not addressing and including all of the issues raised in this matter in one Final Order.

Id. at 32.

On remand, the Department should be directed to immediately "cure" the error by issuing one order for purposes of appeal and base it on the established record without further hearing. This is appropriate as a matter of judicial economy, because the parties have expended vast amounts of time and resources on this matter, including litigating the methodology related to material injury during a nearly three week hearing in January of 2008. If the Court fails to order

the Director immediately cure the error, all parties' efforts in the previous proceeding will have been wasted and may need to be duplicated should the Supreme Court remand the matter later on the same basis on the same issue. Therefore, the Ground Water Users request the Court instruct the Director as set forth above.

2. To clarify that the Director has the authority to determine that in times of shortage Twin Falls Canal Company may not be entitled to its full decreed (or recommended) amount.

On page 26 of the *Order* the Court found that “[i]n times of shortage junior users will only be regulated or required to provide mitigation subject to the material injury factors set forth in CMR Rule 42” and that a “finding of material injury requires more than shortfalls to the decreed and license quantity of the senior right.” These conclusions indicate that the decreed quantity is an authorized maximum and that the application of the factors in CMR Rule 42 may show that there is an amount of water that is less than the decreed or licensed quantity that a senior may be required to use in times of shortage. However, on pages 31 and 32 of the *Order*, the Court determines that the Director exceeded his authority in determining that the full head gate delivery for Twin Falls Canal Company is $\frac{5}{8}$ of an inch instead of $\frac{3}{4}$ of an inch. Clearly, the Director was intending to find what Twin Falls Canal Company needed in times of shortage in a delivery call under the CM Rules which is entirely consistent with the Court’s conclusion on p. 26 of the *Order*. For that purpose alone the $\frac{5}{8}$ inch was determined by the Director as the proper amount for purposes of determining material injury to Twin Falls under the evidence as established in this case. The Director was not intending interfere with the SRBA Court’s authority in determining the proper amount to ultimately be included in TFCC’s partial decree. The Ground Water Users agree with the other statements made on p. 31 of the *Order*, that the SRBA District Court has exclusive jurisdiction to determine the elements of water rights

pending before it and do not believe the Director was intending to adjudicate Twin Fall Canal Company's water rights. These points need to be clarified and the apparent inconsistency of the Court's statements on pages 26 and 31 resolved.

3. To clarify whether junior ground water users are physically curtailed while the hearing process is proceeding under a proposed mitigation plan and before a final order has been entered?

The Court's finding on p. 29 of the *Order* states that:

Once a mitigation plan has been proposed, the Director must hold a hearing as determined necessary and follow the procedural guidelines for transfer . . .

No where in this *Order* does the Court state when curtailment can actually be imposed.

However, in the *Order on Petition for Judicial Review in Clear Springs Foods, Inc. v. Tuthill*,

Case No. 2008-444 (Fifth Jud. Dist. Gooding County) the Court found in that

After the initial order is issued and pursuant to the constitutional requirements of due process, the parties pursuant to notice and upon request are entitled to a hearing before junior rights are curtailed and before the senior rights are injured further.

Id. at 49. The Court further stated that

[A] more appropriate course of action for the Director to follow would have been to issue the initial curtailment order, provide the junior Ground Water Users time to submit a mitigation plan before making that order final, and then hold a hearing on the order of curtailment and material injury . . . and the mitigation plan at the same time.

This indicates that the curtailment order should not be enforced until a hearing process has been completed on a mitigation plan and a final order issued. Thus, the Court in this *Order* needs to confirm that the same process applies here, meaning that junior ground water users will be provided due process to protect their real property rights and that curtailment will not be enforced prior to completing the hearing process and issuance of a final order. If the seniors get the curtailment they want in advance, then it would only be to their benefit to string out the

hearing process. However, if curtailment only happens after a hearing and final order on the mitigation plan, both parties receive due process and there is incentive to complete the process timely by the parties and the Department. Now that the Court has invalidated the use of replacement water plans as an interim response to initial curtailment orders, clarification on when physical curtailment of junior ground water users can occur is needed.

The Ground Water Users will within fourteen days submit a brief in support of this Petition for Rehearing pursuant to Idaho Appellate Rule 42.

DATED this 13th day of August, 2009.



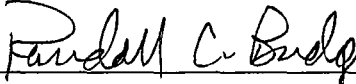
RANDALL C. BUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of August, 2009, the above and foregoing document was served in the following manner.

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