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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. **GARY SPACKMAN,** in his capacity as Interim Director of the Idaho Department of Water	CASE NO. CV 2008-551 **SURFACE WATER COALITION'S RESPONSE TO IGWA'S AND CITY OF POCATELLO'S PETITIONS FOR REHEARING**

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

COME NOW, Petitioners, A&B Irrigation District ("A&B"), American Falls Reservoir District #2 ("AFRD #2"), Burley Irrigation District ("BID"), Milner Irrigation District ("Milner"), Minidoka Irrigation District ("MID"), North Side Canal Company ("NSCC"), and Twin Falls Canal Company ("TFCC") (collectively hereafter referred to as the "Surface Water Coalition", "Coalition", or "SWC"), by and through their undersigned counsel, and hereby file this response to the petitions for rehearing filed by IGWA and the City of Pocatello ("Pocatello") on October 9, 2009.

As explained in detail below, the relief sought by IGWA and Pocatello is not warranted and therefore their petitions should be denied. The Court should affirm its July 24, 2009 *Order on Petition for Judicial Review* ("*Order*").

ARGUMENT

I. IGWA's Request to Restrict Future Procedures on Remand is Not Warranted.

The Court correctly found that the "Director abused his discretion by not addressing and including all of the issues raised in this matter in one *Final Order*." *Order* at 32. The Court determined that the Director's "two order" approach violated Idaho's APA and IDWR's own

procedural rules. *See id.* There is nothing ambiguous or erroneous in the Court's decision on this issue. Hence, there is no basis to reconsider or clarify the ruling.

Under the guise of seeking clarification of the Court's decision, IGWA asks this Court for new anticipatory relief against IDWR on the theory that the "Director may implement an improper proceeding or procedure resulting in the waste of additional judicial and legal resources". *IGWA Br.* at 3. IGWA's claim is not supported by Idaho's APA or any other law and should be denied.[1]

The Court remanded the case to IDWR for "further proceedings consistent with this decision". *Order* at 33. This ruling was consistent with Idaho law which provides that "[i]f the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary". I.C. § 67-5279(2). IGWA asks this Court to pre-judge the Director's decision on remand, as it is apparently concerned the Director will not remedy the errors with the final order as directed by the Court. Although SWC agrees with IGWA that the Director cannot simply re-issue a new final order based upon evidence not included in the existing agency record, there is no reason to assume IDWR or the Director will issue such an erroneous decision. Although IGWA references the former Director's June 30, 2009 *Order Regarding Protocol for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* as its basis to argue that IDWR "may" incorporate that decision into a "unified Final Order" in this proceeding, that "assumption" is no basis to grant the new relief IGWA seeks on re-hearing.[2]

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[1] Both IGWA and Pocatello seek "new" relief in this case through their petitions for rehearing by asking the Court to prohibit or restrict future agency action. This type of request is improper for petition for rehearing: "Generally, a litigant may not raise new legal points, questions, issues, contentions or arguments... for the first time on a petition or motion for rehearing." 5 CJS § 803. That instead "a petition for rehearing is generally confined to those issues which were properly presented in the initial appeal, but were overlooked or improperly decided." *Id.* In light of long established case law and policy, the Court should dismiss new issues raised by IGWA and Pocatello.

[2] The Court correctly noted that the June 30, 2009 order is not part of the record in this matter. *See Order* at 32, n. 8.

Stated another way, IGWA's requested relief hinges completely upon the assumption that the Director may violate the law in the future by incorporating information not in the record into his new final order. This is not a proper basis for rehearing or clarification of the Court's *Order* in this case.

Importantly, the Court ruled that the Director abused his discretion and violated Idaho law in attempting to issue "two orders issued months apart". *Order* at 32. Accordingly, the Director has no authority to simply adopt the *2009 Protocol Order* as a "final order" in this matter as IGWA fears. Moreover, the former Director issued that "interlocutory order" the day before he retired from IDWR, and a month prior to this Court's decision. In issuing the *2009 Protocol Order*, the former Director wrongly assumed the decision he issued on September 5, 2008 (R. Vol. 39 at 7981) and the process he was employing with a "two order" approach in this matter was correct.

Accordingly, since the *2009 Protocol Order* was issued improperly and does not reflect the requirements of IDWR as set forth in this Court's order on judicial review, there is no basis to assume that IDWR can or will adopt that decision on remand. Moreover, the Director recently rescinded the *2009 Protocol* by order issued on November 5, 2009. Contrary to IGWA's request, the Court should instead presume that IDWR will follow the law in issuing a new final order consistent with this Court's July 24, 2009 *Order*.

Second, IGWA requests clarification that the Director rely "exclusively upon the evidence and facts contained in the record" in this case when issuing a new final order consistent with this Court's order. *IGWA Br.* at 4. Although SWC agrees that the Director is required to issue a new order on remand based upon the facts and evidence included in the existing agency record, IGWA asks this Court to further "advise the Director that no further or additional hearing

is permitted". *IGWA Br.* at 5. Similar to its first request wherein IGWA assumes that the Director is destined to err in issuing a new final order, IGWA's request to prohibit additional proceedings before IDWR is premature and improper at this stage in the litigation.

While the SWC agrees that the Director has an adequate record in this case to issue a new final order consistent with this Court's directives, the requested relief to "prohibit further hearings on this matter" is not appropriate at this time and is unnecessary for purposes of reconsideration or clarification of the Court's *Order*. The Court should presume that IDWR and the Director will follow the law and the Court's July 24, 2009 *Order* in issuing a new final agency order in this case. IGWA's request wrongly presumes that the Director would require "rehearing" of the entire case in order to implement the Court's order. *IGWA Br.* at 6.

Rather than prohibit or pre-judge IDWR's future action on remand now, the better approach, consistent with the requirements of judicial review under Idaho's APA, is to presume the Director will issue a new final order consistent with this Court's order. If the Director issues a new decision that is not based upon "sufficient evidence" it may be that an additional hearing will be necessary at that time. *See Hardy v. Higginson*, 123 Idaho 485, 492 (1993) (Court may remand matter to IDWR for further proceedings if the record is insufficient to support its decision). Alternatively, if and when the Director proposes additional proceedings or a hearing as part of that process, the parties can address the necessity of that action or its scope at that time.

Accordingly, the SWC submits that the Court should not completely "prohibit" any future hearing at this time as IGWA's request presumes unlawful action on part of IDWR or the Director that has yet to occur.

II. IGWA's Request that the Court Clarify the Director's Authority to Determine that TFCC May Not be Entitled to its Full Decree in Times of Shortage Should be Denied.

IGWA confuses two distinct issues here and requests clarification regarding a perceived discrepancy between two of the Court's holdings, when in fact both holdings can be read in light of the other without contradiction. IGWA seeks clarification of the full headgate delivery to TFCC and the fact that in times of shortage, a senior water right holder may receive less than the full decreed water right without sustaining material injury under the CM Rules. The only inconsistency here, as pointed out by the Court in the Order, is the Director's recommendation of 3/4 inches per acre delivery to TFCC in the SRBA adjudication and the Director's adoption of the Hearing Officer's findings in favor of 5/8 inch per acre in the present proceeding.

The Court is correct in holding that the Director exceeded his authority in determining that full headgate delivery for TFCC should be calculated at 5/8 of an inch instead of its decreed right of 3/4 of an inch per acre. The Director's finding was not supported by the substantial evidence in the record - which includes prior decrees and the testimony of TFCC shareholders that demonstrate less than 3/4 inch per share represents an injury to the water right and further impacts crop yields and farming operations. R. Vol. 37 at 7102; R. Vol. 39 at 7382. The Court was therefore right to reverse the Director on this point.

A prior decree is binding as to the "nature and extent" of the water right. *See* Idaho Code § 42-1420. As such, the Department is bound to accept a prior decree for purposes of administration. In addition, the administrative process cannot be used to re-adjudicate the prior decree. *AFRD#2*, at 878; R. Vol. 37 at 7072. Rather, in water right administration, the Director's discretion is limited to reviewing the decrees and considering those "post adjudication factors" that impact the proposed water use.

The Director and watermaster are required to distribute water to TFCC's water rights, not according to a "per share" or "per acre" calculation that differs from what can be beneficially used within the authorized diversion rates of TFCC's decreed water rights. The law demands as much. *See* Idaho Code §§ 42-602 & 42-607. Reduced deliveries have injured TFCC's water rights and resulted in impacts to its shareholders' crop yields and farming operations. R. Vol. 33 at 6363-64; 6270-72; 6338-39; R. Vol. 40 at 7546-50.

TFCC's natural flow water rights have been recommended in the SRBA in a manner consistent with TFCC's historical delivery of 3/4 inch at the headgate. *See* Ex.4001A. Objections have been filed to these recommendations, *see* Ex. 9729, and the subcases are proceeding through the SRBA. The Court's order on this issue is fully supported by the law and facts in this case. For the above stated reasons, the Court should deny IGWA's request for clarification on this point.

III. Idaho's Water Distribution Statutes and CMRs Do Not Require a Hearing Prior to Administration of Junior Priority Ground Water Rights.

This issue is squarely before the Court in a separate appeal concerning the Director's final order in the Spring Users case. *See Clear Springs et al. v. Spackman et al.* (Idaho 5th Jud. Dist., Case No. 2008-444). SWC incorporates by reference the arguments presented in that case and provides a brief summary of those arguments below for the Court's convenience.

Within organized water districts the watermasters have a clear legal duty to distribute water as follows:

> ... **the duty of said watermaster to distribute the waters** of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom **according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut** or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply,

> **when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others** in such stream or water supply...

Idaho Code § 42-607 (emphasis added).

CM Rule 40 similarly requires the Director to either order curtailment of the junior water rights or allow out-of-priority diversions pursuant to an approved mitigation plan. *See Clear Springs Brief in Support of Joint Petition for Rehearing* at 14 (Idaho 5th Jud. Dist, Case No. 2008-444). Unlike CM Rules 30 and 41, which expressly provide for contested case procedures and a hearing prior to administration, Rule 40 follows the statutory system of administration followed in organized water districts.

Further, Rule 40 makes it clear that junior "surface" water rights are subject to immediate curtailment to protect senior rights. *See* CMR 40.02.a. The same is required of junior "ground" water rights. *See* CMR 40.02.b. If the Director issues a curtailment order and no mitigation plan has been approved, injuring junior ground water rights are subject to immediate "regulation" or curtailment in order to protect senior surface water rights within the water district. Just as there is no basis to provide a hearing before curtailing a junior "surface" water right holder within an organized water district, the same applies for junior "ground" water rights found to be injuring senior surface water rights.

SWC has a right to the expectation that its rights will be protected from interfering junior rights within organized water districts. *See Almo Water Co. v. Darrington*, 95 Idaho 16, 21 (1972) (Senior water users are "entitled to presume that the watermaster is delivering water to them in compliance with the governing decree."). Senior water right holders should not be submitted to "mini-adjudications" or countless "contested cases" every time they request administration within the water district. Junior ground water users have the option to file a CM

Rule 43 mitigation plan and obtain approval to prevent injury to the senior if they want to divert out-of-priority.

That the law requires no hearing before implementing the administrative action follows the constitution's law of prior appropriation. IDAHO CONST. Art XV, § 3. The Idaho Supreme Court addressed the subject in *Nettleton v. Higginson*, 98 Idaho 87 (1977), where the Court rejected the "due process" challenge:

> The governmental function in enacting not only I.C. § 42-607, but the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources. As to the private interests affected, **it is obvious that in times of water shortage someone is not going to receive water. Under the appropriation system the right of priority is based on the date of one's appropriation, i.e. first in time is first in right.**
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> * * *
>
> **The requirement of procedural due process is satisfied by the statutory scheme of Title 42 of the Idaho Code.** Our holding is supported by a comparison of the state's duty as mandated by Article 15, § 1 of the Idaho Constitution with the appellant's ability, under I.C. § 42-1405, to at any time verify his "constitutional use right," thereby reaping the protective benefit of I.C. § 42-607 himself. **Granted that when action is taken pursuant to I.C. § 42-607 there is no notice or hearing prior to the shutting off of the unadjudicated water rights,** but as the United States Supreme Court noted in *Fuentes v. Shevin*, supra, there are extraordinary situations when postponement of notice and a hearing is justified.

98 Idaho at 90-92 (emphasis added).

Just as there is no "notice and hearing" prior to "shutting off" unadjudicated water rights in a water district, the same procedure applies to junior priority adjudicated and licensed water rights when necessary to fill senior rights in times of shortage. See I.C. § 42-607; *Nettleton*, 98 Idaho at 93 ("In times of shortage one holding an unadjudicated water right stands in the position similar to he who holds the 'recorded' water right of the lowest priority date."). This is consistent with the Supreme Court's holding and reasoning set forth in *AFRD #2 v. IDWR*, 143 Idaho 862 (2007), wherein the Court stated:

> We agree with the district court's exhaustive analysis of Idaho's Constitutional Convention and the court's conclusion that **the drafters intended that there be no unnecessary delays in the delivery of water pursuant to a valid water right**. Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call.

143 Idaho at 874 (emphasis added).

Pursuant to the Supreme Court's holding in *Nettleton*, there is no violation of "due process" when the watermaster performs his duty and curtails junior rights without a hearing. This ensures "timely delivery" of water to the senior. Any delay in administration, caused by the holding of an administrative hearing or otherwise, would impermissibly shift the burden to the senior and perpetuate the injury caused by interfering juniors.

As found in *Nettleton*, administration of junior rights, surface or ground water, does not require a hearing before curtailment. The Court should therefore deny IGWA's request for clarification that Idaho's water distribution statutes and the CM Rules do not require a hearing prior to the administration of junior water rights. The law in Idaho has long been clear that no hearing is required, no further clarification is needed.

IV. Pocatello's Petition Is an Untimely Appeal of the Director's Final Order.

Pocatello requests the Court to "explain that the remaining process to be afforded to participants is a hearing *solely* on the issue of the reliability of the juniors' proffered replacement water pursuant to CMR 43." *Poc. Br.* at 3. Similar to IGWA's petition for rehearing, Pocatello asks this Court to restrict IDWR's future actions in this case. Pocatello confuses issues of "due process" in this proceeding with that related to future hearings on mitigation plans yet to be filed by junior ground water users that injure the SWC's senior surface water rights. The Director has yet to issue his final injury decision consistent with Idaho law and this Court's July 24, 2009 *Order*. Moreover, no Rule 43 mitigation plans have been filed by IGWA or others to prevent

injury to the SWC. Contrary to Pocatello's theory, the Court is not in a position to prohibit or restrict future hearings before IDWR on these matters.

In support of its claim to restrict future proceedings, Pocatello erroneously argues that the "Director properly made a preliminary determination of injury to the calling water right". *Id.* at 6. Pocatello asks this Court to revise its holding in its July 24, 2009 *Order* to, among other things, instruct IDWR that it "may hold a hearing on the adequacy of the juniors' replacement supplies . . . to provide timely replacement water in the amounts specified in the Director's May 2, 2005 Amended Order." *Id.* at 9. This request completely misrepresents the record in these proceedings and must be denied since it constitutes an untimely appeal of the Director's September 5, 2008 Final Order.

As explained above, the Director has not yet issued his final injury decision consistent with Idaho law and this Court's July 24, 2009 *Order*. Contrary to Pocatello's theory, the amount of injury "specified in the Director's May 2, 2005 Amended Order" was not adopted in the Director's September 5, 2008 Final Order. A brief review of the orders in this case plainly reveals that the methodology and the Director's original injury determinations made in 2005 were in error.

Justice Schroeder summarized the legal and factual errors with the Director's injury determination in the May 2, 2005 Amended Order as follows:

> **8. The attempt to project the amount of water that is necessary for the members of the SWC to fully meet crop needs within the licensed or decreed amounts is an acceptable approach to conjunctive management, but there have been applications of the concept of a minimum full supply that should be modified if the use of the protocol is to be retained.** Whether one starts at the full amount of the licensed or decreed right and works down when the full amount is not needed or starts at a base and works up according to need, the end result should be the same. However, there should be adjustments if the process of establishing a base different from the licensed amount is to be utilized in future administration. . . .

> **a. 1995 was a wetter than average year, diminishing the validity of use of that year to establish the base for a minimum full supply and underestimating the material injury likely to occur in 2005 and subsequent years.** According to the Snake River Heise Natural Flow information from 1911-2004 (exhibit 100) 1995 was in the top third of wet years. Overall it was a wetter than average year. This warps the determination of a base supply downward. If precipitation saturates the soil and relieves the need for the use of irrigation either from natural flow or storage the amount necessary from natural flow and storage declines. Basing the minimum full supply on a wet year makes it likely that material injury was underestimated in 2005 and subsequent years, unless an adjustment is made at the outset to account for the effects of a greater than average amount of precipitation through the year.
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> * * *
>
> **6. The minimum full supply established in the May 2, 2005, Order is inadequate to predict the water needs of SWC on an annual basis.** There are two many unaccounted variables in the minimum full supply analysis to be continued in use as the baseline for predicting the likelihood of material injury.
>
> **7. In the absence of acceptable average budget analysis amounts from either party, the Department must modify the minimum full supply analysis as a method of establishing a baseline of predicted water need for projecting material injury.** . . . The approach adopted in the May 2, 2005 Order was a response to a call for curtailment which required a response. It was never intended to be the final word. Within this context it is time for the Department to move to further analysis to meet the goal of the minimum full supply but with the benefit of the extended information and analysis offered by the parties and available to its own staff.

R. Vol. 37 at 7091-92, 7097-98.

Justice Schroder expressly found that the Director "underestimated" the SWC's injury in the May 2, 2005 Amended Order. *Id.* at 7092. He further held that the "minimum full supply" was "inadequate to predict the water needs of SWC on an annual basis". R. Vol. 37 at 7097. The Director adopted these findings in his September 5, 2008 Final Order. R. Vol. 39 at 7382. In addition, this Court's decision on the Director's failure to account for multiple years of carry-over storage further demonstrates the errors in the May 2, 2005 Amended Order where the Director only accounted for one year of "reasonable carry-over storage"'. Accordingly, there is

no question that the Director's "injury amounts" in the May 2, 2005 Amended Order have not been adopted by the agency in this case and should not be affirmed by this Court on the basis of Pocatello's rehearing petition.

If Pocatello truly believed the "injury" amounts from the Director's May 2, 2005 Amended Order should have been affirmed on judicial review, Pocatello had the opportunity to appeal the Director's final order in this case. Pocatello did not file a timely appeal as required by Idaho's civil rules. *See* I.R.C.P. 84(b) (petition for judicial review must be filed within 28 days of agency action). Consequently, Pocatello's efforts to have this Court reverse the Director's Final Order now through a petition for rehearing should be rejected. *See* I.R.C.P. 84(n); *see also*, *Horne v. Idaho State University*, 138 Idaho 700 (2003); *Canyon County Bd. of Equalization v. Amalgamated Sugar Co., LLC*, 143 Idaho 58, 62 (2006).

CONCLUSION

IGWA and Pocatello have failed to present sufficient legal or factual reasons to justify reconsideration or clarification of the Court's July 24, 2009 *Order* in this case. Although IGWA and Pocatello both seek to restrict or prohibit future proceedings on remand before IDWR, their arguments are based upon assumptions and a misinterpretation of the status of the agency orders in this case. Since the Director has been instructed to issue a new final order consistent with Idaho law and this Court's decision, that process is not yet complete. Finally, Pocatello's requested revision of the Court's decision constitutes an untimely appeal. Since the injury determination in the May 2, 2005 Amended Order was not accepted, nor appealed by any party, the Court cannot reverse that decision now on rehearing.

In summary, the petitions for rehearing are simply untimely requests for relief or judicial review against IDWR and should be denied.

DATED this 6th day of November, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of November, 2009, I served true and correct copies of the *Surface Water Coalition's Response to IGWA's and City of Pocatello's Petitions for Rehearing* upon the following by the method indicated:

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