

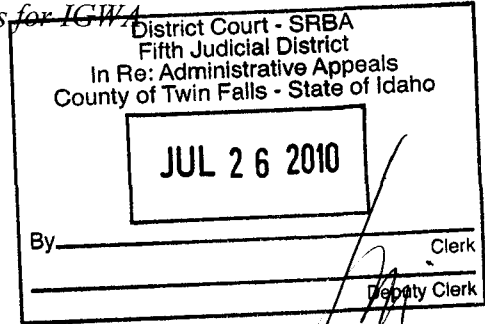
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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

CITY OF POCATELLO,

Petitioners,

vs.

GARY SPACKMAN, in his capacity as
Interim 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-2010-0000388

**IGWA AND POCATELLO'S MOTION
FOR CONSOLIDATION
(Final Methodology Order)**

COMES NOW, the Idaho Ground Water Appropriators (“IGWA”) and the City of Pocatello (“City” or “Pocatello”), by and through undersigned counsel and move for stay and consolidation of pending appeals for the reasons set forth below and pursuant to I.C. §67-5272(2).

IGWA and Pocatello have requested that the following matters all be stayed and consolidated for resolution with Gooding County Case No. 2008-000551:

1. *IGWA Petition for Judicial Review (Second Amended Final Order Re: Methodology June 23, 2010)*, Gooding County Case No. 2010-000383.
2. *Pocatello’s Notice of Appeal and Petition for Judicial Review of Agency Action (Final Methodology Order)*, Gooding County Case No. 2010-000388.
3. *SWC Notice of Appeal and Petition for Judicial Review of Agency Action (Final Methodology Order)*, Gooding County Case No. 2010-000384.
4. *IGWA Petition for Judicial Review (Final Order Re: April 2010 Forecast Supply dated June 24, 2010)*, Gooding County Case No. 2010-000382.
5. *Pocatello Notice of Appeal and Petition for Judicial Review of Agency Action (Final As-Applied Order)*, Gooding County Case No. 2010-000387.
6. *SWC Notice of Appeal and Petition for Judicial Review of Agency Action (2010 April Forecast Supply)*, Twin Falls County Case No. 2010-003403.¹

A Motion for consolidation has been or will be filed in all the above-listed cases.

PROCEDURAL HISTORY

The 551 Case involves an appeal of the Director’s final order in the Surface Water Coalition’s Delivery Call *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*

¹ IGWA and Pocatello refer to the June 24, 2010 order as the “Final As-Applied Order” while the Surface Water Coalition has referred to that same June 24, 2010 order as the “April 2010 Forecast Supply” Order. For ease of reference in this *Motion for Consolidation*, the June 24, 2010 Order will be referred to as the Final As-Applied Order.

Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company. The Honorable John M. Melanson issued a limited remand in that matter to the Department and stayed entry of a final decision in an *Order Staying Decision for Rehearing Pending Issuance of Revised Final Order* issued March 4, 2010 in the 551 Case. In that Order the Court ordered that it would hold in abeyance the pending petitions for rehearing until “the time periods for filing a motion for reconsideration and petition for judicial review of [the Final Methodology Order] have expired.” *Id.* at 3. As such, Judge Melanson has not issued a final order on the pending petition for judicial review in the 551 case and is waiting for any other petitions for judicial review to be filed in the 551 case for his consideration before issuing a final order.

In response to the remand in the 551 Case, the Director issued the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Final Methodology Order”) on June 23, 2010.² IWGA, Pocatello and the Surface Water Coalition have all appealed the Final Methodology Order in the 551 Case as part of the ongoing matter that was remanded to IDWR. However, the Gooding County Clerk assigned new case numbers to those July 21, 2010 petitions.³ Because those appeals are part of the ongoing appeal in the 551 Case handled for the past two years by the Honorable John Melanson, IGWA and Pocatello have requested in a separate motion that all appeals be renumbered and filed in Gooding County Case No. CV-2008-551.

² *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.*

³ IGWA’s *Petition for Judicial Review (Second Amended Final Order Re: Methodology dated June 23, 2010)* has been assigned Gooding County Case No. CV-2010-000383; Pocatello’s *Notice of Appeal and Petition for Judicial Review of Agency Action (Final Methodology Order)* has been assigned Gooding County Case No. CV-2010-000388; SWC’s *Notice of Appeal and Petition for Judicial Review of Agency Action (Final Methodology Order)* was assigned Gooding County Case No. CV-2010-000384.

On June 24, 2010, the Department issued a *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4); Order on Reconsideration* (“Final As-Applied Order”) in the same administrative matter as the *Final Methodology Order*.⁴ The *Final Methodology Order* and the *Final As-Applied Order* were the subject of separate, limited hearings held on May 24 and 25, 2010. On July 21, 2010, IGWA and Pocatello appealed the *Final As-Applied Order* in Gooding County.⁵

Both the *Final Methodology Order* and *Final As-Applied Order* are based on substantially the same agency record.

ARGUMENT

I. The Idaho APA Provides For Consolidation of Appeals from the Same Agency Action.

Pursuant to the Idaho Administrative Procedure Act (“Idaho APA”), when two or more petitions for judicial review of the same agency action have been filed, “the administrative judge in the judicial district in which the first petition was filed, after consultation with the affected judges, shall order consolidation of the judicial review of the petitions.” I.C. § 67-5272(2). “[S]eparate consideration of the petitions in different counties or by different district judges shall be stayed” until consolidation of the petitions is ordered. *Id.*

Pursuant to Idaho Code § 67-5272(2), the administrative judge of the Fifth Judicial District is statutorily charged with deciding whether to consolidate the appeals of the Director’s *Final Methodology Order* and *Final As-Applied Order* (collectively “Orders”) in the 551 case. Both Orders stem from the same agency action: the Department was ordered by the Court in the

⁴ *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.*

⁵ Gooding County Case Nos. CV-2010-000383 and CV-2010-000388 respectively.

551 Case to issue a new order explaining the agency's methodology for determining material injury to the parties' water rights, which the Department issued in the *Final Methodology Order*, and applied to the 2010 irrigation season in the *Final As-Applied Order*. Both Orders set forth IDWR's methods to be used to determine material injury to the water rights at issue in the 551 Case, and how that injury analysis will be used in administration. The *Final As-Applied Order* and *Final Methodology Order* appeals should be consolidated with the 551 Case as all these matters involve the same agency action.

II. The Court Has Authority Under The Idaho Appellate Rules And Rules Of Civil Procedure To Consolidate The Appeals Because The Matters Involve Similar If Not Identical Parties, Facts And Legal Issues.

The Court has the authority to consolidate the appeals of the *Final As-Applied Order* and *Final Methodology Order* with the pending 551 Case. Numerous Idaho Supreme Court decisions state that cases may be consolidated for appeal if similar issues and parties are involved, to wit, *Alpine Villa Dev. Co., Inc. v. Young*, 99 Idaho 851, 590 P.2d 578 (1979) ("four actions were consolidated on appeal due to the similarity of facts and identity of legal issues"); *Ada County v. Schemm*, 96 Idaho 396, 529 P.2d 1268 (1974) ("These two cases were consolidated upon appeal since both involve the same real property and present essentially the same question").

Idaho Appellate Rule 48 provides the Court with authority to consolidate appeals in the same manner and pursuant to the same standard as general civil matters⁶:

[In] cases where no provision is made by statute or by these rules, proceedings in the Supreme Court shall be in accordance with the practice usually followed in such or similar cases, or as may be prescribed by the Court or a Justice thereof.

⁶ Further, the Idaho Appellate Rules acknowledge the possibility of consolidated appeals. See I.A.R. 35(g) (in cases consolidated for purposes of appeal parties may join in a single brief and may adopt by reference any part of the brief of another party).

Therefore, because there is no Idaho Appellate Rule explaining the standard that courts should use to evaluate consolidation of appeals, courts should turn to Idaho Rule of Civil Procedure Section 42(a), which permits courts to consolidate matters that involve “a common question of law or fact.”

“Whenever the Court is of the opinion that consolidation will expedite matters and will minimize expense upon the public and the parties, an order of consolidation should be made.” *Harrison v. Taylor*, 115 Idaho 588, 597, 768 P.2d 1321, 1330 (1989). Consolidating the Petitions for Judicial Review of the *Final Methodology Order* and its application as found in the *Final As-Applied Order* into the 551 case in one appeal before Judge Melanson is the best use of judicial resources. Consolidation of this appeal with the 551 Case is appropriate because the appeals share common questions of fact, law and essentially identical parties⁷:

- As explained above, the two Orders involve the same agency action: a delivery call initiated by the Surface Water Coalition in 2005.
- The two Orders set forth the Departments’ methodology for determination of material injury to certain water rights of the Surface Water Coalition at issue in the 551 Case.
- Essentially the appeals raise identical legal issues.
- One of the numerous issues Petitioners have raised in the new appeals concerns the Department’s compliance with the Court’s limited remand, including whether the *Final Methodology Order* is supported by the original record in the 551 Case, as ordered by the Court.
- Finally, because a central issue in Petitioners’ new appeals concerns whether the *Final Methodology Order* has been applied in the *Final As-Applied Order* in an arbitrary and capricious manner, consolidation is required in this matter and is in the interests of judicial economy.

The Honorable John M. Melanson has handled the 551 Case for over two years, and continues to preside over the case after being appointed to the Court of Appeals. He is most familiar with the

⁷ The United States Bureau of Reclamation was an active participant in the delivery call hearing which resulted in the need for the Final Methodology Order, but was not an active participant in the Final As-Applied Order matter.

large agency record (consisting of over 7,500 pages, in addition to a few hundred exhibits) and with the issues raised by the parties. Judge Melanson's familiarity with the case is undisputed, and it would promote judicial economy to consolidate the two cases on his docket. Further, consolidating the pending *Petitions for Judicial Review* would relieve the Department from having to reproduce the large agency record and would relieve the parties of having to review the record again to make sure it contained all the relevant documents.

Finally, consolidation will more quickly allow conclusion of the appeals, and lead to a more expedited final decision and possibility for further appeal to the Supreme Court. Consolidation will also allow a reviewing court to see not only the *Final Methodology Order* but its actual application to a specific water year in the *Final As-Applied Order*, in which the Director predicted material injury to the senior users. No party will be prejudiced by consolidation, and indeed costs and complications from multiple appeals raising the same issues in multiple courts will be avoided.

WHEREFORE, IGWA and Pocatello respectfully request that the Court order consolidation before Judge Melanson because the appeals involve the same agency action, similar issues of fact and law, essentially the same parties, and a nearly continuous administrative record. The Court should stay the appeals pursuant to Idaho Code Section 67-5272(2) so that they can be consolidated with the appeals in the 551 Case by the administrative judge of the Fifth Judicial District.

Petitioners do not request argument on this Motion.

Dated this 23rd day of July, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of July, 2010, the above and foregoing document was served in the following manner.

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