

Randall C. Budge, ISB #1949
Candice M. McHugh, ISB #5908
RACINE OLSON NYE
BUDGE & BAILEY, CHARTERED
101 S. Capitol Blvd., Suite 208
Boise, Idaho 83702
Telephone: (208) 395-0011
rcb@racinelaw.net
cmm@racinelaw.net

*ATTORNEYS FOR IDAHO GROUND WATER
APPROPRIATORS*

Jerry R. Rigby, ISB #2470
Rigby, Andrus
25 N 2nd E
PO Box 250
Rexburg, Id 83440
Telephone: (208) 356-3633
jribgy@rex-law.com

*ATTORNEYS FOR FREMONT-MADISON
IRRIGATION DISTRICT*

A. Dean Tranmer ISB # 2793
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
(208) 234-6149
(208) 234-6297 (Fax)
dtranmer@pocatello.us

Sarah A. Klahn, ISB #7928
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, Colorado 80202
(303) 595-9441
(303) 825-5632 (Fax)
sarahk@white-jankowski.com

Attorneys for the City of Pocatello

**BEFORE DEPARTMENT OF WATER RESOURCES
STATE OF IDAHO**

IN THE MATTER OF THE
PETITION FOR DELIVERY CALL
OF A&B IRRIGATION DISTRICT
FOR THE DELIVERY OF GROUND
WATER AND FOR THE CREATION
OF A GROUND WATER
MANAGEMENT AREA

Docket No.: 37-03-11-1

**RESPONSE TO PETITION FOR
CLARIFICATION AND REQUEST
FOR DIRECTOR'S ORDER THAT
DEADLINE TO FILE
EXCEPTIONS HAS EXPIRED**

The Idaho Ground Water Appropriators ("IGWA"), City of Pocatello, and Fremont-Madison Irrigation District (collectively, the "Respondents") jointly respond to the *Petition for Clarification of the Hearing Officer's May 29, 2009 Order* ("Petition for Clarification") filed by A&B Irrigation District on June 12, 2009.

INTRODUCTION

For the reasons identified below, the Respondents ask that the Hearing Officer deny the Petition for Clarification and that the Director deem the matter is before him because the deadline for filing exceptions has expired.

A&B's Petition for Clarification is untimely and should be denied. A&B (or any party) was authorized to file *exceptions* to the Hearing Officer's Recommendations on June 12, 2009—not a further, delay-inducing, repackaging of A&B's arguments in its failed *Petition for Reconsideration of Hearing Officer's March 27, 2009 Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* ("Petition to Reconsider"). As the Hearing Officer is aware, on May 28, 2009, Director Tuthill announced that he was resigning effective June 30, 2009. It was Director Tuthill who issued the initial order of January 29, 2008, that was the subject of A&B's challenge in this contested case hearing. Because of Director Tuthill's familiarity with the issues involved in this case and as a matter of judicial and administrative economy, it would be more efficient to have Director Tuthill in the position to issue a final order. Delay only lessens the likelihood that he will be able to meet that challenge.

1. On March 27, 2009, the Hearing Officer filed his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* ("Opinion") affirming the Director's finding of no injury to A&B water right no. 36-2080 from the pumping of junior ground water rights.

2. On April 10, 2009, A&B Irrigation District filed its *Petition for Reconsideration of Hearing Officer's March 27, 2009 Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* ("Petition for Reconsideration").
3. On May 29, 2009, the Hearing Officer filed an order denying in part the Petition for Reconsideration.
4. The Hearing Officers' denial of A&B's Petition for Reconsideration required that exceptions be filed with the Director within 14 days after the denial of the petition for reconsideration (by Friday, June 12, 2009). This is in accordance with Rule 720.02.b of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01.770), which states, in relevant part:

Within fourteen (14) days of the service date of...(b) a denial of a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of [the] recommended order.... If no party files exceptions to the recommended order... the agency head or designee will issue a final order within fifty-six (56) days: ... ii. The service date of a denial of a petition for reconsideration by the hearing officer....

5. However, on June 12, 2009, A&B Irrigation District filed its Petition for Clarification, not exceptions. Further, the Petition for Clarification does not seek clarification of the Hearing Officer's order, but instead merely repeats arguments A&B already made in its Petition for Reconsideration. In substance, the Petition for Clarification is a petition for reconsideration under a different name. As such, the Petition for Clarification should be denied for failure to comply with the deadline for filing petitions for reconsideration.
6. Even if A&B's Petition for Clarification were not in substance a petition for reconsideration, the clear intent of Rule 770 of the Department's Rules of Procedure is that petitions for clarification be filed as part of, or an alternative to, a petition for reconsideration. Rule 770 states:

Any party or person affected by an order may petition to clarify any order, whether interlocutory, recommended, preliminary or final. Petitions for clarification from final orders do not suspend or toll the time to petition for reconsideration or appeal the order. A petition for clarification may be combined with a petition for reconsideration or stated in the alternative as a petition for clarification and/or reconsideration.

7. Were petitions for clarification not required to be combined with, or stated in the alternative to, petitions for reconsideration, A&B could file endless petitions for clarification, precluding any final order. Simply put, a Petition for Clarification cannot be reasonably understood to allow a party to delay the process and suspend other timelines set forth in the Department's rules. Accordingly, A&B's Petition

for Clarification should be denied for failure to comply with the deadline for filing petitions for clarification.

8. Thus, on June 12, 2009, A&B might have timely and properly filed exceptions to the Hearing Officer's Opinion and order denying A&B's Petition for Reconsideration. However, A&B failed to do so. A&B waived its right to file exceptions, as did the Respondents. Therefore, the matter is now pending before the Director to make a final decision and issue a final order.
9. Alternatively, if the Hearing Officer finds that the Petition for Clarification is timely, he can rule on the Petition today, because all active parties (i.e., the Respondents) do not intend to provide any further reply to the Petition for Clarification. A ruling should be made on the Petition for Clarification as expeditiously as possible.
10. Concurrent with the Hearing Officer's consideration of the requests in this response, the Respondents ask the Director to find that the timeframe for filing exceptions on the Opinion has passed and that the matter is deemed fully submitted to the Director.

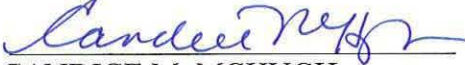
CONCLUSION

For the reasons identified herein, Respondents request:

- 1) That the Petition for Clarification be denied.
- 2) That the Director issue an ordering finding that the time period for filing exceptions to the Director has expired. Alternatively, if the Director finds that the time period has not passed for filing exceptions, then the Respondents request that an order shortening time be entered requiring the parties to file any exceptions to the Director no later than Thursday, June 25, 2009 so that the current Director can review the exceptions and issue a final order before his resignation become effective.

Submitted this 15th day of June 2009.


RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED


CANDICE M. MCHUGH
Attorneys for IGWA

WHITE & JANKOSKI, LLP


SARAH A. KLAHN
Attorneys for Pocatello

RIGBY, ANDRUS


JERRY R. RIGBY
Attorneys for Fremont-Madison Irr. Dist.