

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

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)
_____)

Gooding County Case
No. CV-2008-0000551

**ORDER SETTLING AGENCY
TRANSCRIPT AND RECORD**

The Idaho Department of Water Resources (“Department” or “IDWR”) served its *Notice of Lodging of Transcript and Record with Agency* (“Notice”) in this matter upon the parties on January 7, 2009, pursuant to I.R.C.P. 84(j). The *Notice* gave the parties fourteen (14) days from the date of the *Notice* to file any objections to the agency transcript and record. On January 20, 2009, the Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (“Ground Water Users”) timely filed *IGWA’s Objection to the Agency Record (IGWA’s Objection)*, which was joined in by the City of Pocatello. On January 21, 2009, members of the Surface Water Coalition filed *Coalition’s Objection to Agency Record*. On January 23, 2009, the U.S. Bureau of Reclamation filed *Petitioner United States’ Objection to Agency Record*. No objection was made to the transcript of the agency hearing.

Each of the objections raised by the parties is set forth below followed by the Department’s response identifying the location of the document in the record or stating the corrective action taken:

I.

IGWA'S OBJECTION TO THE AGENCY RECORD

MISSING DOCUMENTS

IGWA objected that the agency record as lodged with the Department for settlement did not include the documents listed below. The Department has determined that the documents should be included in the agency record. Those documents now included in the record are as follows:

1. Petition for Water Right Administration and Designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area dated January 14, 2005 (in addition to the letter dated January 14, 2005).
2. Notice of Application for Approval of Mitigation Plan from Karl Dreher.
3. Application for Approval of Mitigation Plan (AFR) dated February 8, 2005.
4. Idaho Power Company's Petition to Intervene (GWMA Administration) dated February 14, 2005.
5. Petition Requesting Hearing on Director's February 14, 2005 Order Denying Request to Designate Eastern Snake Plain Aquifer as a Ground Water Management Area dated March 7, 2005.
6. Order Continuing Hearing dated March 18, 2005.
7. Ground Water Districts' Motion for Continuance of Mitigation Plan Hearing dated March 18, 2005.
8. Surface Water Coalition's Motion to Dismiss the Ground Water Districts' Application dated March 21, 2005.
9. Reclamation's Protest dated March 21, 2005.

10. Notice of Protest dated March 21, 2005.
11. Surface Water Coalition's Protest Against Approval of Proposed Mitigation Plan dated March 21, 2005.
12. Protest and Request for Independent Hearing Officer dated March 21, 2005.
13. Reclamation's Motion to Dismiss Mitigation Application or in the Alternative to Request Hearing to be Reset dated March 21, 2005.
14. Motion to Dismiss Petition and Brief in Support Thereof dated March 21, 2005.
15. Ground Water Districts' Response to Motions to Dismiss dated April 4, 2005.
16. Water Resource Coalition's Amicus Brief: Pursuit of Delivery Call Against Nonparties to Prior Decrees dated April 13, 2005.
17. Protest, Objection, and Motion to Dismiss "Replacement Water Plans" dated May 5, 2005.
18. Water Resource Coalition Amended Application for Approval of a Mitigation Plan dated May 5, 2005.
19. IGWA Information Submittal Responding to May 6, 2005 Order Regarding IGWA Replacement Water Plan dated May 23, 2005.
20. Reclamation's Response to Petitions for Reconsideration dated May 31, 2005.
21. Notice of Status and Scheduling Conference dated June 3, 2005.
22. Objection to Motion to Consolidate Formal Proceedings on Amended Order of May 2, 2005 with Proceedings for Approval of Mitigation Plan dated June 27, 2005.
23. Reclamation's Opposition to IGWA's Motion to Consolidate dated June 29, 2005.

24. Idaho Power Company's Opposition to IGWA's Motion to Consolidate the Contested Matter on the Director's May 2, 2005 Amended Order with the Contested Matter on the Mitigation Plan Approval dated June 29, 2005.

25. IGWA's Reply Brief on the Mitigation Plan Delivery Call Consolidation Issue dated July 6, 2005.

26. IGWA's Initial Disclosures dated August 5, 2005.

27. Surface Water Coalition's Petition for Hearing on Director's July 22, 2005 Supplemental Order and Director's Amended Order of May 2, 2005 as Amended and Supplemented dated August 5, 2005.

28. Report on Expected Lay Witnesses dated August 18, 2005.

29. IGWA's Initial List of Issues of Fact and Law for Hearing dated August 18, 2005.

30. Surface Water Coalition's List of Issues of Fact and Law for Hearing on Director's May 2, 2005 Amended Order dated August 18, 2005.

31. State Agency Ground Water Users' Issues of Fact and Law Report of Basis for Witnesses' Testimony dated August 19, 2005.

32. Second Disclosure and Issues of Law and Fact Submitted by Minidoka Irrigation District dated August 19, 2005.

33. Report of General Basis of Witness Testimony for Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company dated August 19, 2005.

34. Pocatello's List of Issues of Fact and Law and Summary of Witness Testimony dated August 19, 2005.

35. Reclamation's List of Issues and General Basis of Lay Witness Testimony dated August 19, 2005.

36. Idaho Dairymen's Association List of Issues of Fact and Law dated August 19, 2005.
37. Report on the General Basis of Witnesses' Testimony dated August 19, 2005.
38. IGWA's, Pocatello's and State Agency Ground Water Users' Joint Written Request to Depose Idaho Department of Water Resources Employees dated August 23, 2005.
39. Surface Water Coalition's Objection to Proposed Deposition Schedule of IDWR Employees Submitted by IGWA Pocatello State Agency Ground Water Users dated August 24, 2005.
40. Joint Supplemental Disclosure of Expert Witnesses dated September 1, 2005.
41. Reclamation's Disclosure of Expert Witnesses dated September 1, 2005.
42. IGWA Supplemental Expert Witness Disclosure dated September 2, 2005.
43. City of Pocatello's Disclosure of Expert Witnesses dated September 2, 2005.
44. Order Regarding Protests and Motions to Dismiss Mitigation Plan, Appointment of Independent Hearing Officer, Motion to Consolidate Mitigation Plan Proceeding with Delivery call Proceeding, and Motion to Amend Mitigation Plan dated September 13, 2005.
45. IGWA and the City of Pocatello's Joint Request for Deposition of Additional IDWR Employees dated September 20, 2005.
46. Affidavit of Charles M. Brendecke in Support of IGWA's and Pocatello's Response to Motion for Partial Summary Judgment dated April 26, 2006.
47. Letter from Lynn Tominaga to Karl Dreher dated July 10, 2006.
48. Letter from Josephine Beeman to John Simpson dated March 28, 2007.
49. Ground Water Districts' Joint Replacement Water Plan for 2007 dated May 8, 2007.

50. Affidavit of Charles M. Brendecke in Support of Ground Water Districts' Joint Replacement Water Plan for 2007 dated May 8, 2007.

51. IGWA's Second Supplemental Expert Witness Disclosure dated August 10, 2007.

52. Order Re Pocatello's Motion to Compel dated September 14, 2007.

53. Affidavit of Norman Young.

54. Direct Testimony of Steven M. Thurin.

55. Direct Testimony of David B. Shaw.

56. Expert Testimony of Charles E. Brockway, P.E. Ph.D.

57. Direct Testimony of John Koreny.

58. Response to IGWA's Motion for Reconsideration of Order Denying IGWA's Motion to Participate dated November 1, 2007.

59. Rebuttal Report of Charles M. Brendecke dated November 7, 2007.

60. Rebuttal Testimony of Ronald Dean Carlson dated November 7, 2007.

61. Reclamation's Lay Witness and Exhibit List dated November 14, 2007.

62. IGWA's Lay Witness Disclosure dated November 14, 2007.

63. Joint Response to Stipulated Motion to Amend Schedule dated November 30, 2007.

64. Joint Motion to Compel Discovery Responses and Notice of Hearing dated December 14, 2007.

65. City of Pocatello's Supplemental Disclosures of Witness Testimony and Errata dated December 26, 2007.

66. Direct Testimony of Dan Shewmaker.

67. Joint Motion to Strike Prefiled Lay Testimony of Surface Water Coalition and Memorandum in Support dated January 11, 2008.

II.

IGWA'S OBJECTION TO THE AGENCY RECORD

DOCUMENTS THAT NEED TO BE CORRECTED IN THE AGENCY RECORD

Following is a list of documents identified by *IGWA's Objection* as requiring correction.

The Department's response to each objection is set out following the objection:

1. Agency Record Page 5369 should be corrected to be "Direct Testimony of Albert Lockwood dated January 4, 2008."

Response: The Department corrected the Table of Contents to correctly reflect the title of the document as stated in IGWA's objection. The document is located in the Agency Record at Page 6257.

2. Agency Record Page 5505 is a repeat of Agency Record Page 5215.

Response: The Department corrected the record by removing the redundancy.

3. Agency Record Page 5521 should be corrected to be "Direct Testimony of Dean Stevenson, Dated January 8, 2008."

Response: The Department corrected the document as requested in IGWA's objection. The document is located in the Agency Record on Page 6409.

4. Agency Record Page 5588 is a repeat of Agency Record Page 5349.

Response: The Department corrected the record by removing the redundancy.

5. Agency Record Page 5659 is a repeat of Agency Record Page 2580.

Response: The Department corrected the record by removing the redundancy.

III.

IGWA’S OBJECTION TO THE AGENCY RECORD

EXHIBITS THAT ARE NOT IN THE RECORD

IGWA objected that the agency record as lodged with the Department for settlement did not include the exhibits listed below. The Department has determined that the exhibits should be included in the agency record. The exhibits now included in the record are as follows:

Exhibits 1000 to 1023, 3034, 3036, 3046, 3062, 4154A, 4154B, 4155A, 4156A, 4168 to 4183, 4212 to 4213, 4300, 4402, 4500 to 4505, 4600 to 4603, 4611, 7000 to 7006, 8000 to 8044, 8046 to 8059, 8061 to 8070, 8072 to 8078, 8081 to 8119, 8121, 8125 to 8149, 8190, 8193 to 8194, 8200 to 8204, 8211 to 8231, 9000, 9100, 9103, 9200, 9300, 9400, 9500, 9600, 9700, and 9707 to 9713.

Exhibit 7018 was listed in IGWA’s objection, however, a review of the record reflects that this exhibit was withdrawn at hearing by Kathleen Carr, for the Bureau of Reclamation. The Department has not included Exhibit 7018 in the record.

IGWA objected that pages 5215 to 5223 of the record were not produced or reserved and requests clarification. The document entitled “Direct Testimony of Bob Esterbrook” was initially included in the record twice at page 5215 and 5505. The document is now located at page 6103 of the record.

IV.

CITY OF POCATELLO’S OBJECTION TO THE AGENCY RECORD

The City of Pocatello joined in IGWA’s objection to the Agency Record and identified the same missing pleadings and exhibits. The Department’s response to *IGWA’s Objection* resolves the City of Pocatello’s Objection to the Agency Record.

V.

COALITION'S OBJECTION TO THE AGENCY RECORD

MISSING DOCUMENTS

The Coalition objected that the agency record as lodged with the Department did not include the documents listed below. The Department has determined that the documents should be included in the agency record. The documents now included in the record are as follows:

1. Affidavit of Dan Temple, dated April 11, 2005.
2. Initial Disclosures of Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company, dated August 4, 2005
3. First Supplemental Initial Disclosure, dated August 19, 2005
4. Notice of Service of Milner Irrigation District, NSCC, & TFCC's Responses to IGWA/Pocatello First Set of Production Requests, dated August 24, 2005
5. Reclamation's Response to IGWA, Pocatello & State Agency GW User's Joint Written Request to Depose IDWR's Employees, dated August 25, 2005
6. Order Amending Scheduling Order of July 22, 2005, dated September 1, 2005
7. IDWR Response to Information Request from HDR Engineering, Inc., dated September 12, 2005
8. Affidavit of John S. Koreny, dated October 27, 2005
9. Agreement (AFRD#2, TFCC, MID, NSCC, Minidoka Irr. Dist., A&B and Burley Irr. Dist., IGWA & City of Pocatello), dated January 11, 2006
10. Reply Memo in Support of Motion in Limine, dated May 12, 2006
11. Interim Order Suspending Hearing Schedule, dated June 30, 2006
12. Mitigation Agreement, dated April 13, 2007

13. WMC Mitigation Agreement, dated April 13, 2007
14. Letter to the Director regarding IGWA's Amended Joint Replacement Plan for 2007, dated May 17, 2007
15. Letter from the Director Regarding WMC Mitigation Agreement, dated June 1, 2007
16. Notice of Status Conference (9/24/07 @ 10am), dated September 6, 2007
17. Affidavit of Dennis R. McGrane, dated September 12, 2007
18. Notice of Status Conference, dated September 19, 2007
19. SWC Notice of Filing of Expert Report, Testimony and Exhibit List, dated September 21, 2007
20. SWC's Supplemental Response to Pocatello's Renewed Motion to Compel, dated September 28, 2007
21. Notice of Service of Errata Sheets for SWC's Expert Report, dated October 2, 2007
22. Status Conference Minutes, dated December 12, 2007
23. Seventh Supplemental Order Amending Replacement Water Requirements, dated December 20, 2007
24. Reclamation's Response to Pocatello's and IGWA's Motion for Summary Judgment and Motion in Limine, dated December 21, 2007
25. Order Granting Request for Extension of Time, dated January 8, 2008

VI.

PETITIONER UNITED STATES' OBJECTION TO THE AGENCY RECORD

MISSING DOCUMENTS

The Petitioner United States' joined in *IGWA's Objection*, and also objected that the record should include the additional two documents and exhibits listed below. The Department has determined that the documents should be included in the agency record. Those documents now included in the record are as follows:

1. Prefiled Expert Testimony of Patrick C. McGrane, P.E.
2. Prefiled Expert Testimony of David A. Raff, Ph.D., P.E.
3. Exhibits 7000, 7001, 7002, 7003, 7004, 7005, and 7006.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that no objection having been made to the agency transcript in this matter, the transcript is deemed settled. Timely objections having been made to the agency record, the record is settled with the changes identified above.

IT IS FURTHER ORDERED that pursuant to Idaho Rule of Civil Procedure 84(j), the *Objections to Agency Record*, and this Order shall be included in the record on petition for judicial review. The Department shall provide the parties with replacement copies of the agency record on a DVD disk consistent with the modifications made in this order.

DATED this 5th day of February 2009.

A handwritten signature in black ink, appearing to read "David R. Tuthill, Jr.", written in a cursive style.

DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of February 2009, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>Tom Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 2598 Boise, ID 83701-2598 (208) 424-8873 tarkoosh@capitollawgroup.net</p>	<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>
<p>John A. Rosholt John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303-0485 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com</p>	<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>
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318-0248 (208) 878-2548 wkf@pmt.org</p>	<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>
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Idaho Department of Water Resources