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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 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-2008-0000551

**POCATELLO'S PETITION
FOR REHEARING**

The City of Pocatello (“Pocatello”), by and through undersigned counsel, pursuant to Idaho Appellate Rule 42, respectfully petition the Court for rehearing on the following issue raised by the Court’s July 24, 2009 “Order on Petition for Judicial Review”:

- 1. To clarify that because “replacement plans” are indistinguishable from mitigation plans, the hearing procedures followed in the future in this matter should be modified to include an opportunity for hearing on the replacement or mitigation water sought to be provided; however, a hearing on this topic cannot be held unless and until a hearing determines that the Department’s initial injury determination was correct.**

In the July 24, 2009 Order the Court found that the Director abused his discretion by ordering replacement plans to mitigate injury to the Surface Water Coalition’s (“SWC”) water rights rather than requiring replacement by means of a mitigation plan approved following Conjunctive Management Rule (“CMR”) 43 procedures. However, before a mitigation plan can be proposed, junior users must understand the nature and extent, if any, of the senior’s injury.

Under Rule 40 and 42 of the CMR, the Idaho Department of Water Resources makes an initial determination of injury based on allegations of injury made by the senior. Idaho law is inconsistent with the concept of requiring juniors to merely respond with a mitigation plan under Rule 43; such an approach forecloses the determination of whether the Department correctly found injury in the first place. Only after a determination of the propriety of the Department’s determination of injury is a hearing on a mitigation plan appropriate. In the SWC matter, a hearing has been held on the propriety of the injury determination; a complete hearing on the junior’s mitigation plan has not been held. It would be useful for the Court to clarify this interplay and timing between the hearing on the Department’s injury determination and a hearing on a junior’s mitigation plan.

Within fourteen days Pocatello will provide a brief in support of its Petition for Rehearing.

In addition, Pocatello endorses and joins the Petition for Rehearing filed by the Idaho Ground Water Appropriators, August 13, 2009.

Respectfully submitted this 14th day of August, 2009.

CITY OF POCATELLO ATTORNEY'S OFFICE

By 
A. Dean Tranmer

WHITE & JANKOWSKI

By 

SARAH A KLAHN

Attorneys for City of Pocatello

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2009, I caused to be served a true and correct copy of the foregoing **Pocatello's Petition for Rehearing for Case No. CV-2008-0000551** upon the following by the method indicated:



Sarah Klahn, White & Jankowski, LLP

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