

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-2008-551

**CITY OF POCATELLO'S OPENING BRIEF
IN SUPPORT OF PETITION FOR REHEARING**

On Appeal from the Idaho Department of Water Resources

Honorable John M. Melanson, Presiding

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

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

On July 24, 2009, the Court issued its Order on Petition for Judicial Review (“July 24, 2009 Order”) in this matter. The City of Pocatello (“Pocatello”) submitted its Petition for Rehearing on August 14, 2009. Pursuant to the Court’s August 25, 2009 scheduling order on rehearing, Pocatello hereby submits its Opening Brief in Support of Petition for Rehearing.

INTRODUCTION

In considering the Surface Water Coalition (“SWC”) challenge in this matter, this Court’s July 24, 2009 Order on Petition for Judicial Review decided that the Director committed an abuse of discretion by ordering a “replacement water plan” in lieu of certain procedures provided in the Conjunctive Management Rules (“CMR”):

This is not a situation where the replacement water ordered is consistent with the timing and in the quantities authorized under the decreed or licensed rights, leaving no room for disagreement. Rather this is [a] situation where the Director has extensively applied the provisions of the CMR for purposes of making a material injury analysis ultimately resulting in adjustments in the timing of delivery and in the quantities of water authorized under the decrees or licenses. The Court sees no distinction between the “replacement water plans” ordered in this case and a mitigation plan

. . . .

Once a mitigation plan has been proposed, the Director must hold a hearing as determined necessary

. . . .

. . . While the CMR are vague with respect to procedural framework components, the Idaho Supreme Court acknowledged such but nonetheless upheld the constitutionality of these rules in *AFRD#2*. As such, the Director is required to follow the procedures for conjunctive administration as outlined in the CMR when responding to a delivery call between surface and ground water users.

July 24, 2009 Order at 29, 30 (underline emphases added, italic emphases in original).

The Court should clarify its determination that the Director’s procedure violated due process 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.

When a mitigation plan filed under CMR 43 is contested, there are two appropriate categories of issues to be resolved at the hearing: what amount of water is necessary to avoid injury, and has the junior ground water user acquired an adequate supply for that purpose? The first question (what amount of water is required to avoid injury) is the very same issue determined at the trial conducted by Hearing Officer Schroeder January 18 through February 5, 2008 (“2008 Hearing”). The second question (have the junior ground water users acquired an adequate supply of water to avoid injury) has not been the subject of a contested case hearing, although a hearing of sorts was conducted by the Director in June of 2007 regarding Idaho Groundwater Appropriators, Inc.’s (referred to herein as “Ground Water Users”) proffered 2007 replacement supplies. *See* July 24, 2009 Order at 28 (discussion and citations to the record regarding this “limited hearing”).

The Court should clarify its July 24, 2009 Order to explain that the 2008 Hearing on appeal of the Director’s May 2, 2005 Amended Order and subsequent Interim Orders afforded all participants sufficient due process regarding the proper amount of water required to avoid injury to seniors. Although the hearing was conducted in the context of review of the Director’s injury finding, the question is the same as that raised in a contested CMR 43 matter. To satisfy due process, any future CMR 43 hearing regarding the Ground Water Users’ replacement supplies should be limited to the question of whether the Ground Water Users have obtained adequate replacement water to satisfy the amounts required by the July 24, 2009 Order in this matter. The SWC has a right to a hearing on the adequacy of the replacement supplies acquired by the Ground Water Users, but not to revisit the determination of injury made at the 2008 Hearing.

ARGUMENT

A. Under CMR 43, participants must first be afforded a hearing on the Director's determination of injury which has already occurred in this case.

As the Court noted in its July 24, 2009 Order, the Director properly declined the SWC's invitation to simply require delivery of their decreed amounts (which, in the words of the Court, would leave "no room for disagreement" regarding the amounts of replacement water required) and properly chose instead to make an analysis of material injury, and the concomitant replacement supplies required based on the CMR and applicable case law. Because "shut and fasten" administration of junior water rights, irrespective of actual need, is *not* the law in Idaho, any determination of injury made by the Idaho Department of Water Resources ("IDWR" or "Department") must involve a hearing to satisfy due process for juniors who may be required to provide replacement water.¹ By the same token, as this Court found in its July 24, 2009 Order, seniors must have the opportunity to challenge, upon a final determination of the Department's injury findings, the sufficiency of the juniors' proffered replacement water. However, in this case, a CMR 43 hearing regarding the Ground Water Users' replacement supplies does not constitute an opportunity for the SWC to revisit the injury determination already made through the 2008 Hearing.² That issue has already been determined, and under the doctrine of res

¹ As described in Ground Water Users' Opening Rehearing Brief, Idaho law also requires a hearing prior to deprivation of vested property rights. *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977). As such, the Court must also resolve whether the Director can order curtailment (or the provision of replacement water) prior to a hearing on the merits of the seniors' delivery call.

² Since 2005, the SWC has sought delivery of its water rights pursuant to the face of its licenses and/or decrees. In doing so, SWC has disregarded fundamental principles of Idaho water law by ignoring the requirements of beneficial use and of satisfying Idaho constitutional standards regarding public interest, waste, efficient diversion, reasonableness and maximum and optimum use. *See* Idaho Const. art. XV, §§ 1, 3, 5, 7. To date, virtually every court and deliberative body to consider this draconian view of Idaho water law—which effectively reduces a water right to a priority date without more—has rejected the SWC's arguments out of hand. *See, e.g., American Falls Reservoir Dist. No. 2 v. Idaho Dep't Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007) ("AFRD#2"); July 24, 2009 Order; Hearing Officer Schroeder's *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* of April 29, 2008; Director's *Final Order Regarding the Surface Water Coalition Delivery Call* of September 5, 2008; Director's *Order Denying Surface Water Coalition's Motion for Partial Summary Judgment* of May 31, 2006; Director's *Amended Order* of May 2, 2005.

judicata, which has been applied to administrative determinations in Idaho. As the Supreme Court found:

The doctrine of **res judicata** applies to **administrative** proceedings. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991); *J & J Contractors/O.T. Davis Constr. v. State by Idaho Transp. Bd.*, 118 Idaho 535, 797 P.2d 1383 (1990). In *Joyce v. Murphy Land & Irrigation Company*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922), this Court stated that the scope of the doctrine of **res judicata** was as follows:

We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.

The 'sameness' of a cause of action for purposes of application of the doctrine of **res judicata** is determined by examining the operative facts underlying the two lawsuits. *Houser v. Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 649 P.2d 1197 (1982).

Sagewillow, Inc. v. Idaho Dep't of Water Resources, 138 Idaho 831, 844, 70 P.3d 669, 682 (2003) (emphasis added).

In the context of the captioned matter, the Director properly made a preliminary determination of injury to the calling water right. It is the duty of the Director to administer water rights and curtail juniors only when necessary to supply the rights of a senior, and the Director is authorized to acquire additional information as needed to achieve administration. Idaho Code §§ 42-607, 42-606. Exercise of this administrative discretion is consistent with Idaho's constitutional principles of beneficial use without waste, reasonable use in the public interest, and maximum and optimum utilization. Idaho Const. art. XV, §§ 1, 3, 5, 7. To meet these constitutional requirements, water administration officials have an obligation to look to more than the paper decree in administering water rights, and must first determine need as a part

of injury.³ The 2008 Hearing afforded all parties the opportunity to contest the injury determination made by the Director; all that remains is the question of whether the juniors' replacement supplies are adequate.

B. Although as discussed *supra*, the intent of the Court's July 24, 2009 Order appears to be consistent with Idaho law, clarification of the July 24, 2009 Order regarding subsequent hearings under CMR 43 in the captioned matter is necessary to facilitate actions on remand is necessary.

Because the Director's preliminary determinations regarding the magnitude of injury (as contained in the May 2, 2005 Amended Order) were tested via the 2008 Hearing, the Court should clarify its July 24, 2009 Order to state that the only error on the part of the Director in this regard was his failure to hold a CMR 43 hearing regarding the adequacy of the juniors' proffered replacement water. As the Court found in its July 24, 2009 Order, there is no distinction between "replacement water plans" and mitigation plans. In *AFRD#2*, the Idaho Supreme Court found that by ordering that juniors provide "replacement water" to replace injurious ground water depletions, the Director's action in response to the delivery call was timely. *AFRD#2*, 143 Idaho at 875, 154 P.3d at 446. The *AFRD#2* Court went on to note that "[i]ncident to the [Director's May 2, 2005 Amended Order] the parties were entitled to a hearing." *Id.* In 2007, at the time the Court resolved the facial constitutional challenge to the CMR brought by the SWC, the timing and—importantly, for purposes of this petition on rehearing—the scope of the hearing were still in question.⁴

³ A senior appropriator, "regardless of the amount of their decreed right", is not entitled to "the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed." *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 435 n.5, 546 P.2d 382, 390 n.5 (1976); Idaho Code § 42-220. See also *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 395-96, 283 P. 522, 525-26 (1929) (an appropriator is entitled only to the amount necessary for beneficial use).

⁴ The *AFRD#2* Court noted: "Although both IGWA and American Falls exercised their right to a hearing and one was set, American Falls filed this action with the district court on August 15, 2005, before the hearing could be held. Subsequently, American Falls requested stays and continuances in the hearing schedule, one of which requested that the hearing be reset to no sooner than June 15, 2006. It appears that American Falls preferred to have its case heard

As this Court noted in the July 24, 2009 Order IDWR held a hearing from January 18 to February 5, 2008 regarding the Director's determination of injury. July 24, 2009 Order at 7. The Director's determinations in the May 2, 2005 Amended Order regarding the magnitude of injury to the SWC's water rights caused by junior ground water pumping were affirmed by the Hearing Officer and have not been disturbed at any point on appeal. *Id.* at 7-8. Just as this Court found no distinction between replacement water plans and mitigation plans, there is no difference in this case between the findings that resulted from the 2008 Hearing regarding magnitude of injury and the findings called for under CMR 43—the amount of replacement water necessary to avoid injury to seniors. The only thing that remains, therefore, at a CMR 43 hearing is the opportunity for the SWC test the adequacy of the juniors' proffered replacement supplies.

CONCLUSION

As described above, Idaho law does not require a junior to simply obtain replacement water in response to the Department's initial order in a delivery call. By the same token, once the amount of injury is determined, the senior may have a legitimate basis to raise issues with the adequacy of the replacement supply obtained by the juniors. In this matter, the parties have been accorded the opportunity for a hearing regarding the first inquiry: was the Director's determination regarding the magnitude and amount of the SWC injury due to ground water pumping correct? To satisfy CMR 43, the next step is to have a hearing on the adequacy of the mitigation supplies to be provided.

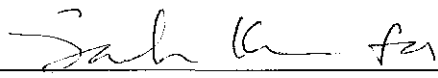
THEREFORE, Pocatello respectfully requests that the Court now clarify its holding on page 30 of this Court's July 24, 2009 Order on Petition for Judicial Review, to include the following clarifying language (underlined):

outside of the administrative process and went to great lengths, first to remove the case from the administrative process and second, to delay the hearing." *Id.*


While the CMR are vague with respect to procedural framework components, the Idaho Supreme Court acknowledged such but nonetheless upheld the constitutionality of these rules in *AFRD#2*. As such, the Director is required to follow the procedures for conjunctive administration as outlined in the CMR when responding to a delivery call between surface and ground water users. For procedural purposes, the hearing held in this matter met the requirements of the CMR and due process insofar as it provided the opportunity for a hearing on the Director's injury finding; prospectively, in order to provide all participants with due process and an opportunity to be heard on the issue of replacement water, IDWR may hold a hearing on the adequacy of the juniors' replacement supplies pursuant to the procedure outlined in the CMR to provide timely replacement water in the amounts specified in the Director's May 2, 2005 Amended Order.

Respectfully submitted this 8th day of October, 2009.

CITY OF POCA TELLO 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 8th day of September, 2009, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Opening Brief in Support of Petition for Rehearing** for Case No. CV-2008-0000551 upon the following by the method indicated:



 Sarah Klahn, White & Jankowski, LLP

Cynthia R. Eagle-Ervin, Deputy Clerk Gooding County District Court 624 Main St Gooding ID 83330	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile – 208-934-4408 = Phone – 208-934-4861 <input type="checkbox"/> Email
Courtesy Copy to: Judge John M. Melanson SRBA PO Box 2707 Twin Falls ID 83303-2707	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-736-2121 <input type="checkbox"/> Email
C. Thomas Arkoosh Capitol Law Group PO Box 32 Gooding ID 83330 tarkoosh@capitolawgroup.net	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-934-8873 <input checked="" type="checkbox"/> Email
John A. Rosholt John K. Simpson Travis L. Thompson Barker Rosholt & Simpson 113 Main Ave West Ste 303 PO Box 485 Twin Falls ID 83303-0485 jar@idahowaters.com tlt@idahowaters.com jks@idahowaters.com	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-735-2444 <input checked="" type="checkbox"/> Email
Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318 wkf@pmt.org	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-878-2548 <input checked="" type="checkbox"/> Email
Clive J. Strong Phillip J. Rassier Chris M. Bromley Deputy Attorneys General – IDWR PO Box 83720 Boise ID 83720-0098 clive.strong@ag.idaho.gov phil.rassier@idwr.idaho.gov chris.bromley@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile - 208-287-6700 <input checked="" type="checkbox"/> Email

<p>Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey 201 E Center St PO Box 1391 Pocatello ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-232-6109 <input checked="" type="checkbox"/> Email</p>
<p>Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 dtranmer@pocatello.us</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-234-6297 <input checked="" type="checkbox"/> Email</p>
<p>Kathleen Carr US Dept Interior, Office of Solicitor 960 Broadway Ste 400 PO Box 4169 Boise ID 83706 kmarioncarr@yahoo.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-334-1918 <input checked="" type="checkbox"/> Email</p>
<p>Ronald Tenpas David W. Gehlert Natural Resources Section Environment & Natural Resources Division US Dept of Justice 1961 Stout St 8th Floor Denver CO 80294 david.gehlert@usdoj.gov</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 303-844-1350 <input checked="" type="checkbox"/> Email</p>
<p>Michael Gilmore Attorney General's Office PO Box 83720 Boise ID 83720-0010 mike.gilmore@ag.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-334-2830 <input checked="" type="checkbox"/> Email</p>
<p>Michael C Creamer Jeffery C. Fereday Givens Pursley 601 W Bannock St Ste 200 PO Box 2720 Boise ID 83701-2720 mcc@givenspursley.com jefffereday@givenspursley.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-388-1300 <input checked="" type="checkbox"/> Email</p>
<p>Roger D. Ling Attorney at Law PO Box 623 Rupert ID 83350 rdl@idlawfirm.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-436-6804 <input checked="" type="checkbox"/> Email</p>