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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

UNITED STATES OF AMERICA,
BUREAU OF RECLAMATION,

Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.,

Cross-Petitioner,

vs.

Case No.: CV-2008-0000551

**GROUND WATER USERS' AND
POCATELLO'S RESPONSE TO SWC
OBJECTION TO ORDER STAYING
DECISION**

GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources,¹ 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

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District, acting for and on behalf of their members (collectively, the “Ground Water Users”) and the City of Pocatello (“Pocatello”), file this response to the Surface Water Coalition’s *Objection to Order Staying Decision*. The Surface Water Coalition requests that the Court “render a decision on the ‘discretion to require a hearing before administration’ issue and remand the decision of the Court to the Director so the Director can incorporate the Court’s determination into the Final Order that is due on March 31, 2010.” What the Surface Water Coalition is really asking is for the Court to decide whether the junior groundwater users get curtailed if the Director finds material injury in his March 31, 2010 Final Order prior to any hearing on that Final Order and prior to a hearing on the Ground Water Users’ Mitigation Plan that has been pending since November 9, 2009.

¹ Director David R. Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director. I.R.C.P. 25 (d) and (e).

The Court should defer any decision on this matter until the Director has issued his Final Order. It is not necessary at this time for the Court to give any further direction to the Director to act on the Surface Water Coalition's request and it would be more appropriate to decide this issue when the Court renders its final ruling on rehearing.

If the Court is inclined to act now on the Surface Water Coalition's Objection, although it seems unnecessary, the practical realities should be considered. As set forth in the Ground Water Users' *Opening Brief on Rehearing* on pages 8-13 and on pages 5 and 6 in their *Reply on Rehearing*, it is important that junior ground water users are afforded an opportunity for hearing before they are physically curtailed. This case shows the practical consequences of not doing so. The Ground Water Districts filed a Mitigation Plan on November 9, 2009 in response to a potential finding of material injury to a member or members of the Surface Water Coalition. The Mitigation Plan was advertised and the Surface Water Coalition and the Bureau of Reclamation protested the Mitigation Plan. However, no hearing was set or action taken by the Department until March 9, 2010, when a status and scheduling conference was held. A hearing on the Mitigation Plan is tentatively set for the last week in May with a second status and scheduling conference and settlement conference set for April 5, 2010.

The *Order Staying Decision on Petition for Rehearing Pending Issuance of Final Order* requires the Director to issue a Final Order determining material injury to reasonable in season demand and reasonable carry-over storage by March 31, 2010. The irrigation season begins on the Eastern Snake Plain on April 1. As such, if the Director finds material injury and an obligation to provide mitigation water or curtailment in his March 31, 2010 Final Order, the Ground Water Users may be left without the ability to irrigate their property because a hearing has not been held on the Final Order or their Mitigation Plan.

The Court's ruling in its *Order on Petitions for Rehearing* in the case of *Clear Springs v. Idaho Dep't of Water Resources*, Civil Case No. 2008-444, (Gooding County), found that neither Idaho Code §42-607 nor the Conjunctive Management Rules preclude the Director from providing a hearing after the material injury determination is made and prior to curtailment. (*Order* at 12.) It is unnecessary in this case to provide further instruction at this time, and it is proper for the Court to wait until the Director issues his March 31, 2010 Final Order to decide the pending issues on rehearing. Indeed, the Court has no obligation to decide the pending rehearing issues before the March 31, 2010. As such, the Ground Water Users and Pocatello request the Court deny the relief sought by the Objection filed by the Surface Water Coalition.

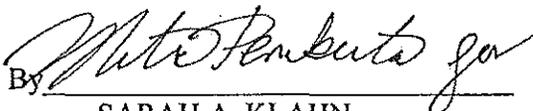
DATED this 17th day of March, 2010

By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of March, 2010, the above and foregoing document was served in the following manner.

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