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DEPARTMENT OF  
WATER RESOURCES

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

A&B IRRIGATION DISTRICT,

Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER  
RESEROUCES and GARY SPACKMAN  
in his official capacity as Interim Director of  
the Idaho Department of Water Resources,

Respondents,

and

THE IDAHO GROUND WATER  
APPROPRIATORS, INC., THE CITY OF  
POCATELLO, FREMONT MADISON  
IRRIGATION DISTRICT, ROBERT &  
SUE HUSKINSON, SUN-GLO  
INDUSTRIES, VAL SCHWENDIMAN  
FARMS, INC., DAVID SCHWENDIMAN  
FARMS, INC., DARRELL C. NEVILLE,  
SCOTT C. NEVILLE, and STAN D.  
NEVILLE,

Intervenor-Appellants.

Case No. CV 2009-647

CITY OF POCATELLO'S  
NOTICE OF APPEAL

Fee category: Exempt

\_\_\_\_\_  
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 GROUND )  
WATER MANAGEMENT AREA )

TO: THE ABOVE-NAMED RESPONDENTS, A&B IRRIGATION DISTRICT, GARY SPACKMAN, IN HIS CAPACITY AS INTERIM DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES, AND THE IDAHO DEPARTMENT OF WATER RESOURCES, IDAHO GROUND WATER APPROPRIATORS, AND THE PARTIES' ATTORNEYS AS IDENTIFIED ON THE CERTIFICATE OF SERVICE BELOW; AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, THE CITY OF POCA TELLO ("Appellant") appeals against the above named respondents to the Idaho Supreme Court from the District Court's final *Judgment I.R.C.P. 54(a)* ("*Judgment*"), entered in the above entitled action on November 23, 2010, the Honorable John M. Melanson presiding<sup>1</sup>. The *Judgment* incorporates the Court's *Memorandum Decision and Order on Petition for Judicial Review* entered on May 4, 2010, and the Court's subsequent *Memorandum Decision and Order on Petitions for Rehearing* entered on November 2, 2010.

2. The Appellant has a right to appeal to the Idaho Supreme Court, and the *Judgment* is appealable pursuant to Rule 11(f) of the Idaho Appellate Rules.

3. The Appellant intends to assert the following preliminary issues on appeal, provided this list of issues shall not prevent the Appellant from asserting other issues on appeal:

- a. Whether the Court erred in finding that, when A&B initiated its delivery call, the Director was limited to evaluating material injury solely by reference to the rates or quantities in the underlying decree, or whether the Director's broad discretion to administer water rights properly allowed him to evaluate injury by reference to other facts and information.
- b. Whether the Court erred in finding a senior appropriator is per se entitled to his decreed amount of water, and that junior appropriators carry the burden of proof in a delivery call proceeding to prove lack of injury to senior water rights.

<sup>1</sup> The Court also entered an *Order Amending Caption Nunc Pro Tunc* on November 23, 2010, finding, *inter alia*, that the City of Pocatello is a real party in interest in the above-captioned proceeding and that that City has interests that may be affected by its outcome.


- c. Whether the Court erred in concluding that the Director's finding that a senior right holder can be satisfied with less than his decreed quantity must be supported by "clear and convincing" evidence rather than a preponderance of the evidence.
    - d. Whether the Court erred in presuming that a partial decree is a measure of the water necessary for an appropriator's beneficial use, rather than a maximum quantity of water that an appropriator may put to beneficial use.
    - e. Whether the Court erred in failing to properly apply the Idaho Administrative Procedure Act to determine whether the Director's finding of no injury is supported by substantial evidence.
  4. No order has been entered sealing any portion of the record.
  5. The Appellant requests that all pleadings and attachments filed in this case plus all other documents in the clerk's record automatically included under Rule 28 of the Idaho Appellate Rules be made part of the record.
    - a. The Appellant requests that the transcript of the administrative proceedings held before the Idaho Department of Water Resources be made a part of the record on appeal. The Appellant currently possesses a copy of the transcript, as it was previously prepared in conjunction with the District Court's judicial review of this action. A copy of the transcript may be obtained from Idaho Department of Water Resources.
  6. The Appellant requests that all of the exhibits included in the agency record be copied and sent to the Supreme Court.
  7. I certify:
    - a. That a copy of this notice of appeal has been served on the reporter.
    - b. That the fee required for the preparation of the reporter's transcript was paid in conjunction with the District Court's judicial review of this action.
    - c. That the estimated fee for preparation of the clerk's record has been paid.
    - d. That Appellant is exempt from the filing fee pursuant to Idaho Code section 67-2301.
    - e. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

Respectfully submitted, this 29<sup>th</sup> day of December, 2010.

CITY OF POCATELLO ATTORNEY'S OFFICE  
Attorneys for the City of Pocatello

By   
A. Dean Tranmer

WHITE & JANKOWSKI, LLP  
Attorneys for the City of Pocatello

By   
Sarah A. Klahn

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29<sup>th</sup> day of December, 2010, a copy of **City of Pocatello's Notice of Appeal in Case No. CV 2009-647** was served by Federal Express to Minidoka County District Court and via U.S. mail, postage pre-paid and addressed to the following:



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Courtesy copy to court reporters:  
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