

DISTRICT COURT
GOODING CO. IDAHO
FILED

2010 JUL 21 PM 3:29

GOODING COUNTY CLERK

BY: 

DEPUTY

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ATTORNEYS FOR THE CITY OF POCATELLO

**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

Cross-Petitioner,

vs.

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

Case No.: CV-2010 0000387

NOTICE OF APPEAL AND PETITION FOR
JUDICIAL REVIEW OF AGENCY ACTION
(FINAL AS-APPLIED ORDER)

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).

FALLS RESERVOIR DISTRICT #2,
BURLEY IRRIGATION DISTRICT,
MILNER IRRIGATION DISTRICT,
MINIDOKA IRRIGATION DISTRICT,
NORTH SIDE CANAL COMPANY AND
TWIN FALLS CANAL COMPANY

COMES NOW, the Petitioner City of Pocatello (“City” or “Pocatello”), by and through its undersigned counsel, and hereby files this Petition seeking judicial review of a final agency action. Pursuant to I.R.C.P. 84(d)(5) Pocatello reserves the right to assert additional issues and/or clarify the issues for judicial review stated in the petition, or which are discovered later.

STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code §§67-5270, 67-5279, and 42-1701A(4) seeking judicial review of the *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4); Order on Reconsideration* (“Final As-Applied Order”) of the Director of the Idaho Department of Water Resources (“IDWR” or “Department”), *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* entered June 24, 2010.

2. The Final As-Applied Order was issued after the Court in Case No. 2010-551 remanded to the Department for the issuance of a final order determining material injury. See *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*, March 4, 2010, Case No. 2008-551 (5th Judicial District, Gooding County) (“March 4, 2010 Order”). The Court ordered that it would hold in abeyance the appeal in Case No. 2008-551 until “the time periods for filing a motion for reconsideration and petition for judicial review of

[the Final Methodology Order] ha[s] expired.” *Id.* at 3. Pocatello has appealed the Department’s Final Methodology Order issued June 23, 2010 in Case No. 2008-551.

3. A limited hearing in this matter was held before the Department on May 24 and 25, 2010.

4. Pocatello requests that the Court consolidate this Petition for Judicial Review of the Department’s Final As-Applied Order with the pending appeal in Case No. 2008-551. As explained in Ground Water Users’ and Pocatello’s Motion for Consolidation, filed contemporaneously, consolidation of Petitioner’s appeals with the ongoing appeal in Case No. 2008-551 is appropriate because the Department’s Final As-Applied Order involves the agency’s application of a new injury methodology announced in the Final Methodology Order, and both the Final Methodology Order and Final As-Applied Order violate Idaho Code § 67-5279.

JURISDICTION AND VENUE

5. This petition is authorized pursuant to Idaho Code §§67-5270 and 67-5279.

6. This Court has jurisdiction over this action pursuant to Idaho Code §§42-1701A(4), 67-5272 and 42-1401D.

7. Venue lies with this Court pursuant to Idaho Code §§42-1701A, 42-1401D and 67-5272. Certain water rights which are the subject of the agency action are delivered to water users located in Gooding County.

8. Petitioner Pocatello exhausted all administrative remedies prior to filing this Petition.

9. The Director's Final As-Applied Order of June 24, 2010 is a final agency action subject to judicial review pursuant to Idaho Code §67-5270(3).

PARTIES

10. Petitioner City of Pocatello is a municipal corporation of Idaho.

11. The Idaho Department of Water Resources is a state agency, with its main office located at 322 E. Front Street, Boise, Idaho. Gary Spackman is the Interim Director of the Idaho Department of Water Resources.

AGENCY RECORD

12. Judicial review is sought of the Director's Final As-Applied Order entered June 24, 2010, *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.*

13. The Court has in its possession a copy of the previously submitted agency record in Case No. 2008-551. The Department held a hearing on the Final As-Applied Order on May 24 and 25, 2010 and on May 24, 2010 on the Final Methodology Order. Both hearings were recorded and transcripts were created, both of which should be made a part of the agency record in this matter. In addition to the transcripts, all exhibits offered and any pleadings or filings made to the agency since the Court's March 4, 2010 order in Case No. 2008-551 should also be included as part of the agency record, including any documents produced, used or relied upon by the Director in issuing his Final Methodology Order or Final As-Applied Order. The person who may have a copy of such transcripts is the Director's Administrative Assistant, Idaho Department

of Water Resources, 322 E. Front Street, P.O. Box 83720, Boise, Idaho 83720-0098, Telephone: (208) 287-4803, Facsimile: (208) 287-6700, email: victoria.wigle@idwr.idaho.gov.

14. Petitioner Pocatello anticipates that it can reach an agreement regarding the agency record with the Department and the other parties, and will pay its necessary share of the fee for preparation of the record at such time.

15. Service of this Notice of Appeal and Petition for Judicial Review of Agency Action has been made on the Department at the time of the filing of this Petition with the Court.

ISSUES ON APPEAL

16. The following list is Pocatello's preliminary statement of issues on appeal:

- a. Whether the Director erred in determining that historic Surface Water Coalition diversions equate to the amount of water the senior is entitled to under the Rules for the Conjunctive Management of Surface and Ground Water Resources ("CM Rules), IDAPA 37.03.11?
- b. Whether the Director erred in requiring the Ground Water Users to mitigate or curtail for an amount of water not based on the extent of beneficial use required for irrigation under the senior users' water right, in violation of *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 876, 154 P.3d 433, 447 (2007)?
- c. Whether the Director erred in failing to incorporate the CM Rules in the Final As-Applied Order?
- d. Whether the Director's Final As-Applied Order is in compliance with this Court's limited remand, *Order on Petition for Judicial Review* issued July 24, 2009, and the prior affirmed decisions of the Department and the Hearing Officer in Case No. 2008-551?
- e. Whether the Director's Final As-Applied Order is supported by substantial evidence, in violation of Idaho law, or is an arbitrary and capricious decision, made upon unlawful procedure, or otherwise in violation of Idaho Code § 67-5279?

- f. Whether the Director's Final Methodology Order was applied in an arbitrary and capricious manner in the Final As-Applied Order?
- g. Whether the Director's Final As-Applied Order is consistent with the agency record?
- h. Whether the Director's decision to unreasonably limit the scope of the May 24 and 25, 2010 hearing in this matter violated the parties' due process rights?
- i. Whether additional proceedings before the agency are required pursuant to Idaho Code § 67-5276?
- j. Whether the Department erred in denying Pocatello's request to appoint an independent hearing officer?
- k. Whether the Director erred in failing to issue a Final As-Applied Order in compliance with Idaho Code § 67-5248?

REASSIGNMENT TO SRBA COURT


17. Pursuant to an *Administrative Order* issued by the Idaho Supreme Court December 9, 2009, effective July 1, 2010, "all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District." The Snake River Basin Adjudication District Court ("SRBA Court") has developed procedures which instruct appealing parties to file a petition for judicial review in a county of proper venue pursuant to Idaho Code § 67-5272(1) and serve a courtesy copy of the petition with the SRBA Court. See *Administrative Order Adopting Procedures for the Implementation of Idaho Supreme Court Administrative Order* dated December 9, 2009, available at <http://www.srba.state.id.us/adminorders.pdf>.

18. The SRBA Court instructs the clerk of the district court in which the petition is filed to "issue, file and concurrently serve upon [the Department and parties] a *Notice of Reassignment*", and instructs that following the issuance of the Notice of Reassignment all

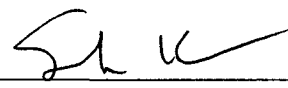
filings shall be filed with the SRBA Court. *Id.* at 2. Pocatello has attached the SRBA Court's form Notice of Reassignment for the convenience of the Gooding County Clerk and requests that this matter be reassigned accordingly.

Dated this 20th day of July, 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 20th day of July, 2010, I caused to be served a true and correct copy of the foregoing **Notice of Appeal and Petition for Judicial Review of Agency Action [Final As-Applied Order]** in Case No. CV-2010-_____ upon the following by the method indicated:



 Sarah Klahn, White & Jankowski, LLP

Gary Spackman, Interim Director State of Idaho, Dept of Water Resources 322 E Front St PO Box 83720 Boise ID 83720-0098 <u>Deborah.Gibson@idwr.idaho.gov</u>	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile 208-287-6700, Phone 208-287-4942 <input checked="" type="checkbox"/> Email
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 Idaho Court of Appeals PO Box 83720 Boise ID 83720-0101	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-334-2616 <input type="checkbox"/> Email
Courtesy Copy to: Judge Eric J. Wildman Presiding Judge Snake River Basin Adjudication 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 208-334-2616 <input type="checkbox"/> Email
C. Thomas Arkoosh Capitol Law Group PO Box 32 Gooding ID 83330 <u>tarkoosh@capitolawgroup.net</u>	<input checked="" 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

<p>John A. Rosholt John K. Simpson Travis L. Thompson Paul L. Arrington 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 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 208-735-2444 <input checked="" type="checkbox"/> Email</p>
<p>Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318 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 208-878-2548 <input checked="" type="checkbox"/> Email</p>
<p>Garrick L. Baxter Chris M. Bromley Deputy Attorneys General – IDWR PO Box 83720 Boise ID 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov</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 208-287-6700 <input checked="" type="checkbox"/> Email</p>
<p>Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey 201 E Center St PO Box 1391 Pocatello ID 83204-1391 rbc@racinelaw.net cmm@racinelaw.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 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 checked="" 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 960 Broadway Ste 400 Boise ID 83706 kmarioncarr@yahoo.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 208-334-1907 <input checked="" type="checkbox"/> Email</p>
<p>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 checked="" 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>

Michael Gilmore Attorney General's Office PO Box 83720 Boise ID 83720-0010 mike.gilmore@ag.idaho.gov	<input checked="" 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
Michael C Creamer Jeffery C. Fereday Givens Pursley 601 W Bannock St Ste 200 PO Box 2720 Boise ID 83701-2720 mcc@givenspursley.com jeffereday@givenspursley.com	<input checked="" 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
Roger D. Ling Attorney at Law PO Box 623 Rupert ID 83350 rld@idlawfirm.com	<input checked="" 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
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise ID 83706-1234 mhoward@pn.usbr.gov	<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
William A. Parsons Parsons Smith & Stone LLP PO Box 910 Burley ID 83318 wparsons@pmt.org	<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
Lyle Swank IDWR – Eastern Region 900 N Skyline Dr Idaho Falls ID 83402-6105 lyle.swank@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 <input checked="" type="checkbox"/> Email
Allen Merritt Cindy Yenter IDWR – Southern Region 1341 Filmore St Ste 200 Twin Falls ID 83301-3033 allen.merritt@idwr.idaho.gov cindy.yenter@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 <input checked="" type="checkbox"/> Email
Courtesy copy to: Snake River Basin Adjudication District Court of the Fifth Judicial District PO Box 2707 Twin Falls ID 83303-2707	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF _____.

RE: PETITIONS FOR JUDICIAL
REVIEW OR ACTIONS FOR
DECLARATORY RELIEF OF
DECISIONS FROM THE IDAHO
DEPARTMENT OF WATER
RESOURCES

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)
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CASE NO. _____
NOTICE OF REASSIGNMENT

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, declares that all petitions for judicial review made pursuant to I.C. § 42-1701A of any decision from the Department of Water Resources be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District, and

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, vests in the Snake River Basin Adjudication District Court the authority to adopt procedural rules necessary to implement said Order, and

WHEREAS on July 1, 2010, the Snake River Basin Adjudication District Court issued an Administrative Order regarding the Rule of Procedure Governing Petitions for Judicial Review or Actions for Declaratory Relief of Decisions from the Idaho Department of Water Resources.

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

1. The above-matter is hereby assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District for disposition and further proceedings.
2. All further documents filed or otherwise submitted in this matter, and all further filing fees filed or otherwise submitted in this matter, shall be filed with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho

83303-2707, provided that checks representing further filing fees shall be made payable to the county where the original petition for judicial review or action for declaratory judgment was filed.

DATED this ___ day of _____, 2010.

CLERK OF THE DISTRICT COURT

By: _____
Deputy Clerk