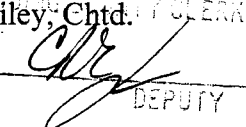


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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

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

Case No.: CV-W-2010-000383

**IGWA AND POCATELLO'S MOTION
FOR CONSOLIDATION**

Cross-Petitioner,

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

Petitioners Idaho Ground Water Appropriators (“IGWA”) and the City of Pocatello (“City” or “Pocatello”), by and through undersigned counsel (collectively, “Petitioners”) move for consolidation of two matters pending on judicial review. For the reasons set forth below, Petitioners move the Court to consolidate judicial review of the ongoing appeal in Gooding County Case No. CV-2008-551 (the “551 Case”) with the contemporaneously filed appeals¹ of *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4); Order on Reconsideration* the Director of the Idaho Department of Water Resources dated June 24, 2010 (“*Final As-Applied Order*”).

The 551 Case involves an appeal of the Director’s final order in the Surface Water Coalition’s Delivery Call *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.*² The newly filed appeal involves the application of the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* in the *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4); Order on Reconsideration* in the 551 case for administration for the 2010 irrigation season.

¹ The City and IGWA have both filed *Petitions for Judicial Review* of the *Final As Applied Order*.

² The seven irrigation entities listed in the matter are known as the Surface Water Coalition.

PROCEDURAL HISTORY

On June 23, 2010, the Department issued the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Final Methodology Order”) in *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*. The *Final Methodology Order* was issued in response to a remand by the Court in the 551 Case. See *Order Staying Decision for Rehearing Pending Issuance of Revised Final Order* issued March 4, 2010, in the 551 Case. The City and IGWA have appealed the *Final Methodology Order* in the 551 Case as part of the ongoing matter that was remanded to IDWR.

On June 24, 2010, the Department issued a *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4); Order on Reconsideration* (“Final As-Applied Order”) in the same administrative matter as *the Final Methodology Order*.³ The *Final Methodology Order* and the *Final As-Applied Order* were the subject of separate, but limited hearings held on May 24 and 25, 2010.

The *Final As-Applied Order* is the Department’s application of its *Final Methodology Order* in the administrative proceeding for the 2010 irrigation season. Both the *Final Methodology Order* and *Final As-Applied Order* are based on substantially the same agency

³ *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*.

record. The City and IGWA have appealed both the *Final Methodology Order* and the *Final As-Applied Order* in separate petitions for judicial review, filed concurrently with this Motion with the Gooding County District Court.⁴

ARGUMENT

I. The Idaho APA Provides For Consolidation Of Appeals From The Same Agency Action.

Pursuant to the Idaho Administrative Procedure Act (“Idaho APA”), when two or more petitions for judicial review of the same agency action have been filed, “the administrative judge in the judicial district in which the first petition was filed, after consultation with the affected judges, shall order consolidation of the judicial review of the petitions.” I.C. § 67-5272(2). “[S]eparate consideration of the petitions in different counties or by different district judges shall be stayed” until consolidation of the petitions is ordered. *Id.*

Pursuant to Idaho Code § 67-5272(2), the administrative judge of the Fifth Judicial District is statutorily charged with deciding whether to consolidate Petitioners’ appeals of the Director’s *Final Methodology Order* and *Final As-Applied Order* (collectively “Orders”). Both Orders stem from the same agency action: the Department was ordered by the Court in the 551 Case to issue a new order explaining the agency’s methodology for determining material injury to the parties’ water rights, which the Department issued in the *Final Methodology Order*, and applied to the 2010 irrigation season in the *Final As-Applied Order*. Both Orders set forth IDWR’s methods to be used to determine material injury to the water rights at issue in the 551 Case, and how that injury analysis will be used in administration. The *Final As-Applied Order*

⁴ The Director’s *Final Methodology Order* and *Final As Applied Order* are final agency actions subject to judicial review pursuant to Idaho Code §67-5270(3).

appeals should be consolidated with the 551 Case as both matters involve the same agency action.

II. The Court Has Authority Under The Idaho Appellate Rules And Rules Of Civil Procedure To Consolidate The Appeals Because The Matters Involve Similar If Not Identical Parties, Facts And Legal Issues.

The Court has the authority to consolidate Petitioners' appeals of the *Final As-Applied Order* with the pending 551 Case and the appeal therein of the Department's *Final Methodology Order*. Numerous Idaho Supreme Court decisions state that cases may be consolidated for appeal if similar issues and parties are involved, to wit, *Alpine Villa Dev. Co., Inc. v. Young*, 99 Idaho 851, 590 P.2d 578 (1979) ("four actions were consolidated on appeal due to the similarity of facts and identity of legal issues"); *Ada County v. Schemm*, 96 Idaho 396, 529 P.2d 1268 (1974) ("These two cases were consolidated upon appeal since both involve the same real property and present essentially the same question").

Idaho Appellate Rule 48 provides the Court with authority to consolidate appeals in the same manner and pursuant to the same standard as general civil matters⁵:

[In] cases where no provision is made by statute or by these rules, proceedings in the Supreme Court shall be in accordance with the practice usually followed in such or similar cases, or as may be prescribed by the Court or a Justice thereof."

Therefore, because there is no Idaho Appellate Rule explaining the standard that courts should use to evaluate consolidation of appeals, courts should turn to Idaho Rule of Civil Procedure Section 42(a), which permits courts to consolidate matters that involve "a common question of law or fact."

⁵ Further, the Idaho Appellate Rules acknowledge the possibility of consolidated appeals. See I.A.R. 35(g) (in cases consolidated for purposes of appeal parties may join in a single brief and may adopt by reference any part of the brief of another party).

“Whenever the Court is of the opinion that consolidation will expedite matters and will minimize expense upon the public and the parties, an order of consolidation should be made.” *Harrison v. Taylor*, 115 Idaho 588, 597, 768 P.2d 1321, 1330 (1989). Consolidating the Petitions for Judicial Review of the *Final Methodology Order* and its application as found in the *Final As-Applied Order* into one appeal before Judge Melanson for judicial review is the best use of judicial resources. Consolidation of this appeal with the 551 Case is appropriate because the two appeals share common questions of fact, law and essentially identical parties⁶:

- As explained above, the two Orders involve the same agency action: a delivery call initiated by the Surface Water Coalition in 2005.
- The two Orders set forth the Departments’ methodology for determination of material injury to certain water rights of the Surface Water Coalition at issue in the 551 Case.
- Essentially the two appeals raise identical legal issues.
- One of the numerous issues Petitioners have raised in the new appeal concerns the Department’s compliance with the Court’s limited remand, including whether the *Final Methodology Order* is supported by the original record in the 551 Case, as ordered by the Court.
- Finally, because a central issue in Petitioner’s new appeals concerns whether the *Final Methodology Order* has been applied in the *Final As-Applied Order* in an arbitrary and capricious manner, consolidation is required in this matter and is in the interests of judicial economy.

The Honorable John M. Melanson has handled the 551 Case for over two years, and continues to preside over the case after being appointed to the Court of Appeals. He is most familiar with the large agency record (consisting of over 7,500 pages, in addition to a few hundred exhibits) and with the issues raised by the parties. Judge Melanson’s familiarity with the case is undisputed, and it would promote judicial economy to consolidate the two cases on his docket. Further, consolidating the pending *Petitions for Judicial Review* would relieve the Department from

⁶ The United States Bureau of Reclamation was an active participant in the delivery call hearing which resulted in the need for the Methodology Order, but was not an active participant in the As-Applied Order matter.

having to reproduce the large agency record and would relieve the parties of having to review the record again to make sure it contained all the relevant documents.

Finally, consolidation will more quickly allow conclusion of both appeals, and lead to a more expedited final decision and possibility for further appeal to the Supreme Court. Consolidation will also allow a reviewing court to see not only the *Final Methodology Order* but its actual application to a specific water year in the *Final As-Applied Order*, in which the Director found material injury to the senior users. No party will be prejudiced by consolidation, and indeed costs and complications from multiple appeals raising the same issues in multiple courts will be avoided.

WHEREFORE, Petitioners respectfully request that the Court order consolidation before Judge Melanson because the appeals involve the same agency action, similar issues of fact and law, essentially the same parties, and a nearly continuous administrative record. The Court should stay IGWA and the City of Pocatello's appeals of the *Final As-Applied Order* pursuant to Idaho Code Section 67-5272(2) so that it can be consolidated with the appeals in the 551 Case by the administrative judge of the Fifth Judicial District.

Petitioners do not request argument on this Motion.

Dated this 20th day of July, 2010.

CITY OF POCATELLO ATTORNEY'S OFFICE


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of July, 2010, the above and foregoing document was served in the following manner.

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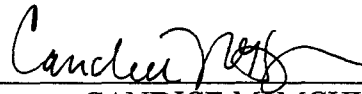
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