LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

GARRICK L. BAXTER, ISB NO. 6301
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Attorneys for Respondents

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 RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources, Respondent.	Case No. CV-2011-512 **SECOND AFFIDAVIT OF CHRIS M. BROMLEY**
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 A GROUND WATER MANAGEMENT AREA	

STATE OF IDAHO)
) ss.
County of Ada)

CHRIS M. BROMLEY, being first duly sworn upon oath, deposes and says:

COPY

1. I am one of the Deputy Attorneys General of record for the Respondents, Idaho Department of Water Resources and Gary Spackman, Interim Director. I am over the age of 18 and state the following based upon my own personal knowledge.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the June 1, 2011 *Order Granting Petition for Reconsideration to Allow Time for Further Review.*

3. Attached hereto as **Exhibit 2** is a true and correct copy of the June 9, 2011 *Amended Order Granting Petition for Reconsideration to Allow Time for Further Review.*

4. Attached hereto as **Exhibit 3** is a true and correct copy of the July 5, 2011 letter from Gary Spackman, Interim Director, to Travis L. Thompson, counsel for the A&B Irrigation District.

5. Attached hereto as **Exhibit 4** is a true and correct copy of July 1, 2011 letter from Mr. Thompson to Interim Director Spackman.

Further your Affiant sayeth naught.

DATED this 1st day of August 2011.

CHRIS M. BROMLEY
Deputy Attorney General
Idaho Department of Water Resources

SUBSCRIBED AND SWORN TO BEFORE ME this 1st day of August 2011.

(s e a l)

DEBORAH J. GIBSON NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC for Idaho
Residing at: Parma, Idaho
My Commission Expires: 8/10/2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served one (1) true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 1st day of August 2011.

Document(s) served: AFFIDAVIT OF CHRIS M. BROMLEY

Person(s) served:

John K. Simpson Travis L. Thompson Barker Rosholt & Simpson 113 Main Ave W., Ste. 303 P.O. Box 485 Twin Falls, ID 83303-0485	Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey P.O. Box 1391 201 E. Center St. Pocatello, ID 83204-1391	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth St., Ste. 500 Denver, CO 80202
Jerry Rigby Rigby Andrus 25 North Second East P.O. Box 250 Rexburg, ID 83440	A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201	

CHRIS M. BROMLEY
Deputy Attorney General
Idaho Department of Water Resources

EXHIBIT 1

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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 A GROUND WATER MANAGEMENT AREA	)))))))	CM-DC-2011-001 **ORDER GRANTING PETITION FOR RECONSIDERATION TO ALLOW TIME FOR FURTHER REVIEW**

On April 27, 2011, the Director of the Idaho Department of Water Resources ("Director" or "Department") issued a *Final Order on Remand Regarding A&B Irrigation District's Delivery Call* ("Final Order on Remand"). The Final Order on Remand was served on April 27, 2011.

On May 11, 2011, A&B Irrigation District ("A&B") filed a timely *Petition for Reconsideration of Interim Director's April 27, 2011 Final Order on Remand/Request for Hearing* ("Petition").

Department Rule of Procedure 740.02.a provides that any party may file a petition for reconsideration within fourteen days of the service date of a final order. IDAPA 37.01.01.740.02.a. *See also* Idaho Code § 67-5246(4). The rule further provides, "The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law." *Id.*

A&B filed its Petition on May 11, 2011, and it will be deemed denied by operation of law if not acted upon by the Department by June 1, 2011. Because the Department requires additional time to review the merits of the Petition, the Director shall grant A&B's Petition for the sole purpose of allowing additional time for the Department to respond to the Petition. An order responding to the merits of the Petition will issue no later than June 9, 2011.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Petition is GRANTED for the sole purpose of allowing additional time for the Department to

respond to the Petition. An order responding to the merits of the Petition shall issue no later than June 9, 2011.

Dated this 1st day of June, 2011.

GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following attached document on the persons listed below by mailing in the United States mail, first class with the correct postage affixed thereto, as well as by e-mail to those persons listed with e-mail addresses, on this 1st day of June, 2011.

John K. Simpson Travis L. Thompson Barker Rosholt & Simpson 113 Main Ave W., Ste. 303 P.O. Box 485 Twin Falls, ID 83303-0485 jks@idahowaters.com tlt@idahowaters.com	Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey P.O. Box 1391 201 E. Center St. Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com
Jerry Rigby Rigby Andrus 25 North Second East P.O. Box 250 Rexburg, ID 83440 jrigby@rex-law.com	A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us	

Deborah J. Gibson

Deborah Gibson
Idaho Department of Water Resources

EXHIBIT 2

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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 A GROUND WATER MANAGEMENT AREA	)	CM-DC-2011-001
	)	**AMENDED ORDER GRANTING PETITION FOR RECONSIDERATION TO ALLOW TIME FOR FURTHER REVIEW**

On April 27, 2011, the Director of the Idaho Department of Water Resources ("Director" or "Department") issued a *Final Order on Remand Regarding A&B Irrigation District's Delivery Call* ("Final Order on Remand"). The Final Order on Remand was served on April 27, 2011.

On May 11, 2011, A&B Irrigation District ("A&B") filed a timely *Petition for Reconsideration of Interim Director's April 27, 2011 Final Order on Remand/Request for Hearing* ("Petition").

Department Rule of Procedure 740.02.a provides that any party may file a petition for reconsideration within fourteen days of the service date of a final order. IDAPA 37.01.01.740.02.a. *See also* Idaho Code § 67-5246(4). The rule further provides, "The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law." *Id.*

A&B filed its Petition on May 11, 2011, and it will be deemed denied by operation of law if not acted upon by the Department by June 1, 2011. Because the Department requires additional time to review the merits of the Petition, the Director shall grant A&B's Petition for the sole purpose of allowing additional time for the Department to respond to the Petition. An order responding to the merits of the Petition will issue no later than June 30, 2011.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Petition is GRANTED for the sole purpose of allowing additional time for the Department to

respond to the Petition. An order responding to the merits of the Petition shall issue no later than June 30, 2011.

Dated this 9th day of June, 2011.

GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following attached document on the persons listed below by mailing in the United States mail, first class with the correct postage affixed thereto, as well as by e-mail to those persons listed with e-mail addresses, on this 9th day of June, 2011.

John K. Simpson Travis L. Thompson Barker Rosholt & Simpson 113 Main Ave W., Ste. 303 P.O. Box 485 Twin Falls, ID 83303-0485 jks@idahowaters.com tlt@idahowaters.com	Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey P.O. Box 1391 201 E. Center St. Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com
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Deborah J. Gibson

Deborah Gibson
Idaho Department of Water Resources

EXHIBIT 3

State of Idaho
DEPARTMENT OF WATER RESOURCES
322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor
GARY SPACKMAN
Interim Director

July 5, 2011

Travis L. Thompson
Barker Rosholt & Simpson
233 2nd St N Ste D
PO Box 485
Twin Falls, Idaho 83303-0485

Dear Mr. Thompson:

I recently received your July 1, 2011 letter regarding *In the Matter of the Petition for Delivery Call of A&B.*

As you are aware, your client's *Petition for Reconsideration* raised numerous technical issues with the *Final Order on Remand* that deserved the Department's full attention and thorough analysis. This required a detailed investigation of facts from the large and complex administrative record.

When it became evident that the technically complex issues raised by your client could not be addressed in twenty-one days, I issued an order granting the *Petition for Reconsideration* "for the sole purpose of allowing additional time for the Department to respond to the Petition. An order responding to the merits of the Petition shall issue no later than June 9, 2011."

When it became evident that the Department's technical review and written response to the *Petition for Reconsideration* could not be issued by June 9, 2011, I extended the deadline to June 30, 2011. On June 30, 2011, the Department issued an *Order Regarding Petition for Reconsideration* and *Amended Final Order on Remand.* The *Amended Final Order on Remand* incorporated the findings and conclusions from the *Order Regarding Petition for Reconsideration* and superseded the *Final Order on Remand.*

As the finder of fact, I believed your client deserved the Department's full attention and detailed investigation of the issues raised in its *Petition for Reconsideration*, and hope your client will appreciate that the Department acted as expeditiously as possible.

Sincerely,

Gary Spackman
Interim Director

cc: Counsel of Record

EXHIBIT 4

John A. Rosholt
Albert P. Barker
John K. Simpson
Travis L. Thompson
Shelley M. Davis
Paul L. Arrington
Scott A. Magnuson
Sarah W. Higer

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Travis L. Thompson
tlt@idahowaters.com

July 1, 2011

VIA U.S. MAIL & EMAIL: gary.spackman@idwr.idaho.gov

Interim Director Gary Spackman
Idaho Department of Water Resources
322 E. Front St.
P.O. Box 83720
Boise, Idaho 83720-0098

Re: ***In the Matter of the Petition for Delivery Call of A&B etc.***

Dear Gary:

I am writing on behalf of our client A&B Irrigation District ("A&B") with respect to the above-referenced matter. Last November A&B requested confirmation that IDWR would proceed with the remand as ordered by Judge Wildman in his *Memorandum Decision and Order on Petitions for Rehearing* (*A&B v. IDWR*, Minidoka County Dist. Ct., Fifth Jud. Dist., Case No. CV-000647). Unfortunately, without any legal basis, you refused to follow the Court's order and A&B was forced to request further relief before the District Court. *See Order Granting Motion to Enforce in Part and Denying Motion in Part* (February 15, 2011).

After the Court ordered compliance with the remand order it took over 60 days for you to issue the *Final Order on Remand* (April 27, 2011). A&B filed a petition for reconsideration on May 11, 2011. On June 1, 2011 you granted A&B's petition. *See Order Granting Petition for Reconsideration to Allow Time for Further Review*. On June 9, 2011, you issued an *Amended Order* attempting to delay further action on A&B's petition. Yesterday, you issued two additional orders, attempting to deny A&B's requested relief on reconsideration.

Pursuant to the plain terms of your June 1st order, A&B's petition was "granted". Accordingly, you have a mandatory duty to immediately administer junior priority ground water rights that injure A&B's senior water right 36-2080. I.C. § 42-607; CM Rule 40. A&B expects you to revise your *Remand Order* promptly in compliance with Idaho law.

In order to protect its legal rights, A&B appealed the *Remand Order* to the Minidoka County District Court on June 27, 2011. It is A&B's position that this appeal is unnecessary since A&B's petition for reconsideration was "granted" by your June 1st order. Once A&B receives confirmation that you have revised your *Remand Order* and are proceeding with administration of junior priority water rights, A&B will withdraw its petition for judicial review.

If you disagree that A&B's petition for reconsideration was "granted," and the District Court confirms this position, then A&B's petition has been denied by operation of law. *See* I.C. § 67-5246(4), (5). Idaho's APA required you to "dispose" of A&B's petition within 21 days. There is nothing in the APA or IDWR's Rules of Procedure that would allow the agency to "grant" a petition for reconsideration for the sole purpose to allow an indefinite time for further review. Therefore any orders you attempted to issue after June 1st are void under Idaho's APA.

On a practical note IDWR has been required to comply with the Court's order on remand for over a year, since May 2010. Once the Court denied the petitions for rehearing, A&B requested confirmation that you would proceed on remand by letter of November 10, 2010. *See* **Ex. A**. In that letter, A&B emphasized the need for timely relief prior to the 2011 irrigation season. As Interim Director you are certainly aware of the need for timely action in water right administration matters. Unfortunately, you refused to follow the Court's order without any legal basis.

The failure to act has now delayed any administration into the middle of the 2011 irrigation season. The recent failure to follow Idaho's APA in responding to A&B's petition for reconsideration is evidence of further inexcusable delay. In short, this type of water right administration violates Idaho law. As Judge Wood accurately observed in a prior case, "an untimely decision effectively becomes the decision; i.e. 'no decision is the decision.'" *See Order on Plaintiffs' Motion for Summary Judgment* at 97, *AFRD #2 v. IDWR et al.* (Gooding County Dist. Ct., Fifth Jud. Dist., Case No. CV 2005-000600).

A&B is clearly disappointed in IDWR's repeated failure to properly respond to the District's request for administration in this matter.[1] We expect a timely response to this letter.

Sincerely,

BARKER ROSHOLT & SIMPSON LLP

Travis L. Thompson

[1] The prior Director also refused to perform any administration when A&B requested action on March 16, 2007. The District Court issued a writ of mandate ordering the Director to respond to A&B's request on October 23, 2007. *See A&B Irr. Dist. v. Tuthill et al.*, (Minidoka County Dist. Ct., Fifth Jud. Dist., Case No. 2007-000665)

cc: Dan Temple (A&B)
David Hensley
Garrick Baxter
Chris Bromley
Randy Budge
Sarah Klahn
Dean Tranmer
Jerry Rigby

Exhibit
A

John A. Rosholt
Albert P. Barker
John K. Simpson
Travis L. Thompson
Shelley M. Davis
Paul L. Arrington
Scott A. Magnuson
Sarah W. Higer

BARKER ROSHOLT & SIMPSON LLP

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brs@idahowaters.com

Travis L. Thompson
tlt@idahowaters.com

November 10, 2010

VIA U.S. MAIL & EMAIL: gary.spackman@idwr.idaho.gov

Interim Director Gary Spackman
Idaho Department of Water Resources
322 E. Front St.
P.O. Box 83720
Boise, Idaho 83720-0098

Re: ***A&B Irr. Dist. v. IDWR*** **(Case No. 2009-647)** ***In the Matter of the Petition for Delivery Call of A&B etc.***

Dear Gary:

I am writing on behalf of our client A&B Irrigation District ("A&B") with respect to the above-referenced matter. Judge Wildman issued his *Memorandum Decision and Order on Petitions for Rehearing* last week on November 2, 2010. Judge Wildman denied the petitions for rehearing and affirmed his prior ruling issued on May 20, 2010 ("*Order*").

In his *Order*, Judge Wildman remanded the case to IDWR in order to apply the appropriate evidentiary standard to the existing record in responding to A&B's delivery call. Although the case was pending on rehearing for several months, we have not received any notice that IDWR is preparing a new administrative order on remand. A&B seeks confirmation that IDWR intends to proceed with the remand as ordered by the District Court.

In addition, on the issue of interconnection within the A&B project, Judge Wildman stated:

> The Director concluded that A&B must make reasonable efforts to maximize interconnection of the system and placed the burden on A&B to demonstrate where interconnection is not physically or financially practical. The Director did not abuse discretion in imposing such a requirement.

Order at 39.

In his recommended order, Hearing Officer Schroeder stated:

> A&B has not undertaken an engineering analysis or other study to determine the feasibility of moving water from a long system to a short system. In light of the manner in which the water right was defined in the license and partial decree it should do so. IDWR should lend whatever expertise it has to that effort.

Opinion at 19.[1]

Although the Director did not initially request A&B to provide an interconnection feasibility study back in 2007,[2] A&B is preparing to undertake the study and requests IDWR to lend its expertise as recommended by Hearing Officer Schroeder. A&B understands the scope of the study to be as follows:

1) Identify water short areas within the project
2) Identify areas where additional water can be diverted and delivered to serve water short areas
3) Determine whether obtaining additional water will interfere with existing wells and water supplies
4) Identify infrastructure improvements and water conveyance facility needs to move water to water short areas (wells, pumps, pipelines, regulating reservoirs, easements)
5) Provide cost estimates and determine feasibility

A&B seeks confirmation that IDWR will assist in the above-referenced study to ensure a complete and adequate record for the Director to make a new injury determination. Please provide any comments on the tasks to be undertaken and information about how IDWR can provide assistance. A&B would be prepared to submit the study by the end of January 2011.

Since time is of the essence for water right administration decisions next year, please advise us as to your intentions regarding the above requests as soon as possible.

Sincerely,

BARKER ROSHOLT & SIMPSON LLP

Travis L. Thompson

[1] Former Director Tuthill adopted this recommended finding. *See Final Order* at 5.
[2] *See Order Requesting Information* (November 16, 2007).

cc: Dan Temple (A&B)
Garrick Baxter
Chris Bromley
Randy Budge
Sarah Klahn
Dean Tranmer
Jerry Rigby