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November 21, 2008

David Tuthill
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720

VIA FACSIMILE (208) 287-6700 & FIRST CLASS MAIL

Re: Surface Water Call
CLG File No. 5722.005

Dear Director Tuthill:

We have received and reviewed your letter of November 7, 2008, regarding requests for place of use information, and offer the following response:

There is no provision for bifurcated final orders in the Idaho Administrative Procedure Process. According to Idaho Code § 67-5244, final orders following a recommended order are due 56 days following the close of the record. The *Recommended Order* in this case was issued April 29, 2008. Your *Final Order* was issued September 5, 2008. The *Final Order* is currently on appeal, and jurisdiction resides in the District Court.

The issue addressed by the November 7, 2008 letter regarding requests for place of use information was fully litigated with findings made by Justice Schroeder, which you adopted in your *Final Order*. Justice Schroeder found:

> Non-irrigated acres should not be considered in determining the irrigation supply necessary for SWC members. IGWA has established that at least 6,600 acres claimed by TFCC in its district are not irrigated. Similar information was submitted concerning the Minidoka Irrigation District, indicating that the claimed acreage of 75,152 includes 5,008 acres not irrigated and Burley Irrigation District has some 2,907 acres of the 47,622 acres claimed not irrigated. These amounts may, of course, change as acreage is removed from irrigation or possibly added back (*Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation,* Page 53, Paragraph e).

To our knowledge, nothing has changed. As you know, each spring, canal companies and irrigation districts must be prepared to deliver the full right to their patrons, and we have no information to the contrary this year. Justice Schroeder memorialized this condition at Page 51 and 52 of the *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* at Paragraph b:

> The concept of a baseline is that it is adjustable as weather conditions or practices change, and that those adjustments will occur in an orderly, understood protocol.
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> ****
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> If there have been significant cropping changes resulting in either greater or less need for water, those should be factored. This is an area of caution. Cropping decisions are matters for the irrigators acting within their water rights. Those decisions should be driven by the market. The fact that a particular crop may take less water does not dictate that it be planted.

Our understanding is that we have not yet developed this "orderly, understood protocol."

The process of adaptive management intra-year is set out at Page 53, Paragraph 8:

> The sources of information for reevaluating the water conditions should be expanded, as occurred in the sixth supplemental order when the Heise Gage was no longer a valid measure of natural flow. Initial use of the Heise Gage unregulated flow is reasonable as a starting point in predicting the water supply, but as the year progresses and adjustments become necessary other sources utilized by the irrigation districts to monitor and predict their water supplies should be included.

Finally, it is our understanding that under the 2006 methodology now used by the Department, subdivisions and cities within the service areas of the entities were not considered irrigated by surface water delivered by the entities. Since the Department is aware that subdivisions and cities have surface water rights and are being irrigated with surface water, could

you please explain why the Department unilaterally (and some might say arbitrarily) did not consider these acres? It is very time consuming and costly for the entities to once again compare their acreages to the latest version proposed by the Department, considering that this information was reviewed by the Department at length as part of the SRBA and again was addressed in the hearing on the water call.

In the event that you feel the findings adopted in the *Final Order* regarding the issue raised by the November 7, 2008 letter are inadequate, Idaho Code § 67-5276(2) provides an avenue to investigate the matter further before the District Court.

While we believe that the *Recommended Order* of Justice Schroeder as adopted by you did set forth a process of adaptive management depending on weather and irrigation conditions as each year progresses, we did not understand the process to be retrospective such that findings based upon 2008 evidence could be displaced by a study done in 2006. We have always understood the flexibility as explained by Justice Schroeder and adopted by your *Final Order* to be meant to accommodate conditions as they occurred in the field, such that the baseline of need of the senior water users could be adjusted as conditions developed into material change.

We would request the opportunity for the project managers to meet with you and your staff to find further resolution to these issues. If you have any questions, please do not hesitate to contact us.

Sincerely,

Capitol Law Group, PLLC

C. Tom Arkoosh for all counsel

CTA/emc