Josephine P. Beeman #1806
Beeman & Associates, P.C.
409 West Jefferson Street
Boise, ID 83702
(208) 331-0950
(208) 331-0954 (Facsimile)
office@beemanlaw.com

Sarah A. Klahn
White & Jankowski, LLP
511 16th St., Ste. 500
Denver, CO 80202
(303) 595-9441
(303) 825-5632 (Facsimile)
sarahk@white-jankowski.com
billh@white-jankowski.com

Attorneys for City of Pocatello

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DEPARTMENT OF
WATER RESOURCES

BEFORE THE DIRECTOR
OF THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE REQUEST FOR ADMINISTRATION IN WATER DISTRICT 120 AND THE REQUEST FOR DELIVERY OF WATER TO SENIOR SURFACE WATER RIGHTS BY 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	)	**POCATELLO'S RESPONSE TO SURFACE WATER COALITION'S PETITION FOR RECONSIDERATION, INCLUDING MOTION TO STRIKE**

The City of Pocatello ("Pocatello") responds to the Petition for Reconsideration filed by the Surface Water Coalition ("SWC"), by requesting the Director to (1) consider the arguments presented by the SWC at the hearing to be held in this matter and (2) strike the excerpts from an expert report tendered by the SWC along with the petition.

On June 29, 2006, the Director entered his Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006. On July 12, 2006, the SWC filed a petition asking the Director to reconsider his June 29, 2006 Order and to stay the hearing in this matter. The SWC petition is based upon a partial summary judgment entered July 11, 2006 by District Court Judge Barry Wood in Gooding County in Case No. CV-2005-600.

In filing its petition, the SWC has followed a practice -- adopted by Pocatello and others in this matter, including the SWC -- of requesting relief from the Director with respect to his orders. The critical difference from the earlier requests for reconsideration, however, is that the Director now has set a hearing, to commence on September 26, 2006, which will address the issues raised by all parties – through requests for reconsideration or otherwise – and which provides the forum for potential relief for any party who is dissatisfied with the Director's rulings in this matter. The administrative hearing schedule is presently suspended to allow the Director to review the SWC's Petition and a separate Petition for Reconsideration filed by IGWA on July 13. *See Interim Order Suspending Hearing Schedule*, July 14, 2006.

Certainly the parties in this matter have different theories of the case – including what the facts are, what the governing law is, and what relief the Director should order. It is likely that none of the parties is completely satisfied with the orders that the Director has issued in advance of the hearing. The appropriate action for the Director to take is to consider these varying theories and the applicable facts at the hearing that he has set for that purpose.

Judge Wood's ruling has been appealed by the State, and it remains to be seen how the Idaho Supreme Court will rule on appeal. Therefore, the hearing before the Director should be broad enough to develop a record on the alternative approaches to well administration urged by the different parties, so that the Director may proceed on a factual record in light of legal rulings that may emerge from the proceedings now before the Idaho Supreme Court.

The SWC, however, acted inappropriately in tendering a portion of its expert report in this matter to the Director in support of its petition. The Director previously in a January 9, 2006 order (attached) has advised the parties that they should not file their expert reports with him, but should wait until the presentation of evidence at the hearing to present testimony. Therefore, the Director should not consider the expert report excerpts tendered with the affidavit of Charles Brockway, but should strike that material from the petition.

Respectfully submitted this 18th day of July 2006

BEEMAN & ASSOCIATES, P.C.

By Josephine P. Beeman
Josephine P. Beeman

WHITE & JANKOWSKI, LLP

By Josephine P. Beeman
for Sarah A. Klahn

Attorneys for the City of Pocatello

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July 2006, I caused to be served a true and correct copy of the foregoing document by regular U.S. Mail, postage prepaid, to:

Roger D. Ling
Ling Robinson & Walker
PO Box 396
Rupert, Idaho 83350

John A. Rosholt
Travis L. Thompson
Barker Rosholt & Simpson
113 Main Ave. West, Suite 303
Twin Falls, Idaho 83301-6167

John Simpson
Barker Rosholt & Simpson
PO Box 2139
Boise, Idaho 83301-2139

Jeffrey C. Fereday
Michael C. Creamer
Givens Pursley
601 Bannock Street, Suite 200
PO Box 2720
Boise, Idaho 83701-2720

Kathleen Marion Carr
U. S. Department of the Interior
960 Broadway Street, Suite 400
Boise, Idaho 83706

Lewis Rounds
IDWR Eastern
900 N. Skyline Drive
Idaho Falls, ID 83402-6105

James S. Lochhead
Adam T. DeVoe
Brownstein Hyatt & Farber
410 17th Street, 22nd Floor
Denver, CO 80202

Terry Uhling
J. R. Simplot
P. O. Box 27
Boise, ID 83707

C. Tom Arkoosh
Arkoosh Law Offices, Chtd.
PO Box 32
Gooding, Idaho 83330

W. Kent Fletcher
Fletcher Law Office
PO Box 248
Burley, Idaho 83318

Scott L. Campbell
Moffatt Thomas
101 S. Capitol Blvd., 10th Floor
PO Box 829
Boise, Idaho 83701-0829

Michael S. Gilmore
Deputy Attorney General
Statehouse, Room 210
P. O. Box 83720
Boise, ID 83720-0010

Matt Howard, PN-3130
U.S. Bureau of Reclamation
1150 N. Curtis Road
Boise, ID 83706

Allen Merritt
Cindy Yenter
IDWR Southern
1341 Fillmore Street, Suite 200
Twin Falls, ID 83301

James Tucker
Idaho Power Company
1221 West Idaho street
Boise, ID 83702

Josephine P. Beeman

Josephine P. Beeman [7235]

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

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 (Water Districts No. 120 and No. 130)	)	**ORDER REGARDING SERVICE OF EXPERT REPORTS**

The Director of the Idaho Department of Water Resources ("Director") issued a *Scheduling Order* in this matter on July 22, 2005, which authorized the parties to engage in discovery according to the Idaho Rules of Civil Procedure, subject to certain conditions. On November 25, 2005, the Director issued a *Second Amended Scheduling Order*, which extended the deadline to submit expert witness reports to December 30, 2005. On December 29, 2005, the U.S. Bureau of Reclamation ("Reclamation") filed with the Department *Reclamation's Notice of Service of Expert Report of Patrick C. McGrane, P.E.* together with the original *Expert Report of Patrick C. McGrane, P.E.* On December 30, 2005, the City of Pocatello filed with the Department *Pocatello's Notice of Service of Expert Disclosures in Compliance with Scheduling Order* together with originals or copies of the expert disclosures, reports, affidavits, and resumes referenced in its *Notice of Service*.

On January 3, 2006, the Surface Water Coalition ("SWC") and the Idaho Ground Water Appropriators, Inc. ("IGWA") separately filed with the Department notices of service of their respective expert reports upon the other parties to the proceeding without filing the originals or copies of the reports with the Department. The question thus arises as to whether the expert reports should be filed with the Department.

The *Second Amended Scheduling Order* provides that "parties submit expert witness reports" on December 30, 2005, without providing specific direction as to whether or not the reports were to be filed with the Department. The preparation and exchange of expert reports in this proceeding was required to facilitate the discovery process among the parties. *See* I.R.C.P. 26(b)(4); I.R.E. 705. As such, it is premature to submit the reports to the Director at this stage of the proceeding.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that the expert reports and associated documents, other than the notices of service, filed with the Department on December 29, 2005, by the U.S. Bureau of Reclamation, and by the City of Pocatello on December 30, 2005, shall be returned to the respective parties. The expert reports and associated documents may be offered into evidence at the hearing in this matter as appropriate.

DATED this 9th day of January, 2006.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January, 2006, the above and foregoing, was served by the method indicated below, and addressed to the following:

TOM C. ARKOOSH ARKOOSH LAW OFFICES PO BOX 32 GOODING ID 83330 (208) 934-8873 alo@cableone.net	(x) U.S Mail, Postage Prepaid ( ) Facsimile (x) E-mail
W. KENT FLETCHER FLETCHER LAW OFFICE PO BOX 248 BURLEY ID 83318-0248 (208) 878-2548 wkf@pmt.org	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
ROGER D. LING LING ROBINSON PO BOX 396 RUPERT ID 83350-0396 (208) 436-6804 rdl@idlawfirm.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JOHN A. ROSHOLT TRAVIS L. THOMPSON BARKER ROSHOLT 113 MAIN AVENUE WEST, SUITE 303 TWIN FALLS ID 83301-6167 (208) 735-2444 jar@idahowaters.com tlt@idahowaters.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JOHN K. SIMPSON BARKER ROSHOLT PO BOX 2139 BOISE ID 83701-2139 (208) 344-6034 jks@idahowaters.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail

JEFFREY C. FEREDAY
MICHAEL C. CREAMER
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701-2720
(208) 388-1200
cf@givenspursley.com
mcc@givenspursley.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

SCOTT L. CAMPBELL
MOFFATT THOMAS
PO BOX 829
BOISE ID 83701
(208) 385-5384
slc@moffatt.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

KATHLEEN M. CARR
OFFICE OF THE SOLICITOR
960 BROADWAY, SUITE 400
BOISE ID 83706
(208) 334-1378

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
( ) E-mail

MATT HOWARD PN-3130
US BUREAU OF RECLAMATION
PACIFIC NORTHWEST REGION
1150 NORTH CURTIS ROAD
BOISE ID 83706-1234
(208) 378-5003
mhoward@pn.usbr.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

JOSEPHINE P. BEEMAN
BEEMAN & ASSOCIATES
409 WEST JEFFERSON STREET
BOISE ID 83702
(208) 331-0954
jo.beeman@beemanlaw.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

SARAH A. KLAHN
WHITE & JANKOWSKI
511 16TH STREET, SUITE 500
DENVER CO 80202
sarahk@white-jankowski.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

MICHAEL S. GILMORE
ATTORNEY GENERAL'S OFFICE
PO BOX 83720
BOISE ID 83720-0010
(208) 334-2830
mike.gilmore@ag.idaho.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

TERRY T. UHLING
J.R. SIMPLOT COMPANY
999 MAIN STREET
BOISE ID 83702
(208) 336-2110
tuhling@simplot.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

JAMES C. TUCKER
IDAHO POWER COMPANY
1221 WEST IDAHO STREET
BOISE ID 83702
(208) 388-2112
jamestucker@idahopower.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

JAMES S. LOCHHEAD
BROWNSTEIN HYATT & FARBER
410 17TH STREET, 22ND FLOOR
DENVER CO 80202
(303) 223-1100
jlochhead@bhf-law.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

RON CARLSON
LEWIS ROUNDS
IDWR
900 NORTH SKYLINE DRIVE
IDAHO FALLS ID 83402-6105
(208) 525-7177
ron.carlson@idwr.idaho.gov
lewis.rounds@idwr.idaho.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

ALLEN MERRITT
CINDY YENTER
IDWR
1341 FILLMORE STREET, SUITE 200
TWIN FALLS ID 83301-3033
(208) 736-3037
allen.merritt@idwr.idaho.gov
cindy.yenter@idwr.idaho.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources