John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
Sarah W. Higer, ISB #8012
BARKER ROSHOLT & SIMPSON LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for Petitioner A&B Irrigation District

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, Respondents, and THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT & SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, AND STAN D. NEVILLE, Intervenors.	CASE NO. CV 2009-000647 **MEMORANDUM IN SUPPORT OF A&B IRRIGATION DISTRICT'S MOTION TO ENFORCE ORDERS**

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	)

COMES NOW, Petitioner A&B Irrigation District ("A&B"), by and through its counsel of record, and files this *Memorandum in Support of A&B Irrigation District's Motion to Enforce Orders.*

INTRODUCTION

The Interim Director of the Idaho Department of Water Resources ("IDWR") refuses to act in response to this Court's remand order. Instead, the Director believes he can choose to ignore this Court's order on the basis of a pending appeal to the Idaho Supreme Court. The pendency of the appeal does not suspend the Director's obligation to administer water rights in accordance with Idaho law and this Court's *Orders.*

Therefore, A&B requests that this Court issue an order and/or writ of mandate that requires the Director to comply with this Court's remand order to determine injury to A&B's senior water right #36-2080 in accordance with the proper evidentiary standards and burdens of proof. Further, A&B requests confirmation that the Director will consider A&B's economic and technical feasibility report on the issue of "interconnection" of wells within the A&B project as part of the revised injury determination.

BACKGROUND

On May 20, 2010 this Court entered its *Memorandum Decision and Order on Petition for Judicial Review*. The Idaho Ground Water Appropriators, Inc. ("IGWA") and the City of Pocatello ("Pocatello") filed petitions for rehearing.

On November 2, 2010 this Court entered its *Memorandum Decision and Order on Petitions for Rehearing* affirming the prior decision. On November 23, 2010 this Court entered its *Judgment* remanding the case to the Director to "apply the appropriate evidentiary standard of clear and convincing evidence to the existing record" to re-evaluate A&B's delivery call and the Director's prior "no-injury" determination. Thereafter, IDWR, IGWA, A&B, and Pocatello all filed notices of appeal with the Idaho Supreme Court.

On November 10, 2010 A&B requested confirmation of the remand proceeding and whether the Director would consider an economic and technical feasibility report on "interconnection" of wells within the A&B project. *See* Ex. A to *Thompson Aff.* Over two months later the Director's counsel finally responded and claimed "because the evidentiary standard of review . . . has been appealed, the Department will not proceed with the remand until a final decision has been issued by the Idaho Supreme Court." *See* Ex. B to *Thompson Aff.* (emphasis added). Since IDWR and the Interim Director have refused to follow the Court's judgment and remand order, A&B had no choice but to file the present motion.

ARGUMENT

I. This Court Has Authority to Enforce the Orders in This Case.

Idaho Appellate Rule 13(b) provides that "the district court shall have the power and authority to rule upon the following motions and to take the following actions during the pendency of an appeal . . . (13) Take any action or enter any order required for the enforcement of any judgment, order or decree." A district court's inherent power to enforce its judgments is reserved "notwithstanding a notice of appeal." *Madsen v. State*, 114 Idaho 182, 185, n. 2 (Ct. App. 1988); *see Fuestel v. Stevenson*, 119 Idaho 698, 700 (Ct. App. 1991).

II. Idaho Law Requires the Director to Comply with the Court's Remand Order "Promptly and Completely."

This Court entered a final judgment remanding the case to IDWR to "apply the appropriate evidentiary standard of clear and convincing evidence to the existing record" to re-evaluate A&B's delivery call and the Director's prior "no-injury" determination. *See Judgment* at 2. As of November 2, 2010, the date of the Court's *Rehearing Order*, there was no question that IDWR and the Director had an obligation to re-examine A&B's request for administration to deliver water to its decreed senior water right. The remand order is clear and unambiguous and the Director is required to comply with this Court's order promptly and completely. *Bayes v. State*, 117 Idaho 96, 99-101 (Ct. App. 1989) ("If a person to whom a court directs an order believes that the order is incorrect the remedy is to appeal, but absent a stay, to comply with the order pending appeal.").

Contrary to the January 12, 2011 response from counsel, IDWR and the Director cannot unilaterally refuse to proceed with the remand on the basis that an appeal has been filed with the Idaho Supreme Court. Since IDWR and the Director are well aware of Idaho's appellate rules and the requirement to seek a "stay" of a district court's order, there is no reasonable basis in fact or law for the agency's present refusal to act.[1] The non-action is particularly troubling since this exact issue was recently decided by the Honorable John M. Melanson in the context of the ordered remand in the Spring Users' delivery call proceeding. *See Order Granting in Part Motion to Enforce Orders* (*Clear Springs et al. v. Spackman et al.*, Gooding County Dist. Ct., Fifth Jud. Dist., Case No. CV-2008-444).

[1] IDWR has requested "stays" of prior district court orders pending appeal on at least two different occasions in the context of water right administration cases. *See Musser v. Higginson*, 125 Idaho 392 (1995); *AFRD #2 v. IDWR*, 143 Idaho 862 (2007). IDWR's motions for stay were denied by the district courts and the Idaho Supreme Court in both cases. *See* Exs. C, D to *Thompson Aff.*

In the Spring Users' case IDWR also refused to follow Judge Melanson's remand order on the theory the Director had no jurisdiction until either the time for an appeal expired or the matter was concluded by the Idaho Supreme Court. Judge Melanson rejected IDWR's argument and held:

> 1. The Director shall forthwith comply with this Court's earlier ***Orders*** on remand and apply the proper burdens of proof and evidentiary standards when considering seasonable variations as part of a material injury analysis for water right nos. 36-7210 and 36-44013A.

Order Granting in Part Motion to Enforce Orders at 4 (emphasis in original).

While IDWR at least relied upon an erroneous interpretation of Idaho's appellate rules in seeking to avoid the remand proceeding in the Spring Users' case, here it has not even attempted to provide a legal basis to justify its refusal to follow the Court's orders. Instead, IDWR has flat refused to proceed with the remand because it disagrees with the Court's decision. *See* Ex. B to *Thompson Aff.* Idaho law prohibits agencies from refusing to act in such cases, and it is obvious IDWR knows better under these circumstances.

The pattern of non-action is particularly prejudicial in the context of conjunctive water right administration. IDWR understands the importance of timing in water right administration matters. IDWR also understands the requirements of following a district court's remand order. While IDWR has been on notice of the ordered remand since last May, there was absolutely no question about the required action when the Court issued its *Rehearing Order* on November 2, 2010. Instead of promptly following the Court's order IDWR purposely chose to delay a response to A&B's request (for over 60 days), and has now decided not to act at all. Since the 2011 irrigation season is set to begin in a couple months, A&B stands to lose another year in the lawful administration of its senior water right. Fortunately, there is still time for IDWR and the

Director to take the required action. Unfortunately, that action will only be taken by further direction from this Court.

III. A&B Seeks Confirmation the Director Will Consider the Proposed "Interconnection" Feasibility Study.

In affirming the Director's decision on the issue of "interconnection" within the A&B project, this Court held:

> 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.

Memorandum Decision and Order on Petition for Judicial Review at 39.

In reaching this decision the Court referenced Hearing Officer Schroeder's findings as well:

> Consequently, there is an obligation of A&B to take reasonable steps to maximize the use of that flexibility to move water within the system before it can seek curtailment or compensation from juniors. A&B has some interconnection within the system to utilize the water it can pump. But the record does not establish whether further interconnection is either financially or technically practical.

Id. (citing R. 3096-97).

The Hearing Officer further recommended that IDWR should participate and assist A&B in this study:

> 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.***

R. 3096 (emphasis added).[2]

In response to the Court's decision and the Hearing Officer's recommendation on this issue A&B requested confirmation that the Director would consider A&B's feasibility study in

[2] Former Director Tuthill adopted the Hearing Officer's recommended findings on this issue. *See* R. 3322.

conjunction with the ordered remand. *See* Ex. A to *Thompson Aff.* Since IDWR was required to re-evaluate A&B's delivery call and material injury to its senior water right, A&B believed it would be efficient and expeditious for IDWR to consider the feasibility report as part of its new injury determination.

However, prior to engaging technical consultants and spending time and resources on the study, A&B wanted assurance that the Director would actually consider and not disregard the proposed report. *See id.* In response, IDWR's counsel only stated that "the Department is willing to field questions A&B may have about its study." *See* Ex. B to *Thompson Aff.* Accordingly, it is unclear whether the Director would even consider A&B's proposed feasibility study, particularly since IDWR refuses to proceed with the ordered remand.

A&B requests the Court to order the Director to consider the proposed feasibility study as part of the ordered remand. A&B further requests the Court to order IDWR to assist and lend its expertise to the study as recommended by Hearing Officer Schroeder and previously accepted by the former Director. Although A&B is prepared to undertake the study in a timely fashion, confirmation of the study's scope and consideration by the Director is essential prior to its undertaking.

CONCLUSION

Idaho law requires administrative agencies to comply with a district court's order. Here, IDWR and the Director have refused to comply with the Court's orders and complete the required remand to re-evaluate material injury to A&B's senior water right. In addition, the Director has failed to confirm that he would accept and consider a feasibility study on "interconnection" within the A&B project.

A&B respectfully requests the Court to issue an order and/or writ of mandate to IDWR and the Director to ensure compliance with the Court's prior decisions.

DATED this ___ day of January, 2011.

BARKER ROSHOLT & SIMPSON LLP

_____
Travis L. Thompson

Attorneys for Petitioner A&B Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of January, 2011, I served true and correct copies of the *Memorandum in Support of Motion to Enforce Orders* upon the following by the method indicated:

Deputy Clerk Minidoka County District Court 715 G Street P.O. Box 368 Rupert, Idaho 83350 Fax: (208) 436-5272	✓ U.S. Mail, Postage Prepaid ___ Hand Delivery ___ Overnight Mail ___ Facsimile ___ Email
Courtesy Copy: Hon. Eric J. Wildman SRBA District Court 253 3rd Ave. North P.O. Box 2707 Twin Falls, Idaho 83303-2707 Fax: (208) 736-2121	___ U.S. Mail, Postage Prepaid ✓ Hand Delivery ___ Overnight Mail ___ Facsimile ___ Email
Garrick Baxter Chris Bromley Deputy Attorneys General Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov	✓ U.S. Mail, Postage Prepaid ___ Hand Delivery ___ Overnight Mail ___ Facsimile ✓ Email

Jerry R. Rigby Rigby Andrus & Rigby Chtd. 25 N 2nd East Rexburg, Idaho 83440 jrigby@rex-law.com	Randall C. Budge Candice M. McHugh Racine Olson P.O. Box 1391 201 E. Center Street Pocatello, Idaho 83204-1391 rcb@racinelaw.net cmm@racinelaw.net	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth Street, Suite 500 Denver, Colorado 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com
A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, Idaho 83201 dtranmer@pocatello.us		

Travis L. Thompson