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DEPARTMENT OF WATER RESOURCES

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*Attorneys for 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,	)	CASE NO. CV 2011-000512
	)	
Petitioner,	)	
	)	<b><u>A&amp;B IRRIGATION DISTRICT'S</u></b>
vs.	)	<b><u>AMENDED NOTICE OF APPEAL</u></b>
	)	<b>AND PETITION FOR JUDICIAL</b>
IDAHO DEPARTMENT OF WATER	)	<b>REVIEW OF AGENCY ACTION</b>
RESOURCES and GARY SPACKMAN in his	)	
official capacity as Interim Director of the Idaho	)	
Department of Water Resources,	)	
	)	
Respondents.	)	
_____	)	
	)	
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, the Petitioner, A&B Irrigation District (“A&B”), by and through its undersigned counsel, and pursuant to I.R.C.P. 84(r), I.A.R. 17(m), and this Court’s August 11, 2011 *Order on Motion to Dismiss and Motion to Strike*, hereby files this Amended Notice of Appeal and Petition for Judicial Review, as follows:

**STATEMENT OF THE CASE**

1. This is a civil action pursuant to Idaho Code §§ 67-5270 and 5279 seeking judicial review of the Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call (“Amended Final Order”), issued by the Interim Director of the Idaho Department of Water Resources (“IDWR” or “Department”) on June 30, 2011 ~~April 27, 2011~~. ~~Given the Director’s recent order granting A&B’s petition for reconsideration of the *Remand Order* it is A&B’s position that an appeal is unnecessary. However, in order to preserve its legal rights, A&B is filing this petition for judicial review.~~

2. On April 27, 2011, the Interim Director issued the Final Order on Remand Regarding A&B Irrigation District Delivery Call (“Remand Order”). Pursuant to Idaho Code § 67-5246(4), A&B petitioned the Interim Director to reconsider the *Remand Order* on May 11, 2011. By law, the Director was required to dispose of A&B’s petition within 21 days, otherwise it was deemed denied. See I.C. § 67-5246(4), (5). On June 1, 2011 the Director issued an *Order Granting Petition for Reconsideration to Allow Time for Further Review*. See **Ex. A**. In that order, the Director stated A&B’s petition was granted “for the sole purpose of allowing additional time for the Department to respond to the Petition” and that he would issue an order by June 9, 2011. Based upon the plain terms of the order, A&B’s petition has been granted and the Director is obligated to revise his *Remand Order* consistent with A&B’s requested relief. Consequently, the Director has a duty to immediately administer hydraulically connected junior

water rights that are injuring A&B's senior water right 36-2080 during the 2011 irrigation season. A&B is in the process of making that request with the Director and will withdraw this notice of appeal once the Director confirms he is proceeding in accordance with A&B's request.

3. The Director later issued an *Amended Order Granting Petition for Reconsideration to Allow Time for Further Review* on June 9, 2011. See **Ex. B**. In that order the Director stated that "an order responding to the merits of the Petition shall issue no later than June 30, 2011." In effect, the Director has unlawfully attempted to delay his response to A&B's petition until the middle of the 2011 irrigation season. Since the Director "granted" A&B's petition by order of June 1<sup>st</sup>, this attempted delay is unavailing. Nothing in Idaho's APA or IDWR's Rules of Procedure (37.01.01 *et seq.*) authorizes the Director to "grant" a petition for reconsideration solely for the purpose of "allowing additional time for the Department to respond" to A&B's petition for reconsideration. The Director finally issued the *Amended Final Order on Remand Regarding A&B Irrigation District Delivery Call* on June 30, 2011. ~~Alternatively, if the Director's order results in a failure to dispose of A&B's petition by June 1, 2011, the petition would be deemed denied by operation of law on that day. A&B is filing the present petition for judicial review to protect its right to appeal in the event the Director's June 1, 2011 order is deemed to deny A&B's petition by operation of law.~~

4. On June 27, 2011, A&B filed a *Notice of Appeal and Petition for Judicial Review* with respect to the Interim Director's April 27, 2011 *Remand Order*. A&B maintains that the Director's April 27, 2011 order is the proper order to appeal in this matter. The Department filed a motion to dismiss A&B's Notice of Appeal, asserting that the *Remand Order* was not an appealable order and that any appeal must be taken from the *Amended Final Order*. The Court

granted IDWR's motion on August 11, 2011, and further authorized A&B to file this amended notice of appeal.

5.2. A hearing before the agency on the underlying administrative matter was held in the matter from December 3 - 18, 2008. After judicial review on the Director's initial final order, the case was remanded to IDWR which resulted in the *Remand Order*. A&B requested a hearing on the *Remand Order* pursuant to Idaho Code § 42-1701A(3), and that request was denied ~~has yet to be addressed~~ by the Interim Director.

~~3. A Statement of Issues which A&B intends to assert in this matter will be filed with the Court within 14 days. Pursuant to I.R.C.P. 84(d)(5), A&B reserves the right to assert additional issues and/or clarify or further specify the issues for judicial review stated in this petition or which become later discovered.~~

### **JURISDICTION AND VENUE**

6.4. This amended petition is authorized by Idaho Code §§ 67-5270 and 5279, I.R.C.P. 84(r), I.A.R. 17(m), and this Court's August 11, 2011, *Order on Motion to Dismiss and Motion to Strike*.

7.5. This Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1401D and 67-5272.

8.6. Venue lies in this Court pursuant to Idaho Code §§ 42-1701D and 67-5272. A&B's principal place of business is located in Minidoka County and real property (water right number 36-2080) which was the subject matter of the agency action is appurtenant to lands located in Minidoka County.

9.7. Pursuant to the Idaho Supreme Court's *Administrative Order* issued on December 9, 2009 "all petitions for judicial review of any decision regarding administration of water rights

from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District.” The SRBA Court’s procedures instruct the clerk of the district court in which the petition is filed to issue a *Notice of Reassignment*. ~~A&B has attached a copy of the SRBA Court’s *Notice of Reassignment* form for the convenience of the clerk.~~

10.8. The Director’s *Amended Final Order* ~~*Remand Order*~~ is a final agency action subject to judicial review pursuant to Idaho Code § 67-5270.

### **PARTIES**

11.9. Petitioner A&B is an Idaho irrigation district, which its principal office located in Minidoka County, specifically Rupert, Idaho.

12.10. Respondent Idaho Department of Water Resources, is a state agency with its main office located at 322 E. Front Street, Boise, Idaho. Respondent Gary Spackman is the interim director of the Idaho Department of Water Resources.

### **STATEMENT OF INITIAL ISSUES**

13. The Petitioner intends to assert the following issues on judicial review:

a. Whether the Director erred by failing to provide for timely and lawful administration of junior priority ground water rights to satisfy A&B’s decreed senior ground water right.

b. Whether the Director unconstitutionally applied the Department’s Conjunctive Management Rules (IDAPA 37.03.11 *et seq.*) and erred in failing to recognize and honor A&B’s decreed senior ground water right for purposes of administration.

c. Whether the Director erred in finding that A&B could not beneficially use the quantity of its decreed water right.

d. Whether the Director erred in not finding material injury to A&B’s senior water right because A&B has 11 unused wells or points of diversion “that may be put into production at any time or the wells may be reconstructed at another location.”

- e. Whether the Director erred in finding that the “inherent hydrogeologic environment” for certain wells represents an unreasonable means of diversion.
- f. Whether the Director erred in applying CM Rule 20.03, parts of which have been determined to be invalid by the Idaho Supreme Court in *Clear Springs Foods, Inc., et al. v. Spackman, et al.*, 150 Idaho 790 (2011).
- g. Whether the Director erred in forcing A&B to curtail or regulate its 1994 enlargement water rights as a precondition to the administration of other junior water rights.
- h. Whether the Director erred in using pre-decree information as a basis to disregard A&B’s decreed quantity of 1,100 cfs (0.88 miner’s inch per acre).
- i. Whether the Director erred in concluding that A&B could divert additional water for irrigation purposes during the peak season.
- j. Whether the Director erred in failing to apply CM Rules 20.03 and 40.05 for purposes of evaluating whether junior ground water right holders were “wasting” water.
- k. Whether the Director erred in finding that A&B could not beneficially use 0.88 miner’s inch per acre even though the Director authorized surrounding water users with junior ground water rights to use 0.88 miner’s inch per acre of water, and more.
- l. Whether the Director erred in using a “crop maturity” standard for purposes of water right administration.
- m. Whether the Director erred by addressing issues that are beyond the scope of the Court’s remand order.
- n. Whether the Director’s decision is supported by substantial evidence in the record.
- o. Whether, if A&B’s senior water right is subject to the Ground Water Act, the Director erred in refusing to establish a “reasonable ground water pumping level” for purposes of administration pursuant to Idaho Code § 42-226.
- p. Whether the Director’s attempt to “grant” A&B’s petition for reconsideration of the *Remand Order* for the sole purpose of allowing IDWR more time to dispose of A&B’s petition violates Idaho Code § 67-5246(4) and Department Rule 730.02(a).

14. Pursuant to I.R.C.P. 84(d)(5), A&B reserves the right to assert additional issues and/or clarify or further specify the issues for judicial review stated herein which later become discovered.

### AGENCY RECORD

15.11. Judicial review is sought of the Director's June 30, 2011 ~~April 27, 2011~~ *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call.*

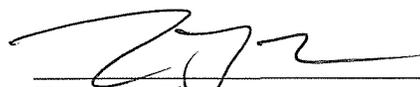
16.12. The agency held a hearing on the underlying administrative matter from December 3 – 18, 2008, which was recorded and a transcript created, which transcript should be made a part of the agency record in this matter. The transcript exists and is part of the record in *A&B Irrigation Dist. v. IDWR*, Minidoka County Dist Ct. Case No. 2009-000647. The parties to the administrative case previously paid for the creation of the transcript of the hearing.

17.13. A&B anticipates that it can reach a stipulation regarding the agency record with the Respondents and the other parties, and will pay its necessary share of the fee for preparation of the record at such time.

18.14. Service of this Notice of Appeal and Petition for Judicial Review of Agency Action has been made on the Respondents at the time of the filing of this Petition.

**DATED** this 25<sup>th</sup> day of August ~~June~~ 2011.

**BARKER ROSHOLT & SIMPSON LLP**

  
\_\_\_\_\_  
Travis L. Thompson

*Attorneys for Petitioner A&B Irrigation District*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 25<sup>th</sup> day of August, 2011, I served true and correct copies of this **A&B IRRIGATION DISTRICT'S AMENDED NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF AGENCY ACTION** upon the following by the method indicated:

Deputy Clerk  
 SRBA District Court  
 253 3<sup>rd</sup> Ave N.  
 P.O. Box 2707  
 Twin Falls, Idaho 83303-2707

- 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](mailto:garrick.baxter@idwr.idaho.gov)  
[chris.bromley@idwr.idaho.gov](mailto:chris.bromley@idwr.idaho.gov)

- U.S. Mail, Postage Prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

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

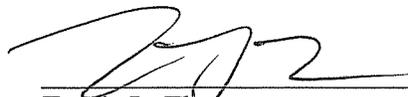
  
 \_\_\_\_\_  
 Travis L. Thompson

Exhibit  
A

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

IN THE MATTER OF THE PETITION FOR )  
DELIVERY CALL OF A&B IRRIGATION ) CM-DC-2011-001  
DISTRICT FOR THE DELIVERY OF GROUND )  
WATER AND FOR THE CREATION OF A ) **ORDER GRANTING PETITION**  
GROUND WATER MANAGEMENT AREA ) **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 1<sup>st</sup> 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 15<sup>th</sup> 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 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a>	Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey P.O. Box 1391 201 E. Center St. Pocatello, ID 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth St., Ste. 500 Denver, CO 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a> <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a>
Jerry Rigby Rigby Andrus 25 North Second East P.O. Box 250 Rexburg, ID 83440 <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a>	A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a>	

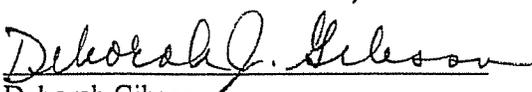
  
Deborah Gibson  
Idaho Department of Water Resources

Exhibit  
B

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

IN THE MATTER OF THE PETITION FOR )  
DELIVERY CALL OF A&B IRRIGATION ) CM-DC-2011-001  
DISTRICT FOR THE DELIVERY OF GROUND )  
WATER AND FOR THE CREATION OF A ) **AMENDED ORDER**  
GROUND WATER MANAGEMENT AREA ) **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.

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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 9<sup>th</sup> 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 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a>	Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey P.O. Box 1391 201 E. Center St. Pocatello, ID 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth St., Ste. 500 Denver, CO 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a> <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a>
Jerry Rigby Rigby Andrus 25 North Second East P.O. Box 250 Rexburg, ID 83440 <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a>	A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a>	



Deborah Gibson  
Idaho Department of Water Resources