

LAWRENCE G. WASDEN
ATTORNEY GENERAL
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

PHILLIP J. RASSIER, ISB #1750
CHRIS M. BROMLEY, ISB #6530
Deputy Attorneys General
Idaho Department of Water Resources
P. O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700

Attorneys for Respondents

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

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,)

Petitioners,)

vs.)

GARY SPACKMAN, in his capacity as Interim)
Director of the Idaho Department of Water Resources,)
and THE IDAHO DEPARTMENT OF WATER)
RESOURCES,)

Respondents.)

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)

Case No. CV-2008-0000551

**IDWR RESPONSE BRIEF
ON REHEARING**

On October 8, 2009, the City of Pocatello and the Ground Water Users filed opening briefs on rehearing in the above-captioned matter. In this brief, the Idaho Department of Water Resources (“Department” or “Director”) will respond solely to the first issue identified by the Ground Water Users in their opening brief:

Whether the Court should clarify that the Director must decide the issue on methodology for determining material injury and reasonable carryover based exclusively upon facts and evidence contained in the current record without holding any additional hearings on this issue?

Ground Water Users’ Opening Brief on Rehearing at 2.

In his September 5, 2008 Final Order, former Director Tuthill did not describe his methodology for determining material injury to reasonable carryover and reasonable in-season demand. Instead, the former Director stated that he would “issue a separate, final order before the end of 2008 detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover for the 2009 irrigation season. An opportunity for hearing will be provided on the order.” R. Vol. 37 at 7386. This Court found that the Director’s decision to issue separate orders was improper. *Order on Petition for Judicial Review at 32.*

As noted by this Court, the separate order was issued on June 30, 2009, but is not part of the record in this proceeding. *Id.* It should also be noted that the June 30, 2009 order was issued as an interlocutory order in accordance with IDAPA 37.01.01.710. On November 5, 2009, the Director rescinded the June 30, 2009 interlocutory order. IDAPA 37.01.01.710.

////

////

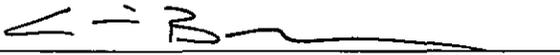
////

////

Based on his review of the record, the Director agrees that sufficient information exists to issue an order determining material injury to reasonable carryover and reasonable in-season demand. The Director will work expediently to issue the order on material injury to reasonable carryover and reasonable in-season demand for review by this Court.

DATED this 6th day of November 2009.

LAWRENCE G. WASDEN
Attorney General
CLIVE J. STRONG
Deputy Attorney General
CHIEF, NATURAL RESOURCES DIVISION


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

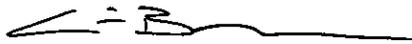
CERTIFICATE OF SERVICE

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 a 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 6th day of November 2009.

Document Served: **IDWR RESPONSE BRIEF ON REHEARING**

Deputy Clerk Gooding County District Court 624 Main St. P.O. Box 27 Gooding, ID 83330	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
Judge Melanson (courtesy copy) SRBA District Court 253 3rd Ave. N P.O. Box 2707 Twin Falls, Idaho 83303-2707	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
Judge Melanson (courtesy copy) Idaho Court of Appeals Supreme Court Building P.O. Box 83720 Boise, Idaho 83720-0101	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
C. Thomas Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 2598 Boise, ID 83701 tarkoosh@capitollawgroup.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

<p>Ronald Tenpas David W. Gehlert Natural Resources Section Environment & Natural Resources Division United States Department of Justice 1961 Stout St. 8th Floor Denver, CO 80294 David.Gehlert@usdoj.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Randall C. Budge Candice M. McHugh Scott J. Smith RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net sjs@racinelaw.net</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Sarah A. Klahn WHITE JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Dean A. Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205 dtranmer@pocatello.us</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Michael C. Creamer Jeffrey C. Fereday GIVENS PURSLEY LLP P.O. Box 2720 Boise, ID 83701-2720 mcc@givenspursley.com jcf@givenspursley.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>



 CHRIS M. BROMLEY
 Deputy Attorney General