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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, )

Case No. CV-2008-0000551

Petitioners, )

vs. )

**IDWR RESPONSE TO IGWA AND  
POCATELLO MOTION FOR STAY  
AND TO AUGMENT THE RECORD  
WITH ADDITIONAL EVIDENCE**

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 )  
\_\_\_\_\_ )

COME NOW Respondents, Gary Spackman in his capacity as Interim Director (“Director”) of the Department of Water Resources and the Department of Water Resources (“Department”) (collectively referred to herein as “Department”), and hereby file this response to the City of Pocatello (“Pocatello”) and Idaho Ground Water Appropriators, Inc.’s (“IGWA”) (collectively referred to herein as “Ground Water Users”) May 12, 2010 *Motion for Stay and to Augment the Record with Additional Evidence* (“Motion”) and accompanying memorandum (“Memorandum”). Because the Ground Water Users have failed to exhaust their administrative remedies before the Department, the Department respectfully requests this Court deny the GWU’s attempt to derail the administrative process.

### ARGUMENT

**I. Following This Court’s Order On Remand, The Director Has Established An Orderly Process For Administration Of Hydraulically Connected Surface and Ground Water Rights**

On March 4, 2010, the Court issued its *Order Staying Decision on Petition for Judicial Review Pending Issuance of Revised Final Order* (“Remand Order”). The Remand Order was issued pursuant to Idaho Appellate Rule 13(b)(14) and tasked the Director to issue a final order determining material injury to reasonable in-season demand and reasonable carryover by March 31, 2010. On March 29, 2010, the Court extended the deadline to April 7, 2010. On April 7, 2010, the Director issued his *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). Attachment A, Affidavit of Chris M. Bromley (“Bromley Affidavit”). “The purpose of this Final

Order is to set forth the Director's methodology for determining material injury to RISD and reasonable carryover to members of the SWC." *Methodology Order* at 2. In the Methodology Order, the Director updated existing data in the record with 2008 data. *Id.* at 7, fn. 4. The parties were made aware of the Director's decision to update existing data, were provided the opportunity for reconsideration on the Methodology Order, and have sought reconsideration of the Methodology Order. In accordance with Idaho Code § 67-5251(4), the Director has provided for a hearing to "contest and rebut" the 2008 data; the hearing is scheduled to commence May 24, 2010. *Notice of Hearing Regarding 2008 Data* (May 10, 2010). Attachment B, Bromley Affidavit.

Because of the need for on-going administration of hydraulically connected surface and ground water rights, the Director applied Steps 3 and 4 of the Methodology Order and, on April 29, 2010, issued his *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4)* ("April Forecast Supply Order").<sup>1</sup> Attachment C, Bromley Affidavit. Following Steps 3 and 4 of the Methodology Order, the Director predicted a demand shortfall of 84,300 acre-feet to the Surface Water Coalition ("SWC"). *Id.* at 2. The Director provided for reconsideration and a hearing on whether the April Forecast Supply Order followed Steps 3 and 4 from the Methodology Order. *Id.* at 4. Petitions for reconsideration and requests for hearing regarding the April Forecast Supply Order have been filed. A hearing on the April Forecast Supply Order is scheduled to commence immediately following conclusion of the hearing on the Methodology Order. Following the hearing on the April Forecast Supply Order, the Director will hold a hearing on IGWA's mitigation plan for the SWC. On June 1, 2010, the Director will hold a hearing on his determination of credit for IGWA's conversion, CREP, and recharge activities.

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<sup>1</sup> Referred to as the "As-Applied Order" by IGWA and Pocatello.

*Order Approving Mitigation Credits Regarding SWC Delivery Call* at 4 (May 17, 2010).

Attachment D, Bromley Affidavit. At the conclusion of these proceedings, the Director will issue orders on reconsideration, which will be subject to judicial review. Idaho Code § 42-1701(A)(4); § 67-5270.

**II. Idaho Code § 67-5276 Does Not Provide The Ground Water Users With An Avenue To Seek Augmentation Of The Department's Administrative Record Before The Director's Orders Are Subject To Judicial Review**

The Ground Water Users state that Idaho Code § 67-5276 authorizes “this Court to order IDWR to take additional evidence to augment the record in this matter.” *Memorandum* at 5.

Idaho Code § 67-5276 states as follows:

ADDITIONAL EVIDENCE. (1) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that:

(a) there were good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.

(b) there were alleged irregularities in procedure before the agency, the court may take proof on the matter.

(2) The agency may modify its action by reason of the additional evidence and shall file any modifications, new findings, or decisions with the reviewing court.

Emphasis added.

The Ground Water Users argue that the Court should force the Director to augment the record because a “hearing” has yet to occur before this Court. Certainly a hearing before the Court has not occurred because the matter is squarely before the Director.

In making their argument, the Ground Water Users first ignore the location in which - 5276 appears in Chapter 52, Title 67. Chapter 52, Title 67 contains the “Idaho Administrative Procedure Act” (“APA”). The APA follows a logical sequence. Regarding contested cases before an administrative agency, -5240 through -5255 addresses the procedures governing

contested cases and declaratory rulings before the agency. In contrast, 5270 through -5279 provides the procedure upon which that review is governed following the issuance of a final order that is subject to “judicial review.” Idaho Code § 67-5270.

Idaho Code § 67-5276 is located squarely within the rules governing judicial review of final agency orders, not within the rules governing contested cases before an agency. The importance of the statute’s location in the APA is that until the Director has (1) completed hearings on reconsideration of the above-mentioned orders, Idaho Code § 67-5246; that (2) results in final orders that are subject to judicial review, Idaho Code § 67-5270; the Court cannot grant the Ground Water Users’ Motion because a hearing on judicial review is not ripe.

Second, the plain language of Idaho Code § 67-5276 makes it clear that the hearing that is referenced is a hearing on judicial review, not a hearing before an agency. Idaho Code § 67-5276(a) states that if “there were good reasons for failure to present it in the proceedings before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.” Emphasis added. Therefore, until an agency completes its hearing and until there are final orders that are ripe for judicial review, the Ground Water Users cannot invoke Idaho Code § 67-5276 to seek an order from this Court to augment the record.

The above interpretation of Idaho Code § 67-5276 is consistent with the articulated principle that parties must first exhaust their administrative remedies before seeking judicial review of agency actions.

A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies. I.C. § 67-5271(1). Until the full gamut of administrative proceedings has been conducted and all available administrative remedies been exhausted, judicial review should not be considered. *See Grever v. Idaho Telephone Co.*, 94 Idaho 900, 903, 499 P.2d 1256, 1259 (1972).

*Regan v. Kootenai County*, 140 Idaho 721, 723-24, 100 P.3d 615, 617-18 (2004).

The Ground Water Users' request that the Court order the Department to augment the record is inconsistent with Idaho law and should be denied.

**III. Idaho Code § 67-5276 Does Not Provide The Ground Water Users With An Avenue To Define The Scope Of Hearings Set By The Director**

In their Motion, the Ground Water Users ask this Court to order the Director to “hold a hearing regarding the full scope of the issues related to the Methodology Order and As-Applied Order[.]” *Memorandum* at 5 (emphasis added). Again, the Ground Water Users base this request on Idaho Code § 67-5276. As stated above in Part I, the Director has granted the parties' requests for hearing on the Methodology Order and the April Forecast Supply Order. What the Ground Water Users take exception with, however, is the Director's decision to define the scope of those hearings to issues that have already been subject to hearing. Idaho Code § 67-5276 does not provide an avenue to define the scope of the hearing, but allows for a court to remand a matter back to an agency. As explained in Part II, until the Director issues a final order that is subject to judicial review, the Court cannot entertain the Ground Water Users' Motion because they have failed to exhaust their administrative remedies. Idaho Code § 67-5271; *Regan* at 723-24, 100 P.3d at 617-18.

**IV. The Ground Water Users Request For Judicial Review Of Certain Elements Of The Methodology Order Is Not Ripe For Review**

The Ground Water Users allege that the Methodology Order is not grounded in the record and seek an order from the Court directing the Department to correct the alleged errors.

*Memorandum* at 7-8. “At hearing in this matter, [the Ground Water Users] will present evidence regarding the factual problems with the new methodology, specifically the over-estimation of SWC crop water demands.” *Id.* at 8.

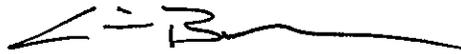
As stated earlier, IGWA, Pocatello, and the SWC have filed petitions for reconsideration regarding the Methodology Order. Starting on May 24, 2010, the Director will hold a hearing on the use of 2008 data in the Methodology Order. Upon completion of that hearing, the Director will issue an order regarding the petitions for reconsideration. Once the Director issues his order on reconsideration, the decision will be subject to judicial review; thereby providing the GWU with an opportunity to contest the Director's actions. The Ground Water Users' Motion for an advisory opinion from this Court on "SWC crop water demands"—a subject that was raised before Hearing Officer Gerald F. Schroeder—constitutes an end-run around established administrative procedures and must be denied. Idaho Code § 67-5271; *Regan* at 723-24, 100 P.3d at 617-18.

### CONCLUSION

Based on the foregoing, the Department respectfully requests that the Court deny the Ground Water Users' Motion for failure to exhaust administrative remedies.

DATED this 19<sup>th</sup> day of May, 2010.

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



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## 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 19<sup>th</sup> day of May, 2010.

Document Served: **IDWR Response to IGWA and Pocatello Motion for Stay and to Augment the Record with Additional Evidence**

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