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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,)

Case No. CV-2008-0000551

**MOTION TO CLARIFY / MOTION
FOR RECONSIDERATION OF
ORDER ON PETITIONS FOR
REHEARING**

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, the Idaho Department of Water Resources and Gary Spackman, in his capacity as Interim Director (collectively referred to herein as “Director” or “Department”), and hereby move to clarify and/or reconsider (“Motion”) this Court’s August 23, 2010 *Order on Petitions for Rehearing* (“Rehearing Order”). This Motion is brought pursuant to Idaho Rule of Civil Procedure 7(b)(1) and 11(a)(2)(B).

In its Rehearing Order, the Court stated: “This case is **remanded** to the Director so that he may apply the ‘clear and convincing’ evidentiary standard and appropriate burdens of proof when determining full headgate delivery for the Twin Falls Canal Company water right at issue in this case.” *Rehearing Order* at 12 (emphasis in original).

As this Court is aware, on September 5, 2008, the Director issued a Final Order that set full headgate deliveries for Twin Falls Canal Company (“TFCC”) at 5/8 of an inch per acre. *Order on Petition for Judicial Review* at 31 (July 24, 2009). On this point, the Court found that the “Director exceeded his authority in determining that full headgate delivery for Twin Falls Canal Company should be calculated at 5/8 of an inch instead of 3/4 of an inch per acre.” *Id.* at 31.

Additionally, the Final Order was remanded because the Court found that “the Director abused his discretion by issuing two ‘*Final Orders*’ in response to the Hearing Officer’s *Recommended Order*.” *Id.* at 32. During the rehearing process, the Court “held in abeyance” the issuance of “a final order on all of the issues presented on rehearing,” pending issuance of a “*Final Order* determining material injury to reasonable in-season demand and reasonable

carryover” *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order* at 2-3 (March 4, 2010).

While the Court held the matter in abeyance, the Director issued his *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (April 7, 2010) (“Methodology Order”).¹ The Methodology Order examined deliveries by the Surface Water Coalition in determining a baseline diversion volume for the irrigation season. The years chosen for the baseline were the average of 2006 and 2008 (“2006/2008”).

The Department’s understanding of the directive for remand is for the Director to “apply the ‘clear and convincing’ evidentiary standard and appropriate burdens of proof” if the Director believes TFCC’s full headgate deliveries should be 5/8 of an inch as opposed to 3/4 of an inch. *Rehearing Order* at 12. *See also Order on Petition for Judicial Review* at 31-32. As established in the Methodology Order, the Director is using 3/4 of an inch for TFCC diversions, instead of the stated 5/8 of an inch in his September 5, 2008 Final Order. *Methodology Order* at 11. Because the Director is using 3/4 of an inch, the basis for the remand is moot.

CONCLUSION

Based on the above, the Department respectfully requests that the Court clarify and/or reconsider its Rehearing Order by stating that the Department is not required to take any action

¹ After issuance of the April 7, 2010 Methodology Order, an administrative hearing was held, which resulted in amendments to the Order. On June 23, 2010, the Director issued his revised Methodology Order. The revised Order may be found on the Department’s website at the following location:

http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/2010/06Jun/20100623_AmendedFinalOrder.pdf

All citations to the Methodology Order herein are to the June 23, 2010 revised Order. As noted by the Court, the Methodology Order is currently on judicial review before the Honorable Eric J. Wildman.

on remand. In his Methodology Order, the Director is basing TFCC deliveries on 3/4 of an inch per acre.

DATED this 26th day of August, 2010.

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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 26th day of August, 2010.

Document Served: **MOTION TO CLARIFY / MOTION FOR REHEARING OF ORDER ON PETITIONS FOR REHEARING**

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