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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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	)	**DOCKET NO. 37-03-11-1** **CM-DC-2011-01**[1] **A&B IRRIGATION DISTRICT'S MOTION FOR CLARIFICATION AND REQUEST FOR OPPORTUNITY TO SUBMIT PROPOSED ORDER ON REMAND**

COMES NOW, A & B Irrigation District ("A&B"), by and through its attorneys of record, and pursuant to IDAPA 37.01.01.770, hereby requests clarification of the Interim Director's orders issued on April 7, 2011. For the following reasons the Director should clarify his orders and provide A&B with a fair and equal opportunity to submit a proposed order on remand.

[1] It is unclear why IDWR has created a new docket number for this matter or if that has any significance. A&B is therefore filing the present motion in both matters.

BACKGROUND

On February 15, 2011 Judge Eric J. Wildman issued his *Order Granting Motion to Enforce in Part and Denying Motion to Enforce in Part* (*A&B Irr. Dist. v. IDWR et al.*, Minidoka County Dist. Ct., Fifth Jud. Dist., Case No. 2009-000647). On March 14, 2011 the City of Pocatello filed its *Proposed Order on Remand and Motion for the Director to Consider Proposed Order on Remand* with IDWR. A&B immediately filed a *Motion to Strike* Pocatello's filing on March 16, 2011. Apparently counsel for IDWR did not realize A&B had filed a motion to strike until March 31, 2011. *See* Exhibit A (email correspondence). It is unknown whether the Interim Director was unaware of A&B's filing until the end of March as well.

IGWA filed a *Response* to Pocatello's motion on March 28, 2011. Consistent with its prior motion, A&B moved to strike IGWA's filing on March 30, 2011. IGWA and Pocatello then filed a joint response to A&B's motions to strike.[2] On April 7, 2011, the Director denied A&B's motion to strike and issued a *Notice of Intent to Issue Final Order by April 15, 2011.* Given the state of the "post-hearing" and "post-judicial review" filings before IDWR, the Director's April 7, 2011 orders should be clarified and A&B should be provided with an opportunity to submit a proposed order on remand.

MOTION

The Director has not formally ruled on Pocatello's *Motion for the Director to Consider Proposed Order on Remand.* Accordingly, A&B is unaware if the April 7, 2011 orders grant Pocatello's motion by implication or not. A&B is uncertain if the Director intends to, or has already considered the proposed orders and information submitted by Pocatello and IGWA. If

[2] Contrary to Pocatello's and IGWA's response, Rule 564 does not apply in this case where the Director has issued a final order that was appealed to District Court, and where the Court has ordered the Director to issue a new order on remand based upon the "existing record". Additional briefs, memoranda, and proposed orders do not fall within the "existing record" in this case.

the Director has already implicitly granted Pocatello's motion, A&B should be provided with an equal opportunity to submit a proposed order on remand as well. Since the Director did not rule upon A&B's motion to strike for over three weeks, A&B had no knowledge as to whether additional "post-hearing" materials would be considered for the order on remand or not.[3] To that end, A&B did not undertake to spend additional time and resources on a filing that may or may not even be considered.

It was A&B's understanding that the record was finalized when the case was appealed and heard by Judge Wildman. *See* I.C. § 67-5249; I.R.C.P. 84(f); *Order Granting Motion to Augment and Correct Agency Record* (February 26, 2010, Case No. 2009-647). In his *Memorandum Decision and Order on Petition for Judicial Review*, Judge Wildman specifically held: "The case is remanded for the limited purpose of the Director to apply the appropriate evidentiary standard to the ***existing record.*** No further evidence is required." *Order* at 49 (emphasis added). Despite the Court's order, Pocatello submitted a "new" filing with IDWR that is not part of the "existing record", a proposed order for the Director to consider on remand. IGWA filed a "response" to Pocatello's motion and proposed order. IGWA's additional filing is not part of the "existing record" either. Since the Director denied A&B's motion to strike the additional post-hearing (and post judicial review) filings, it is presumed the Director has, or will consider both Pocatello's proposed order and IGWA's response for purposes of issuing the forthcoming order on remand.

The Director should provide A&B with a fair and equal opportunity to submit a proposed order as well. As Pocatello recognized: "[o]ther parties may wish to offer, or the Director may wish to request, additional proposed orders to facilitate the efficient review of the record in this

[3] Of course the Director may not have been aware of A&B's filing due to an inadvertent mistake on IDWR's part in handling A&B's motion. *See* Exhibit A.

matter." *Pocatello Motion* at 2. If the "existing record" will now include "new" post-hearing briefing and proposed orders, the Director should provide A&B with a fair opportunity to submit a proposed order on remand.

Given the timing of the Director's orders, the inadvertent delay in ruling on A&B's motions to strike, and the existing obligations of A&B's counsel at this time, A&B requests the Director adopt the following schedule:

Deadline for A&B to Submit Proposed Order	**April 19, 2011**
Deadline for Director to Issue Order on Remand	**April 29, 2011**

The above two-week extension will provide A&B with sufficient time to submit a proposed order on remand and will further give the Director an opportunity to consider A&B's filing. Since Pocatello and IGWA have already submitted information to the Director, the short extension will not prejudice any other parties and therefore should be granted. A&B requests expedited consideration of this motion.

DATED this 8th day of April, 2011.

BARKER ROSHOLT & SIMPSON LLP

Travis L. Thompson

Attorneys for A & B Irrigation District

CERTIFICATE OF MAILING

I hereby certify that on this 8th day of April, 2011, the above and foregoing, was sent to the following by U.S. Mail proper postage prepaid and by email for those with listed email addresses:

Interim Director Gary Spackman
Garrick Baxter
Chris Bromley
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✓ U.S. Mail, Postage Prepaid
____ Hand Delivery
____ Overnight Mail
____ Facsimile
✓ Email

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Travis L. Thompson

Exhibit
A

Travis Thompson

From: Bromley, Chris [Chris.Bromley@idwr.idaho.gov]
Sent: Thursday, March 31, 2011 7:49 AM
To: Jessica Forbis; Travis Thompson; Paul Arrington
Subject: RE: A&B Irrigation District's Motion to Strike

All,

There's reference to a previous motion to strike in response to a document filed by the City of Pocatello. I didn't receive that document. Would you please send it to me? If you could please make sure it was served on the Department, that would also help.

Thanks,

Chris

-----Original Message-----
From: Jessica Forbis [mailto:jf@idahowaters.com]
Sent: Wednesday, March 30, 2011 4:30 PM
To: Gibson, Deborah; rcb@racinelaw.net; cmm@racinelaw.net; sarahk@white-jankowski.com; A. Dean Tranmer; Jerry Rigby; Baxter, Garrick; Bromley, Chris; Travis Thompson; John Simpson; Paul Arrington
Subject: A&B Irrigation District's Motion to Strike

Attached please find a copy of A&B Irrigation District's Motion to Strike regarding case no. 37-03-11-1. A hard copy will follow in the mail.

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-----Original Message-----
From: Barker, Rosholt, Simpson [mailto:scan@barker.local]
Sent: Wednesday, March 30, 2011 4:11 PM
To: Jessica Forbis
Subject: Send data from Tosh6520cTwin [JF_E-MAIL] 03/30/2011 15:11

Scanned from Tosh6520cTwin.
E-mail
JF_E-MAIL
Date: 03/30/2011 15:11
Pages:3
Resolution:200x200 DPI

Scanned image attached...