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Attorneys for the City of Pocatello

**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

UNITED STATES OF AMERICA,
BUREAU OF RECLAMATION,

Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION,
INC.,

Cross-Petitioner,

vs.

GARY SPACKMAN, in his capacity as

Case No.: CV-2008-0000551

NOTICE OF APPEAL AND PETITION FOR
JUDICIAL REVIEW OF AGENCY ACTION
(FINAL METHODOLOGY ORDER)

Interim Director of the Idaho Department of
Water Resources,¹ 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

COMES NOW, the Petitioner City of Pocatello (“City” or “Pocatello”), by and through its undersigned counsel, and hereby files this Petition seeking judicial review of a final agency action. Pursuant to Idaho Rule of Civil Procedure 84(d)(5), Pocatello reserves the right to assert additional issues and/or clarify the issues for judicial review stated in the petition, or which are discovered later.

STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code §§67-5270, 67-5279, and 42-1701A(4) seeking judicial review of the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Final Methodology Order”) of the Director of the Idaho Department of Water Resources (“IDWR” or “Department”), *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*, entered June 23, 2010.

¹ Director David R. Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director. I.R.C.P. 25 (d) and (e).

2. This Final Methodology Order was issued pursuant to a remand by the Court in the Court's *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*, issued March 4, 2010 ("March 4, 2010 Order") in this case. There, the Court ordered that it would hold in abeyance the pending petitions for rehearing in Case No. 2008-000551 until "the time periods for filing a motion for reconsideration and petition for judicial review of [the Final Methodology Order] have expired." *Id.* at 3. Pocatello hereby files this Petition for Judicial Review of the Department's Final Methodology Order pursuant to the March 4, 2010 Order in Case No. 2008-000551.

3. A limited hearing in this matter was held before the Department on May 24, 2010.

JURISDICTION AND VENUE

4. This petition is authorized pursuant to Idaho Code §§67-5270 and 67-5279.

5. The Court has jurisdiction over this action pursuant to Idaho Code §§42-1701A(4), 67-5272 and 42-1401D. This Court also has jurisdiction over this matter pursuant to its continuing jurisdiction over the appeal in Case No. 2008-0000551.

6. Venue lies with this Court pursuant to the Court's continuing jurisdiction over Case No. 2008-0000551 and Idaho Code §§42-1701A, 42-1401D and 67-5272. Certain water rights which are the subject of the agency action are delivered to water users located in Gooding County.

7. Petitioner Pocatello exhausted all administrative remedies prior to filing this Petition.

8. The Director's Final Methodology Order of June 23, 2010 is a final agency action subject to judicial review pursuant to Idaho Code §67-5270(3).

PARTIES

9. Petitioner City of Pocatello is a municipal corporation of Idaho.

10. The Idaho Department of Water Resources is a state agency, with its main office located at 322 E. Front Street, Boise, Idaho. Gary Spackman is the Interim Director of the Idaho Department of Water Resources.

AGENCY RECORD

11. Judicial review is sought of the Director's Final Methodology Order entered June 23, 2010 *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.*

12. The Court has in its possession a copy of the previously submitted agency record in Case No. 2008-000551. The Department held a hearing in this matter on May 24, 2010, which was recorded and a transcript was created, which transcript should be made a part of the agency record in this matter. In addition to the transcript, all exhibits offered and any pleadings or filings made to or by the agency since this Court's March 4, 2010 order should also be included as part of the agency record, including any documents produced, used or relied upon by the Director in issuing his Final Methodology Order. The person who may have a copy of such a transcript is the Director's Administrative Assistant, Idaho Department of Water Resources, 322

E. Front Street, P.O. Box 83720, Boise, Idaho 83720-0098, Telephone: (208)287-4803,
Facsimile: (208) 287-6700, email: victoria.wigle@idwr.idaho.gov.

13. Petitioner Pocatello anticipates that it can reach an agreement regarding the agency record with the Departments and the other parties, and will pay its necessary share of the fee for preparation of the record at such time.

14. Service of this Notice of Appeal and Petition for Judicial Review of Agency Action has been made on the Departments at the time of the filing of this Petition with the Court.

ISSUES ON APPEAL

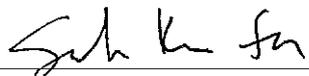
15. The following list is Pocatello's preliminary statement of issues on appeal:

- a. Whether the Director erred in determining that historic Surface Water Coalition diversions equate to the amount of water the senior is entitled to under the Rules for the Conjunctive Management of Surface and Ground Water Resources ("CM Rules), IDAPA 37.03.11?
- b. Whether the Director erred in requiring the Ground Water Users to mitigate or curtail for an amount of water not based on the extent of beneficial use required for irrigation under the senior users' water right, in violation of *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 876, 154 P.3d 433, 447 (2007)?
- c. Whether the Director erred in failing to incorporate the CM Rules in the Final Methodology Order?
- d. Whether the Director's Final Methodology Order is in compliance with this Court's limited remand, *Order on Petition for Judicial Review* issued July 24, 2009, and the prior affirmed decisions of the Department and the Hearing Officer in this matter?
- e. Whether the Director's Final Methodology Order is supported by substantial evidence, in violation of Idaho law, or is an arbitrary and capricious decision, made upon unlawful procedure, or otherwise in violation of Idaho Code § 67-5279?

- f. Whether the Director's Final Methodology Order is consistent with the record developed in this matter?
- g. Whether the Director's decision to unreasonably limit the scope of the May 24th hearing in this matter violated the parties' due process rights?
- h. Whether additional proceedings before the agency are required pursuant to Idaho Code § 67-5276?
- i. Whether the Department erred in denying Pocatello's request to appoint an independent hearing officer?
- j. Whether the Director erred in failing to issue a Final Methodology Order in compliance with Idaho Code § 67-5248?

Dated this 20th day of July, 2010.

CITY OF POCATELLO ATTORNEY'S OFFICE
Attorneys for the City of Pocatello

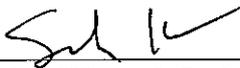
By 
A. Dean Tranmer

WHITE & JANKOWSKI, LLP
Attorneys for the City of Pocatello

By 
Sarah A. Klahn

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2010, I caused to be served a true and correct copy of the foregoing **Notice of Appeal and Petition for Judicial Review of Agency Action [Final Methodology Order]** in **Case No. CV-2008-0000551** upon the following by the method indicated:



 Sarah Klahn, White & Jankowski, LLP

Gary Spackman, Interim Director State of Idaho, Dept of Water Resources 322 E Front St PO Box 83720 Boise ID 83720-0098 Deborah.Gibson@idwr.idaho.gov	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile 208-287-6700, Phone 208-287-4942 <input checked="" type="checkbox"/> Email
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<p>Michael Gilmore Attorney General's Office PO Box 83720 Boise ID 83720-0010 mike.gilmore@ag.idaho.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 208-334-2830 <input checked="" type="checkbox"/> Email</p>
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<p>Lyle Swank IDWR – Eastern Region 900 N Skyline Dr Idaho Falls ID 83402-6105 <u>lyle.swank@idwr.idaho.gov</u></p>	<p><input 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>
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<p>Courtesy copy to: Snake River Basin Adjudication District Court of the Fifth Judicial District PO Box 2707 Twin Falls ID 83303-2707</p>	<p><input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid</p>