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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

IDAHO GROUND WATER
APPROPRIATORS, INC, BONNEVILLE-
JEFFERSON GROUND WATER DISTRICT,
and BINGHAM GROUND WATER
DISTRICT,

Petitioners,

vs.

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

Respondents.

Case No.: CV01-23-8187

**COALITION OF CITIES, CITY OF
POCATELLO AND CITY OF IDAHO
FALLS RESPONSE TO GROUND WATER
DISTRICTS' MOTION TO STAY,
MOTION FOR INJUNCTIVE RELIEF,
MOTION TO COMPEL, MOTION FOR
EXPEDITED DECISION AND
APPLICATION FOR ORDER TO SHOW
CAUSE**

IN THE MATTER OF THE DISTRBUTION
OF WATER RIGHTS TO VARIOUS

RIGHTS HELD BY AND FOR THE
BENEFIT OF A&B IRRIGATION
DISTRICT, AMERICAN FALLS
RESERVOIR DISTRICT NO. 2, BURLEY
IRRIGATION DISTRICT, MILNER
IRRIGATION DISTRICT, MINIDOKA
IRRIGATION DISTRICT, NORTH SIDE
CANAL COMPANY, AND TWIN FALLS
CANAL COMPANY

COME NOW, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (“Coalition of Cities”), by and through their attorneys of record, Candice M. McHugh and Chris M. Bromley, the City of Idaho Falls, by and through its attorney of record, Robert L. Harris, and the City of Pocatello by and through its attorney of record Sarah A. Klahn (collectively the “Cities”), support the *Ground Water Districts’ Motion for Stay, Motion for Injunctive Relief, Motion to Compel, and Motion for Expedited Decision, and Application for Order to Show Cause* (collectively “GWD Motions”) filed on May 19, 2023 in this matter.

In the interest of efficiency and brevity, the Cities hereby incorporate herein their filings in Case Nos. CV01-23-08258 and CV01-23-08306 also filed in Ada County District Court and referred to the Honorable Eric Wildman as the filings in those cases provide important information and background to this case.

The Cities believe that the GWD Motions should be granted because the process that the Director has chosen to take this year shows an extraordinary disregard to the fundamental principles of due process, fairness and attempts to prevent the parties from lawful and necessary discovery into the reasons for the changes to the *Amended Fifth Methodology Order for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fifth Methodology Order”). Not only did the Director issue the Fifth Methodology Order but

he also implemented the Fifth Methodology Order by issuing the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (“As-Applied Order”) the same day and set a hearing date six weeks later.

Yet, he only gave notice of the *Fifth Methodology Order and As-Applied Orders* to parties that were already in the case, even though the implementation of the two orders set deadlines for non-parties to comply with mitigation by May 5, 2023, or face curtailment. Luckily for the Coalition of Cities members, Idaho Falls and Pocatello, they were parties to the case and were given notice in order to participate. However, the process the Director has taken is still extremely troubling to the Cities for several reasons.

First, in an effort to meet the Director’s short deadlines, the Cities, along with the GWDs started the discovery process to gain an understanding of what was changed in the Fifth Methodology Order and why. However, the Director has thwarted that effort by limiting what the Cities and GWDs can learn about the rationale for amending the prior methods and implementing an entirely new order. Thus prompting the filing of the Petition for Judicial Review, Case No. CV01-23-08306.

One of the biggest and most profound changes to the prior order is that the Fifth Methodology Order and the As-Applied Order use the ESPA Model 2.2 in “transient” as opposed to the judicially-sanctioned “steady-state” method to determine the priority date of what water rights should be curtailed to address forecasted injury to Twin Falls Canal Company.

Furthermore, the Department now has multiple years of experience with the methodology to better understand the impact of applying steady-state modeling versus transient modeling to determine a curtailment priority date that would supply adequate water to the senior water right holders. The first version of the ESPA groundwater flow model was not calibrated at a time-scale that supported in-season transient modeling. In contrast, the current version was calibrated using monthly stress periods and halfmonth time steps, a refinement that facilitates in-season transient modeling for calculating the response to curtailment of

groundwater use. The purpose of this *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fifth Methodology Order”) is to update the Director’s methodology for determining material injury to storage and natural flow water rights either held by or committed to members of the SWC consistent with the Director’s ongoing obligation to use the best available science and information.

Exhibit A-1 at 2

While the Department chose 2023 to impose transient modeling to calculate shortages, the Department’s modeler, Jennifer Sukow, testified during deposition that the half-month time step was part of ESPAM 2.1 which was “rolled out in 2013.”

Q. And when did the calibration between ESPAM1.1 and ESPAM -- when the did ESPAM calibration change to **2** the half month time step?

A. With ESPAM2.1.

Q. And when did happen?

A. I believe that was rolled out in 2013.

(Attachment 3 of Decl of Bricker in Case No. CV01-23-08306 Sukow Tr. 49:25-50:5)

Q. So the time step, the half month time step in predicting like when -- that time step is important I guess to determining in a transient model run, like when water, or when the output is going to be realized; is that true?

A. Yes, that's true.

Q. So in 2013, the time step being a half month is the same time step as in 2023 under the same current version of the model?

A. Yes.

Q. And there were curtailment orders issued between 2013 and 2023 by the Department; correct?

A. Yes.

Q. And those all use steady state?

A. Yes.

Q. Even though the model was a transient model and had the half month time step since 2013?

A. Yes.

Id. at Sukow Tr. 50:21-51:13

The Director has foreclosed the Cities efforts to investigate the bases for IDWR's decision to move from steady-state to transient in 2023. The Department's rationale has spanned from an assertion of the deliberative process privilege (which is not the law in Idaho) to an assertion of the Director's discretion to decide what is important for protestants to know about the origins of an Order that he, himself, drafted. (See Case No. CV01-23-08306 *Petitioners' Memorandum in Support of Motion for Stay Based on IDWR's Interference with Lawful Discovery* at 3.) The Department's asserted scope of this alleged "privilege" spans not just to the few months leading up to the Fifth Methodology Order, rather, as testified by Matt Anders, it harkens back to shield discovery into information in the fall of 2020:

Q: And in those meetings in the fall of 2020 when you discussed those three items that you just told me about with the Director, did he essentially approve you to look at those or to create some sort of a task force within the agency? What was that process?

A: MR. BAXTER: Matt, I'm going to object to the question here. I think we are back in getting to the Director's deliberative process on legal and policy considerations here, which have been excluded by the Director as being outside the scope of this deposition. So I'm going to instruct you not to answer that question.

Declaration of Candice McHugh, Ex 1 Anders Transcript Vol II, Tr. 266: 25- 267: 11. See too Id. Tr. 265: 19- 266. There is simply something amiss occurring in this case that is motivating IDWR to withhold information from the parties over a nearly 3 year time frame.

The Discovery and Scheduling Order were sent only to entities that were previously parties to the captioned matter; meanwhile, the Director's "As-Applied" order seeks to curtail over 800 water users. Notice of that curtailment was not provided until *after* the deadlines set in the May 5 Order. Case No. CV01-23-08306, Declaration of Candice McHugh at ¶3-4, Ex. A. The Cities support the Ground Water Districts and IGWA in seeking a hearing on the Director's lack of process in this matter—process which is so lacking it simply cannot form the basis for lawful administration of Idaho water rights. The Director's message to new agribusiness in Idaho

is clear: if you come to Idaho and use groundwater, outside city limits, do not expect to be notified in a timely manner that your water rights will be curtailed until after necessary deadlines. Id.

Third, the hearing in this matter was set with only six weeks notice and while the Director argues that is plenty of time to prepare for hearings involving conjunctive management because he has forced parties to do it before, in this case, he set the hearing without any regard to counsel's schedules or the availability of the Cities' expert in a year when there is not a drought. While counsel can appreciate that they should be available to represent their clients, even in difficult and time-sensitive circumstances, the entire lack of regard for the Cities' schedules is an abuse of process and entirely unnecessary.¹

Based on the foregoing, along with the arguments made by the Ground Water Districts, the Ground Water Districts' Motions should be granted.

DATED this 31st day of May, 2023.

/s/ Candice M. McHugh

Candice M. McHugh

/s/ Sarah Klahn

Sarah Klahn

Attorney for City of Pocatello

/s/ Chris Bromley

Chris Bromley

Attorneys for Coalition of Cities

/s/ Robert Harris

Robert Harris

Attorney for City of Idaho Falls

¹ The Director denied the Cities' request to continue the hearing, reconsideration of that denial and the Cities' request to re-set the hearing date to begin two weeks later.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of May, 2023, I served a true and correct copy of the foregoing document was served through iCourt on any other persons who have entered notices of appearances or are named parties through iCourt:

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