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ATTORNEYS FOR THE CITY OF POCATELLO

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

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)

**CITY OF POCATELLO'S
PETITION FOR
RECONSIDERATION**

The City of Pocatello (“City” or “Pocatello”) hereby submits this Petition for Reconsideration of the Interim Director’s Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover (“April 7th Order” or “Modified Protocol”). Pocatello asks the Director to reconsider several components of the April 7th Order, which “set[s] forth the Director’s methodology for determining material injury to RISD and reasonable carryover to members of the SWC.” *Id.* at 2, ¶ I.4.. Because some of the methodologies, assumptions and data that Director utilizes in the April 7th Order are not

supported by the record or are contrary to Idaho law, the City asks the Director re-issue his April 7th Order with the changes and modifications identified below. To better assist the Director in making his determinations, the City will submit technical comments in support of its Petition for Reconsideration.

1. The Director’s Calculation of Baseline Demand Improperly Relies on Historical Diversions as a Measure of SWC Demand

- a. Defining injury based upon historical diversions, instead of actual need and beneficial use, is inconsistent with Idaho law. As the Department has repeatedly acknowledged, under Idaho law depletion does not equal injury. *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources* (“AFRD#2”), 143 Idaho 862, 868, 154 P.3d 433, 439 (2007). As the Idaho Supreme Court found in *AFRD#2*, senior water users can only call for the amount of water that can be beneficially used.
 - i. The amount of water that is necessary to meet the water needs of the SWC cannot be simply equated to how much water those entities have historically diverted, but instead must be determined by examining crop water needs, conveyance losses, and on-farm efficiencies. The record in this matter establishes that any Department protocol for determining injury must accurately define need as to ensure that “use of water above that amount would not be applied to a beneficial use and would constitute waste.” *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation*, April 29, 2008 (“Recommendations”) at 44, ¶ XIII 7. “[I]n considering whether there is material injury . . . [i]t is relevant to consider how much water is necessary to irrigate crops to maturity.” *Id.* at 54, ¶ XV 1.
 - ii. The Department’s approach to predicting injury in the April 7th Order is inconsistent with the approach of the Department in the A&B Delivery Call. *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 (“A&B Irrigation District Delivery Call”). The A&B injury determination did not simply look at historical pumping by seniors. Instead, the Department evaluated whether A&B’s crop water requirements could be satisfied by the available water supply. That evaluation was based on whether the available supply was sufficient to meet crop demands, assuming that farmers would operate at reasonable on farm efficiencies that are consistent with IDWR administrative practices. The Department’s conceptual approach in the A&B delivery call is a more appropriate approach to determining need, and the modified protocol in this matter is

not consistent with administrative practice as implemented in the A&B Delivery Call.

- iii. The record reflects that IDWR's discretion is limited in determining material injury, and that "in considering whether there is material injury . . . [i]t is relevant to consider how much water is necessary to irrigate crops to maturity." Recommendations at 54, ¶ XV 1.¹ Injury must be determined by "establish[ing] the amount necessary to meet water needs . . ." *Id.* at 40, ¶ XIII 4. (emphasis added).
 - iv. The Director is required to take the principles of optimum utilization and beneficial use into account when developing an injury protocol. By using higher than average year diversions, these principles have been abandoned. Further, the record is replete with findings related to the danger of overestimating predicted injury.
- b. In addition, the Department's determination of need should be developed by reference to average conditions. "Predictions of need should be based on an average year of need, subject to adjustment up or down depending upon the particular water conditions for the irrigation season." Recommendations at 49, ¶ XIV 2. (emphasis added). "The development of an acceptable baseline subject to adjustment for changing conditions retains the value of having senior rights while providing some level of protection against unnecessary curtailment." *Id.* (emphasis added).
- i. The Modified Protocol incorrectly determines that the baseline year "should represent a year(s) of above average diversion, and to avoid years of below average diversions. Above average diversion year(s) selected as the BLY should also represent year(s) of above average temperatures and ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors." April 7th Order at 5, ¶ II.C.i.16. (emphasis added).
 - ii. The record in this matter establishes that junior users only have to prove the ability to provide that amount of water that is actually needed by the SWC. "Using the maximum amount in determining a level of water that will be needed would in instances be higher than the amount necessary. Although it could be adjusted down, it would require commitments to be made for the acquisition of water that at times would not be needed. It would not encourage reasonable conservation as required in CM Rule 42.01." Recommendations at 48, ¶ XIV 1. (emphasis added).
 - iii. The current Modified Protocol develops demand numbers based on an average of SWC diversions from 2006 and 2008. It is, by its terms, inconsistent with the record in this matter and must be revised.

¹ Citations in this Petition are to the Hearing Officer's Recommendations except where the Director's Final Order or the District Court's initial decision are at variance with the Hearing Officer's Recommendations.

2. **The Director’s Method of Calculation of Shortfall is Not Supported by the Record.**

- a. The Director’s Modified Protocol intentionally underestimates the supply of water available to the SWC. The underestimation of supply and overestimation of demand, as described above, results in an unreasonably inflated estimate of predicted shortfall by the Department. The Modified Protocol not supported by the record and is not consistent with the principles of full economic development and maximum utilization.

3. **The Modified Protocol’s Method of Applying “Project Efficiencies” is Not Supported by the Record in this Matter**

- a. The Modified Protocol determines the water requirements for the SWC members based solely on historical diversions rather than also considering the amount of water necessary to meet crop water needs.
- b. Historical diversions are used to determine the baseline demands at the start of the year. In updating the water requirements at various points throughout the irrigation season, the Director proposes a methodology that uses project efficiencies derived from historical diversions. Use of project efficiencies in this manner essentially locks in the historical diversions as the yardstick for the water requirements of the SWC members. This is contrary to the conceptual approach used by the experts for the surface water users and the ground water users, as well as the approach used in the IDWR Order on A&B Irrigation District Delivery Call, in which water requirements are determined based on the irrigators operating at reasonable irrigation efficiencies.
- c. The Recommendations place appropriate limitations on the use of historical diversions in determining the SWC demands by requiring consideration of the diversion requirements of the crops and the reasonable and efficient operation of the irrigation systems that are in place. Recommendations at 51-52, ¶ XIV 7.
- d. The Director found in the Modified Protocol that the predominant method of application by SWC members is sprinkler irrigation. April 7th Order at 11. IDWR has previously found that accepted application efficiencies for sprinklers range from 60%-85%, with center-pivot systems having efficiencies ranging from 75-85%. See IDWR Order on A&B Irrigation District Delivery Call.
- e. The Director should revise the Modified Protocol and not rely solely on historical diversions as the means to determine the demands of the SWC members, but should instead also factor in the amount of water that is actually necessary to meet crop water demands considering reasonable conveyance losses and reasonable application efficiencies.

4. **Planned Use of the Eastern Snake Plain Aquifer Model in Administration is not explained in the Modified Protocol**
 - a. It is not clear from the Modified Protocol how the Department will use the Eastern Snake Plain Aquifer model in any as applied orders (applying any modified protocol in coming years) or whether such use is supported by the record in this matter or by Idaho law.

5. **Determination of Injury to Carryover is Not Consistent with Idaho Law or the Record in this Matter**
 - a. The Modified Protocol requires that the Department establish reasonable carryover estimates on or before November 30th, and within fourteen days junior water users will be required to establish that they have the ability to provide a volume of storage water equal to reasonable carryover shortfall, or be curtailed. April 7th Order at 36 ¶ 14. Requiring junior water users to guarantee this amount of water, over six months before the time of need, is unreasonable and is not supported by the record in this matter and is inconsistent with maximum utilization and full economic development.
 - b. The methodology to determine Reasonable Carryover for each entity in the Modified Protocol is unclear and is not based on the record. The Director should revise the Modified Protocol to explain how reasonable carryover is calculated and where this methodology is supported in the record.
 - c. Further, the Modified Protocol relies on data from 2008 to calculate reasonable carryover, which is not data that was available to the parties before the hearing officer in this matter.

6. **The Director's Modified Protocol Must Be Limited to Reliance on Data and Information That are in the Record**
 - a. The Director has used data from 2008 in the Modified Protocol. This data is not in the agency record. *See* April 7th Order at 7 n.4.
 - b. "The agency's findings must be affirmed unless the findings are not supported by substantial evidence on the record as a whole, I.C. § 67-5729(3), or the findings are arbitrary, capricious, or an abuse of discretion, I.C. § 67-5729(2)(d). Any findings made by the [agency] based on matters outside the record must be reversed as unsupported by substantial, competent evidence or as arbitrary and capricious." *Laurino v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 137 Idaho 596, 601, 51 P.3d 410, 415 (2002).
 - c. The parties did not have the opportunity at hearing to examine or present expert testimony regarding the reliability of the Director's methodology or the 2008 data. Further, the hearing in this matter did not address the matter of how the Department will use future hydrologic and water use data in any modified protocol. Because the record does not support the Director's Modified Protocol

for determining injury in the April 7th Order, if the Modified Protocol continues to rely on extra-record material, the parties are entitled to a new hearing to examine this new evidence in light of the findings already in the record.

Respectfully submitted this 21st day of April, 2010.

CITY OF POCA TELLO ATTORNEY'S OFFICE

By 
A. Dean Tranmer

WHITE & JANKOWSKI

By 
Sarah A. Klahn

ATTORNEYS FOR CITY OF POCA TELLO

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2010, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Petition for Reconsideration for Final Order regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover dated 04-07-10** upon the following by the method indicated:



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