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ATTORNEYS FOR GROUND WATER
USERS

**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

**CITY OF POCATELLO'S AND
GROUND WATER USERS'
REPLY IN SUPPORT OF MOTION FOR
STAY AND TO AUGMENT THE
RECORD WITH ADDITIONAL
EVIDENCE AND MOTION TO LATE
FILE REPLY**

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

The City of Pocatello (“Pocatello”) and the Idaho Ground Water Appropriators, acting for and on behalf of their members (“Ground Water Users”) submit this Reply in Support of their Motion to Stay and to Augment the Record with Additional Evidence (“Motion to Augment”). Pocatello and the Ground Water Users also respectfully request permission to late file this brief for the reasons described in the Motion appended to the end of this Reply.

Introduction

As a result of the limited remand granted to IDWR by this Court, the Department issued two orders regarding the SWC delivery call. The first was the April 7, 2009 “Methodology Order” and the second was the April 29, 2009 “As-Applied Order”, which purported to apply steps 3 and 4 from the Methodology Order to determine the mitigation amount owed by the Ground Water Users and set a curtailment date. *See* Attachments 1 and 2 to the Motion to Augment. As described in the Motion to Augment, the Methodology Order (and thus the As-Applied Order) is not consistent with the record below regarding the methodologies determined

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).

by the Hearing Officer, Director and this Court based on evidence taken at the 2008 Hearing in this matter.

Subsequent to the filing of the Motion to Augment, the Director held limited hearings on May 24 and 25, 2010 for the sole purpose of allowing inquiry into the reliance on 2008 data and whether the Department had complied with Steps 3 and 4 of the Methodology Order². The limitations on the scope of these hearings reflect a misperception on the part of the Department that the April 7th Methodology Order is consistent with the record below and the limited remand of the District Court.³ In the course of the hearings, the Director declined to consider evidence offered by Pocatello and the Ground Water Users that would have demonstrated the disconnect between the Methodology Order and the record below; further, the Director, in an abuse of discretion, refused to allow Pocatello and Ground Water Users to make offers of proof made on these subjects.

While the Department and the SWC responded to Pocatello and Ground Water Users' Motion to Augment, neither has provided any basis for the Methodology Order to be accepted into the record, or for the Court to find that the Methodology Order is consistent with the limited remand. Given the factual deficiencies in the record from the limited hearings held on May 24-25, and the abuse of discretion committed by the Department in exceeding the scope of the remand as well as the abuse of discretion regarding proceedings at the hearings on those dates, the Ground Water Users respectfully request that their Motion to Augment the record be granted.

² Enclosed with this Reply is an Affidavit of Sarah A. Klahn, attached to which are true and correct copies of the transcripts from the May 24th and 25th hearings in the Methodology Order and As Applied Order.

³ Despite the limited nature of the hearings, and the resulting violation of principles of due process, the evidence during the hearings demonstrated that the administrative steps outlined in the Department's Methodology Order have not been followed for purposes of issuing the 2010 curtailment order.

I. ALTHOUGH THE DEPARTMENT HELD HEARINGS ON MAY 24-25, 2010, THE SCOPE OF THE HEARINGS WAS INADEQUATE TO AUGMENT THE RECORD.

As described in the Motion to Augment, the Director noticed limited hearings for May 24-25 allowing evidence on the use of 2008 data in the Methodology Order and allowing inquiry into whether Steps 3 and 4 of the Methodology Order were followed. *See* Motion to Augment at 2-3 and Attachment 5.

At the May 24th hearing on the Methodology Order, the Director stated that despite the fact that the Methodology Order “may not be based on the methods that – methods that were proposed or the processes that were proposed by the parties in the [2008] hearing itself,” he saw any hearing on the Methodology beyond the department’s use of 2008 data as “beyond the scope of [Judge Melansen’s] directive to the Department.” Methodology Order Hearing Transcript, attached as Exhibit A to the Affidavit of Sarah A. Klahn, May 24, 2010, 22:17-23:7. The Director’s statement assumes, without allowing the parties to demonstrate otherwise, that the Methodology Order itself is consistent with the directive of Judge Melansen’s limited remand.

In the Methodology Order, the Department adopted methods (Steps 3 and 4) that purportedly allow for determination of shortage to the SWC. In the course of the Methodology Order hearing on May 24, Pocatello attempted to ask Department employees about the validation methods for the 2010 forecast shortfall, but the Director refused to allow that line of questioning because it went beyond “whether the 2008 date [sic] is accurate and reliable or not.” *Id.* at 52:25-53:11. The Director also refused testimony regarding whether the 2008 data “needs to be adjusted somehow in the presentation of the raw data [because] I think that goes beyond what was intended to bring into the record with respect to the 2008 data.” *Id.* at 95:14-19. *See also id.* at 106:8-14.

A. Although Limited, Testimony at the May 24-25 Hearings Demonstrated the Department's Methodology Order is Arbitrary and Erroneous. A New Hearing Is Required.

Although the Department held two limited hearings on matters related to the Methodology, the scope of the hearings was inadequate to augment the record for the purposes of this motion. Pocatello and the Ground Water Users are not in a position to demonstrate the shortcomings of the hearing record, however, because the Director not only excluded testimony and cross-examination, he also excluded offers of proof. To wit:

I don't intend to allow offers of proof that will go on for hours, and enlarging the record in that manner. And I recognized that there is some risks in not allowing evidence into the record. That risk being that the matter could be remanded to the Department for the taking of additional evidence.

Id. at 24:2-8. Similarly, the Director refused the testimony of Greg Sullivan in the As Applied Hearing as beyond the scope of the Court's limited remand. Counsel for the City offered a written offer of proof to make a record on the matter and establish the substance of the testimony that was denied. The Director refused the offer of proof. As Applied Hearing Transcript, Vol. II, attached as Exhibit C to the Affidavit of Sarah A. Klahn, May 25, 2010, 202:15-203:16.

B. The Methodology Is Facially Inconsistent With the Prior Orders of the Hearing Officer, Director and Court in This Matter.

In its response, IDWR suggests that the Motion to Augment is an attempt to execute an "end-run around established administrative procedures by raising the concept of crop water needs in its motion". IDWR Response at 7. However, the "concept of crop water need" is the fundamental benchmark relied on by the Hearing Officer, Director and this Court in determining the appropriate framework methodology for purposes of the SWC Delivery Call. To wit:

[T]he Department must modify the minimum full supply analysis as a method of establishing a baseline of predicted **water need** for projecting material injury.

Properly applied, the minimum full supply approach is an attempt to measure, for purposes of determining if there should be curtailment, **the amount of water senior surface water users need to raise crops of their choosing to maturity.**

2008 Opinion, R. p. 7098, ¶ XIV 7 (emphasis added).

There are scientific approaches well beyond what water was taken and used that the parties have utilized in order to establish **the amount of water SWC members actually need to meet full crop years [sic] over time.**

Id. at 7096, ¶ XIV 3 (emphasis added). The Director affirmed these findings in the September 5, 2008 *Final Order Regarding the Surface Water Coalition Delivery Call*; similarly, this Court affirmed the findings in its July 24, 2009 *Order on Petition for Judicial Review*. This is the standard upon which the Department's administration must be based; not historical diversions, as used by the Department in the Methodology Order.

C. Evidence at Hearing Establishes that the Department Did Not Even Rely on the Methodology Order in Determining Shortage and Curtailment.

At the limited hearings on May 24-25, testimony showed that the Department's administration is not based on the Methodology Order. However, due to the limited nature of those hearings the parties have still not been apprised of what exactly the Department is proposing with respect to administration of the SWC water rights. Such an approach to administration is not consistent with due process and requires more transparency on the part of IDWR. Although parties were not permitted to enquire into the substance of the Methodology Order at hearing, or determine exactly how IDWR proposes through that order to administer the SWC water rights in coming years, testimony and evidence demonstrated that the Methodology Order has not been followed by the Department in its 2010 administration.

For example, at hearing it was established that despite the Methodology Order's instruction to "remove any water diversions that can be identified to not directly support the beneficial use of crop development", Methodology Order at ¶43, the Department only adjusted

SWC demand for “wheeled water”⁴ diversions if those diversions were more than one percent of the diverting entities’ total demand. As Applied Hearing Transcript, Vol. I, attached as Exhibit B to the Affidavit of Sarah A. Klahn, May 24, 2010, 46:7-49:21. The Department witness admitted that there was not support for this one percent threshold in the Methodology Order. *Id.*

Further, Department employees admitted at hearing that their administration of the SWC call in 2010 was not based on the Methodology Order exclusively, but relied on memoranda prepared by staff that contained more detail than the administration rules explained in the Methodology Order. *See, e.g.,* As Applied Hearing Transcript, Vol. I, attached as Exhibit B to the Affidavit of Sarah A. Klahn, May 24, 2010, 78:1-5. Such an approach is contrary to the law: parties are “entitled to be fairly advised of what the Government proposes and to be heard upon its proposals” where the agency has undertaken a proceeding “aimed at the control of their activities.” *Gonzales v. United States*, 348 U.S. 407, 414, 75 S. Ct. 409, 413 n.5 (1955).⁵

CONCLUSION

Pocatello and the Ground Water Users respectfully request that the Court (1) order the Department to hold full and opening hearings on the Methodology and As Applied Orders

⁴ “Wheeled water” is defined as water diverted and carried in a canal by one entity on behalf of another entity. Methodology Order Hearing Transcript, attached as Exhibit A to the Affidavit of Sarah A. Klahn, May 24, 2010, 67:4-20. The removal of the “wheeled water” amounts from the SWC diversions is appropriate; removal of all but those that exceed 1% of diversions is not and has the result of increasing the Ground Water Users mitigation requirements by as much as 10,000 af.

⁵ Department employees admitted that the Methodology Order is vague on how it executes certain components of the methodology, such as forecast supply, and that the Methodology Order leaves open room for “another professional hydrologist or professional engineer [to] go about and develop their own methodology with the guidance to arrive at their own analog years, and arrive at their own allocation volumes,” and admitted that the Methodology Order doesn’t actually spell out how the Department will come up with predicted storage allocation. As Applied Hearing Transcript, Vol. I, attached as Exhibit B to the Affidavit of Sarah A. Klahn, May 24, 2010, 78:14-79:7. *See also Id.* at 147:13-23 (Department employee admitted that the staff memo is how storage is predicted and that it would be appropriate to include that information in the Department’s orders instead); *Id.* at 152:2-23 (Employee testifying that forecast base based on her own discretion and consideration of variable, that there is no set algorithm for calculating forecast supply.).

pursuant to Idaho Code section 67-5276, or (2) order the Department to rescind the Orders as outside the scope of the Court's limited remand, and stay the matter before the Court pending this year's administration.

MOTION TO FILE REPLY ONE DAY LATE (JUNE 8, 2010)

Movants request a one-day extension for physical filing of this Reply with Gooding County District Court. As reflected in the Affidavit of Sarah Klahn, June 7, 2010, Movants did not receive the Court's Order Granting Requests for Extension until Friday, June 4, 2010. On information and belief, as of June 4, 2010, Ground Water Users' counsel had not received the Order Granting Requests for Extension at all. Due to the late receipt of the Order, the Pocatello and the Ground Water Users were unable to physically file the Reply with Gooding County on Monday, June 7th. Pocatello and Ground Water Users will submit the Reply by overnight Federal Express, email it to opposing parties and the Department, as well as providing a courtesy copy to Judge Melanson in chambers at the Court of Appeals on Monday June 7, 2010. *See*, Affidavit of Sarah Klahn, June 7, 2010. No prejudice will accrue to any party for the submission of this Reply brief in the manner and timing described above, and Movants respectfully request that the reply brief be considered timely filed.

Respectfully submitted, this 7th day of June, 2010.

ATTORNEYS FOR CITY OF POCATELLO

ATTORNEYS FOR GROUND WATER
USERS



A. Dean Tranmer



Candice M. McHugh



Sarah A. Klahn

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2010, I caused to be served a true and correct copy of the foregoing **City of Pocatello's and Ground Water User's Reply in Support of Motion for Stay and to Augment the Record with Additional Evidence and Motion to Late File Reply in Case No. CV-2008-0000551** upon the following by the method indicated:



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