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BEFORE DEPARTMENT OF WATER RESOURCES
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	Docket No.: CM-DC-2010-001; and METHODOLOGY ORDER PROCEEDING **POCATELLO'S AND GROUND WATER USERS' PREHEARING BRIEF**

The City of Pocatello ("City" or "Pocatello") and Idaho Ground Water Appropriators, Inc. ("Ground Water Users"), acting for and on behalf of its members, through counsel, hereby submit this Prehearing Brief.

Pocatello and the Ground Water Users have requested a hearing on the Director's *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*, April 7, 2010 ("Methodology Order") and a

hearing on the Director's *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 &4)*, April 29, 2010 ("As-Applied Order"). The Surface Water Coalition has requested a hearing on the As-Applied Order as well.

I. THE DEPARTMENT ABUSED ITS DISCRETION IN ISSUGING THE METHODOLOGY ORDER BECAUSE IT WAS ISSUED WITHOUT REGARD TO THE LIMITED SCOPE OF THE DISTRICT COURT'S REMAND.

The Director's Methodology Order was issued pursuant to a limited remand of the district court. In that remand, Judge Melanson provided that pursuant to the Department's representations, it should, based on the record in this matter, "develop a new methodology, apply that methodology to the facts on the record, and issue an order in accordance with this Court's previous holding." *Order Staying Petition on Decision for Rehearing Pending Issuance of Revised Final Order*, March 4, 2010, at 2. However, as Pocatello and the Ground Water Users have asserted in their petitions for reconsideration and requests for hearing, the Methodology Order goes beyond the remand and in fact is based on evidence and mixed questions of law and fact *not* in the record. Because the Methodology Order was purportedly used to develop the mitigation or curtailment requirements in the As-Applied Order, the As-Applied Order is similarly tainted. It was these problems with the Methodology and As-Applied Orders that lead Pocatello and the Ground Water Users to request that Judge Melanson allow augmentation of the record pursuant to Idaho Code section 67-5276. That motion is pending for decision before the district court.

In response to Pocatello and Ground Water Users requests for a hearing on the Methodology and As-Applied Orders in order to develop the abuse of discretion argument, the Director ordered a hearing that is "limited ... to provide the parties the opportunity to contest or rebut the 2008 data," *Notice of Hearing Regarding 2008 Data*, May 10, 2010 at 2,

and "on the limited issue of whether the April Forecast Supply Order followed Steps 3 and 4 of the Methodology Order..." *Order Denying IGWA's Request for Stay, and/or Extension of Time; Order Granting Request for Reconsideration and Hearing; Order Authorizing Discovery, in Part; and Notice of Hearing*, May 10, 2010 at 3. The Director has rejected Pocatello's request for an Independent Hearing Officer. The limited scope of the May 24th hearing reflects the Director's assumption that the Methodology Order is valid in the absence of district court review; the limited scope of the hearing also interferes with Pocatello and the Ground Water Users attempts to show otherwise. For example, although the Director has allowed a hearing into "whether April Forecast Supply Order followed Steps 3 and 4 of the Methodology Order", this only begs the question of whether Steps 3 and 4 were properly developed by the Director under the limited remand.

As the testimony of Mr. Weaver on May 12th and 20th, 2010 establishes, much of the procedure followed by IDWR in applying Steps 3 and 4 was not even *part* of the Methodology Order. *See*, Deposition Transcript Volume I, Mat Weaver, May 12, 2010: 29:5-25, 41:2-42:10, 79:1-23; 87:10-13, 88:10-16; Deposition Transcript Volume II, Mat Weaver, May 20, 2010: 145:22-24; 147. This transcript of sworn testimony by the Department's proffered witness establishes that significant agency procedures used to develop the As-Applied Order were not based on the Methodology Order. It appears that the Methodology Order is a hollow shell, not based on the record, and not relied upon by the Department in developing mitigation and curtailment obligations. Its usefulness in the context of administration is unclear.

II. A REVIEWING COURT WILL JUDGE THIS HEARING BASED ON CONCEPTS OF DUE PROCESS: MEANINGFUL TIME AND MEANINGFUL MANNER.

A. The hearing must be timely, but timely does not mean precipitous and without regard to the scope.

AFRD#2 v. IDWR is the Idaho Supreme Court's statement of timeliness as well as the proper scope of a hearing in the context of due process requirements. *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources* ("*AFRD#2*"), 143 Idaho 862, 154 P.3d 433 (2006). There the Court said:

> Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water. While there must be a timely response to a delivery call, neither the Constitution nor the statutes place any specific timeframes on this process, despite ample opportunity to do so. Given the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior's water right will indeed provide water to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. **It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.**
>
> Absent additional evidence that the Director abused his discretion or that the delay in the hearing schedule was unreasonable despite the self-imposed extensions (both of which are appropriate to an "as applied" challenge on a fully developed administrative record), there is no basis for setting aside the CM Rules based upon the lack of specifically articulated time standards.

AFRD#2 at 875, 446 (emphasis added). The Idaho Supreme Court did not ask the Department to rush to hearing to the detriment of the process—or to limit the scope of the hearing to the detriment of the record—but has instead instructed the Department to consider all necessary information and make a thoughtful, reasoned analysis. Thus, while Pocatello and the Ground Water Users believe that a hearing this summer on these issues is important, it is equally important to have a hearing that is sufficiently broad to inquire into abuse of agency discretion. The Director's decision to hold a hearing on narrowly defined issues, with

only two weeks notice, and refusal to appoint an independent hearing officer, means that the May 24th hearing will lack any actual due process value.

B. The fundamental problem here is with the scope of the hearing—in other words, a hearing must provide meaningful opportunity to be heard on issues in dispute.

The Idaho Court had this to say about due process in the *AFRD#2* decision:

> The issue regarding whether or not American Falls was denied due process at the administrative level due to the length of time it had to wait for a hearing is arguably an issue which has been factually established, at least as of the time this declaratory action was filed.

Id. It concluded that the Conjunctive Management Rules did not facially violate due process for purposes of the hearing in the matter originally set in 2005-2006.

While American Falls complained to the Supreme Court about timeliness of the hearing, timeliness is not the only test. Pocatello and the Ground Water Users here assert that the hearing is meaningless in terms of content. Simply put, the limited hearings scheduled for May 24th on the Methodology and As-Applied Orders are not capable of fulfilling the requirements of due process. Procedural due process requires that parties have an opportunity to be heard, and this opportunity "must occur at a meaningful time **and in a meaningful manner.**" *Cowan v. Bd. of Comm'rs of Fremont County*, 143 Idaho 501, 512, 148 P.3d 1247, 1258 (2006) (internal citations omitted) (emphasis added).

The problem here is not the "meaningful time" portion of the Court's formulation, instead the problem is with the "meaningful manner" portion of the test. Limiting parties to hearing on those arbitrary issues selected by the Department to allow the Department to *avoid* inquiry into the areas that would establish abuse of discretion is not a meaningful opportunity to be heard. As the hearing officer, the Director has the obligation at the hearing "to assure that there is a full disclosure of all relevant facts and issues, including such cross-

examination as may be necessary," and "[s]hall afford all parties the opportunity to respond and present evidence and argument on all issues involved..." I.C. § 67-5242(3)(a), (b). The Director has limited the scope of the hearings such that the parties will only be allowed to address issues cherry-picked by the Director.

While it has already been established that the As-Applied Order is not even based on the Methodology—requiring the Department to go back to square 1 on the As-Applied Order—Pocatello and the Ground Water Users also have the right to fully explore whether the Department's Methodology Order is supported by the record and thus whether or not it is in compliance with the District Court's limited remand:

> Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

Gonzales v. United States, 348 U.S. 407, 414, 75 S. Ct. 409, 413, 99 L. Ed. 467 (1955) n. 5. There are numerous elements of the Methodology Order that are not based on the record and not adequately explained in the Order itself. Therefore, Pocatello and the Ground Water Users requests that the Director allow the parties an opportunity to adequately investigate and analyze the As-Applied Order and the Methodology Order in full at a hearing, and to issue an order allowing discovery regarding the entirety of the application of the Director' Methodology Order.

Due process clause requires the department to grant "an aggrieved party the opportunity to present a case and have its merits fairly judged." *Jackson Water Works, Inc. v. Pub. Utilities Comm'n of State of Cal.*, 793 F.2d 1090, 1097 (9th Cir. 1986). "The opportunity to present reasons why a proposed action should not be taken is a fundamental due process requirement." *Martin v. Sch. Dist. No. 394*, 393 F. Supp. 2d 1028, 1037 (D.

Idaho 2005). Unless the parties are afforded a meaningful opportunity to present evidence regarding the Director's As-Applied Order and Methodology Order, free of unjustified limitation, the Department's approach to this matter amounts to insufficient process.

Respectfully submitted this 24th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2010, I caused to be served a true and correct copy of the foregoing **Prehearing Brief** upon the following by the method indicated:

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