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ATTORNEYS FOR IDAHO GROUND
WATER APPROPRIATORS

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 AND
IGWA'S RESPONSE TO SWC'S
PETITION FOR
RECONSIDERATION, REPLY
IN SUPPORT OF PETITION
FOR RECONSIDERATION**

The City of Pocatello ("City" or "Pocatello") and Idaho Ground Water Appropriators, Inc. ("IGWA") hereby submits this Response to the Surface Water Coalition's ("SWC") 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") filed May 7, 2010 and Reply in support of the City's Petition for Reconsideration filed April 21, 2010.

I. THE FUNDAMENTAL PROBLEMS WITH THE DIRECTOR'S APRIL ORDERS ARE TECHNICAL IN NATURE AND A HEARING IS REQUIRED.

Pocatello moved the Director to reconsider the April 7, 2010 Methodology Order because of fundamental technical problems with the administrative rationale. While the Director improperly relied on extra-record evidence in developing the Methodology Order, Pocatello's technical materials were based on and supported by the record in this matter. See *Laurino v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 137 Idaho 596, 601, 51 P.3d 410, 415 (2002).

The SWC's technical memoranda, submitted May 7, 2010, suggests a dispute between the parties on the nature of the technical problems. However, the substance of the Dave Shaw's memorandum is unresponsive to the problem Pocatello pointed out—namely that the Director's Methodology Order departs from Department injury methodologies used in the A&B Irrigation District delivery call, and departs from the direction of the Hearing Officer in his Recommendations. In the event the Director declines to reconsider his order in light of Pocatello's technical memoranda, Pocatello requests a hearing on the April 7, 2010 Methodology Order.

II. POCATELLO'S AND IGWA'S SUBMISSIONS ARE NOT TIME BARRED OR PROCEDURALLY BARRED.

In their Response, SWC argues that because Pocatello did not appeal the Director's November 2009 Final Order, it cannot make any of the arguments presented in their Petitions for Reconsideration. The SWC's argument views the present procedure as if with blinders: Pocatello, at minimum, cannot be procedurally constrained by the Department's decision to issue an order while an appeal is pending and that is not supported by the record. The Department has issued a 'new' Final Order, in contravention to Idaho law and Department procedure. While this

matter is pending before the Department and the parties are entitled to submit briefing as part of this proceeding.

III. CONTRARY TO ASSERTIONS OF THE SWC, THE HEARING OFFICER DID NOT FIND THAT CROP WATER NEEDS SHOULD BE IGNORED IN THE DEPARTMENT’S DETERMINATION OF INJURY

The SWC’s contention that any consideration of actual crop need was rejected by the Hearing Officer and Director after hearing is in error. The record in this matter establishes that any Department protocol for determining injury must accurately define need 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. Contrary to the findings in the Director’s April 7 Order, SWC need cannot be simply equated to how much water those entities have historically diverted, but must be determined by examining crop water needs. Injury must be determined by “establish[ing] the amount necessary to meet water needs . . .” *Id.* at 40, ¶ XIII 4. (emphasis added).

IV. THE DIRECTOR’S CALCULATION OF BASELINE DEMAND IS NOT CONSISTENT WITH THE PRINCIPLES OF OPTIMUM UTILIZATION AND FULL ECONOMIC DEVELOPMENT.

The Director is required to take the principles of optimum utilization and beneficial use into account when developing an injury protocol. Water rights must be administered with “some regard to the rights of the public” and “necessities of the people, and not so as to deprive a whole neighborhood of community of its use and vest an absolute monopoly in a single individual.” *American Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Resources* (“AFRD#2”), 143 Idaho 862, 154 P.3d 433 (2007), quoting *Schodde v. Twin Falls Land & Water Co.*, 161 F. 43 (9th Cir.

1908). Furthermore, “[t]he welfare of the people of the state of Idaho is dependent upon the conservation, development, augmentation and optimum use of the water resources of this state.” I.C. § 42-4201(1). “It is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state.” I.C. § 42-234(1).

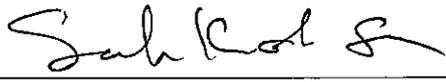
The Department’s evaluation of in-season demand must be tempered by principles of reasonableness, optimum development of water resources in the public interest, and full economic development. Conjunctive Management (“CM”) Rule 20 and 42; *Schodde v. Twin Falls Land and Water Co.*, 224 U.S. 107 (1912); *AFRD#2*, 143 Idaho at 876-77, 154 P.3d at 447-48. “An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.” CM Rule 20.03. As the Department has repeatedly acknowledged, under Idaho law depletion does not equal injury. *Id.* at 868, 439.

As explained by Pocatello in its Petition for Reconsideration, the Director’s April 7th Order violates the above-referenced principles of law because it, among other things, calculates shortages based on higher than average year diversions, ignores the reasonable efficiencies expected of the SWC under Idaho law and specifically the Conjunctive Management Rules, and requires junior water users to guarantee carryover water more than six months before the time of need. *See* I.C. § 42-101 (“Water being essential to the industrial prosperity of the state... depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved”); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073, 1079 (1915) (“It is the policy of the law of this state to require the highest

and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes”).

Respectfully submitted this 10th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2010, I caused to be served a true and correct copy of the foregoing **City of Pocatello's and IGWA's Response to SWC's Petition for Reconsideration, Reply in Support of Petition for Reconsideration for Surface Water Coalition Priority Call Case** upon the following by the method indicated:



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