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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'  
MEMORANDUM IN SUPPORT OF  
MOTION FOR STAY AND TO  
AUGMENT THE RECORD WITH  
ADDITIONAL EVIDENCE**

Interim Director of the Idaho Department of  
Water Resources,<sup>1</sup> 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”) (collectively, “Movants”) submit this Memorandum in Support of their Motion to Stay and to Augment the Record with Additional Evidence. Pocatello and the Ground Water Users have requested a hearing on the Director’s Director’s April 7, 2010 *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”) and the Director’s April 29, 2010 *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 and 4)* (“As-Applied Order”) (together referred to herein as the “April Orders”)<sup>2</sup>. For the reasons stated herein, Movants respectfully request that the Court: 1) Order the Department to hold a hearing on all aspects of the Methodology Order and the As-Applied

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<sup>1</sup> 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).

<sup>2</sup> All the documents and orders referenced herein are publicly available from IDWR and Movants request that the Court take judicial notice of these materials. However, for the convenience of the Court the following materials are provided as Attachments 1-6: Attachment 1: Methodology Order; Attachment 2: As-Applied Order; Attachment 3: Memoranda of Spronk Water Engineers; Attachment 4, Affidavit of Charles Bendecke; Attachment 5, May 10, 2010 Notice of Hearing Regarding 2008 Data; Attachment 6: Order Denying IGWA’ s Request for Stay and/or Extension of Time etc.

Order with sufficient time for the technical experts to develop opinions and testimony; and 2) stay the captioned matter during the interim.

### SUMMARY OF ARGUMENT

On May 10, 2010, the Director partially granted the Ground Water Users Motion for Hearing by allowing a severely limited hearing on the use of 2008 evidence in the development of the Methodology Order; the Director also allowed a hearing on the As-Applied Order. However, the Director has declined to allow a hearing on the various factual and technical problems with the Methodology Order. *Id.* As it stands now, the Methodology Order is *not* based on the record and, as such, Movants will argue on judicial review that the Methodology Order must be vacated altogether. *See, e.g.*, Technical Memoranda of Spronk Water Engineers; Affidavit of Charles K. Brendecke. Vacation of the Methodology Order will require remand to the agency and water users in Eastern Idaho will again pass an irrigation season without any certainty regarding administration of junior ground water rights.

The more expeditious course is for this Court to order the Department to hold a hearing, pursuant to I.C. § 67-5296, to augment the record regarding the technical and factual problems with the Methodology Order, give the Department a chance to revise the Order in accordance with testimony and evidence received at hearing, and then proceed onto judicial review through the captioned matter. Although this will result in a slight delay in concluding this case, if this Court or the Supreme Court vacates the Methodology Order because it is not based on the record below, the only option is remand to the Department for another hearing and development of yet another injury methodology. The better course of action is to order a hearing pursuant to I.C. § 67-5276 on the full scope of issues related to the Methodology Order and to stay this matter in the interim.

## ARGUMENT

### I. BACKGROUND

On July 24, 2009 the Court issued an *Order on Petition for Judicial Review* in the above-captioned matter. The Court found that the Director of the Idaho Department of Water Resources (“Director” or “IDWR”) abused his discretion when he issued two Final Orders in response to Justice Schroeder’s Recommended Order of April 29, 2008 (“Recommendations”). In February 2010, IDWR informed the parties that there was sufficient information in the record “to 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” without an additional hearing with the parties. *Id.* In accepting the Department’s offer to issue a methodology based on the record, the Court recalled its July Order, in which it “held that the Director failed to apply new methodologies for determining material injury to reasonable in-season demand and reasonable carryover.” *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*, March 4, 2010, at 2. On the strength of IDWR assurances regarding the new methodology, the Court agreed to hold its decision on rehearing in abeyance until:

the time periods for filing a motion for reconsideration and petition for judicial review of the new order [on methodologies to determine injury] have expired.

*Id.*

On April 7, 2010 the Director issued an order announcing a new methodology for determining injury to reasonable in season demand and carryover (the “Methodology Order”). The SWC, Ground Water Users, and the City of Pocatello all filed Petitions for Reconsideration<sup>3</sup> with the Department asking the Director to revise the Methodology Order to comply with the

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<sup>3</sup> The Director did not provide parties with any technical data supporting the Methodology Order until April 21, 2010, the same date that Petitions for Reconsideration were due. This technical information was not provided to the parties before the 2007 hearing in this matter, and the parties have not been afforded an opportunity to have their technical experts fully examine this new evidence—to the extent there is any— and to develop opinions on the Department’s reliance on this information.

record and the Court's orders.<sup>4</sup> However, without regard to these arguments, on April 29, 2010, the Director applied the methods announced in the Methodology Order to the As-Applied Order. The As-Applied Order predicts a shortfall of 84,300 acre-feet to Twin Falls Canal Company and American Falls Reservoir District No. 2. The Director has ordered that junior ground water users secure 84,300 acre feet of storage water to mitigate for the shortage by May 13, 2010, or be curtailed, despite the fact that the amount of water orders is in excess of the amount that could be obtained through curtailment. As-Applied Order at 3; Brendecke Aff.

**II. THE COURT HAS DISCRETION UNDER I.C. 67-5276 TO ORDER THE DEPARTMENT TO HOLD A HEARING REGARDING THE FULL SCOPE OF ISSUES RELATED TO THE METHODOLOGY ORDER AND AS-APPLIED ORDERS.**

The Idaho Administrative Procedures Act, I.C. § 67-5276, provides a means for this Court to order IDWR to take additional evidence to augment the record in this matter. Under the statute:

(1) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that:

(a) there were good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.

(b) there were alleged irregularities in procedure before the agency, the court may take proof on the matter.

(2) The agency may modify its action by reason of the additional evidence and shall file any modifications, new findings, or decisions with the reviewing court.

I.C. 67-5276.

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<sup>4</sup> On May 7, 2010, the Director issued an *Order Granting Petitions for Reconsideration*, which granted all three pending petitions without any substantive analysis or explanation of the status of the pending matter before the Department.

The court's discretion to evaluate party requests to augment a record is based on these statutory standards. Under *Wohrle v. Kootenai County*, 47 Idaho 267, 207 P.3d 998 (2009), the Idaho Supreme Court reversed the district court's determination to allow augmenting of the record. Although the appellants' request was timely (made at the time the petition for judicial review was filed), the appellants otherwise failed to satisfy the statutory standards above, and because the district court apparently accepted the additional evidence without remanding to the agency, the Court reversed. *Id.* at 270, 1002.

However, unlike the facts in *Wohrle*, the statutory standards are satisfied in this matter, to wit:

- ❖ The request is timely. Under this Court's March 4, 2010 Order, the captioned matter is currently "in abeyance until [the Methodology Order] is issued and time periods for filing petitions for reconsideration and petitions for judicial review have expired". March 4, 2010 Order at page 3. The Department granted the motions to reconsider on May 10, 2010, although it has not yet modified the Methodology Order. As such, the Methodology Order is not yet final for purposes of judicial review, so this request is being made "before the date set for hearing" in this matter.
- ❖ Additional evidence regarding the factual and technical problems with the Methodology Order is "material" to the matter and "relates to the validity of the agency action" in not only issuing the Methodology Order but also in relying upon it to curtail (as of May 13, 2010) over 70,000 acres of ground served by junior wells as well as numerous municipal rights on the ESPA.

- ❖ Movants have good reason for failing to present evidence on the Methodology Order at the 2008 hearing: the Methodology Order was entered on April 7, 2010.
- ❖ The entry of the Methodology Order is a study in agency irregularities, but the most pronounced and most relevant for this Court's consideration is the fact that the Methodology Order is *not* based on the record and thus exceeds the scope of agency discretion on remand.

### III. SPECIFIC PROBLEMS WITH THE METHODOLOGY ORDER THAT A HEARING MIGHT CORRECT

The Department's Methodology Order is not based on the record or the evidence presented by parties, but instead on the concept that:

Given that the water balance method for estimating annual diversion requirements is subject to varying results based on the range of parameters used as input, an alternate approach is to assume that unknown parameters are practically constant from year-to-year across the entire project.

Methodology Order at 15 (emphasis supplied). In a nutshell<sup>5</sup>, the Director's methodology overestimates SWC crop water demand for the 2010 year by relying not on engineering methodologies or other evidence in the record, but instead by averaging the two most recent years (2006 and 2008) of high "above the historic average" diversions by SWC. Methodology Order at 12 ¶29. The Department's reliance on "unknown parameters" to develop its new methodology is at this point of course "unknown" to the parties. Methodology Order at 15.

The Department's reliance on "unknown parameters" and extra-record evidence rather than knowable objective information is at best contrary to the direction of Hearing Officer Schroeder in this matter, and at worst arbitrary and capricious administration. While Hearing Officer Schroeder found no error in the Department's reliance on average diversions to develop

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<sup>5</sup> See attached technical information submitted by Pocatello and the GWU to supplement their respective Motions to Reconsider.

the “minimum full supply” concept employed in the May 2, 2005 Order, the Hearing Officer specifically held that for purposes of future administration “it is time for the Department to move to further analysis to meet the goal of the minimum full supply but with the benefit of the extended information and analysis offered by the parties and available to its own staff.” Recommendations, page 51 ¶XIV 7. Specifically, the Department was directed to evaluate SWC demand by reference to inputs used in the SWC and/or Pocatello water balance evidence. *Id.* The Department’s new methodology, while paying homage to these engineering concepts, rejects them completely in favor of a new version of the 2005 Minimum Full Supply analysis and “unknown parameters”.

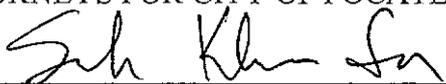
At hearing in this matter, Pocatello and the Ground Water Users will present evidence regarding the factual problems with the new methodology, specifically the over-estimation of SWC crop water demands. The new methodology does not relate to actual crop needs, unreasonably restricts the projected water supply, fails to tie the impact of ground water use on SWC crop needs, and ignores facts related to engineering methodology previously approved by Justice Schroeder.

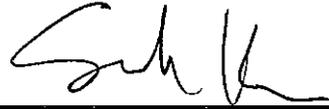
#### CONCLUSION

For the reasons stated herein, the Movants respectfully request that the Court order the Department to hold a hearing on the full range of issues related to the April Orders and stay the pending appeal of this matter during the interim.

Respectfully submitted, this 12<sup>th</sup> day of May, 2010.

ATTORNEYS FOR CITY OF POCATELLO

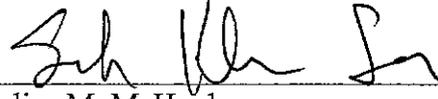
  
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Sarah A. Klahn

ATTORNEYS FOR GROUND WATER USERS



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Candice M. McHugh

LIST OF ATTACHMENTS TO  
CITY OF POCA TELLO'S AND GROUND WATER USERS' MEMORANDUM IN  
SUPPORT OF MOTION FOR STAY AND TO AUGMENT THE RECORD WITH  
ADDITIONAL EVIDENCE

Attachment 1= Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover, dated April 7, 2010

Attachment 2 = Order Regarding April 2010 Forecast Supply [Methodology Steps 3 & 4}, dated April 29, 2010

Attachment 3 = Memorandum by Spronk Water Engineers, re: April 7, 2020 IDWR Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover, dated April 29, 2010.

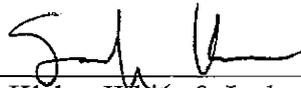
Attachment 4 = Affidavit of Charles Brendecke, dated May 6, 2010.

Attachment 5 = Notice of Hearing Regarding 2008 Data, dated May 10, 2010.

Attachment 6 = 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, dated May 10, 2010.

## CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of May, 2010, I caused to be served a true and correct copy of the foregoing **City of Pocatello's and Ground Water Users' Memorandum in Support of Motion for Stay and To Augment the Record with Additional Evidence** [with attachments being sent via U.S. mail] for Case No. CV-2008-0000551 upon the following by the method indicated:

  
 \_\_\_\_\_  
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