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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)

**POCATELLO'S RESPONSE TO
RECLAMATION'S PETITION
FOR RECONSIDERATION OF
THE DIRECTOR'S FINAL
ORDER**

Pursuant to the Idaho Department of Water Resources Rule of Procedure 740.02.a, the City of Pocatello hereby files its Response to the United States Bureau of Reclamation's Petition for Reconsideration of the Director's Final Order.

INTRODUCTION

In its Petition for Reconsideration, the United States Bureau of Reclamation ("BOR") argued that the Director's Final Order ("Final Order") does not comply with Idaho Code § 67-5248(1) because it did not contain "a reasoned statement in support of the decision and a concise

and explicit statement of the underlying facts of record supporting the findings.’’ *Reclamation’s Petition for Reconsideration* at 1-2. Pocatello does not agree with Reclamation’s assessment that the Order fails the statutory standard; however, it does assert that judicial economy and policy reasons support amending the Order to address certain of the substantive issues described in Reclamation’s Petition.

ARGUMENT

The Director’s Final Order described findings of fact regarding four areas that were in dispute during the course of the litigation before the Department: Replacement Water Plans (§9-15), Timing of Reasonable Carryover (§16-21), Prediction of Material Injury (§22-25) and ESPA Ground Water Model (§26-27). The Order states a reasoned basis for each of these findings of fact, and to the extent it isn’t on the face of the Order, the reasons can easily be discerned from the record of interlocutory orders and the Hearing Officer’s Final Order issued below.

Pocatello’s concern is that the “Prediction of Material Injury” section of the Director’s Final Order contemplates another hearing. The Director proposes in paragraph 25:

Because of the need for ongoing administration, the Director will issue a separate, final order before the end of 2008 detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover for the 2009 irrigation season. An opportunity for a hearing on the order will be provided.

The Surface Water Coalition, Idaho Ground Water Appropriators, and the City of Pocatello all presented testimony through expert witnesses regarding the appropriate “approach” for predicting material injury. The testimony of a variety of witnesses, including Mssrs. Brockway, Koreny, Brendecke, Sullivan and Franzoy, was directed at describing methods of determination—or issues and methods that were not appropriate for determining—material injury. Pocatello’s Proposed Findings of Fact and Conclusions of Law, submitted in post-trial briefing, also describe proposed methods of determining material injury based on the record. Indeed, the substantive approach

developed by SWC and Pocatello had few conceptual differences—although the parties disagreed greatly on the proper inputs to the method. If the Director determines the evidence submitted by the parties is insufficient for some reason, the SWC and Pocatello both endorsed reliance on the 1996 Tuthill-Dreher Report, which also lays out the concepts and methods for determining irrigation requirements for crops. In short, there is ample basis in the record for the Director to evaluate the proper methods to determine material injury—even though he also has the discretion to delay his ruling on this until his proposed order in December.

The Parties to this matter have been litigating this case since May of 2005, when the Director entered the final order that was the subject of the Surface Water Coalition’s appeal. Vast amounts of money, expert and lay witness time, and attorney time have been spent to develop a thorough record on the issue of injury, as well as the methods to determine material injury. It would be in the interest of judicial economy—not to mention the parties’ pocketbooks—to use the information currently in the record to make a determination of the “approach” for predicting material injury into the future.

CONCLUSION

Pocatello disagrees with the Bureau’s assessment that the Final Order is statutorily insufficient and asserts that the Director has the discretion he’s identified in his Final Order to deal with the material injury question through a separate proceeding. However, it would be in the interest of judicial economy to revise the Final Order to include findings on the appropriate methods the Director has determined should be used in the “Prediction of Material Injury” so that the parties have certainty about how the Department will administer these water rights into the future.

Respectfully submitted, this 3rd day of October, 2008.

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By Sarah K
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2008, I caused to be served a true and correct copy of the foregoing **Pocatello's Response to Reclamation's Petition for Reconsideration of the Director's Final Order in Surface Water Coalition Priority Call Case** by electronic mail to:



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