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DEPARTMENT OF
WATER RESOURCES

Candice McHugh, ISB No. 5908
McHugh Bromley, PLLC
Attorneys at Law
380 S. 4th St., Ste. 103
Boise, ID 83702
Telephone: (208) 287-0991
Facsimile: (208) 287-0864
cbromley@mchughbromley.com

Attorney for the City of Bellevue

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF BASIN 37
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**MOTION FOR MORE DEFINITE
STATEMENT, MOTION FOR
CLARIFICATION AND MOTION TO
POSTPONE HEARING**

REQUEST FOR EXPEDITED DECISION

COMES NOW the City of Bellevue through its attorney of record, Candice McHugh of the firm McHugh Bromley, PLLC and files this *Motion For More Definite Statement And/Or Clarification And Motion To Postpone Hearing* regarding the *Notice of Administrative Proceeding, Pre-hearing Conference, and Hearing* dated May 4, 2021 (“Notice”).¹ On May 11, 2021 the City of Bellevue filed its Notice of Intent to Participate in the above captioned matter.

A. Request for More Definite Statement or Request for Clarification.

The Notice states:

NOTICE IS HEREBY GIVEN that pursuant to Idaho Code § 42-237a.g. and IDAPA 37.01.01.104, the Director is initiating an administrative proceeding to determine whether

¹ Notwithstanding the fact that IDWR’s administrative rules do not authorize a “Notice of Administrative Proceeding,” the Director appears to have initiated a contested case with no respect to its own process and procedures. See IDAPA 37.01.01 et al.

water is available to fill the ground water rights, excluding ground water rights for domestic uses as defined in Idaho Code § 42-111 and stock watering uses as defined in Idaho Code § 42-140 I A(11), within the Wood River Valley south of Bellevue, as depicted in the attached map.

Notice at 1 (emphasis added). The introduction to the Notice states:

Curtailment model runs of the Wood River Valley Groundwater Flow Model v.1.1 ("Model") show that curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for the holders of senior surface water rights during the 2021 irrigation season

Based on the information from the Model, the Director of the Idaho Department of Water Resources ("Department") believes that the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season. Therefore, the Director is initiating an administrative proceeding to determine whether water is available to fill the ground water rights, excluding water rights for domestic uses as defined in Idaho Code § 42-111 and stock watering uses as defined in Idaho Code § 42-140 I A(11), within the Wood River Valley south of Bellevue, as depicted in the attached map. If the Director concludes that water is not available to fill the ground water rights, the Director may order the ground water rights curtailed for the 2021 irrigation season.

Id. (emphasis added).

On May 11, 2021, the Director submitted a Request for Staff Memorandum ("Request"). In that Request, the director asks for several items that are much broader than what is set forth in the Notice, including: the hydrology and hydrogeology of the Big Wood River, Little Wood, River, Silver Creek and Camas Creek Basins; the methods for predicting surface water supplies for the entire Wood River Basins, simulate curtailment of junior ground water rights within the entire model boundary and simulate the benefits of curtailment to the Big Wood River, including Magic Reservoir. Thus, the City is requesting the Director for a more definite statement regarding the following as it relates to the administrative proceeding set forth in the Notice.

1. Scope of physical curtailment. Is the area that the Director will look to physically curtail groundwater users limited to the area depicted on the map attached to the Notice?

- a. If so, what is the basis for asking for additional analysis from staff on areas beyond the Bellevue Triangle? (See request to clarify no. 1 and 2 below)
2. Timing of physical curtailment. Will the curtailment be only for the upcoming 2021 irrigation season or will the curtailment also look to curtail uses beyond the irrigation season?
3. Injury or demand.
 - a. Is the injury or demand that the Director is expecting to remedy through the above captioned proceeding limited to senior surface water rights on Silver Creek and its tributaries as set forth in the Notice?
 - b. Will injury or demand to water rights on the Big Wood River, Little Wood River and Magic Reservoir be determined in the proceeding?

The City requests that the Director clarify the following issues:

1. Clarify the relevance of surface water deliveries in the entire Wood River Basin as set forth in the Request as it relates to the administrative proceeding as set forth in the Notice.
2. Clarify the relevance of ground water use in the Wood River Basin as set forth in the Request as it relates to the administrative proceeding and the map as set forth in the Notice.
3. Clarify the scope of physical curtailment that may result from any order from the administrative proceeding set forth in the Notice

Given the scope of the Request it is impossible to know at this point whether the Director will need to broaden or modify the Notice.

B. Motion to Postpone the Hearing

On May 4, 2021 the Director sent the Notice to over a thousand water users and published a notice in local papers. On May 7, 2021 the Director sent new Notices to over a thousand water users because the first Notice had multiple errors in addresses. In the Notice, the Director set a deadline of May 19, 2021 to file notices to participate and set May 24, 2021 as a pre-hearing conference. It won't be until this date that the City will even know who to serve its pleadings on in accordance with IDAPA 37.01.01.203 and 303. The staff memorandum is due May 17, 2021 in response to the Director's Request. The hearing is set to start June 7, 2021 and

last one week. The hearing is set with 11 business days between knowing who is participating in the hearing and the first day of the hearing. The hearing is set with only 13 business days to review and evaluate the staff memo.

And, although some entities or persons may file notices of intent to participate, they may not actually appear at the per-hearing conference, thus, the first time that parties will know who is actually going to participate is March 24, 2021 only 8 total business days to conduct and conclude discovery and prepare for the hearing. This rushed schedule certainly seems to simply give lip service to a full and fair opportunity for parties to defend their water rights and use. Given the process that is occurring, IDWR risks reversal of any decision as arbitrary capricious and a violation of due process under the existing schedule.²

1. The Notice Provided as Compared to the Staff Memo, Fails to Meet Due Process Requirements

Because the Request broadens the scope of the administrative hearing that was set forth in the Notice, the Notice fails to provide accurate Notice of what may occur in the administrative hearing and does not properly identify what is to be remedied or what the government's interest in curtailing junior groundwater use actually is. Thus, the Notice fails to meet due process requirements. The Notice must accurately provide the affected parties, in this case, real property right holders, with what is at stake, what the process and procedures will be and whether or not their interests are at risk. If people relied strictly on the Notice, water users outside the curtailment area could have reasonably concluded that they were not at risk, yet, the Request makes it clear that the Director thinks the entire basin is at issue, including all groundwater

² Compare this schedule with the Rangen schedule: February 27, 2013 -- IDWR issues Staff Memo, March 1, 2013 -- letter asking for information in the Staff Memo, March 8, 2013 -- letter from IDWR with requested info, April 4, 2013 -- Pocatello, FMID, IGWA expert response to Staff Memo, May 1-15, 2013 -- hearing. And, the parties were engaged in discovery months prior.

pumping and all streams. At the very least, before being deprived of their property, the water users are entitled to a Notice that specifically apprises them of the reasons and in this case, the location, of what is at risk in order to have meaningful review of any action or proposed action by the Director. See *True v. Idaho Dep't of Health and Welfare*, 103 Idaho 151, (1982) (“Without being apprised of the reasons behind his recommitment, the patient can hardly be assured of the meaningful review to which he is constitutionally entitled.”)

2. A Full and Fair Hearing with Reasonable Notices, Deadlines and Discovery is Required to Protect the Due Process Rights of Parties to Protect Their Property Interests

In all procedural due process cases the risk of an erroneous deprivation of the individual's interest and the interest of the government must be balanced. “A two-step analysis is appropriate in determining the dictates of due process: (1) is the specific interest threatened by government action within the contemplation of the liberty or property language of the Fourteenth Procedures needed to comply with due process will vary according to specific factual contexts, since not all situations calling for procedural safeguards call for the same kind of procedure. Amendment, and (2) assuming the existence of such an interest, what process is due.” *Lowder v. Minidoka County Jt. School Dist. No. 331*, 132 Idaho 834, 840 (1999).

In this case, the City owns water rights that may be curtailed depending on the outcome of the hearing. Idaho Code §55-101 states that water rights are real property rights; as such, they cannot be deprived without due process of law. *Id.* The interest of the government, the Director in this case, is unclear as there is no finding of shortage or injury to any water right. However, even if the staff memorandum shows some sort of injury or shortage, the City, along with all the other parties, will have only have 13 days to review it, understand it and develop any defenses it may have to protect its real property rights. The hearing and process, prior to any deprivation,

must be meaningful. *City of Boise v. Industrial Com'n*, 129 Idaho 906, 910 (1997). In order to be meaningful, sufficient time to develop a defense and evidence must be afforded including a reasonable time for discovery of all parties' interests and the government's case.

The Idaho Civil Rules allow for 30 days to respond. In this case, a motion to authorize discovery cannot even reasonably be filed under IDAPA 37.01.01.521 until May 24, 2021 when the full participants are known. If discovery were immediately authorized, there would only be 8 business days to promulgate discovery and respond to and prepare for the hearing. This process is unreasonable, especially in light of the fact that the Director chose to act at the last minute, during the irrigation season.

Serving notice and holding a hearing of this magnitude with potentially hundreds of water users and rights involved in less than 30 days is unreasonable and violates due process. As such, the City asks that the hearing be postponed and that a scheduling conference be held at the pre-hearing conference so that all parties can set forth a hearing that will allow a full and fair opportunity to present evidence examine witnesses and defend their properties rights.

3. Unavailability of Counsel

Notwithstanding the above issues and reasons to postpone the hearing, the undersigned counsel is out of the country on a trip that has been planned for months from June 1 and does not arrive back in the United States until late on June 7 and cannot be in Boise until early afternoon on June 8, 2021. Parties have a right to their chose of counsel. The undersigned counsel has represented the City on its water right interest for the past seven years and is the most familiar with the City's water use and defenses. Thus, the City requests that the hearing be postponed to allow counsel a reasonable time to prepare and participate.

C. REQUEST FOR EXPEDITED DECISION

Because of the schedule, the City requests a decision on this motion be provided by May 21, 2021.

D. CONCLUSION

Based on the foregoing, the City requests that the Director provide a more definite statement and clarify issues as set forth above regarding the scope of curtailment, the timing of such curtailment and the interest to be protected. The City also requests that the hearing be postponed with the currently schedule May 24, 2021 pre-hearing conference used as a scheduling conference so that all parties have a chance to set a schedule that allows them a full and fair opportunity a hearing to protect their interests.

DATED this 14th day of May, 2021



Candice M. McHugh
Attorney for City of Bellevue

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of May, 2021, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

Director Gary Spackman
Idaho Department Of Water Resources
PO Box 83720
Boise, ID 83720

- Via US Mail, Postage Paid
- Via Facsimile
- Hand-Delivered
- Via Electronic Mail

Garrick L. Baxter
Deputy Attorney General
Idaho Department Of Water Resources
PO Box 83720
Boise, ID 83720-0098
garrick.baxter@idwr.idaho.gov

- Via US Mail, Postage Paid
- Via Facsimile
- Hand-Delivered
- Via Electronic Mail

Travis L. Thompson
Albert P. Barker
Michael A. Short
BARKER ROSHOLT & SIMPSON
195 River Vista Place, Ste. 204
Twin Falls, ID 83301-3029
tlt@idahowaters.com
apb@idahowaters.com
mas@idahowaters.com

- Via US Mail, Postage Paid
- Via Facsimile
- Hand-Delivered
- Via Electronic Mail

Courtesy copy

W. Kent Fletcher
FLETCHER LAW OFFICE
P.O. Box 248
Burley, ID 83318
wkf@pmt.org

- Via US Mail, Postage Paid
- Via Facsimile
- Hand-Delivered
- Via Electronic Mail

Courtesy copy

Sarah A. Klahn
SOMACH SIMMONS & DUNN
2033 11th St., #5
Boulder, CO 80302
sklahn@somachlaw.com

- Via US Mail, Postage Paid
- Via Facsimile
- Hand-Delivered
- Via Electronic Mail

Courtesy copy

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC
P.O. Box 50130
1000 Riverwalk Drive, Suite 200
Idaho Falls, ID 83405
rharris@holdenlegal.com

- Via US Mail, Postage Paid
- Via Facsimile
- Hand-Delivered
- Via Electronic Mail

Courtesy copy

Chris Bromley
MCHUGH BROMLEY, PLLC
Attorneys at Law
380 S. 4th St., Ste. 103
Boise, ID 83702
cbromley@mchughbromley.com

- Via US Mail, Postage Paid
- Via Facsimile
- Hand-Delivered
- X Via Electronic Mail

Courtesy copy

Michael P. Lawrence
GIVENS PURSLEY LLP
601 W. Bannock Street
P.O. Box 2720
Boise, ID 83701-2720
mpl@givenspursley.com

- Via US Mail, Postage Paid
- Via Facsimile
- Hand-Delivered
- X Via Electronic Mail

Courtesy copy

Matthew A. Johnson
Brian O'Bannon
WHITE PETERSON GIGRAY & NICHOLS, P.A.
Canyon Park at the Idaho Center
5700 E. Franklin Rd., Ste. #200
Nampa, ID 83687-7901
mjohnson@whitepeterson.com
bobannon@whitepeterson.com

- Via US Mail, Postage Paid
- Via Facsimile
- Hand-Delivered
- X Via Electronic Mail

Courtesy copy

Evan Robertson
Robertson & Slette, PLLC
PO Box 1906
Twin Falls, ID 83303-1906
erobertson@rsidaholaw.com

- Via US Mail, Postage Paid
- Via Facsimile
- Hand-Delivered
- X Via Electronic Mail

Courtesy copy

Heather O'Leary
LAWSON LASKI CLARK PLLC
PO Box 3310
Ketchum, ID 83340
heo@lawsonlaski.com

- Via US Mail, Postage Paid
- Via Facsimile
- Hand-Delivered
- X Via Electronic Mail

Courtesy copy

Norman Semanko
PARSONS BEHLE & LATIMER
800 W. Main St., Ste. 1300
Boise, ID 83702
nsemanko@parsonsbehle.com

- Via US Mail, Postage Paid
- Via Facsimile
- Hand-Delivered
- X Via Electronic Mail

Courtesy copy

Charlie Honsinger
HONSINGER LAW, PLLC
PO Box 517
Boise, ID 83701

- Via US Mail, Postage Paid
- Via Facsimile
- Hand-Delivered
- X Via Electronic Mail

honsingerlaw@gmail.com

Dylan Lawrence
VARIN WARDWELL
PO Box 1676
Boise, ID 83701
dylanlawrence@varinwardwell.com



Candice McHugh

Courtesy copy

- Via US Mail, Postage Paid
- Via Facsimile
- Hand-Delivered
- Via Electronic Mail

Courtesy copy