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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 **CITIES/SVC's POST-HEARING BRIEF**

The Cities of Bellevue, Hailey, and Ketchum, and Sun Valley Company (collectively, "Cities/SVC"), by and through their respective counsel of record, and pursuant to the Director's order on the record at the hearing in the above-captioned proceeding on Saturday, June 12, 2021, hereby file this post-hearing brief.

INTRODUCTION

This is the first proceeding to curtail junior groundwater pumping ever initiated under Idaho Code § 42-237a.g. Cities/SVC participated in this proceeding because its outcome could affect their interests as groundwater users in the Big Wood River Ground Water Management Area ("BWRGWMA"). While Cities/SVC do not hold water rights within the Potential Area of Curtailment ostensibly at issue in this proceeding, the Director's notices and orders describing the scope of this proceeding implicated the effect of groundwater pumping outside that Area, and other parties attempted to introduce such evidence at the hearing. Accordingly, Cities/SVC participated to protect their interests from being prejudiced by this unprecedented proceeding.

This brief addresses certain concerns that Cities/SVC believe could prejudice their interests, whether by the outcome of this proceeding or otherwise. Cities/SVC reserve their rights to raise any issues not addressed in this brief later in this proceeding or in any subsequent proceeding concerning their water rights.

BACKGROUND

Cities/SVC hold water rights with points of diversion and places of use within the BWRGWMA. *See* Exs. SVC 2, BV 2, Hailey 1, Ketchum 1, and SVC/Cities 1. On May 4, 2021, the Director issued his *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* ("*Notice*") commencing the above-captioned proceeding. Attached to the *Notice* was a map depicting a "Potential Area of Curtailment" comprised of an area known generally as the "Bellevue Triangle." The points of diversion and places of use for Cities/SVC's water rights are located outside the Potential Area of Curtailment identified in the *Notice*.

The cover letter included with the *Notice* stated:

> The administrative proceeding may affect surface and ground water rights beyond the Little Wood-Silver Creek drainage

> and Bellevue areas. Therefore, this notice has been sent to holders of ground and surface water rights administered by Water Districts 37 and 37B, except domestic and stock water rights . . . .

Letter from Gary Spackman, Director of IDWR to Water Right Holders regarding Notice of Basin 37 Administrative Proceeding (May 4, 2021) ("*Cover Letter*").[1]

On May 11, 2021, the Director issued his *Request for Staff Memorandum* ("*Staff Memo Request*"), which included requests for information concerning, among other things: the hydrology and hydrogeology of the Big Wood River; methods of predicting surface water supplies for the Wood River Basins and a recommendation for making such a prediction for the 2021 irrigation season; surface water deliveries in the Wood River Basins; the development and beneficial use of ground water in the Wood River Basins; the development and operation of the Wood River Valley Groundwater Flow Model Version 1.1 ("WRVl.1"); simulations of full curtailment of junior ground water rights within the WRVl.1 model boundary, including the identification of areas within the model boundary where curtailment of groundwater use has a minimal contribution to streamflow in Silver Creek and the Little Wood River; the total benefits of simulated curtailment to the Big Wood River, including Magic Reservoir; and whether diminished Wood River flows from ground water flow would cause injury to water rights with the "Exchange Condition" (also known as "Condition 161"). *Staff Memo Request* at 1-2.

IDWR staff submitted memos responding to the *Staff Memo Request* (collectively, the "*Staff Memos*"), which were published to the IDWR website (but not served on individual parties) on May 18, 2021. The memo submitted by IDWR employee Jennifer Sukow ("*Sukow Memo*") identified a Potential Area of Curtailment that differed slightly from the one identified in the *Notice*, including moving the Area's northern boundary to the south.

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[1] This letter was later resent out on May 7, 2021 due to multiple typographical errors in the addresses.

Because of language in the *Notice*, *Cover Letter, Staff Memo Request*, and *Staff Memos*, potentially implicating groundwater pumping outside the Potential Area of Curtailment identified in the *Notice* and impacts to surface waters other than Silver Creek and its tributaries, Cities/SVC each timely filed a notice of intent to participate in the proceeding prior to the May 19, 2021 deadline set forth in the *Notice*.

At the May 24, 2021 pre-hearing conference, the Director determined that Cities/SVC would be allowed to participate fully in the proceeding, with no limitation on briefing, although he would exercise his discretion to limit their evidence that might be "duplicative, repetitive, or irrelevant." *See Prehearing Order; Scheduling Order* (May 25, 2021) ("*Scheduling Order*"). At the hearing conducted from June 7 through June 12, 2021, the Director indeed allowed Cities/SVC to fully participate by allowing them to object to evidence, cross-examine other parties' witnesses, and introduce their own evidence and expert testimony. The Director did not limit the evidence presented by Cities/SVC.[2]

At the conclusion of the hearing, the Director ordered that the parties may submit post-hearing briefing by June 18, 2021. This is Cities/SVC's post-hearing brief.

ARGUMENT

The Idaho Supreme Court has stated:

> While the Constitution, statutes and case law in Idaho set forth the principles of the prior appropriation doctrine, those principles are more easily stated than applied. These principles become even more difficult, and harsh, in their application in times of drought. Because of concepts like beneficial use, waste, reasonable means of diversion and full economic development, the decisions are highly fact driven and sometimes have unintended or unfortunate consequences.

[2] Cities/SVC voluntarily limited the evidence they presented at the hearing based on account of their water rights being outside the Proposed Area of Curtailment.

Am. Falls Reservoir Dist. No. 2 v. IDWR ("*AFRD2*"), 143 Idaho 862, 869, 154 P.3d 433, 440 (2007) (emphasis added).

Cities/SVC urge the Director to consider and avoid the unintended or unfortunate consequences of curtailing groundwater pumping in a truncated proceeding such as this where facts concerning concepts like beneficial use, waste, reasonable means of diversion, and full economic development are not fully developed.

I. Cities/SVC Have A Substantial Interest In This Proceeding

Cities/SVC hold water rights with points of diversion and places of use within the BWRGWMA. *See* Exs. SVC 2, BV 2, Hailey 1, Ketchum 1; SVC/Cities 1. However, their rights are not located within the Potential Area of Curtailment identified in the Director's *Notice* or the Area as it was subsequently changed by the *Sukow Memo.*[3] Nevertheless, the Director properly recognized that Cities/SVC have a substantial interest in this proceeding both procedurally and substantively because of their inclusion in the BWRGWMA and Water District 37, and he correctly allowed them to fully participate in this proceeding and did not exclude any evidence they presented, including the substantial expert witness testimony of their expert. Moreover, the Director sustained objections made by Cities/SVC to evidence other parties attempted to introduce concerning the impacts of groundwater pumping outside the Potential Area of Curtailment he identified.

In short, Cities/SVC's substantial interest in this proceeding was properly recognized by the Director.[4] However, because Cities/SVC's ground water pumping occurs outside the

[3] In his *Scheduling Order*, the Director stated that he "will limit the Potential Area of Curtailment to the area considered in Jennifer Sukow's staff memo [dated May 17, 2021]." *Scheduling Order* at 4.

[4] Cities/SVC requested that the Director limit the scope of this proceeding in ways that arguably would eliminate their interest, but those requests were denied. *See Joint Motion to Strike, Motion in Limine and Motion to Limit the Scope of Evidence, and Request for Expedited Decision* (June 2, 2021). Cities/SVC contend that their

Potential Area of Curtailment identified by the Director in his *Notice* and his other statements made in this proceeding, it would violate Cities/SVC's due process rights if the Director orders curtailment of their water rights in this proceeding.

II. The Director Exceeded His Statutory Authority In Initiating And Prosecuting This Proceeding

According to the *Notice*, the Director commenced this hearing pursuant to Idaho Code § 42-237a.g. *Notice* at 1 (citing the statute's provision that "water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect ... the present or future use of any prior surface or ground water right"). His alleged authority to do so was evidently confirmed to him by his legal staff:

> Folks,
>
> I have been thinking a lot about the possibility of initiating conjunctive water administration in the Wood River basin during the irrigation season of 2021. Megan Carter [deputy attorney general] confirms I have the authority to initiate administration under Idaho code section 42-237a.g.
>
> Because we would not have a delivery call and will not have evidence presented at a hearing prior to regulation, administration would have to be limited to the ground water rights unquestionably affecting flows in Silver Creek and would only be regulated to deliver holders of water rights that do not have AFRD#2 storage.
>
> Is there a possibility of establishing a trimline that would separate groundwater diversions primarily affecting the Big Wood river flows from ground water diversions primarily affecting Silver Creek? Also, Tim [Luke], can we identify just those water users who do not hold any AFRD#2 storage?
>
> Gary

SVGWD/GGWD Ex. 36 (emphasis added).

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ground water pumping does not materially injure, and may not impact in any way, any senior ground or surface water rights at issue in this proceeding and in Water District 37 in general.

However, Section 42-237a.g is but a small portion of Idaho's Ground Water Act ("GWA"). *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 506, 284 P.3d 225, 231 (2012) (the GWA was enacted in 1951 and is found in I.C. §§ 42-226 through 42-239). The Director cannot pick and choose certain words and phrases to implement. Instead, all of its provisions must be followed. *Peavy v. McCombs*, 26 Idaho 143, 149, 140 P. 965, 967 (1914) ("The rule that statutes *in pari material* should be construed together applies with peculiar force to statutes passed at the same session of the Legislature."); *see also In re Order Certifying Question to Idaho Supreme Court*, 469 P.3d 608, 611 (Idaho 2020) ("Statutes are *in pari materia* when they *relate to the same subject*. Such statutes are taken together and construed as one system.").

The following subsections address elements of this proceeding that are inconsistent with the GWA.

A. Evidence Does Not Support A Finding That Curtailment Can Be Ordered Consistent With The Stated Policy Of Idaho's Ground Water Act

There was no evidence or testimony showing, "administration and enforcement of this act" will be done in a manner that is consistent "the policy of this state to conserve its ground water resources . . . ." I.C. § 42-237a (emphasis added). The "act" that is referred to is Idaho's Ground Water Act of which I.C. §§ 42-237a and 42-237a.g. are part and parcel. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 582-83, 513 P.2d 627, 634-35 (1973).

The "policy" spoken of in I.C. § 42-237a is found in I.C. § 42-226, which states: "The traditional policy of the state of Idaho, requiring the water resources of the state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to ground water resources of this state as said term is hereinafter defined and, while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full

economic development of underground water resources." I.C. § 42-226 (emphasis added). *See Parker v. Wallentine*, 103 Idaho 506, 512, 650 P.2d 648, 654 (1982) ("The Ground Water Act was the vehicle chosen by the legislature to implement the policy of optimum development of water resources.").

At the hearing in this proceeding, and despite the fact that this was not an actual "delivery call"—a proceeding which would have been governed by the time-tested Conjunctive Management Rules, IDAPA 37.03.11 ("CM Rules")—senior surface water users asked the Director for priority administration of ground water rights in the Bellevue Triangle in order to supply their senior-priority surface water rights from Silver Creek and Little Wood River. They generally asserted that the aquifer and surface sources are hydraulically connected. At least one surface water user who testified at the hearing specifically asked for equal priority administration of all ground water and surface water rights. This is simply not the law in Idaho.

The GWA modified pure priority administration of ground water rights. The *Baker* Court stated:

> We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Cost. Art. 15 § 7. Full economic development of Idaho's ground water resources can and will benefit all of our citizens. . . . . We conclude that our legislature attempted to protect historic water rights while at the same time promoting full development of ground water.

Baker at 584, 513 P.2d at 636 (emphasis added). Thus, pursuant to the GWA, the Director cannot curtail ground water rights simply because they are junior. Rather, the Director must ensure that administration pursuant to I.C. § 42-237a.g is consistent with I.C. § 42-226's stated goal that "a reasonable exercise of [priority] right[s] shall not block full economic development

of underground water resources." The evidence presented at the hearing was not sufficient to curtail groundwater rights while ensuring this policy is satisfied.

In short, if the Director is to curtail ground water rights pursuant to I.C. § 42-237a.g, there must be evidence showing that the resulting amount of water available to senior water users will be used reasonably. Without evidence showing this, any curtailment ordered on a pure priority basis will violate the GWA.

B. Evidence Does Not Support A Finding That There Is Insufficient Water Available In Wells Within The Bellevue Triangle

Evidence and testimony presented at the hearing did not support a finding that the Director should "limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available." I.C. § 42-237a.g. Testimony and evidence instead focused on flows in Silver Creek and Little Wood River. With no evidence about the amount of water in wells, it would violate the GWA to curtail withdrawals in such wells.

C. Evidence Does Not Support A Finding That The Aquifer Is Being Mined Or Of Need For A Reasonable Ground Water Pumping Level

No evidence was presented at the hearing to show "mining" of the aquifer beneath the Bellevue Triangle, which would be indicated if water was being withdrawn at a "rate beyond the reasonably anticipated average rate of future natural recharge." I.C. § 42-237a.g. Moreover, no evidence was presented for purposes of establishing a "reasonable ground water pumping level." I.C. § 42-237a.g. Indeed, some evidence presented at the hearing indicated that ground water levels had stabilized or increased since 1991. SVGWD/GGWD Ex. 15 at 12 (IDWR Open-File Report written by Allan Wylie titled "Summary of Ground Water Conditions in the Big Wood River Ground Water Management Area: 2019 Update"). While the setting of a reasonable pumping level is meant to assist the Director and is discretionary, *A&B* at 510-11, 284 P.3d at

235-36, the lack of any evidence discussing such a level demonstrates the failure to consider other provisions of the GWA. Consequently, and without evidence of groundwater being mined or the need for a reasonable pumping level, curtailment of groundwater within the Bellevue Triangle is inappropriate in this proceeding.

III. The Burden Of Proof In This Proceeding Must Not Prejudice Junior Groundwater Users

As noted above, this is the first proceeding ever brought under the provisions in Idaho Code § 42-237a.g. This proceeding is not governed by the CM Rules. This was made clear in the Director's *Notice*, which cited Idaho Code § 42-237a.g as the basis for initiating the proceeding. At the pre-hearing conference, the Director confirmed that the CM Rules did not apply. *See* May 24, 2021 Prehearing Conf. Tr. 50: 14-17 ("[W]ithout adopting the rules of procedure—I'm sorry, the Conjunctive Management Rules as the rules that will govern what the Director is doing in this proceeding . . . .").

The question of burdens was addressed at the prehearing conference. There the Director stated that the parties' respective burdens are at least in part what was described in *AFRD2*. And his legal counsel explained that although *AFRD2* deals with the CM Rules, "it does set up what the standard is going into the Conjunctive Management Rules by talking about what the standard was prior to using the Conjunctive Management Rules. So that's–that's what we're drawing from." May 24, 2021 Prehearing Conf. Tr. 44: 2-7.

AFRD2 (as cited by the Director at the prehearing conference) provides that "[t]he presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed." *AFRD2*, 143 Idaho at 878, 154 P.3d at 449. The *AFRD2* Court also stated that "[r]equirements pertaining to the standard of proof [in a delivery call] and who

bears it have been developed over the years . . . ." *Id.* at 874, 154 P.3d at 445. But the *AFRD2* Court expressed no opinion as to what those burdens are in connection with particular claims, defenses or factual allegations in a water delivery call, and certainly not in a proceeding under Section 42-237a.g.

In a subsequent case brought under the CM Rules, the Idaho Supreme Court stated (as quoted by the Director at the prehearing conference) that "[i]n Idaho, [a] subsequent appropriator attempting to justify his diversion has the burden of providing that it will not injure prior appropriations." *A&B Irr. Dist. v. IDWR.* ("*A&B*"), 153 Idaho 500, 516, 284 P.3d 225, 241 (2012) (internal quotation marks omitted). The *A&B Court* further clarified:

> It is Idaho's longstanding rule that proof of "no injury" by a junior appropriator in a water delivery call must be by clear and convincing evidence. Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence.

A&B, 153 Idaho at 524, 284 P.3d at 241 (2012) (emphasis added).

But this is not a water delivery call (let alone a delivery call under the CM Rules), so *AFRD2* and *A&B* do not clearly apply. This proceeding was initiated by the Director under Idaho Code § 42-237a.g's provision that "water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect . . . the present or future use of any prior surface or ground water right." *Notice* at 1. Put another way, this is an "administrative proceeding to determine whether water is available to fill the ground water rights." *Id.* This being the first proceeding to curtail junior water rights under Section 42-237a.g, and without proceeding under the CM Rules, the typical burdens and standards of proof in a delivery call should not apply.

In Idaho, the common law rule is that the moving party has the burden of proof including not only the burden of going forward but also the burden of persuasion in administrative hearings. *Intermountain Health Care, Inc. v. Bd. of County Comm'rs of Blaine County,* 107 Idaho Ct. App. 248, 251, 688 P.2d 260, 263 (1984), *rev'd on other grounds,* 109 Idaho 299, 707 P.2d 410 (1985) (citation omitted). But in this case, there is no "moving party." Rather, IDWR initiated the proceeding to confirm (or not) the conclusion in the *Notice* "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." *Notice* at 1. Accordingly, the clear and convincing standard applied to juniors (who desire to avoid curtailment) in delivery calls does not apply here.

Under Idaho law, "preponderance of the evidence" is generally the applicable standard for administrative proceedings, unless the Idaho Supreme Court or legislature has said otherwise. *N. Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho Ct. App. 437, 439, 926 P.2d 213, 215 (1996). That is the standard that must be applied to both juniors and seniors in this proceeding.

Another way to consider the burdens in this proceeding under Idaho Code § 42-237a.g is that a heightened burden falls on the Director. Both juniors and seniors in this proceeding have real property interests at stake in the form of water rights. But neither of them initiated this proceeding, and they are not equally situated. The surface water users have over a century's worth of knowledge based on visible observations to support cropping decisions and to assess water supply. The ground water users, on the other hand, divert from a poorly understood underground environment where pumping impacts are not readily apparent, but water supply has been seemingly consistent. The Director provided the ground water users with roughly one month's notice, in late spring, that their water supply may be curtailed based on his staff's recent

determination (based on a newly developed ground water model) that groundwater pumping might "affect . . . the present or future use of any prior surface or ground water right." *Notice* at 1 (quoting I.C. § 42-237a.g) (emphasis added).

In light of these facts and the truncated nature of this proceeding, any determination by the Director to curtail ground water rights must be supported by "clear and convincing evidence" or some other heightened proof that doing so will actually supply water needed for a senior's actual use during the 2021 irrigation season. As the statute makes clear, the Director must focus on the senior's actual use of their water rights this season in determining whether water is not available to fill a junior water right (i.e. whether to curtail a junior water right).[5]

It is worth noting that only a fraction of senior surface water users who might potentially benefit from groundwater curtailment put on any evidence at the hearing, and the Watermaster testified that, of those, only three rights (totaling 8.5 cfs) would benefit from curtailment of all groundwater rights in the Potential Area of Curtailment.

IV. Junior Ground Water Users Are Entitled To Propose And Prosecute Mitigation Prior To Physical Curtailment

The CM Rules provide that a junior will be protected from curtailment "where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan." IDAPA 37.03.11.042.02. Of course, as noted, this is not a proceeding under the CM Rules.

However, under the GWA, a junior groundwater user must be provided an opportunity to provide mitigation to avoid curtailment. The GWA affirmed the basic tenets of the prior

[5] Although this case does not involve the CM Rules, in reviewing the seniors' actual use of water the Director should look at the factors for evaluating material injury and the reasonableness of seniors' diversions in Rule 42 of the CM Rules. At the pre-hearing conference, the Director indicated that he knew of no other relevant factors for determining material injury and the reasonableness of diversions. Neither the IDWR staff nor the senior water users' expert witness (Eric Miller) testified that they had analyzed the Rule 42 factors (in name or in substance) for this proceeding.

appropriation doctrine and their application to groundwater resources—namely "[t]he traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation"—but modified it with respect to groundwater by providing that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources." I.C. § 42-226.

The Director's action in this proceeding must be considered in light of the GWA's mandate that the priority doctrine shall not block full economic development of underground water resources. To fulfill this obligation, the Director cannot curtail junior groundwater pumpers without giving them an opportunity to provide mitigation to avoid curtailment.

Mitigation, of course, is a junior groundwater user's potential response to avoid curtailment if the Department determines they are causing material injury to senior water rights. They cannot—and should not be required to—develop mitigation proposals until they know whether material injury to specific water rights has been determined. Only then can they know which of the numerous available mitigation techniques can be successfully employed.

Whether, and the extent to which, any senior water rights will suffer material injury within the scope of this proceeding has not yet been determined. If and when that occurs, the potentially curtailed junior groundwater users must be given an opportunity to provide mitigation to avoid curtailment of their water rights. Unfortunately, however, it may be impossible to arrange for appropriate mitigation at this late date (months into the irrigation season in which the juniors are threatened with curtailment). Indeed, IDWR employee Tim Luke testified at the hearing that he did not know of any way that junior groundwater pumpers could mitigate to avoid curtailment if it is ordered in this proceeding. On the other hand, there also was testimony

at the hearing about potential water deliveries of Snake River water to the seniors and pumping to augment Silver Creek flows. In any event, curtailing junior groundwater rights (*i.e.*, real property interests) without providing the holders with a meaningful opportunity to provide mitigation violates their due process rights and the GWA.

V. Cities/SVC's Rights To Due Process Were Violated By The Truncated Timeline In This Proceeding

This proceeding's highly compressed schedule did not provide parties with sufficient time to prepare for the hearing, such as by thoroughly reviewing the staff memos, producing their own model runs, and reviewing historical water rights administration documentation. The following is a timeline to illustrate the problem:

- May 4, 2021 – Director sends his *Notice* commencing this proceeding to all water right holders in Water District 37 and 37B, requesting notices of intent to participate by May 19, 2021, noticing a prehearing conference on May 24, 2021, and noticing a hearing to commence on June 7, 2021;
- May 11, 2021 – City of Bellevue notices its intent to participate;
- May 11, 2021 – Sun Valley Company notices its intent to participate;
- May 11, 2021 – Director issues his *Request for Staff Memorandum*, to "be submitted to the Director on or before May 17, 2021";
- May 13, 2021 – City of Ketchum notices its intent to participate;
- May 18, 2021 – City of Hailey notices its intent to participate;
- May 18, 2021 – IDWR posts four (4) staff memos to the website with no actual notice to parties who had noticed an intent to participate;
- May 21, 2021 – Cities/SVC file their *Request for Information Related to Staff Memoranda* asking IDWR for data associated with each of the four (4) staff memos. As stated on the record in this proceeding, the information requested was drafted by Cities/SVC's engineer, Greg Sullivan, to better allow him and counsel to understand the staff memos;
- May 24, 2021 – prehearing conference was held;

- May 26, 2021 – deadline for parties to identify expert witnesses;
- May 28, 2021 – deadline for parties to identify factual witnesses;
- June 2, 2021 – deadline for parties to submit exhibits;
- June 7, 2021 – hearing commences;
- June 7, 2021 – at the end of the day, Cities/SVC ask the Director if IDWR will provide information in response to the May 21, 2021 *Request for Information Related to Staff Memoranda*, with Director stating he will discuss with staff;
- June 9, 2021 – counsel for IDWR sends four (4) emails during the hearing with information responsive to the *Request for Information Related to Staff Memoranda*. The first email is sent at 9:45 a.m., the second and third emails are sent at 11:48 a.m., and the fourth email is sent at 6:44 p.m.;
- June 12, 2021 – Cities/SVC's expert witness Greg Sullivan testifies that he was unable to review the information IDWR provided in relation to the May 21, 2021 *Request for Information Related to Staff Memoranda* due to the timing; and
- June 12, 2021 – hearing concludes.

With more time, the parties could have conducted the kinds of preparations required by a case like this that carries such substantial consequences.

Moreover, IDWR failed to timely respond to the Cities/SVC's May 21, 2021 *Request for Information Related to Staff Memoranda*, further preventing Cities/SVC from putting on a complete case to contest the actions of the Director and the evidence presented by IDWR staff and senior surface water users. Cities/SVC filed their *Request for Information Related to Staff Memoranda* ahead of the May 24, 2021 prehearing conference, but received no response prior to the actual hearing. Only by asking the Director at the end of the first day of the hearing about the status of the request did Cities/SVC confirm that IDWR had done nothing with the request. While IDWR did eventually provide information throughout the day on June 9, 2021 (while Cities/SVC and their expert witness were attending the hearing and unable to focus on the emails), Cities/SVC's expert witness was prevented from analyzing the information due to the

fact that the hearing was ongoing. Had the information been disclosed ahead of the exhibit deadline, Cities/SVC would have had an opportunity to prepare and timely disclose hearing exhibits based on the information.[6] Getting the information during the hearing did not allow for this. IDWR's failure to provide the requested information ahead of the exhibit deadline prevented the Cities/SVC from putting on a full and complete case.

In summary, the extremely condensed schedule and IDWR's failure to timely respond to Cities/SVC's information request each violated Cities/SVC's due process rights by preventing them from being able to adequately prepare for the hearing.

VI. Cities/SVC Renew Their *Joint Motion to Strike, Motion in Limine etc.*

On June 2, 2021, the Cities of Bellevue, Hailey, and Ketchum and Sun Valley Company filed their *Joint Motion to Strike, Motion in Limine and Motion to Limit the Scope of Evidence, and Request for Expedited Decision* ("*Joint Motion*"). The Director denied the *Joint Motion* in part and allowed evidence regarding Big Wood River matters. Because the *Notice* did not include the Big Wood River as a source to be considered in the proceeding, information and testimony regarding Big Wood River water supplies should be excluded from the record and from consideration of need or injury. Cities/SVC again re-assert the rationale for this request that is contained in the memorandum filed in support of the *Joint Motion*.

VII. Sun Valley Company Renews Its *Motion To Dismiss*

The Director previously denied the May 14, 2021 *Motion to Dismiss* filed by Sun Valley Company ("SVC"), which raised procedural and due process issues associated with the Director's authority to initiate this proceeding. *See Order Denying Motions to Dismiss, for*

[6] For example, the information provided on June 9 included priority cut tables from 1975 through 2020, plus 1931, 1937, and 1939, which could have been used to prepare an exhibit analyzing the history of priority cuts.

Continuance or Postponement, and for Clarification or More Definite Statement (May 22, 2021) ("*Order Denying Motions to Dismiss*"). SVC hereby renews its *Motion to Dismiss*.

A stated basis in the *Motion to Dismiss* was the failure of the Director to convene a local ground water board, consistent with Idaho Code § 42-237b. That statute still is in effect despite the 2021 Idaho Legislature's vote to repeal it through House Bill 43.[7] The *Motion to Dismiss* argued the repeal will not be effective until July 1, 2021, at the earliest, with the repeal potentially not being effective until the Idaho House adjourns *sine die*. *Motion to Dismiss* at 9-10. Under either scenario, and until the repeals are effective, these statutes, which are part and parcel of the GWA, must be followed. *See A&B* at 506, 284 P.3d at 231 (the GWA was enacted in 1951 and is found in I.C. §§ 42-226 through 42-239).

In further support of its *Motion to Dismiss*, SVC attaches to this brief the meeting materials for the June 15, 2021 Special Board Meeting No. 9-21 of the Idaho Water Resource Board ("IWRB"). Two memoranda are included in the meeting materials, each of which discuss the consequence of Idaho's House of Representatives not adjourning *sine die*.

According to a June 14, 2021 *Memo* from Mat Weaver to the IWRB: "Because the House recessed the session, and has not yet adjourned *sine die*, there is uncertainty as to when the IWRB's currently adopted temporary fee rules will take effect." *Memo* at 2.

And according to a May 20, 2021 *Memorandum* from Alex J. Adams to the Executive Branch Agency/Department Heads Rules Review Officers: "rule changes presented to the 2021 legislature have not taken effect. Rule changes would traditionally take effect upon *sine die* (if properly acted on by the legislature), which could be as late as December 31st." *Memorandum* at 1.

[7] House Bill 43, when effective, also will repeal Idaho Code Sections 42-237c and 42-237d.

Because the Idaho House merely recessed and did not adjourn *sine die*, the repeals to Idaho Code §§ 42-237b, 42-237c, and 42-237d of the GWA are not yet effective, meaning the Director must follow their requirements in this proceeding. With these statutes not followed, the entire proceeding should be dismissed.

DATED this 21st day of June, 2021.

for

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Attorney for Sun Valley Co.

for

Candice M. McHugh
Attorney for the City of Bellevue

Michael P. Lawrence
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for

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 21st day of June, 2021, I filed and served true and correct copies of the above and foregoing document by method selected below:

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