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DEPARTMENT OF
WATER RESOURCES

**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

**CITY OF POCATELLO'S POST-
HEARING BRIEF AND JOINDER IN
CITIES'/SVC's POST-HEARING BRIEF**

Pursuant to the verbal instructions given by the Idaho Department of Water Resources ("IDWR" or "Department") Director and Hearing Officer Gary Spackman at the conclusion of the hearing in this matter on June 12, 2021, and as amended by emails from counsel for IDWR on Friday June 18, 2021, the City of Pocatello ("Pocatello") submits its post-hearing brief in the captioned matter. Pocatello joins in the Post-Hearing Brief of the Cities of Bellevue, Hailey, and Ketchum, and Sun Valley Company (collectively, "Cities/SVC"). In addition, Pocatello's brief offers additional argument on threshold legal issues that the Department must wrestle with in any final order in this matter.

The instant dispute arises from a Department-initiated effort to curtail wells in a specified area of Basin 37 by invoking the Director's authority under Idaho Code § 42-237a.g., and by disregarding the Director's authority under the remainder of the Ground Water Act, Idaho Code § 42-602, and the Rules for Conjunctive Management of Surface and

Ground Water Resources (“CMR”) in IDAPA 37.03.11. This novel application of a subset of the Department’s statutory authority will presumably become one of the “tools” in the Department’s toolbox to curtail junior ground water users—if upheld after an almost certain appeal.

Pocatello is not located within any of the areas of proposed curtailment, nor is it located within Basin 37. However, Pocatello is a junior ground water user in the neighboring Eastern Snake Plain Aquifer Ground Water Management Area (“ESPA-GWMA”), and its interest in this matter is, generally, to ensure that the Director’s exercise of his discretion to curtail wells is consistent with the scope of applicable legal authority.¹ For the reasons argued below, Idaho Code § 42-237a.g. does not create an independent basis for agency curtailment authority.

1. Source and Extent of IDWR Legal Authority to Curtail in a GWMA.

a. The Department’s Authority Does Not Arise Solely under 42-237a.g.

Although the Department alleges Idaho Code § 42-237a.g. as the sole source of authority in this matter, the Department has not explained how Idaho Code § 42-237a.g. can create an *independent* source of authority to curtail junior ground water rights, divorced from the remainder of the Ground Water Act, Idaho Code §§ 42-226 through 42-239 (“Ground Water Act”), or from Idaho Code §§ 42-602 and 42-603.

¹ This is also consistent with the Director’s May 25, 2021 Scheduling Order, which included Pocatello in the “Interested Water Users” group of participants and limited party status of this group to participation on legal issues. Scheduling Order at 2.

- This is an effort to “distribute” water. The Director’s authority to do so arises under Idaho Code § 42-602² and case law interpreting the same.³
- Idaho Code § 42-603 provides authority to adopt rules—which have in fact been adopted for purposes of water distribution in Basin 37 (both the CMR and Basin 37-specific rules). Yet the Department ignores these sources of authority and—more importantly—the procedural and substantive limitations on its authority as interpreted by the Supreme Court in *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 154 P.3d 433 (2007).

b. The Department’s authority is limited by the plain language of any statute upon which it purportedly relies.

Before ordering curtailment, and based on the plain language of the Ground Water Act, the Director’s order must determine that “insufficient water is available” to serve wells in the Bellevue Triangle or that the aquifer is being “mined” or otherwise drawn down at a “rate beyond the reasonably anticipated average rate of future natural recharge.” Idaho Code § 42-237a.g. Alternatively, the Director’s order must explain how the Director’s authority can simultaneously arise from Idaho Code § 42-237a.g. and yet not be limited by the plain language of the statute.

If the Director instead determines the authority exercised in the captioned matter is in fact reliant on the entirety of the Ground Water Act, the Director’s order must demonstrate how any determinations in this matter are consistent with *inter alia*, Idaho Code §§ 42-226

² Basin 37 is an organized water district; as such, it isn’t clear how the Department can escape the confines of § 42-602 in this matter.

³ See, e.g., Case No. 2009-000647, Memorandum Decision and Order on Petitions for Rehearing [in the A&B Irrigation District Delivery Call] at 5 (“The initiation of a contested case is not required in an organized water district.”) (“Memo Decision on Rehearing”).

and 42-233b. As an example, “reasonable use” cannot be whatever the Department says it is. Instead, it must have some relationship to the amounts of water a senior surface water right requires and, as the Supreme Court has instructed, certain “post-adjudication factors” may result in a senior receiving less water than his decreed entitlement. *See generally, American Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Resources*, 143 Idaho 862 (2007); *see also*, Memo Decision on Rehearing at 9-13.

2. This is a Delivery Call and the CMR Must be Applied.

Based on review of the record to date, in all respects this was a delivery call except that the Department announced in its May 4 Order a proposed area (or areas, apparently several were offered into evidence) of curtailment instead of requiring the senior water right users to make a demand for water. The CMR provide that the purpose of the rules is to:

establish the procedures to regulate the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.

Summary contained in “Zero Based Regulation Review” of the CMR.

Further, under CMR Rule 37-03-11.01:

The rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply. **It is intended that these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently.**


IDWR has adopted “general rules” for Basin 37, and thus the CMR are “incorporated” into these rules.

Finally, the Department has imposed the same burdens of proof on the junior ground water users in this matter that would apply in a delivery call—but without the procedural

protections afforded junior ground water users by the CMR. The Department's unwillingness to apply the CMR to this dispute is without basis.

Respectfully submitted this 21st of June, 2021.

SOMACH SIMMONS & DUNN

By 
Sarah A. Klahn

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2021, I caused to be served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

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