

Candice M. McHugh, ISB # 5908
Chris M. Bromley, ISB # 6530
MCHUGH BROMLEY, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
(208) 287-0991
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

*Attorneys for the Cities of Bliss, Burley,
Carey, Declo, Dietrich, Gooding, Hazelton,
Heyburn, Jerome, Paul, Richfield, Rupert,
Shoshone, and Wendell*

Robert L. Harris, ISB # 7018
HOLDEN KIDWELL HAHN & CRAPO
100 Riverwalk Dr., Ste. 200
PO Box 50130
Idaho Falls, ID 83405
(208) 523-0620
rharris@holdenlegal.com

Attorneys for City of Idaho Falls

Sarah A. Klahn, ISB # 7928
SOMACH SIMMONS & DUNN
2033 11th St., Ste. 5
Boulder, CO 80302
(303) 449-2834
sklahn@somachlaw.com

Attorneys for 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

Docket No. CM-DC-2010-001

**MOTION FOR APPOINTMENT OF
INDEPENDENT HEARING
OFFICER**

COME NOW, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (“Coalition of Cities”), by and through their attorneys of record, Candice M. McHugh and Chris M. Bromley, the City of Idaho Falls, by and through its attorney of record, Robert L. Harris, and the City of Pocatello by and through its attorney of record Sarah A. Klahn (collectively the “Cities”),

pursuant to I.C. § 42-1701A(2) and IDAPA 37.01.01.410, and hereby moves the Director to appoint an independent hearing officer.

On April 21, 2023, the Director issued a series of orders regarding the Surface Water Coalition (“SWC”) delivery call: *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”); *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (“As-Applied Order”); and *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* (“Hearing Order”).

The *Methodology Order* is a detailed, technical order, stating it is using the “best available science” to revise the Director’s predictive tools for determining material injury to the SWC pursuant to the CM Rules. A material change in this *Methodology Order* from all prior decisions of the Director in the SWC delivery call is his decision to use the Eastern Snake Plain Aquifer Model (“ESPAM”) in transient as opposed to steady-state. *See Methodology Order* at 35, ¶ 19. The significance of this policy change cannot be overstated, is unprecedented, and not understood.

The *As-Applied Order* uses the information from the *Methodology Order* and applies it to the first half of the 2023 irrigation season, to compute a “Demand Shortfall” of 75,200 acre-feet to Twin Falls Canal Company for the period April – July. Using a transient modeling run, ESPAM predicts that ground water rights that are junior to December 30, 1953 will need to be curtailed to satisfy the predicted injury. The predicted shortfall to TFCC in a year when the Upper Snake Reservoir systems is expected to fill and with the mountains of eastern Idaho currently containing more than 100% snow water equivalent, *see*

the *Motion for Continuance* filed contemporaneously by the Cities, results in an unprecedented quantification of material injury that defies logic.

Associated with the *As-Applied Order* is a link with files containing *April Background Information*. The *April Background Information* contains: historical diversion data for the SWC members; historical Heise flow data; analyses to estimate the 2023 shortages to the SWC members; transient ground water modeling files and results; irrigated area shape files for Minidoka Irrigation District.

The *Hearing Order* authorizes discovery, establishes that a prehearing conference will take place on April 28, 2023, and that the hearing in the contested case will commence on June 6, 2023. The *Hearing Order* does not specify if the Director will serve as the hearing officer.

Idaho Code § 42-1701A(2) provides that, “The director, in his discretion, may direct that a hearing be conducted by a hearing officer appointed by the director.” IDAPA 37.01.01.410 allows for the appointment of a hearing officer who may be an “employee[] of the agency or [an] independent contractor[.]”

If the Director elects to serve as the Hearing Officer, the Cities respectfully move him to appoint an independent hearing officer for the following reasons:

1. Since the 2005 delivery call was filed by the Surface Water Coalition (“SWC”), the only evidentiary hearing of any magnitude occurred in 2008, when former Chief Justice Gerald F. Schroeder served as the independent hearing officer and issued his April 29, 2008 Recommended Order. *A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 645, 315 P.3d 828, 833 (2013). Former Chief Justice Schroeder’s

Recommended Order lead former Director David R. Tuthill, Jr. to issue the first *Methodology Order* on April 7, 2010. *Id.* at 647, 315 P.3d 835. The first *Methodology Order* and orders implementing the same were addressed by the Court in its 2013 decision in *A&B v. Spackman*.

2. Since then, Director Spackman has issued updates to the *Methodology Order*, with the methodology now in its fifth iteration.
3. The *Methodology Order* that was issued on April 21, 2023, represents a sea-change in the use of predictive tools, updated data, and use of the Eastern Snake Plain Aquifer Model in a transient function, as opposed to steady-state, to quantify material injury and choose a priority date for curtailment. Despite this, the *Methodology Order* fails to update data as to SWC irrigation efficiencies, irrigation practices, irrigated area, among other topics that will need to be addressed at an evidentiary hearing with a fully developed record.
4. Former Chief Justice Schroeder was named as the hearing officer in response to the SWC's *Request for Independent Hearing Officer; Disqualification of the Director as a Matter of Right* (June 4, 2007).¹ When former Chief Justice Schroeder was named as the hearing officer, former Director Tuthill issued an order not only appointing former Chief Justice Schroeder to serve, but he also stating that he would continue to administer water rights in response to the SWC delivery call: "The Director maintains jurisdiction over the ongoing administration of water rights related to this matter." *Order Appointing Hearing*

¹ SWC Request for Independent Hearing Officer; Disqualification of the Director as the Hearing Officer as a Matter of Right | June 4, 2007 | SWC (idaho.gov).

Officer (Aug. 1, 2007) (emphasis added).²

5. What was decided in 2007 holds true today. The Director has the tools by which to administer junior-priority ground water rights for the benefit of the SWC, with mitigation plans in place to protect most ground water users from curtailment while the hearing process plays out.
6. It has been eighteen years since the original SWC delivery call. It has been fifteen years since the evidentiary hearing before former Chief Justice Schroeder, meaning it has been fifteen years since an evidentiary hearing of any consequence has taken place. In those intervening fifteen years, many irrigation practices have likely changed, all of which deserve a hearing, based on a fully developed record, to be heard by an independent hearing officer for consideration by the Director.

Based on the foregoing, IDWR's practice is to appoint an independent hearing officer to preside over evidentiary hearings in the SWC delivery call. Cities agree with past practice respectfully move the Director to appoint an independent hearing officer.

Respectfully submitted this 28th day of April, 2023.

/s/ Robert L. Harris
Robert L. Harris
HOLDEN KIDWELL HAHN & CRAPO
Attorneys for City of Idaho Falls

/s/ Candice M. McHugh
Candice M. McHugh
MCHUGH BROMLEY
Attorneys for Coalition of Cities

/s/ Chris M. Bromley
Chris M. Bromley
MCHUGH BROMLEY
Attorneys for Coalition of Cities

/s/ Sarah A. Klahn
Sarah A. Klahn
SOMACH SIMMONS & DUNN
Attorneys for City of Pocatello

² Order Appointing Hearing Officer | August 1, 2007 | SWC (idaho.gov).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of April, 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

Idaho Dept. of Water Res.
PO Box 83720
Boise, ID 83720-0098
file@idwr.idaho.gov
garrick.baxter@idwr.idaho.gov

Kathleen Marion Carr
US Dept. Interior 960 Broadway Ste 400
Boise, ID 83706
kathleenmarion.carr@sol.doi.gov

John K. Simpson
MARTEN LAW LLP
P.O. Box 2139 Boise, ID 83701-2139
jsimpson@martenlaw.com

David W. Gehlert
Natural Resources Section Environment and
Natural Resources Division U.S. Department
of Justice
999 18th St., South Terrace, Suite 370
Denver, CO 80202
david.gehlert@usdoj.gov

Travis L. Thompson
MARTEN LAW LLP P.O. Box 63
Twin Falls, ID 83303-0063
tthompson@martenlaw.com
jnielsen@martenlaw.com

Matt Howard
US Bureau of Reclamation
1150 N Curtis Road Boise, ID 83706-1234
mhoward@usbr.gov

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

Sarah A Klahn
Somach Simmons & Dunn
1155 Canyon Blvd, Ste. 110 Boulder, CO
80302 sklahn@somachlaw.com
dthompson@somachlaw.com

Thomas J. Budge
Elisheva M. Patterson
RACINE OLSON
P.O. Box 1391 Pocatello, ID 83204-1391
tj@racineolson.com
elisheva@racineolson.com

Rich Diehl
City of Pocatello
P.O. Box 4169 Pocatello, ID 83205
rdiehl@pocatello.us

Candice McHugh
Chris Bromley
MCHUGH BROMLEY, PLLC
380 South 4th Street, Suite 103 Boise, ID
83702 cbromley@mchughbromley.com
cmchugh@mchughbromley.com

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

Robert E. Williams
WILLIAMS, MESERVY, & LOTHSPREICH,
LLP P.O. Box 168 Jerome, ID 83338
rewilliams@wmlattys.com

Skyler C. Johns
Nathan M. Olsen Steven L. Taggart
OLSEN TAGGART PLLC P.O. Box 3005
Idaho Falls, ID 83403
sjohns@olsentaggart.com
nolsen@olsentaggart.com
staggart@olsentaggart.com

Randall D. Fife City
Attorney, City of Idaho Falls
P.O. Box 50220 Idaho Falls, ID 83405
rfife@idahofallsidaho.gov

Corey Skinner
IDWR—Southern Region
1341 Fillmore St., Ste. 200 Twin Falls, ID
83301-3033
corey.skinner@idwr.idaho.gov

Tony Olenichak IDWR—Eastern Region
900 N. Skyline Drive, Ste. A Idaho Falls, ID
83402
Tony.Olenichak@idwr.idaho.gov

William A. Parsons
PARSONS SMITH & STONE
P.O. Box 910 Burley, ID 83318
wparsons@pmt.org

/s/ Candice M. McHugh
Candice M. McHugh