

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*

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

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

**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 CONTINUANCE

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”),

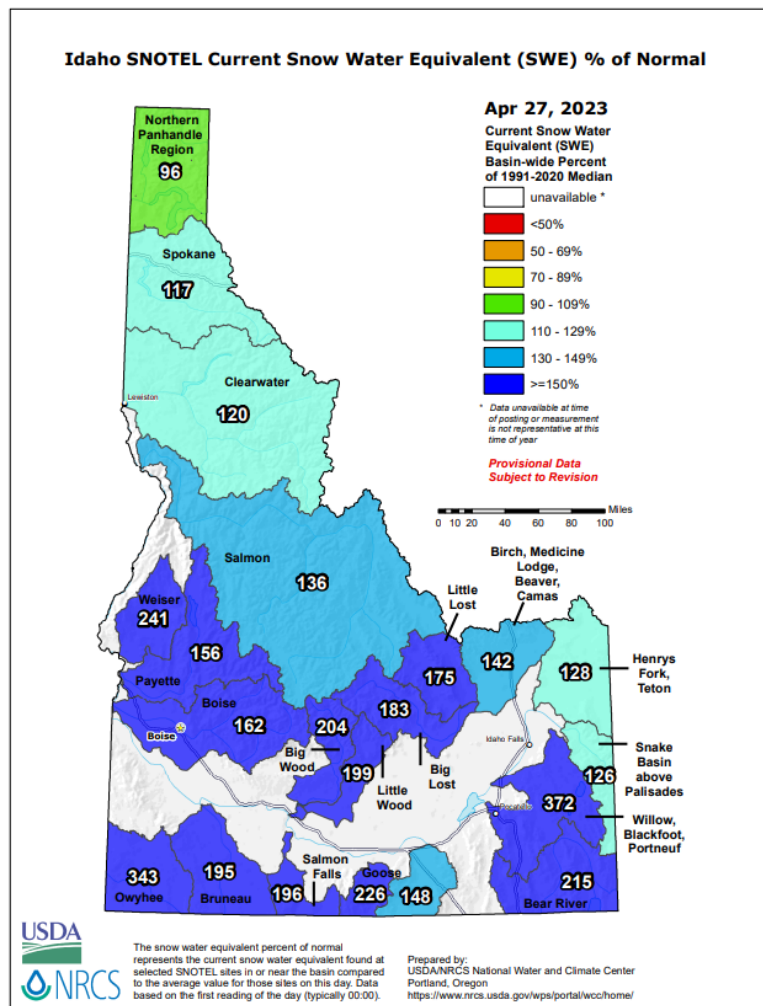
pursuant to IDAPA 37.01.01.220 and IDAPA 37.01.01.560, and hereby move for continuance of the hearing scheduled for June 6-10, 2023, in the above-captioned matter.

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”). While the Cities are in full compliance with their approved mitigation plan, the Cities nevertheless remain subject to the *Methodology Order* and its significant analytical departure from the Fourth Methodology 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. The Director decided in this *Methodology Order* to make a material departure from all prior decisions in the SWC delivery call to use the Eastern Snake Plain Aquifer Model (“ESPAM”) in transient as opposed to steady-state to predict the priority date for curtailment needed to satisfy that injury. *See Methodology Order* at 35, ¶ 19. The significance of this policy change cannot be overstated and is unprecedented.

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 (“TFCC”) 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, which is shown on the following page, results in an unprecedented quantification of material injury that defies logic:



https://www.wcc.nrcs.usda.gov/ftpref/data/water/wcs/gis/maps/id_swepctnormal_update.pdf

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.

IDAPA 560 states: “The presiding officer may continue proceedings for further hearing.” The Cities request that the hearing be continued until December 2023 or January 2024 for the following reasons:

1. The need for completion of adequate discovery by the parties. The Idaho Rules of Civil Procedure allows thirty (30) days for a party to respond to written discovery. If discovery is served on or after the prehearing conference, which is scheduled for April 28, 2023, answers would not be due until at least May 30, 2023, which is seven (7) days before the hearing is scheduled to commence. Additionally, compounding the already compressed schedule is the fact that Memorial Day is May 29, 2023. It is customary to have responses to written discovery before noticing depositions. Since written responses to discovery will not be available until after Memorial Day, it is simply not possible to have depositions before the June 6, 2023 hearing date.
2. The need for completion of expert reports and rebuttal reports. In order to properly formulate expert opinions and reports, the Cities require discovery from the parties as well as information from IDWR. Without discovery and information from IDWR, and based on what is understood now, issues that may be raised as expert opinions in expert reports include but are not limited to the following:
 - a) IDWR’s new reliance on transient modeling.
 - b) IDWR’s reliance on new data. IDWR has added seven (7) years of additional, voluminous hydrologic and water use data to the datasets used in the *Methodology Order* and *As-Applied Order*. There is insufficient time available to properly review and vet these data and how they were used in the revised calculations;
 - c) IDWR’s failure to properly identify the SWC’s irrigated acreage used in the determination of reasonable in-season demand;
 - d) IDWR’s failure to consider TFCC’s increase in diversions over the last twenty

years;

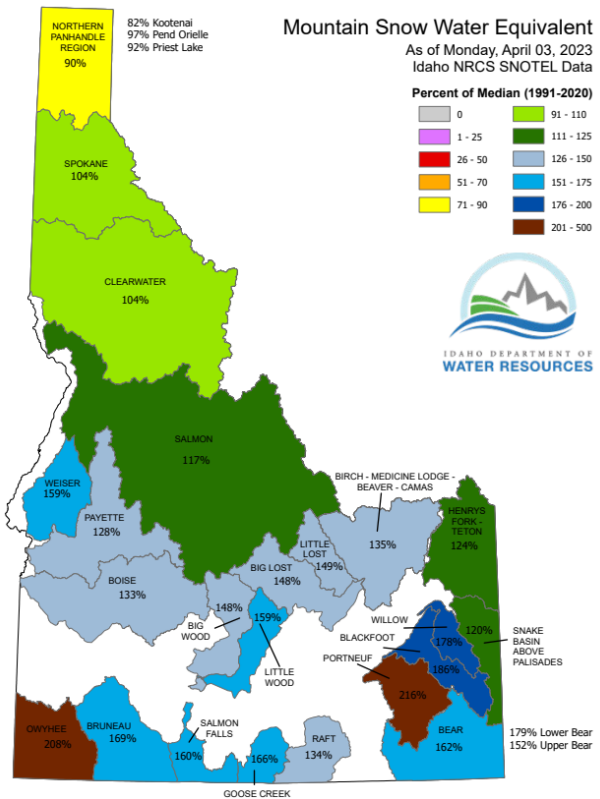
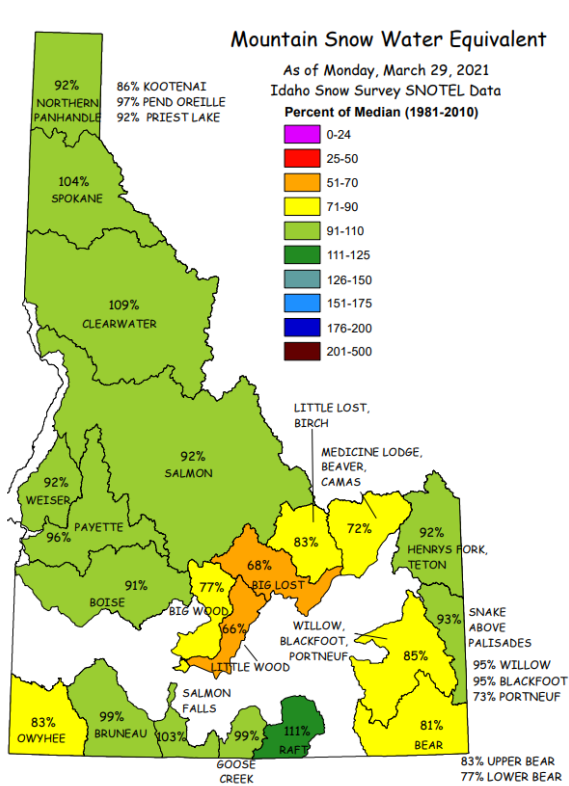
- e) IDWR's failure to consider changes in the efficiency of SWC operations;
 - f) IDWR's failure to apply CM Rule 20.03 and principles of reasonableness generally; and
 - g) IDWR's violation of due process rights of all interested water users:
 - i. By engaging in an apparently sham public process related to the Department's convening of the "Technical Work Group" to discuss modifications to the Fourth Methodology Order; and
 - ii. By setting the hearing without regard to the time required for discovery and without consideration of the existing obligations of the parties, their legal representatives, and consultants.
3. The allotted schedule leaves no time for necessary site investigations, let alone the ability for expert and lay witnesses to be deposed as to their opinions when it comes to water use and current practices. The original delivery call was filed eighteen (18) years ago in 2005 with various proceedings and an administrative hearing occurring in 2008. Water use, irrigation practices, and irrigated area have likely materially changed in the intervening fifteen (15) years since the hearing. If IDWR is using the "best available science" to administer junior-priority water rights, juniors, who have due process rights in delivery calls, must be afforded the same opportunity to use the best available science to evaluate the SWC's current water use.
 4. Evaluation of the factual and legal issues that the Director has addressed in the *Methodology Order* and *As-Applied Order* will be complex and require significantly more time from the Cities' attorneys, consultants, and expert witnesses than has been allotted.
 5. In prior delivery call hearings, the Director has asked for preparation of staff memoranda. If staff memoranda are prepared, those documents will need to be evaluated in an already compressed time period. With the likelihood that parties will request interviews or depositions of the authors of the staff memoranda and the likely need for expert rebuttal reports to the memoranda and to the expert reports of other parties, the time provided is grossly inadequate.
 6. The need for the Director to resolve the Cities' *Motion to Appoint an Independent Hearing Officer*.
 7. The Coalition of Cities' attorney, Candice M. McHugh, is unavailable during the dates set for hearing because of a previously scheduled out of state obligation, leaving the Coalition of Cities' other attorney, Chris M. Bromley, as the sole attorney representing

the client and running the office.

8. Mr. Bromley, as well as other counsel who represent parties in this matter, is set to argue before the Idaho Supreme Court on June 5, 2023 in the Department's appeal of the 2021 curtailment in Basin 37, *South Valley Ground Water Dist. v. Idaho Dept. of Water Res.*, Docket No. 49632. Mr. Bromley has a duty to another client in the appeal that will require his full attention in the week leading up to the argument and will be unable to provide the focus that is required to adequately represent the Coalition of Cities with Ms. McHugh's absence. Additionally, Mr. Bromley is scheduled to be out of the country on a previously planned trip with his family for most of the month of July.
9. Greg Sullivan, expert consultant for the Cities, is scheduled to be out of the country from May 17, 2023 through June 3, 2023 and will be unavailable to consult with the Cities' attorneys to assist in developing strategy, prepare expert reports, prepare exhibits, and to attend depositions if the schedule even allows for depositions to occur.

Based on the foregoing, the abbreviated hearing schedule leaves no time for discovery, fact finding, and the ability for the Cities' attorneys and experts to adequately represent their clients' interests.

A continuance is further warranted because, unlike in the Basin 37 delivery call that is referenced above, a "drought is [not] predicted for the 202[3] irrigation season" *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* at 1 (May 4, 2021). Indeed, "The Joint Forecast predicts an unregulated inflow of 3,700,000 acre-feet at the Snake River near Heise gage for the period of April through July. The forecasted flow volume equates to 112% of average." *As-Applied Order* at 5. The water supply in eastern Idaho is self-evident when looking at IDWR's snow water equivalency map for the spring of 2021 that was used to predict the drought in Basin 37 and comparing it with the same map for the spring of 2023, as shown on the follow page:



<https://idwr.idaho.gov/water-data/water-supply/snow-water-equivalency/>

In the Basin 37 delivery call, the Director stated he had to act with exigency because of a historically poor water supply and because he lacked a framework for determining material injury to senior-priority surface water rights. Here, material injury has already been determined in the current *Methodology Order* and those that preceded it, allowing the Director to administer water rights. Additionally, many of the junior-priority ground water users who pump from the Eastern Snake Plain Aquifer (“ESPA”) are allowed to do so based on previously approved CM Rule 43 mitigation plans. On April 24, 2023, the Director issued an order in the companion matter, CM-MP-2016-001, related to IGWA’s obligations for 2023; these obligations are also referenced in footnote 5 of the Final Order Regarding April 2023 Forecast Supply Methodology Steps 1-3. The ESPA Cities, of which the Cities are part, is one group that is allowed to pump in the 2023 irrigation season because they are in compliance with their mitigation plan. *As-Applied Order* at 5, fn. 5. Therefore, the

Director has all of the tools at his disposal to administer junior-priority ground water rights for the benefit of senior-priority surface water rights, with mitigation plans in place to address material injury, and no exigency to warrant a complex, technical hearing in such a compressed schedule.

As explained by the Supreme Court, expediency in conjunctive administration is important, however, “It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.” *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007) (emphasis added). Because there is no exigency, the schedule that the Director established does not allow time for the parties to present their information for consideration. Therefore, the Cities move to continue the hearing until a date in December 2023 or January 2024, which respects the schedules of the parties and will allow the Director sufficient time to evaluate the evidence and issue an order prior to the 2024 irrigation season.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of April, 2023, the above and foregoing, was served electronically as follows:

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