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**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

**SURFACE WATER COALITION'S
RESPONSE TO CITIES' REQUEST
FOR HEARING AND ORDER
AUTHORIZING DISCOVERY**

COME NOW, 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 ("Surface Water Coalition" or "Coalition"), by and through counsel of
record, and hereby respond to the *City of Pocatello's, City of Idaho Falls', and Coalition of
Cities' Request for Hearing and Order Authorizing Discovery* ("Request") filed on August 3,

2023. The Coalition requests the Director to deny the Cities' Request for the reasons set forth below.

BACKGROUND

The Director issued the *Fifth Amended Methodology Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Fifth Methodology Order") on April 21, 2023. The Cities challenged that order and filed several requests for hearing. See *Pocatello's Request for Hearing* (April 28, 2023); *Coalition of Cities' Amended Request for Hearing* (April 28, 2023); *City of Idaho Falls Challenge and Request for Hearing* (May 4, 2023). The Cities later filed additional statements of issues. See *Pocatello's Statement of Issues* (May 4, 2023); *Coalition of Cities' Statement of Issues* (May 4, 2023); *City of Idaho Falls Statement of Issues* (May 4, 2023). Notably, the Cities raised the following issues subject to the administrative hearing that was held from June 6-9, 2023:

- c) Whether the Surface Water Coalition's ("SWC") actual irrigated acreage was properly determined for use in determining reasonable in-season demand; . . .
- e) The reasonableness of Project efficiencies of the SWC members, trends in said efficiencies in recent years, and how the efficiency values are used in determining reasonable in-season demands;
- f) IDWR's failure to consider all sources of supply to the SWC;

Pocatello's Request for Hearing at 2; see also *Pocatello's Statement of Issues* at 2.

- b) IDWR's failure to properly identify the Surface Water Coalition's ("SWC") irrigated acreage used in the determination of reasonable in-season demand; . . .
- d) IDWR's failure to consider changes in the efficiency of the SWC's operations;
- e) IDWR's failure to consider all sources of supply available to the SWC;

Coalition of Cities' Amended Request for Hearing at 2.

- 4. IDWR's failure to consider changes and reasonableness of the project efficiencies of the SWC's operations; . . .

11. IDWR’s failure to investigate whether the SWC members are using the water they divert efficiently and without waste, and in compliance with the terms of their decreed water rights;

Coalition of Cities’ Statement of Issues at 2-3.

4. The reasonableness of Project efficiencies of the SWC members, trends in the efficiencies in recent years, and how the efficiency values are used in determining reasonable in-season demands;

5. Whether IDWR failed to consider all sources of water supply to the SWC; . . .

12. Whether IDWR’s failure to investigate whether the SWC members are using the water they divert efficiently and without waste, and in compliance with the terms of their decreed water rights;

City of Idaho Falls Statement of Issues at 2-3.

The parties were allowed to address the above issues at hearing through both lay and expert testimony and through exhibits.¹ The parties also submitted post-hearing briefing on all issues that were raised, or could have been raised, at the hearing. *See generally, Cities’ Closing Brief* (June 16, 2023). The Director issued the *Post-Hearing Order Regarding Fifth Amended Methodology Order* and the *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-season Demand and Reasonable Carryover* (“Sixth Methodology Order”) on July 19, 2023.

The Sixth Methodology Order was issued as a “final” administrative order subject to reconsideration and/or appeal to district court. *See* I.C. §§ 67-5246; 67-5270 to 5272; *see also*, Explanatory Information to Accompany a Final Order (attached to the Director’s Sixth Methodology Order).

¹ These issues are essentially the same issues identified in the Cities’ present Request. *See Request* at 2 (i.e. “operate reasonably and without waste,” “irrigated acreage,” “supplemental groundwater” and “enlargement rights”). All of these issues address the Coalitions’ use of water and the Cities had an opportunity to discover and present this information at the June hearing.

ARGUMENT

I. IDWR Already Provided a Hearing on the Cities' Issues and the Statute Does Not Provide for a Second Hearing.

The Cities have erroneously petitioned for an administrative hearing on the Sixth Methodology Order pursuant to Idaho Code § 42-1701A(3). The statute only allows an aggrieved person to have a hearing on a director's action or order when that person "has not previously been afforded an opportunity for hearing on the matter." *See* I.C. § 42-1701A(3). The Cities do not fall into that category. Instead, IDWR provided the Cities with an opportunity for hearing on the issues listed in their recent *Request for Hearing* June 6-9, 2023. Issues related to the SWC's reasonable use of water, irrigated acres, supplemental groundwater, and enlargement rights were all subject to the hearing on the Fifth Amended Methodology Order held before the Director this past June. The Director specifically addressed these issues in the Post-Hearing Order. *See Post-Hearing Order* at 17-23. Although the Cities may disagree with the Director's decision, their remedy is not a "second" administrative hearing. Since the Cities had an opportunity for a hearing on their issues, Idaho law does not afford them a right to a "second" hearing. The Cities' request should be denied accordingly.

Moreover, the Sixth Methodology Order was issued as a "final" agency order. Pursuant to section 42-1701A(4) the Cities' statutory remedy is judicial review of that order. Idaho's APA provides the right to ask for reconsideration and/or appeal that decision to district court. The Cities did not ask for reconsideration and have yet to appeal the Sixth Methodology Order, however IGWA did ask for judicial review. *See IGWA's Petition for Judicial Review* (Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV01-23-13713, Aug. 16, 2023). Since the Director's Sixth Methodology Order is on appeal to the district court it is not subject to any

further administrative process or hearing, unless ordered by the court. *See* I.R.C.P. 84. The Cities’ request for a “second” hearing should be denied accordingly.

II. The Sixth Methodology Order Updates the Fifth Methodology Order Based on Information Produced at Hearing.

Notwithstanding the Sixth Methodology Order was issued as a “final” agency order subject to reconsideration and/or judicial review, the Director updated the Fifth Order based upon information produced at hearing. In other words, the issues that the Cities seek to address with a hearing on the Sixth Methodology Order were already addressed in the June hearing. There is nothing new in the final order that would warrant an additional administrative hearing. The Cities’ request in this regard is unduly burdensome and would cost the parties and agency time and additional resources without any legal basis.

Notably, the Director stated “[t]his Sixth Methodology Order relies on the same data included in the Fifth Methodology Order.” *See* Sixth Methodology Order at 8, n. 8, at 9, n. 9, at 10, n. 10, at 15, n. 13, at 24, n. 18, at 26, n. 20, at 28-29, n. 21 (emphasis added). All of this information was available to the Cities as of April 21, 2023. However, the Director did identify certain limited corrections to the Fifth Methodology Order:

As discussed in footnote 12, during the June 2023 Hearing the Department identified an error in AFRD’s 2018 diversion data. Hr’g T. vol. IV, at 173-74. This correction was resolved in his Sixth Methodology Order, which relies on the updated data. The updated data did not result in an appreciable increase in 2018’s diversion value.

Sixth Methodology Order at 12, n. 11.

In this Sixth Methodology Order, AFRD2’s 2018 diversion value has been increased by 5,000 acre-feet. This increase was necessary to remedy the error committed by Department staff in calculating AFRD2’s 2018 adjusted diversion value for the Fifth Methodology Order, which was identified during the June 6 Hearing.

Id. at 13, n. 12.

IDWR staff member Matt Anders addressed the above data correction during the June hearing. He was available for cross-examination by the parties and the Cities had a full and fair opportunity to rebut or contest this information if they disagreed with it. Moreover, the Cities had a full and fair opportunity to rebut and contest any of IDWR's updates to the Fifth Methodology Order that were carried over to the Sixth Methodology Order. Stated another way, there is nothing new in the recent order that was not subject to the June hearing on the Fifth Methodology Order. All of the Cities' issues identified in their *Request for Hearing* were either expressly raised or could have been raised at the June hearing and finally addressed in the Director's *Post-Hearing Order* which resulted in the final Sixth Methodology Order.²

Alternatively, and without waiving any right to contest the granting of such a hearing, if the Director grants the Cities' request then the hearing should be limited to the issue of the updated data regarding AFRD2's 2018 diversion volume. The Director has such discretion and has limited review of amended methodology orders in that fashion before. This is the only change in the Sixth Methodology Order that could even be considered subject to another hearing. *See Order Limiting Scope of Evidence and Offering Witnesses (Methodology Order)* (May 21, 2010).

Similar to the request for hearing, the Director should deny or limit the Cities' request for discovery. Any issues that were already addressed at the hearing on the Fifth Methodology Order would be beyond the scope of discovery regarding a hearing on the additional data regarding AFRD2's 2018 diversion volume. Moreover, the Cities' request would be unduly

² The Cities have requested judicial review of the July 19, 2023 *Post-Hearing Order*. *See Notice of Appeal and Petition for Judicial Review* (Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV01-23-13238, Aug. 16, 2023). It is anticipated that this appeal will be consolidated with IGWA's appeal of the Sixth Order.

repetitious and burdensome to the SWC in both time and expense. The Director should deny or limit the request accordingly.

CONCLUSION

The Cities' request for hearing on the Sixth Methodology Order is an impermissible attempt at a "second" hearing not authorized by statute. Moreover, Idaho law does not allow an agency to hold a "redo" administrative hearing of a final agency order that is pending on appeal to the district court. Since the Cities' issues were already addressed at the underlying hearing held in June, there is no basis to grant a second hearing on the Sixth Methodology Order.

The Coalition respectfully requests the Director to deny or limit the Cities' request for hearing and an order authorizing discovery accordingly.

DATED this 22nd day of August, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

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