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DEPARTMENT OF WATER RESOURCES

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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTERS OF THE BIG WOOD
RIVER AND LITTLE WOOD RIVER
DELIVERY CALLS**

**DOCKET NOS. CM-DC-2015-001 &
CM-DC-2015-002**

**JOINT MOTION TO MODIFY
REQUEST FOR STAFF
MEMORANDA**

COME NOW the City of Bellevue (“Bellevue”) and the City of Hailey (“Hailey”), by and through their respective attorneys of record, and pursuant to the Director of the Idaho Department of Water Resources’ (“IDWR” or “Department”) June 12, 2015 *Request for Staff Memoranda* (“Request”) file this motion requesting modification of the Request.

I. INTRODUCTION

The Big Wood & Little Wood Water Users Association (“Petitioners”) sent letters to the Director on February 23, 2015, alleging material injury caused by junior-priority ground water pumping, in accordance with the Department’s *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 *et seq.* (“CM Rules”). Petitioners have since amended the delivery calls; and, on June 22, 2015, filed additional documents with the Director to again amend their pleadings.

On May 4, 2015, the Director held a status conference in Shoshone, Idaho, in which the Director and IDWR staff discussed information concerning the delivery calls.

Shortly after the status conference, and in response to the Sun Valley Company's April 29, 2015, *Motion for Order Authorizing Discovery*, the Director, on May 13, 2015, issued an *Order Authorizing Discovery*.

On May 20, 2015, the Director sent a letter ("Letter") to counsel for the Petitioners, requesting "additional information[,] and asking that Petitioners "respond . . . within thirty (30) days from the date of this letter." *Id.*¹ Based on the timing of the Letter, the requested information from Petitioners should have been received by IDWR on or before June 19, 2015.

On June 2, 2015, Petitioners filed a *Motion for Protective Order* in response to written discovery requests served upon Petitioners by the Sun Valley Company. On June 16, 2015, Sun Valley filed its *Opposition to Motion for Protective Order*. To date, the issue remains unresolved.

On June 12, 2015, the Director issued his *Request for Staff Memoranda*, in which he asked that "Department staff review data and information in possession of the Department, and prepare staff memoranda regarding the above-captioned matter" on a number of topics. *Request* at 2. The Director's Request set an August 21, 2015 deadline for submission of any staff memoranda to the Director and the parties.

For the reasons set forth below, Bellevue and Hailey request that the Director modify his Request to (a) prohibit IDWR staff from evaluating evidence or determining issues that are to be decided by the Director on a fully developed record, (b) delay issuance of any staff memoranda

¹ The Letter is located on IDWR's website: http://www.idwr.idaho.gov/files/legal/CM-DC-2015-001/CM-DC-2015-001_20150520_Letter_to_Joe_James-Request_for_additional_information.pdf.

until junior water right holders have an opportunity to gather and provide the Department with information relevant to the topics listed in the Request, or alternatively exclude from staff's review any information provided by Petitioners, (c) exclude topics that the Department must address in other proceedings, and (d) narrowly tailor the topics to be addressed in any staff memoranda.

II. ARGUMENT

A. **The Director should modify the Request to Prohibit IDWR Staff from Evaluating Information or Analyzing Rule 42 Factors and Other Issues that May be Decided in these Contested Cases.**

In these proceedings, the Director must determine whether the holders of senior-priority water rights are suffering material injury by reason of diversion of water by the holders of junior-priority ground water rights in an area having a common ground water supply in an organized water district. IDAPA 37.03.11.040.01. CM Rule 42 sets forth factors the Director evaluates in determining whether the holders of senior water rights are suffering material injury and using water efficiently and without waste. IDAPA 37.03.11.042. These determinations are for the Director to make based on the evidence in the contested case hearing record. IDAPA 37.01.01.600.

Bellevue and Hailey are concerned that the Request asks IDWR staff to evaluate an incomplete record and make determinations on Rule 42 factors or other issues (in whole or in part) that instead must be determined by the Director on a fully developed record.

For example, the Director's Request asks IDWR staff to provide "[a] conceptual description of the interaction between ground water and surface water in the Camas Creek drainage, the Big Wood River drainage, the Silver Creek drainage, the Little Wood River drainage, and any other hydrologic units that may be hydraulically connected to the ground water

and surface water in the larger Big Wood River and Little Wood River basins.” *Request* at 3. Determining how ground water and surface water interact will be important to the Director’s determination of Rule 42’s third factor: “Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.” IDAPA 37.03.11.042.01.c. The ground water-surface water interaction is an open question about which all potentially affected parties should have an opportunity to present evidence before IDWR attempts to answer it.² A “conceptual description” of the interaction developed by IDWR staff and submitted to the Director on a less-than-fully developed record could unduly prejudice the parties by potentially forcing them unwind premature determinations made the agency.

Likewise, it could unduly prejudice the parties if, at this stage of the proceedings, IDWR staff describes Petitioners’ sources of water supply, delivery systems, and physical delivery and water application works, or analyzes junior ground water consumptive use, or hydrologic or hydrogeologic data, publications, methods, or tools. *Request* at 3-4. These too are subjects about which the parties are entitled to present all their evidence before it is evaluated using the “agency’s experience, technical competence and specialized knowledge.” IDAPA 37.01.01.600.

IDWR’s Rules of Procedure allow the Director to take official notice of “generally recognized technical or scientific facts within the agency’s specialized knowledge.” IDAPA 37.01.01.602 (emphasis added). The Rules of Procedure do not allow the Director to take

² As discussed below, the Director’s request for hydrologic and hydrogeologic information, including his request for “[a] conceptual description of the interaction between ground water and surface water,” are the type of information that the Director may use to develop an area of common ground water supply (“ACGWS”), and that determination must be made through rulemaking rather than in these contested cases.

official notice of staff's opinions, conclusions, or evaluations of evidence (including the credibility or weight attributable to such evidence). *Compare* IDAPA 37.01.01.600 *with* IDAPA 37.01.01.602. The Director alone is tasked with evaluating evidence, finding facts, drawing conclusions, and ultimately making determinations concerning the Rule 42 factors and other issues that will be decided in these contested cases.³ The parties have their burdens to meet in presenting their cases to the Director. *In the matter of Distribution of Waters to Various Water Rights Held by or for the Benefit of A&B Irr. Dist.*, 155 Idaho 640, 653-54, 315 P.3d 828, 841-42 (2013) ("Thus, any determination of a delivery call requires application of established evidentiary standards, legal presumptions and burdens of proof."); *Memorandum Decision and Order on Petitions for Judicial Review*, CV-2010-382, p. 38 (Fifth Jud. Dist., Sept. 26, 2014) ("the burden of proof in a delivery call switches to the junior users once a determination has been made that material injury is occurring or will occur." (internal quotation marks omitted)). It is not IDWR staff's job to present these cases, assume burdens, or decide the merits of the dispute.

Bellevue and Hailey therefore respectfully request that the Director modify his Request to expressly limit any staff memoranda to identifying, assembling, and compiling "generally recognized technical or scientific facts within the agency's specialized knowledge," and to prohibit staff from evaluating information or making determinations of the Rule 42 factors and other issues (in whole or in part) that the Director will decide in these contested cases.

³ IDWR Rule of Procedure 600 allows a presiding officer to use the "agency's experience, technical competence and specialized knowledge . . . in evaluation of evidence." IDAPA 37.01.01.600. But this Rule pertains to evidence in a contested case's record. At this early stage, the records in these contested cases are not fully developed. As discussed in the next section, the Petitioners might have provided IDWR with information, and IDWR might have some of its own information, that could be germane to answering the questions in the Request and in determining the Rule 42 factors. But the junior water right holders have not had the opportunity to collect or present their evidence. Any evaluation of the Rule 42 factors, in whole or in part, by IDWR staff or the Director would be premature at this point and fundamentally unfair to the junior water right holders.

B. IDWR Staff's Review of Petitioners' Information in the Absence of Information Provided by Junior-Priority Ground Water Users will Unduly Prejudice Bellevue and Hailey

The Request asks IDWR staff “to review data and information in possession of the Department, and prepare staff memoranda” *Request* at 2 (emphasis added). Bellevue and Hailey ask the Director to modify this portion of the Request because it asks IDWR staff to consider the Petitioners' information but not any information provided by junior priority ground water right holders.

Based on the timing of the Director's May 20, 2015 Letter requesting information from Petitioners within 30 days, it must be expected that the requested information from Petitioners will be “in possession of the Department” in time for IDWR staff to review it before their August 21, 2015 deadline for submitting staff memoranda.

Junior-priority ground water right holders, on the other hand, have not had any meaningful opportunity to gather information or submit it to IDWR, and it is apparent they will not be able to do so in time for IDWR staff's review prior to the August 21 staff memoranda deadline. The Director authorized discovery only a little over a month ago on May 13, 2015. Since then, Petitioners have sought a protective order from the Director in response to the first (and so far only) written discovery requests propounded upon them. *Petitioner's Motion for Scheduling Order and Motion for Protective Order* (June 2, 2015). Bellevue and Hailey are working with expert consultants to gather documentation and on-the-ground information this irrigation season, but that endeavor is only just starting and there is no possibility it will be completed by the August 21 deadline. Allowing IDWR staff to review information submitted by Petitioners, which “will assist [the Director] in determining . . . material injury,” *Letter*, without

also having information from junior-priority ground water users, will unduly prejudice Bellevue and Hailey's due process rights.

As stated by the Supreme Court in *American Falls*, "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 Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007). The concern here is that the Director will take official notice of staff memoranda prepared after staff reviewed information submitted by Petitioners but without IDWR staff reviewing "necessary pertinent information" provided by junior-priority ground water right holders.⁴ IDWR staff's "review [of] data and information" pursuant to the Request should include information developed by all parties. See IDAPA 37.01.01.600 ("Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development.") Any staff memoranda that fails to analyze submittal of information by all parties to these proceedings will prejudice the parties and "frustrate development" of the record.

Therefore, Bellevue and Hailey ask that the Director modify the Request to delay issuance of any staff memoranda until junior-priority ground water users have been given a meaningful opportunity to submit their own information to IDWR for consideration.

If staff memoranda are prepared on or before the August 21 deadline, Bellevue and Hailey alternatively ask that the Director prohibit IDWR staff from examining information submitted by Petitioners in response to the May 20, 2015 Letter.

⁴ Of course, as discussed in the previous section, any IDWR staff memoranda should not include evaluations of evidence or determinations of issues that the Director must decide in these contested cases, including whether the holders of senior water rights are suffering material injury or using water efficiently without waste.

C. The Request asks for Information that Should be Developed through Rulemaking.

The Request asks IDWR staff to develop a memorandum on the following topics, among others:

Hydrology, Hydrogeology, and Hydrologic Data

1. Any hydrologic or hydrogeologic data or publications collected by or available to the Department that may assist the Director in understanding surface and ground water interactions in the Big and Little Wood River basins.
2. A conceptual description of the interaction between ground water and surface water in the Camas Creek drainage, the Big Wood River drainage, the Silver Creek drainage, the Little Wood River drainage, and any other hydrologic units that may be hydraulically connected to the ground water and surface water in the larger Big Wood River and Little Wood River basins. . . .
5. Identification of any hydrologic or hydrogeologic methods or modeling tools that may be employed in analyzing the impacts of junior ground water pumping on calling senior-priority surface water right holders.

Request at 3-4 (emphasis added).

Bellevue and Hailey request that the Director remove topics 1, 2, and 5 from the Request because they ask staff to address the type of information that the Director may use to develop an area of common ground water supply (“ACGWS”). See CM Rules 41 and 50. Because this proceeding is a CM Rule 40 delivery call, the Director must define the ACGWS through rulemaking, not the administrative hearing process. The evidence concerning the ACGWS designation (including the kind of information requested in topics 1, 2, and 5) should be developed within the ACGWS rulemaking process rather than in these proceedings.

Contemporaneously with this *Motion*, Hailey and Bellevue have filed a *Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* and supporting memorandum and affidavit (collectively, “ACGWS Motion”). Bellevue and Hailey hereby incorporate the

ACGWS Motion by reference, and ask that the Director strike topics 1, 2, and 5 from the Request, as they relate to topics concerning the ACGWS.

D. The Request Should be Narrowly Tailored

Lastly, the Request asks that IDWR staff “review data and information in possession of the Department, and prepare a staff memorandum, regarding the above-captioned matter, which could include, without limitation [the following topics and subparts].” *Request* at 2 (emphasis added). Similar language is also found in topic 3, subpart (f), under “Surface Water Delivery Systems”:

3. Information about each calling party’s physical delivery and water application works, including: (a) diversion works, including headgates, and control/check structures or valves; (b) measuring and recording device(s); (c) water conveyance systems such as canals, pipes, pumps, lift stations; (d) method of water application or use (for example sprinkler/flood irrigation); (e) wasteways; and (f) any other relevant information.

Request at 3 (emphasis added).

The open-ended nature of the Request could lead IDWR staff to opine on CM Rule 42 factors which, again, are for only the Director to conclude, after consideration of all the evidence admitted at the hearing. Bellevue and Hailey ask the Director to strike subpart (f), and to narrowly tailor the Request to specifically identified issues, with instructions for staff to draw no conclusions regarding CM Rule 42 factors or other matters the Director must decide in these proceedings or in ACGWS rulemaking.

III. CONCLUSION

Based on the foregoing, Bellevue and Hailey ask that the Director modify his Request to prohibit IDWR staff from evaluating information or determining issues that are to be decided by the Director. Bellevue and Hailey also ask the Director to delay issuance of any staff memoranda until junior-priority ground water users have been given a reasonable opportunity to

develop information in response to Petitioners' delivery call. Alternatively, if staff prepares memoranda now, Bellevue and Hailey ask the Director to instruct staff not to review information submitted by Petitioners in response to the May 20, 2015 Letter. Moreover, Bellevue and Hailey ask that the Director narrowly tailor the Request, so that staff is only addressing specifically identified topics. To that point, Bellevue and Hailey ask the Director to strike "Surface Water Delivery System" subpart (f) of topic 3. Lastly, Bellevue and Hailey ask that the Director strike topics 1, 2, and 5 from the "Hydrology, Hydrogeology, and Hydrologic Data" section of the Request, as they relate to topics concerning the ACGWS, which must be established through rulemaking, not the administrative hearing.

DATED this 26th day of June, 2015.

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