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Attorneys for Respondents

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CITY OF POCATELLO, CITY OF IDAHO
FALLS, CITY OF BLISS, CITY OF BURLEY,
CITY OF CAREY, CITY OF DECLO, CITY OF
DIETRICH, CITY OF GOODING, CITY OF
HAZELTON, CITY OF HEYBURN, CITY OF
JEROME, CITY OF PAUL, CITY OF
RICHFIELD, CITY OF RUPERT, CITY OF
SHOSHONE, CITY OF WENDELL, BINGHAM
GROUND WATER DISTRICT, BONNEVILLE-
JEFFERSON GROUND WATER DISTRICT,
and MCCAIN FOODS USA, INC.,

Petitioners,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES, and GARY SPACKMAN in his
capacity as the Director of the Idaho
Department of Water Resources.

Respondents,

and

A&B IRRIGATION DISTRICT, BURLEY
IRRIGATION DISTRICT, MILNER
IRRIGATION DISTRICT, NORTH SIDE
CANAL COMPANY, TWIN FALLS CANAL

Case No. CV01-23-08258

**DECLARATION OF
GARRICK L. BAXTER IN
SUPPORT OF
DEPARTMENT'S MOTION
FOR ATTORNEY FEES**

COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, and MINIDOKA IRRIGATION DISTRICT,

Intervenors.

IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND 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

I, GARRICK L. BAXTER, certify under penalty of perjury pursuant to the law of the State of Idaho that the following is true and correct:

1. I am a Deputy Attorney General representing the Idaho Department of Water Resources and its Director, Gary Spackman (collectively “Department”) in this matter. I am a competent adult over the age of eighteen years, and the statements made herein are based upon my own personal knowledge and belief of the events described.

2. Co-counsel for the Department in this matter is Deputy Attorney General Pete Wood.

3. An itemization of attorney fees, including the date that the services were rendered, the personnel providing the services, the type of service, the time expended, and the total dollar charge, is included in the *Memorandum of Costs*.

4. The hourly rate set forth in the *Memorandum of Costs* is based upon the current Attorney General’s Attorney Fee Rates, a true and correct copy of which is attached as Exhibit A to this Declaration. The Attorney General’s office is in the process of updating this policy but, as of the time of this declaration, the new policy has not been released. The fees articulated in the Attorney General’s fee structure are based on market research completed by the Attorney General’s office for Idaho attorneys. The Attorney General’s hourly rate for attorneys with more

than 20 years of experience is \$250.00 per hour. I have practiced law in Idaho for 22 years. The hourly rate for attorneys with 6–10 years of experience is \$200.00 per hour. Pete Wood has practiced law for 6 years.

5. Attached as Exhibit B is a true and correct copy of an excerpt from the District Court hearing in this matter held June 1, 2023.

DATED this 15th day of June 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

A handwritten signature in blue ink, appearing to read "G. Baxter", is written over a horizontal line.

GARRICK L. BAXTER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of June 2023, I caused to be served a true and correct copy of the foregoing *Declaration of Garrick L. Baxter in Support of Department's Motion for Attorney Fees*, via iCourt E-File and Serve, upon the following:

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GARRICK L. BAXTER
Deputy Attorney General



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

MEMORANDUM

DATE: October 29, 2018

TO: Division Chiefs
Office of the Attorney General

FROM: Sherman F. Furey III
Chief Deputy
Office of the Attorney General

RE: Adjustment of Attorney Fee Rates

Going forward, based on research completed by the Civil Litigation Division, as well as input I have received from each of you, newly established attorney fee rates, which may be requested by the Office of the Attorney General in successful in-state litigation, will be as follows:

EXPERIENCE LEVEL	\$\$ RATE
Attorney General	\$300.00
Attorneys w/more than 20 years of experience	250.00
Attorneys with 11-20 years of experience	225.00
Attorneys with 6-10 years of experience	200.00
Attorneys with 0-5 years of experience	175.00
Law Clerks and Paralegals	125.00

If there is litigation that supports an adjustment to the rate(s) shown above, it will be handled on a case-by-case basis, requiring prior approval by senior management.

Please disseminate this information within your respective divisions as you deem appropriate.

SFF:jc

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF ADA

CASE NOS:

CV01-23-8258 - CITY OF POCA TELLO vs. IDWR (Motion for Order to Show Cause)

CV01-23-8187 - IDAHO GROUND WATER ASSOCIATION vs. IDWR (Motion for Stay, Motion to Compel, Motion for Injunctive Relief, Motion for Expedited Decision, Motion for Order to Show Cause)

CV01-23-8306 - CITY OF POCA TELLO vs. IDWR (Motion for Stay)

EXCERPT FROM HEARING ON ADMINISTRATIVE APPEALS

(COURT'S RULING)

JUNE 1, 2023

HONORABLE JUDGE ERIC J.WILDMAN PRESIDING

JACK L. FULLER, CSR
Official Court Reporter for Hon. Michael J. Whyte
2119 Meppen Drive
Idaho Falls, Idaho 83401
Phone: (208) 497-4126
E-Mail: jfuller@co.bonneville.id.us

1 **COURT'S RULING**

2 THE COURT: Well, given the exigency of the
3 circumstances and the time constraints and the fact that the
4 parties have to know how they are going to be proceeding in the
5 future, the Court does not have the luxury of taking the matter
6 under advisement and, as such, will be ruling from the bench at
7 this time.

8 So in -- with respect to Case Number CV01-23-8258,
9 the Court, regarding the writ of prohibition and the writ of
10 mandate, the Court will rule as follows:

11 Under Idaho Code Section 7-302, a writ of mandate
12 may issue, quote, "to any inferior tribunal to compel the
13 performance of an act which the law especially enjoins as a duty
14 resulting from an office," end quote, or to compel the admissions
15 of a party to the use and enjoyment of a right or office to which
16 he is entitled and from which he is unlawfully precluded by such
17 inferior tribunal. The writ is only available in limited
18 circumstances where there is not a plain, speedy, and adequate
19 remedy in the ordinary course of law. That's Idaho Code Section
20 7-303.

21 A writ of mandamus is not a writ of right, and the
22 Court's decision whether to issue a writ is discretionary.
23 That's *Regan vs. Denney*, 165 Idaho 15, 2019 case.

24 Further, the Idaho Supreme Court has instructed
25 and this Court has held on numerous occasions -- I went through

1 and printed off every case where I have addressed mandamus with
2 respect to delivery calls -- that a writ of mandate is not
3 available to control discretionary acts of tribunals acting
4 within their jurisdiction.

5 A writ of prohibition is the counterpart to a writ
6 of mandate, Idaho Code Section 7-401. It arrests the proceedings
7 of a tribunal when it is in excess of the jurisdiction of the
8 tribunal. It may issue in all cases where there is not a plain,
9 speedy, and adequate remedy in the ordinary course of law. The
10 Court's decision whether to issue a writ is discretionary.
11 That's *Hepworth Holzer vs. Fourth Judicial District*, 169 Idaho
12 387, 2021.

13 Okay. With regard to the issues pertaining to the
14 legal propriety of the Fifth Amended Methodology Order and Final
15 Order regarding the April, 2023, forecast supply, the Court finds
16 the petitioners have a plain, speedy, and adequate remedy at law
17 through IDAPA in the form of judicial review. The Idaho Supreme
18 Court has made it clear, it was never that the intention of a
19 writ should take the place of an appeal. *Smith vs. Young*, 71
20 Idaho 31, 1950.

21 The Court, importantly, the Court also notes that
22 there is a hearing presently scheduled before the Department to
23 commence on June 6th on these orders. That administrative remedy
24 has not been exhausted at this time, and the director must first
25 be given the opportunity through that hearing to address issues

1 raised by petitioners pertaining to the legal propriety of the
2 2023 orders.

3 That segues us into issues pertaining to due
4 process. Petitioners raised due process concerns pertaining to
5 the hearing process utilized by the director for the
6 administrative hearing to commence June 6th. In evaluating the
7 due process concerns raised by the petitioners, the Court must be
8 cognizant of the director's duty to timely administer water
9 rights in priority.

10 The Idaho Supreme Court instructed in *Musser vs.*
11 *Higginson* that the director's duty to administer water is clear
12 and executive. Time is of the essence in water administration.
13 In any given year the reality is, there is a short time frame
14 between when water supply determinations can be made and when
15 water users' demands for irrigation water begin. Any process
16 employed by the director must account for the exigencies of these
17 time constraints. These exigencies were recognized by the
18 drafters of our Constitution as set forth in the Idaho Supreme
19 Court and American Falls Reservoir District Number 2. The Court
20 found the drafters intended that there be no unnecessary delay in
21 the delivery of water pursuant to a valid water right and that a
22 timely response is clearly required when a delivery call is made
23 and water is necessary to respond to that call. That's AFRD
24 Number 2, 143 Idaho at 874.

25 This analysis recognizes the failure of the

1 director to timely administer in priority can result to senior
2 rights in times of shortage. In conjunction, the Idaho Supreme
3 Court further determined that neither the Constitution nor the
4 statutes place any specific time frames on this process.

5 In this case the record reflects the Department
6 began notifying individuals in September, 2022, that it would be
7 reviewing data used in the Fourth Methodology Order. In November
8 and December, 2022, the Department conducted six meetings
9 regarding possible amendments to the Fourth Methodology Order
10 where staff presented new data and analyses with respect to
11 methodology. Later in December the Department released a
12 document setting forth preliminary recommendations for amendments
13 to the Fourth Methodology Order. The preliminary recommendations
14 stated that the Department will continue to evaluate the
15 integration of these recommendations and others into the
16 methodology. The recommendations also invited outside
17 consultants to submit written comments by January 16, 2023, which
18 some outside experts did by submitting preliminary comments.

19 On April 21st, 2023, the director issued the Fifth
20 Amended Methodology Order and Final Order regarding the April,
21 2023, forecast supply. In the final order regarding the April,
22 2023, forecast supply, the director predicted an in-season demand
23 shortfall to the Twin Falls Canal Company in the amount of
24 75,200-acre feed. The order gave affected juniors until May 5,
25 2023, to establish they can mitigate for their proportionate

1 share of the predicted demand shortfall. For those juniors who
2 could not, the order stated that the director would issue a
3 curtailment order.

4 The director did hold a hearing prior to issuing
5 the April 21st, 2023, orders. However, he has set a hearing --
6 and he has set a hearing to commence June 6th, 2023, on the
7 orders pursuant to Idaho Code Section 42-1701A(3). Idaho Code
8 Section 42-1701A(3) governs hearings before the director.
9 Subsection 3 applies where the director takes action without a
10 hearing. Normally a party has 15 days to request a hearing under
11 Subsection 3. However, because the director found time was of
12 the essence and because he anticipated multiple parties would
13 request a hearing, he took the proactive step of sua sponte
14 noticing up a hearing to save time. He also set a prehearing
15 conference for April 28th, 2023.

16 The director subsequently denied a request from
17 the petitioners to continue the June 6th hearing until December
18 or January. He also denied a request from the petitioners to
19 appoint an independent hearing officer.

20 On May 2nd, 2023, the director issued a scheduling
21 order, directing that discovery be completed by May 31st, 2023.
22 Then on May 5th, 2023, the director issued an order limiting
23 discovery to preclude questions regarding the director's
24 deliberative process.

25 Oh. I misread my notes here, and I want to go

1 back. When I said that the director held a hearing prior to
2 issuing the April 21st, 2023, order, I meant to say he did not
3 issue an -- he did not hold a hearing.

4 Okay. Again, on May 2nd, 2023, the director
5 issued a scheduling order, directing that discovery be completed
6 by May 31st, 2023. Then on May 5th, 2023, the director issued an
7 order limiting discovery to preclude questions regarding the
8 director's deliberative process on legal and policy
9 considerations.

10 Okay. So in evaluating the process in this case
11 against the director's duty to timely administer water rights in
12 priority, the Court finds it provides due process consistent with
13 the exigencies of the circumstances and the need to administer
14 water in priority to avoid injury to senior rights. In making
15 this finding, the Court is influenced by the fact that
16 administration in this case arises in the larger context of an
17 ongoing delivery call that has existed since 2005. The director
18 issued its first methodology order in 2010. Since then, the
19 methodology order has been modified and amended three times to
20 account for new data, modeling revisions, and climate trends. So
21 this is not a new issue. And the director gave heads-up that
22 amendments may be required again in 2023, starting in September
23 of 2022, when he notified individuals that the Department was
24 investigating integrating new data techniques into the
25 methodology order.

1 Again, he then conducted a series of meetings,
2 presenting new data and techniques, and issued a preliminary
3 recommendation setting forth proposed amendments and inviting
4 comment from outside experts. In effect, the parties were put on
5 notice starting in September of 2022 that amendments to the
6 methodology order were being considered. Based on prior actions
7 within the context of this ongoing delivery call, parties were
8 also well-aware of the exigent time constraints following demand
9 shortfall predictions.

10 In particular, in its memorandum decision issued
11 on April 11, 2011, in Gooding County Case CV-2010-382, the Court
12 addressed similar due process arguments concerning short time
13 frames for notice and discovery in the context of this very call.
14 The process provided then was found to provide due process.

15 In this instance the parties are being provided
16 with a hearing on the 2023 orders to commence on June 6th. They
17 were provided approximately six weeks actual notice for the
18 hearing. In addition, the director began making parties aware
19 that amendments to the methodology order were being considered
20 back in September of 2022. At the hearing on June 6th the
21 parties will be given the opportunity to present evidence and
22 arguments pertaining to the 2023 orders.

23 The Court finds this process provides due process
24 consistent with the exigencies of the circumstances and the
25 director's duty to timely administer water rights in priority.

1 And frankly, setting a hearing after the irrigation season as
2 requested is not a tangible alternative, given the director's
3 duty and the demand shortfall prediction for the 2023 irrigation
4 season.

5 With respect to the discovery limitations, the
6 Court finds the director does have the discretion to limit the
7 type and scope of discovery in an administrative hearing. We
8 talked about IDAPA 37.01.01.521. This discretion was also
9 recognized by the Idaho Supreme Court in *Musser* when it held that
10 while the director has a clear duty to administer water, the
11 details of how he chooses to do so are largely left to his
12 discretion.

13 For these reasons the Court, in an exercise of its
14 discretion, will deny petitioner's applications for writ of
15 mandate and writ of prohibition in Case CV01-23-8258.

16 That brings me to the Ground Water District's
17 petition and motions in CV01-23-8187. With respect to the
18 motions filed in that case, the Court finds it lacks jurisdiction
19 over the petition for judicial review filed in that proceeding
20 pursuant to Idaho Code Section 42-1701A and the doctrine of
21 exhaustion.

22 Subsection 3 of Idaho Code Section 42-1701A
23 provides that any aggrieved person, by any action of the
24 director, including any decision, determination order, or other
25 action, who has not previously been afforded an opportunity for a

1 hearing on the matter shall be entitled to a hearing before the
2 director to contest the action. It further provides that
3 judicial review of any final order of the director issued
4 following the hearing shall be had pursuant to Subsection 4 of
5 that section of the Code.

6 Here the director issued the 2023 orders without a
7 hearing. This is within the director's discretion, given that
8 the orders were issued under the umbrella of an active and
9 ongoing delivery call. Therefore, Subsection 3 of Idaho Code
10 Section 42-1701A controls. Until the director holds the hearing
11 on June 6th and issues a written decision, no person aggrieved by
12 the 2023 orders are entitled to judicial review under Idaho Code
13 Section 42-1701A(4). Likewise, under the doctrine of exhaustion,
14 the pursuit of statutory remedies is a condition precedent to
15 judicial review.

16 In this case the remedy provided in Idaho Code
17 Section 42-1701A(3) has not been exhausted. The Court must -- or
18 excuse me. The director must be given the opportunity to address
19 the issues raised by the petitioners pertaining to the 2023
20 orders.

21 The Court notes that it has come to the same
22 conclusion previously in several similar cases involving
23 premature petitions for judicial review, and I'll cite a few of
24 them. In preparation for this hearing, I went in and printed off
25 every one of them, and I have a stack of them here. But that

1 includes the Order Dismissing Petition for Judicial Review in Ada
2 County Case CV01-17-67, issued February 16, 2017; Order
3 Dismissing Petition for Judicial Review in Ada County Case
4 CV01-16-23173, also issued February 16, 2017; and an Order
5 Granting Motion to Dismiss in Jerome County Case CV27-22-945,
6 issued December of 2022. Therefore, based on the foregoing
7 reasons, the Court will grant the motion to dismiss.

8 With respect to McCain Foods' motion for stay,
9 CV -- and petition, CV01-23-8306, with respect to the motion for
10 stay filed in that case, the Court will deny the motion for the
11 same reason it denied the motion for stay and motion for
12 injunctive relief in CV01-23-8187. Namely, the director has
13 discretion to limit the type and scope of discovery in an
14 administrative hearing and that the Court lacks jurisdiction over
15 the petition for judicial review filed in this case due to the
16 pendency of a hearing. Therefore, the Court, in an exercise of
17 discretion, will deny the motion for stay and grant the motion to
18 dismiss.

19 And I'm going to add one final conclusion here.
20 You know, after reviewing the issues raised in these cases and
21 preparing for these hearings, as I had mentioned earlier, I went
22 back and reviewed the numerous opinions that have been addressed
23 by this Court where substantially the same if not the same issues
24 were raised in the context of conjunctive management delivery
25 calls, including this same delivery call brought by the Surface

1 Water Coalition. The issues are not new, and my reading of the
2 prior decisions explicitly sets forth and reiterates the
3 overriding principles that govern these types of matters. And
4 I'm aware in every single one of those, parties attempt to
5 distinguish that particular set of circumstances to justify the
6 requirement of exhausting administrative remedies.

7 But the issues raised -- and based on my review,
8 the issues raised today in these cases are no different. And
9 these include that the director's statutorily charged with
10 administering water in priority; time is of the essence in
11 responding to delivery calls; the director must act quickly to
12 avoid injury to senior rights; due process is required but must
13 account for the exigencies of the circumstances; the director has
14 discretion in limiting the scope and timing of the hearings; and
15 unless a statute or rule otherwise provides for a hearing, the
16 director may issue an order and conduct a hearing after issuance
17 of the order.

18 If a hearing has been requested or otherwise set,
19 administrative remedies have not been exhausted, thereby
20 depriving this Court of jurisdiction. The director must first
21 have the opportunity to rule on the issues raised by the order.
22 This process is set forth plainly in Idaho Code Section
23 42-1701A(3). Further, writs of mandate cannot issue for acts
24 that are discretionary with the director. Staying hearings and
25 holding them after the irrigation season where the director has

1 predicted material injury to seniors is unworkable as juniors
2 will be permitted to pump out of priority during the irrigation
3 season.

4 So that is my ruling. And anything else we need
5 to take up at this time?

6 MR. BAXTER: No, Your Honor. The only thing that
7 just briefly -- I think the parties -- do we want to stick around
8 for a minute?

9 (Discussion regarding parties conferring by Zoom
10 following the hearing)

11 THE COURT: Well, for the rest of -- everybody
12 else on the Zoom, if you're not -- those that aren't
13 participating in the discussion will be adjourned.

14 (Proceedings concluded)

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REPORTER'S CERTIFICATE

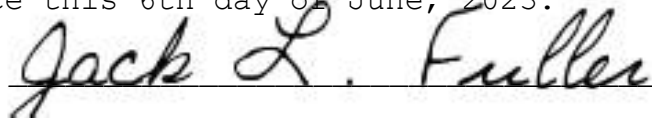
STATE OF IDAHO)
) CASE NOS. CV01-23-8258, CV01-23-8187,
COUNTY OF ADA) and CV01-23-8306

I, JACK L. FULLER, Certified Shorthand Reporter in and for the State of Idaho, do hereby certify:

That said proceedings were reported by me in machine shorthand at the time and place therein named and thereafter reduced to typewriting by me and that the foregoing transcript contains a verbatim record of said proceedings.

I further certify that I am not related to any of the parties nor do I have any interest, financial or otherwise, in the cause of action of which said proceedings were a part.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office this 6th day of June, 2023.



Jack L. Fuller, Idaho CSR #762
CSR Expiration Date: 07-10-23