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Attorneys for City of Pocatello

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

IN THE MATTER OF THE REQUEST FOR	)
ADMINISTRATION IN WATER DISTRICT 120	)
AND THE REQUEST FOR DELIVERY OF WATER	)
TO SENIOR SURFACE WATER RIGHTS BY	)
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	)
	)

**PETITION FOR HEARING, DISCOVERY AND STAY
AND REQUEST FOR PREHEARING CONFERENCE**

The City of Pocatello ("Pocatello" or "City") respectfully requests an evidentiary hearing on all issues of fact and law that were addressed, or should have been addressed, in the May 2, 2005 Amended Order ("May 2 Order") issued by Karl J. Dreher as Director ("Director") of the Idaho Department of Water Resources ("IDWR" or "Department") and in the curtailment order

issued by Lewis Rounds, as Watermaster for Water District 120, on April 22, 2005 ("Curtailment Order"). Pocatello also requests a stay of enforcement of the May 2 Order and the Curtailment Order pending the hearing and subsequent ruling by the Department. Pocatello's rights will be violated if the Orders are permitted to go into effect without a full and fair evidentiary hearing.

Pocatello files this petition under Sections 42-1701(A)(3) and 67-5274 of the Idaho Code and Rule 740(b) of the IDWR Rules of Procedure. Pocatello is aggrieved by the orders referred to above. Pocatello is aggrieved because of the threatened curtailment of its Biosolids Well and potentially other wells that it owns and operates. Pocatello's well associated with water right No. 29-7771 (the "Biosolids Well") is located in Water District 120 and appears to be a subject of the Curtailment Order. Pocatello's Biosolids Well is used in the City's wastewater treatment program, pursuant to the requirements of the City's Biosolids Management Plan and of an NPDES permit. These set out detailed requirements for the land application and treatment of the biosolids. Water from the Biosolids Well is required for the operation of the City's biosolids program. If the Biosolids Well cannot be used, the operation of the City's biosolids program will be seriously impaired. Under the terms of the May 2 Order and of the Curtailment Order, Pocatello would be required to cease use of the Biosolids Well unless the Department approves a "mitigation plan" under which Pocatello would be required to provide water to the Snake River. Although Pocatello tendered such a plan as a member of the "Water Resource Coalition", the Director entered an Order on May 6, 2005 (the "Mitigation Plan Order") in which he refused to allow Pocatello to provide mitigation water for the Biosolids Well, except through a ground water district, and refused to allow Pocatello to provide mitigation water through its proposed non-use of another water right.

Pocatello petitions for a hearing on all aspects of the May 2 Order and the Curtailment Order, insofar as of these apply to Pocatello, because:

1. The Orders fail to recognize the senior priority of Pocatello's Biosolids Well, which the City has claimed as 1867 in the SRBA, Subcase No. 29-11609. Pocatello requests the Director to rule that the Curtailment Order does not apply to the Biosolids Well because of its seniority or, in the alternative, to stay the effect of the Curtailment Order until the priority of the Biosolids Well has been determined as a result of the SRBA.

2. The Orders were entered without notice to Pocatello and without an evidentiary hearing. The entry of orders affecting Pocatello's property rights without notice and a prior evidentiary hearing are a violation of due process and of the IDWR Rules of Procedure. Pocatello requests the Director to withdraw the May 2 Order and the Curtailment Order and to hold an adequate evidentiary hearing before acting on the delivery call placed by the Surface Water Coalition.

3. The Orders were entered without record support for the actions. Without limiting the generality of that statement, Pocatello requests the Director to take evidence upon those matters that he is required to consider, but did not address in entering the May 2 Order. For example, the Director did not address the requirement of Idaho law that a senior appropriator must make reasonable use of their water rights.

Pocatello petitions the Director to hold an evidentiary hearing that provides a full record of decision, reflecting the evidence concerning all matters required by the Conjunctive Management Rules to be addressed. The May 2 Order, by its terms, shows that the Director did not consider, or did not consider adequately, all matters that the Conjunctive Management Rules require him to address.

For example, Rule 20 of the Conjunctive Management Rules sets forth statements of purpose and policies for conjunctive management of surface and ground water resources. Among other things, the rules require the consideration of priority, reasonable use, optimum development of water resources in the public interest, full economic development and the principle of futile calls.

Rule 40 of the Conjunctive Management Rules specifies how the Director is to respond to a delivery call. Among other things, Rule 40.03 provides: "In determining whether diversion and use of water will be regulated ..., the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42."

Rule 42 of the Conjunctive Management Rules, to which reference is made in Rule 40, specifies factors that the Director is to "consider in determining whether he holders of water rights are suffering material injury and using water efficiently and without waste ...." These factors include, among others, the following considerations with respect to the calling water rights:

> d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.
>
> ....
>
> g. The extent to which the requirements of the holder of a senior priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conservation practices; ...."

h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells ...."

In failing to address all matters he was required to address before entering the May 2 Order and approving the Curtailment Order, the Director has violated substantial rights of Pocatello.

Pocatello requests that the hearing be set at a time and for a duration that will allow all participants adequately to prepare for and fully to present and to cross examine witnesses and evidence and to present legal argument. The hearing should allow for the development of a full record of decision relating to all matters that the Director is required to consider. Therefore, the hearing should be set for a period covering several weeks, perhaps 8-10, so that all parties will have a full opportunity to present evidence and argument and to conduct cross-examination of other parties' witnesses. Moreover, the hearing should be set to commence after a period of time that is adequate for all parties to conduct discovery and develop evidentiary presentations. Pocatello estimates that it will take the parties at least four months to prepare for such a hearing.

Pursuant to Rule 521 of the IDWR Rules of Procedure, Pocatello hereby moves for an order allowing it to conduct discovery to prepare for this hearing. Pocatello requests that the time and scope allowed for discovery be sufficient to allow the participants to prepare adequately for the hearing.

Pocatello, pursuant to Rule 510 of the IDWR Rules of Procedure, also requests the Director to set a prehearing conference to facilitate the requested hearing. The conference should include such matters as:

1. Setting of the hearing.

2. Disclosures of basic information by all parties.

3. Expert reports by all parties and disclosure of documents and other information considered by such experts.

4. Discovery deadlines.

5. Deadlines for motions.

6. Exchange of exhibits.

7. Briefing schedules.

8. Order of presentations.

9. Form of presentations. (For example, should the Director require that all direct testimony and exhibits be provided in writing in advance of the hearing, and permit live cross-examination only?)

10. Burden of proof.

11. Evidentiary standards.

12. Any other matters required to be addressed concerning preparation for and conduct of the hearing.

Pursuant to I.C. §67-5274, Pocatello requests a stay of enforcement of the May 2 Order and the Curtailment Order pending the hearing and subsequent ruling by the Department. Pocatello's rights will be violated if the Orders are permitted to go into effect without a full and fair evidentiary hearing.

Respectfully submitted the 16th of May 2005.

Sarah Klahn for
Josephine P. Beeman

Sarah Klahn
Sarah A. Klahn

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May 2005, I caused to be served copies of the foregoing **PETITION FOR HEARING, DISCOVERY AND STAY AND REQUEST FOR PREHEARING CONFERENCE** upon the following, by U. S. Mail, postage prepaid:

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