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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

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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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

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Exhibit A

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 POCATELLO 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 POCATELLO vs. IDWR (Motion for Stay)

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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
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Idaho Falls, Idaho 83401
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Exhibit B

COURT'S RULING

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

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

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

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

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

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

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

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

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

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

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

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

This analysis recognizes the failure of the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Discussion regarding parties conferring by Zoom following the hearing)

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

(Proceedings concluded)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
)
COUNTY OF ADA)

CASE NOS. CV01-23-8258, CV01-23-8187, 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

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