

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
TO LEASE WATER FOR
HYDROELECTRIC GENERATION IN
THE NAME OF THE CITY OF
POCATELLO

FINAL ORDER

This matter came before the Director of the Idaho Department of Water Resources ("Director" or "IDWR") on an application by the City of Pocatello to lease storage water from Palisades Reservoir to the Idaho Power Company for hydroelectric generation during the 2008 irrigation season. Protests to the application were filed following publication of notice. The Director conducted a hearing on the protested application in Jerome, Idaho on July 31, 2008. After considering the testimony, exhibits, and other evidence made part of the record, the Director finds, concludes, and orders as follows:

FINDINGS OF FACT

Procedural Background

1. On June 19, 2008, the City of Pocatello ("City") filed an Application for Leasing of Water for Hydroelectric Generation ("Application") pursuant to Idaho Code §§ 42-108A and 42-108B with the Idaho Department of Water Resources ("IDWR" or "Department").
2. The Department published notice of the Application on July 10 and 17, 2008 in the Idaho Falls Post Register, the Twin Falls Times News, and the Boise Idaho Statesman. The notice provided for the filing of protests on or before July 22, 2008, and scheduled a hearing on any protests for July 31, 2008 in Jerome, Idaho.
3. Timely protests in response to the published notice of the Application were filed by the following five entities, Palisades Water Users, Inc., New Sweden Irrigation District, Idaho Irrigation District, the Committee of Nine for Water District No. 1, and the Idaho Ground Water Appropriators, Inc., for and on behalf of its member ground water users (collectively the "Protestants").
4. On July 24, 2008, the Director issued a Notice of Hearing which identified the issues to be addressed at the hearing as including: (1) What is the applicability of the provisions of section 42-108B, Idaho Code, given the requirements of the Water District 1 Rental Pool authorized by sections 42-1763 and 42-1765, Idaho Code; (2) What are the contractual obligations of the City of Pocatello and the U. S. Bureau of Reclamation under the City's federal

storage contract and what is the effect, if any, of the contractual limitations on the City's proposed lease of water pursuant to state law; and (3) If the lease is approved, could other water rights senior or junior to the leased water right be injured?

5. The following parties participated in the hearing before the Director: the City of Pocatello represented by City Attorney A. Dean Tranmer; New Sweden Irrigation District, Idaho Irrigation District, and the Committee of Nine for Water District No. 1, represented by Jerry R. Rigby of Rigby, Andrus & Moeller, Chartered; the Idaho Ground Water Appropriators, Inc., represented by Randall C. Budge of Racine Olson Nye Budge & Bailey, Chartered; and Palisades Water Users, Inc. represented by Robert L. Harris of Holden, Kidwell, Hahn & Crapo, P.L.L.C.

6. At the commencement of the July 31, 2008 hearing, the City moved to have all five protests dismissed based upon the language of I.C. § 42-108B which states "anyone who desires to protest the proposed leasing of water and *who has a superior right to use the water and who may suffer pecuniary loss* shall file notice of protest with the department within five (5) days of the last date of publication." (Emphasis added). The City argued that all protests should be dismissed since "[n]o one has a superior right to use the City's storage allotment." City's Pre-Trial Brief at 3; City's Closing Brief at 4. The Director took the motion under advisement and allowed the hearing to proceed.

7. The following individuals testified as witnesses at the hearing: Roger Chase, Mayor of Pocatello; Lyle Swank, Watermaster of Water District No. 1 and Eastern Regional Manager of IDWR; Tim Deeg, President of IGWA; and Wendy Murphy, Bookkeeper for Water District No. 1 and Secretary of Palisades Water Users, Inc.

8. At the close of the hearing, the Director allowed for the parties to submit closing briefs by August 8, 2008. All parties submitted timely closing or post-hearing briefs to the Director.

Pocatello's Palisades Contract

9. The City of Pocatello's right to the use of water from Palisades Reservoir is based upon a storage capacity contract with the United States Bureau of Reclamation entered into on January 8, 1960 and identified as Contract No. 14-06-100-1825 ("Contract"). Ex. A. The contract entitles the City to the amount of water accruing to a percentage of the total active storage capacity of the 1.2 million acre-feet reservoir that is equivalent to 50,000 acre-feet.

10. Recital 4 of the Contract states the City "desires to replace in the Snake River by means of storage at Palisades Reservoir water in volume approximately the equivalent of that removed by pumping from Snake River tributary underground and surface flows, and it having been determined that 50,000 acre-feet of active capacity in Palisades Reservoir will furnish such approximate equivalent volume." Ex. A at 2.

11. Article 16(a) of the Contract provides that one-half of all surface and ground water diverted by the City during the irrigation season shall be accounted for as delivered storage water from the City's Palisades space as available, except for the first 10,000 acre-feet each

irrigation season to reflect the existence of senior priority rights held by the City. *See* Ex. A at 23-24.

12. Article 16(b) anticipated that the Watermaster for Water District No. 1 would each year provide corresponding storage or natural flow credits to those water rights “that have been infringed on by pumping for the City.” Ex. A at 24. The Director’s understanding is that historically this contract provision was not implicated because the City diverted less than 10,000 acre-feet and so no credit was required for senior priority rights pursuant to the contract. The Department now has Conjunctive Management Rules that may be used to govern the administration of hydraulically interconnected surface and ground water rights. IDAPA 37.03.11.

13. Article 15 of the Contract authorizes the City to rent water accrued to its credit in the reservoir for one-year terms “at a time and at rates to be approved in advance by the Secretary and the Advisory Committee.” Ex. A at 23. The Advisory Committee is defined by Articles 5 and 30(c) to be the Committee of Nine, or its duly authorized representative. *Id.* at 3, 37.

14. The City has made all required payments and complied with all its obligations to the U.S. Bureau of Reclamation under the Contract. Testimony of Mayor Roger Chase; City’s Closing Br. at 13.

15. The Bureau of Reclamation submitted a letter dated July 30, 2008 to the Director, with copies to all parties, in response to the notice of hearing. The letter states:

Reclamation believes that the threshold legal determination is the application of State law, including whether Idaho Code § 42-108A is applicable and whether, after factual evidence is presented by the protestants, the lease would injure other water rights including the contract entitlements of reservoir spaceholders. We do not believe that Reclamation’s contract with Pocatello is germane to these determinations. Accordingly Reclamation does not plan to attend the hearing.

If the state law questions are resolved favorably to the City of Pocatello and the lease is approved, then it would be incumbent upon the City of Pocatello to work with Reclamation as the Contracting Officer to implement the lease consistent with the contract with Reclamation.

Agency Record; Ex. F to Pocatello Closing Br.

The Lease Agreement

16. Effective June 11, 2008, the City entered into a Water Lease Agreement, pursuant to I.C. § 42-108A, to lease to the Idaho Power Company on a one-time basis in 2008 up to 20,000 AF of water available under Pocatello’s Palisades Contract at a price of \$35 per acre-foot for delivery below Milner Dam for hydroelectric generation purposes. *See* Ex. B.

17. The Lease Agreement is contingent upon the City “Acquiring all approvals by the Idaho Department of Water Resources and/or other authorities that may be required by state or

federal law, rule or regulation for the rental, release, delivery and use of the Leased Water for hydroelectric purposes by Idaho Power.” Ex. B at 2, ¶4.a.

18. The Lease Agreement is also contingent upon “the ability of Idaho Power to place the Leased Water to beneficial use for power purposes at all of its facilities on the Snake River downstream from Palisades Reservoir and Milner Dam, to and including Hells Canyon Dam, subject only to reasonable carriage loss between the point of delivery and the places of use.” Ex. B at 2, ¶4.b.

The Upper Snake Rental Pool

19. In 1979, the Legislature enacted I.C. § 42-1761 *et seq.* directing the Idaho Water Resource Board (“Board”) to operate a water supply bank to facilitate the rental of water as called for in the Board’s 1976 State Water Plan. The Legislature required the Board to adopt rules “governing the management, control, delivery and use and distribution of water to and from the water supply bank.” I.C. § 42-1762. The Legislature authorized the Board to “appoint local committees, including water district advisory committees ... to facilitate the rental of stored water.” I.C. § 42-1765.

20. “The terms and conditions of any rental of water from the water supply bank must be approved by the director of the department of water resources.” I.C. § 42-1763. A rental may be rejected where (1) it will reduce the quantity of water available under other existing water rights; (2) the water supply is insufficient for the purpose sought; (3) the rental would cause the use of water to be enlarged beyond that authorized; (4) the rental will conflict with the local public interest as defined in section 42-202B, Idaho Code; or the rental will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates. *Id.*

21. As originally enacted I.C. § 42-1764 provided that, “The approval of a lease or rental may be a substitute for the requirements of section 42-222, Idaho Code.” 1979 Idaho Sess. Laws, ch. 193, § 4, p. 560. This language was amended in 1990 to read: “The approval of a rental of water from the water supply bank may be a substitute for the transfer proceeding requirements of section 42-222, Idaho Code.” 1990 Idaho Sess. Laws, ch. 318, § 3. p. 868.

22. In October 1980, the Board initially adopted the Water Supply Bank Rules mandated by I.C. § 42-1762 to govern the operation and management of the Bank. IDAPA 37.02.03. Rule 40 provides for the appointment of local rental pool committees to facilitate the lease and rental of stored water. IDAPA 37.02.03.01.040. The Committee of Nine, as the advisory committee for Water District 01, has served as the Board-appointed Local Rental Committee for the Upper Snake River Rental Pool since 1979.

23. Rule 40 requires each local rental committee to develop a set of procedures pursuant to which it will facilitate the lease and rental of stored water. Rule 40 provides a list of certain factors that must be addressed in the procedures and requires that the procedures must be approved by the Board following review by the Director. Factors required to be included in the procedures that are relevant to this proceeding include: (a) determination of priority among competing applicants to assign water to the bank or rent water from the bank; (b) determination

of a reimbursement schedule; (c) determination of the rental price; (d) determination of local committee administrative charge; ... (h) prevention of injury to other water rights; (i) protection of the local public interest; and (j) consistency with the conservation of water resources within the state of Idaho.

24. The 2008 Procedures for the Upper Snake River Rental Pool approved by the Board, and in effect during all times relevant to this proceeding, provide: "It is the policy of the water users of Water District 1 and the Committee to operate the rental pool to achieve the maximum beneficial use of available surplus stored water." Rule 3.1. The procedures are "designed to assure that stored water made available ... will not impact the allocation of any spaceholder without his consent or without his being made whole as far as possible." Rule 3.2. The priorities established for the rental of water from the rental pool are as follows: (1) First priority, participating spaceholders whose storage was impacted by rentals from the previous year, other than from agricultural/recharge rentals and private leases; (2) Second priority, spaceholders for agricultural purposes up to the amount of their unfilled storage space; (3) Third priority, non-spaceholders for uses above Milner; and (4) Fourth priority, rental for uses below Milner. Rule 5.1.

25. Rental supplies made available for flow augmentation are determined through a separate process described in Rule 3.8 and Figure 1 appended to the Procedures. The base price for rental pool water varies as follows: \$5.00 per acre-foot, if the storage system fills; \$12.00 per acre-foot, if the storage system does not fill but water is provide for flow augmentation; and \$18.00 per acre-foot, if the storage system does not fill and no flow augmentation water is provided. Rule 6.1.A. In addition, the District's administrative fee is \$.80 per acre-foot and the Board's surcharge is 10% of the base price. *Id.* The rental price for any use below Milner is \$12.00 per acre-foot plus the District's administrative fee and the Board's surcharge. Rule 6.1.B.

Impact of Leases Below Milner

26. The Protestants presented evidence at the hearing through the testimony of Lyle Swank, Watermaster of Water District No. 1, that approval of the Lease Agreement authorizing the City to lease storage water to the Idaho Power Company for hydroelectric generation use below Milner Dam outside the process provided by the Water District's Rental Pool Procedures would cause injury to other water rights.

27. Mr. Swank explained how due to the complicated nature of the Water District 01 storage system, a rental of water by one space holder can significantly impact the rights of other space holders. To the extent the water is diverted and used above Milner, the impacts are lessened because the return flows can be rediverted for additional uses above Milner consistent with the original purposes of the storage water projects.

28. The Water District No. 1 Rental Pool Procedures approved by the Idaho Water Resource Board take into account the impacts on the rights of other storage water spaceholders to ensure that no other class of right holders is unduly impacted or injured without consideration being provided either through disbursements from a monetary impact fund or through enforcement of the "last to refill" requirement applied to private leases.

29. Mr. Swank testified that approval of the City's proposed Lease Agreement and other similar leases which could be expected to follow would be destructive of the primary purpose of the Upper Snake River storage system which is to meet the needs of water users above Milner.

30. Mayor Chase testifying on behalf of the City recognized that if Pocatello could rent its water as proposed in the Lease Agreement, then other spaceholders could likely rent their storage water in a similar fashion. Because of the ability of hydroelectric generation users to pay higher rental fees than most other users, particularly agriculture, such rentals could greatly reduce or eliminate the availability of rental storage water to meet agricultural demands above Milner, which is the primary purpose of the storage system.

31. In support of approval of the Lease Agreement, the City argued that the injury concern expressed by the Protestants was speculative because injury will occur only if the reservoir system does not fill the year after the City leases its water for hydroelectric generation purposes below Milner. The City further argued that under Idaho Code § 42-108B Protestants must show that their water rights are injured, not that "their water rights could be affected if the reservoir system did not fill in 2009." Pocatello's Closing Brief at 15.

32. The City asserted that the Director should approve the proposed lease pursuant to Idaho Code §§ 42-108A and 42-108B because, "There is insufficient evidence to prove that water rights senior or junior to the water to be leased are injured by this proposed Lease." *Id.* at 18. The City's position is that the referenced statutes require the "showing of an immediate, distinct, palpable injury, not a speculative future one." *Id.*

33. Although the opportunity to lease water pursuant to the Lease Agreement in 2008 has expired, it is important to address the issues raised by the City's Application because the issues could arise in the future under a new application.

34. Findings of Fact later determined to be Conclusions of Law are herein made as Conclusions of Law.

CONCLUSIONS OF LAW

1. The City of Pocatello filed its Application to lease water to the Idaho Power Company for hydroelectric generation purposes pursuant to Idaho Code §§ 42-108A and 42-108B, which were enacted in 1981. Idaho Code § 42-108A provides as follows:

42-108A. LEASING OF WATER FOR HYDROELECTRIC GENERATION -- EXCEPTION TO REQUIREMENT OF APPLICATION TO CHANGE NATURE OF USE. Any person having the right to the beneficial use of a water right may lease the water to a private or public utility doing business in the state of Idaho for hydroelectric generation purposes within the state of Idaho for a period not to exceed one (1) year on application to the department of water resources indicating the name of the owner of the right, the lessor, the lessee, the amount of water leased, the duration of the lease, and the proposed place of use and point of diversion. Such a lease or leases shall not constitute a

change in the nature of use of such water nor shall the same constitute an abandonment or forfeiture or any other diminution of such water right.

1981 Idaho Sess. Laws, ch. 267, § 1, p. 566. (Emphasis added).

2. Idaho Code § 42-108B sets forth the procedure to be followed for an application seeking approval to lease water for hydroelectric generation purposes pursuant to I.C. § 42-108A and describes the duty of the Director to act upon the application:

42-108B. LEASING OF WATER UNDER ESTABLISHED RIGHTS -- NOTICE -- APPEAL. Any person, entitled to the use of water whether represented by a license issued by the department of water resources, or by decree of the court, who shall desire to lease the water pursuant to section 42-108A, Idaho Code, shall make application to the department of water resources. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be leased. Upon receipt of said application, an application filing fee of thirty dollars (\$30.00) and a publication fee of fifty dollars (\$50.00), it shall be the duty of the director of the department of water resources to examine same and if otherwise proper, to cause notice of the proposed leasing of water and setting forth the hearing date at which protests will be heard, to be published once a week for two (2) consecutive weeks in a newspaper published and of general circulation within the county where the water is diverted, if there is such a paper, otherwise in a newspaper of general circulation within the county. Such notice shall advise that anyone who desires to protest the proposed leasing of water and who has a superior right to use the water and who may suffer pecuniary loss shall file notice of protest with the department within five (5) days of the last date of publication. The hearing date set by the director of the department of water resources shall be held not sooner than ten (10) nor later than fifteen (15) days after the last date of publication. Upon receipt of any protest, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed lease.

The director of the department of water resources shall examine all of the evidence and available information and shall approve, in whole or in part, or upon conditions, provided no other water rights senior or junior to the water to be leased are injured thereby. A copy of the approved application for leasing of water shall be returned to the applicant, and he shall be authorized upon receipt thereof to lease the water pursuant to section 42-108A, Idaho Code. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny same and forward a notice of such action to the applicant by certified mail, which decision shall be subject to review pursuant to section 42-1701A, Idaho Code.

All fees received by the department of water resources under the provisions of this section shall be submitted to the state treasurer for deposit in the water administration fund.

1981 Idaho Sess. Laws, ch. 267, § 2, p. 566. (Emphasis added).

3. Because the City's Application seeks to lease water from above Milner Dam on the Snake River for use below Milner for hydroelectric generation purposes it is subject to special statutory and administrative provisions.

4. The Protestants have demonstrated through their explanation of the operation of the Upper Snake River storage system that they hold rights to the use of storage water that could be injured should the City's Application be approved as requested. The Protestants are therefore proper party participants in this proceeding.

5. Concerns involving the use of water for hydropower purposes in the 1920s lead to an amendment of section 3, article XV of the Idaho Constitution adopted in 1928, which provides that "the state may regulate and limit the use [of water] for power purposes." Idaho Const. Art. XV, § 3.

6. The Idaho State Water Plan contemplated by Idaho Constitution Article XV, § 7 and authorized by Idaho Code § 42-1734A(1) was first adopted and published in 1976. In the 1976 Idaho State Water Plan, the Idaho Water Resource Board established, "after considering all current and potential uses of water on the main stem Snake River," an average daily protected flow of "0 cfs" at the U.S.G.S. Milner gaging station below Milner Dam. 1976 Idaho State Water Plan at 116 (Policy 32).

7. In 1985, the Idaho Water Resource Board adopted amendments to the Idaho State Water Plan intended to implement the Swan Falls Agreement. The amendments provided, in part: "It is the policy of Idaho that the ground water and surface water of the [Snake River] basin be managed to meet or exceed a minimum average daily flow of zero measured at the Milner gaging station." The 1985 amendments also provided: "The zero flow established at Milner means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-water years. The Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system." The Idaho Legislature ratified these amendments in 1985. 1985 Idaho Sess. Laws 514.

8. In 1988, the Idaho Legislature enacted Idaho Code § 42-1734B, which provides, in part, that all state agencies "shall exercise their duties in a manner consistent with the comprehensive state water plan."

9. The current "Idaho State Water Plan" was adopted by the Idaho Water Resource Board in 1996. Policy 5B of the Plan is the policy for "Snake River Minimum Flows." Through legislation ratifying the 1996 revision of the Idaho State Water Plan, the Legislature amended Policy 5B of the Plan to add: "The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero." 1997 Idaho Sess. Laws 67, 71. Idaho State Water Plan at 17 (Policy 5B).

10. Policy 5B of the State Water Plan is consistent with the Legislature's 1986 statutory amendment providing: "For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered." Idaho Code § 42-203B(2); 1986 Idaho Sess. Laws 309.

11. In 1981, the Legislature amended I.C. §§ 42-108 and 42-222 to authorize the Director to approve changes in the "period of use, or nature of use" of a water right through an

application for transfer filed with the Department. 1981 Idaho Sess. Laws 253. The 1981 amendment also added language to I.C. § 42-108 providing that, “any permanent change in period or nature of use in or out-of-state for a quantity greater than fifty (50) cfs or for a storage volume greater than five thousand (5,000) acre-feet shall require the approval of the legislature. Any lease within the state of Idaho for a term of less than three (3) years may be approved by the director without legislative approval.” *Id.*

12. Sherl Chapman, then Executive Director of the Idaho Water Users Association, testified before the Senate Resources and Environment Committee on March 16, 1981, regarding these changes to I.C. §§ 42-108 and 42-222: “Two amendments have been proposed to this bill. The first amendment allows leasing of water for less than a three year period primarily to provide a mechanism by which Idaho Power or other hydro power facilities can lease water for hydro power generation if there is a willing water right holder.” Minutes, Idaho Senate Resources and Environment Committee, March 16, 1981. House Bill 253 contained an emergency effectiveness clause and took effect on the date of approval by the Governor, March 27, 1981. 1981 Sess. Laws, ch. 147, p. 253.

13. The Legislature, thus, enacted two bills in 1981 to facilitate the rental of water to be used for hydroelectric generation purposes: House Bill 253 amending I.C. §§ 42-108 and 42-222, and Senate Bill 1169 adding I.C. §§ 42-108A and 42-108B. 1981 Sess. Laws 253, and 1981 Sess. Laws 566. The amendment to I.C. § 42-222 authorizing a change in the nature of use of a water right removed the existing uncertainty as to whether a water right for irrigation purposes leased through the Upper Snake Rental Pool could be used for hydroelectric generation purposes based upon the language in I.C. § 42-1764 providing that, “The approval of a lease or rental may be a substitute for the [transfer] requirements of section 42-222, Idaho Code.” In 1990, the Legislature amended the pertinent language in I.C. § 42-1764 to read: “The approval of a rental of water from the water supply bank may be a substitute for the transfer proceeding requirements of section 42-222, Idaho Code.” 1990 Idaho Sess. Laws, ch. 318, § 3. p. 868 (emphasis added).

14. If possible, sections 42-108A and 42-108B, Idaho Code, relied upon by the City, must be read harmoniously with sections 42-1761 *et seq.* and 42-222, which direct and enable the Idaho Water Resource Board to operate a water supply bank and which authorize the Board to approve the operation of the Water District 1 Rental Pool to facilitate the rental of storage water under approved Rental Pool Procedures. *See State v. Barnes*, 133 Idaho 378, 380, 987 P.2d 290, 292 (1999) (“Statutes relating to the same subject matter, although in apparent conflict, are to be construed in harmony, if reasonably possible.”)

15. Construing sections 42-108A and 42-108B to authorize the leasing of storage water in Water District 1 as requested by the City without going through the Rental Pool and the safeguards it provides would create an untenable tension with the water bank statutes. To avoid such direct conflict between the statutes, sections 42-108A and 42-108B should be viewed as applying only in situations where the water to be leased is not subject to the operation of rental pool approved by the Board pursuant to section 42-1765, Idaho Code. Such construction is consistent with other statutory provisions and the directives of the Idaho State Water Plan relating to the use and administration of rights to the use of the waters of the Snake River and its tributaries upstream from Milner Dam.

16. The evidence presented at hearing demonstrated that the storage water rights of the Protestants and other spaceholders in the Upper Snake River storage system would be subject to uncompensated injury should the City's Application be approved as requested without the safeguards provided under the Water District 1 Rental Pool Procedures. Even applying the provisions of sections 42-108A and 42-108B to the present case, the City's Application must be denied because section 42-108B only authorizes approval of the storage water lease "provided no other water rights senior or junior to the water to be leased are injured thereby."

17. No Department records have been identified showing that the Department has previously processed an Application for Leasing of Water for Hydroelectric Generation under the provisions of I.C. §§ 42-108A and 42-108B. All of the recorded Upper Snake River water rentals by Idaho Power for hydroelectric generation purposes since 1981 have been transacted through the Rental Pool.

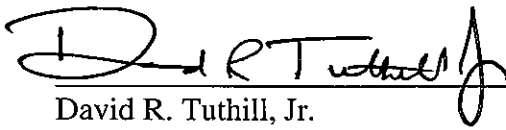
ORDER

Based upon and consistent with the foregoing,

IT IS HEREBY ORDERED, that the motion to dismiss the Protestants as parties to this proceeding is DENIED, and further that the City of Pocatello's Application for Leasing of Water for Hydroelectric Generation filed pursuant to Idaho Code §§ 42-108A and 42-108B is DENIED.

IT IS FURTHER ORDERED that pursuant to the provisions of Idaho Code § 42-108B, a copy of this Final Order shall be mailed to the City by certified mail and shall be subject to review pursuant to the provisions of section 42-1701A, Idaho Code. The available procedures and applicable time limits for seeking reconsideration or other relief are set forth in the accompanying sheet entitled *Explanatory Information to Accompany a Final Order* incorporated herein by reference.

Dated this 29th day of June, 2009.



David R. Tuthill, Jr.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2009, the above and foregoing, was served by the method indicated below, and addressed to the following:

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Victoria Wigle
Administrative Assistant to the Director

**EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER**

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) the petition for reconsideration is disposed of; or
 - (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days a) of the date of issuance (not service) of the final order, b) the date of issuance of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

**EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER**

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) the petition for reconsideration is disposed of; or
 - (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

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