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DEPARTMENT OF
WATER RESOURCES

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U.S. Department of the Interior, Bureau of Reclamation

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR 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	**RECLAMATION'S SCHEDULE FOR DIRECTOR'S MAY 2, 2005 AMENDED ORDER**

COMES NOW the U. S. Department of the Interior, Bureau of Reclamation ("Reclamation"), by and through its attorney, Kathleen Marion Carr, Office of the Field Solicitor, and submits that it joins in the pre-trial schedule submitted by A&B Irrigation District, American Falls Reservoir Ditrict #2, Burley Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the Surface Water Coalition).

Reclamation does not agree with the City of Pocatello and Idaho Ground Water Association's (IGWA) proposed pre-trial schedule for the following reasons:

1. SIMULATANEOUS EXPERT REPORTS.

IGWA and the City of Pocatello's proposal to require the Surface Water Coalition and "allied parties" to submit expert reports first is unacceptable because it presumes that

the Surface Water Coalition bears the burden of proof on all the issues. The burden of proof will be a contested issue in this case. Also, in the event the Director grants IGWA's motion to consolidate its Mitigation Plan into this proceeding, clearly the burden of proof falls to IGWA. In light of the foregoing, the only fair and equitable means for the disclosure of expert reports is to require all the parties to file simultaneous expert and rebuttal expert reports, so as to avoid an unfair advantage to any party.

2. WRITTEN EXPERT TESTIMONY.

Reclamation does not agree with IGWA and the City of Pocatello proposal that written expert testimony is needed for several reasons. First, it appears unnecessary since the parties will be exchanging detailed expert reports. Thus, written expert testimony will be largely duplicative and redundant.

Second, the requirement of written testimony does not fit well within the limited timeframe within which to complete other necessary pretrial matters, particularly, discovery. For example, in order to effectively prepare for trial, the experts will need several months to develop and prepare their expert reports. This will likely take until at least late October as set out in the schedule submitted by the Surface Water Coalition. All parties will need to conduct discovery and depositions related to those expert reports. With Thanksgiving in the middle, it will likely take until mid-December to complete all discovery in order to accommodate all the schedules of the various experts and attorneys. In addition, IGWA and the City of Pocatello suggest they need between 3-4 weeks to prepare written testimony and then even additional time to file responsive testimony. That sort of timeline does not fit with a hearing starting in early or mid-January. The fundamental question is this: Is one month of time prior to the hearing better spent on

essential pre-trial activities such as discovery, expert reports, and trial preparation or, as is the view of IGWA and the City of Pocatello, is a month of time better spent on preparing written expert testimony that is largely redundant and duplicative of the already submitted expert reports?

Third, another reason that written expert testimony is not desirable is because the testimony is ultimately filtered through the attorneys as are typically responses to interrogatories. IGWA and the City of Pocatello appear to ignore that this is an evidentiary hearing and not a summary judgment proceeding. As an evidentiary hearing the testimony is to come in the form of live testimony and documentary exhibits. If there is logic in requiring written direct testimony, as proposed by IGWA and the City of Pocatello, then why is it not logical to also submit written cross and rebuttal testimony?

In the end, IGWA and City of Pocatello's proposal for written expert testimony unnecessarily complicates and burdens essential pre-trial activities (discovery, expert reports, and trial preparation). In any event, IGWA and the City of Pocatello's proposal to have the Surface Water Coalition and allies submit written expert testimony first is unfair and prejudicial. Because the written testimony is supposed to be "direct" both sides should have to submit the testimony at the same time to prevent an unfair advantage to either side.

3. STIPULATION TO EXHIBITS.

IGWA and the City of Pocatello propose that the parties submit proof of authenticity and relevance of exhibits prior to the hearing. Reclamation views this as an unnecessary burden on the parties. Typically, the most efficient way to handle exhibits is to set a deadline for the parties to exchange witness and exhibit lists together with copies

of exhibits. The parties either meet at, or prior to, the pre-trial conference (typically held a couple weeks before trial) to stipulate to the exhibits and identify those exhibits to which the parties will not stipulate. For the unstipulated-to exhibits foundation will be provided at the hearing. Under the scenario by IGWA and the City of Pocatello, the parties would unnecessarily have to get numerous affidavits, etc., from custodians of various exhibits, which the parties would otherwise have stipulated to prior to hearing.

4. GENERAL TRIAL PROCEDURE.

As a general proposal, Reclamation would suggest that whatever schedule the Director orders be consistent with past practices of the Department, which include: 1) a discovery cut-off date; 2) a deadline for simultaneous exchange of expert reports; 3) a deadline for submission of witness and exhibit lists and exchange of exhibits; and 4) live direct testimony, cross-examination, and rebuttal testimony. Because of the complex nature of this case and the number of parties involved, a pre-trial conference two to three weeks prior to the hearing to resolve last minute procedural motions, motions in limine, and other pre-trial matters, including pre-trial stipulations and orders, would be beneficial to facilitate an efficient hearing process.

Respectfully submitted this 29 day of June, 2005.

U.S. Department of the Interior, Bureau of Reclamation

By Kathleen M. Carr
KATHLEEN MARION CARR

CERTIFICATE OF SERVICE

The undersigned certifies that on them 29 day of June 2005, a true and correct copy of **RECLAMATION'S SCHEDULE FOR DIRECTOR'S MAY 2, 2005 AMENDED ORDER** was served on the following person(s) as shown below:

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