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 (Water Districts No. 120 and No. 130)	)	**ORDER REGARDING POCATELLO'S MOTION FOR STAY and FOURTH AMENDED SCHEDULING ORDER**

This matter is before the Director of the Department of Water Resources ("Director" or "Department") as a result of a Motion for Stay ("Motion") filed on June 9, 2006, by the City of Pocatello ("Pocatello"). The Motion seeks a stay in the proceedings[1] based on Judge Barry Wood's June 2, 2006, *Order on Plaintiff's Motion for Summary Judgment* in Case No. CV-2005-0000600 (Dist. Ct., Fifth Jud. Dist., Gooding County).

On June 12, 2006, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed a Response to Pocatello's Motion for Stay ("IGWA Response"). In its response, IGWA states that it agrees with Pocatello's Motion. IGWA filed its response, however, to "make clear its position that, under the circumstances, the Director should impose a stay of all current proceedings, including all scheduled depositions, until such time when these matters reasonably can be restarted. IGWA makes this point only because it is unclear whether Pocatello's motion seeks such an immediate stay of proceedings or simply an extension of deadlines." *IGWA Response* at p. 2 (emphasis in original).

On June 13, 2006, the Surface Water Coalition filed a Response to Pocatello's Motion for Stay ("SWC Response"). In its response, the Surface Water Coalition stated that it agreed with the stay proposed by Pocatello in its Motion and supported by IGWA in its response. The Surface Water Coalition did state, however, that "Although the Coalition does not oppose staying the administrative case for the hearing on the Director's May 2, 2005 *Amended Order*, it opposes any stay of the finalization of the 2005 mitigation obligations as well as water right administration and injury determinations for 2006." *SWC Response* at p. 2.

On June 13, 2006, the United States Bureau of Reclamation ("USBR") filed its Response to Pocatello's Motion for Stay ("USBR Response"). According to its response, the USBR "joins with the *Surface Water Coalition's Response to Pocatello's Motion for Stay*. Reclamation

[1] The remaining applicable dates in the proceeding are set forth in the Director's May 19, 2006, *Third Amended Scheduling Order*.

concurs that the depositions as well as the September 26th hearing date should be vacated." *USBR Response* at p. 1.

Counsel for all other parties to the proceeding that did not file briefing with the Department in response to Pocatello's Motion were contacted. Counsel for the State Agency Ground Water Users agreed with Pocatello's Motion. Counsel for the Idaho Dairymen's Association stated that his client was not taking a position for or against Pocatello's Motion.

By way of briefing, the parties have identified the need to reschedule upcoming deadlines in the administrative proceeding. Despite the belief of the parties that entry of a stay is the appropriate course of action, entry of a stay at this juncture would be premature because a final judgment in *American Falls Res. Dist. No. 2 et al. v. Idaho Dept. of Water Resources*, Case No. CV-2005-0000600 (Dist. Ct., Fifth Jud. Dist., Gooding County) ("American Falls"), has not been entered by the court.

As will be discussed below, the Director provided relief to the plaintiffs in the form of required mitigation (replacement water for out-of-priority ground water depletions) or curtailment of junior priority ground water rights based on the information available to him at the time of his Amended Order of May 2, 2005. The Director's Amended Order also provided the parties with an opportunity for a hearing on the Amended Order. The purpose of the hearing was to afford the parties an opportunity to contest the Director's initial findings in the Amended Order. While all parties filed a petition for a hearing on the Amended Order, the parties have repeatedly requested that the hearing be rescheduled for various reasons. As set forth below, the Director is reluctant to countenance continued delay of the proceeding unless required as a matter of law.

Procedural History

This proceeding commenced on January 14, 2005, when the Surface Water Coalition filed a letter ("Letter") with the Director seeking administration and curtailment of ground water rights within Water District 120.

One month after the Surface Water Coalition filed its Letter, the Director issued an order on February 14, 2005 ("February 2005 Order"), which provided an initial response to the Surface Water Coalition's Letter. The February 2005 Order stated that "The Director will make a determination of the extent of likely material injury after April 1, 2005, when the USBR and USACE release forecasts for inflow to the Upper Snake River Basin for the period April 1 through July 1, 2005." *February 2005 Order* at p. 33, ¶ 3.

As promised, shortly after the release of the forecasts for inflow to the Upper Snake River Basin, and at the beginning of the irrigation season, the Director issued an order on April 19, 2005 ("April 2005 Order") determining that diversions by junior ground water users had materially injured the Surface Water Coalition. Accordingly, the Director ordered that junior ground water users provide 27,700 acre-feet of replacement water to the Surface Water Coalition, "which equals the amount of the predicted shortage in 2005 set forth in Findings 115 and 116." *April 2005 Order* at p. 46, ¶ 5. The Order further stated that "The Director will make

a final determination of the amounts of mitigation required and actually provided after the final accounting for surface water diversions from the Snake River for 2005 is complete." *Id.* at p. 47, ¶ 11. The Director also retained jurisdiction over the delivery call and stated that he would "make a determination of the extent of injury reasonably likely to occur to members of the Surface Water Coalition from out-of-priority ground water depletions under water rights within water districts **annually** after April 1, when the USBR and USACE release forecasts for inflow to the Upper Snake River Basin for the period April 1 through July 31, and **require mitigation or curtailment as warranted without further demand by members of the Coalition until such time that a permanent mitigation plan may be approved.**" *Id.* at p. 47, ¶ 12 (emphasis added).

Approximately one month later, on May 2, 2005, the Director issued an order ("May 2005 Order") revising various findings of fact and corrected numbering of some paragraphs in the conclusions of law of the April 2005 Order.

Consistent with the orders of April and May 2005, replacement water plans were presented and ultimately approved by the Director. *See Order Regarding Water Resource Coalition Replacement Water Plan* (May 6, 2005); *Order Regarding Simplot Replacement Water Plan* (May 6, 2005); *Order Regarding IGWA Replacement Water Plan* (May 6, 2005); *Order Approving IGWA Replacement Water Plan for 2005* (June 24, 2005).

A hearing on the May 2005 Order was sought by the parties. On June 15, 2005, the Director conducted a status and scheduling conference in which the parties were ordered to submit proposals in regard to the establishment of a prehearing schedule. *Scheduling Order* (July 22, 2005) ("Scheduling Order"). The proposed prehearing schedules were ordered to be consistent with the Director's stated intention of scheduling a hearing in the administrative proceeding in January 2006. *Id.* In the Scheduling Order, the Director established a prehearing schedule that culminated with the commencement of the hearing on January 30, 2006, at 9:00 a.m. at the Department. *Id.*

On August 24, 2005, the Director received a joint motion to modify the Scheduling Order from Pocatello and IGWA. *Order Amending Scheduling Order of July 22, 2005* (September 1, 2005") ("Order Amending Scheduling Order"). On August 31, 2005, the Director received a similar joint motion from the Surface Water Coalition and the USBR. *Id.* Among other things, the joint motions requested that the date for submission of expert witness reports, as well as rebuttals to those reports, be extended from October 17 and October 31, 2005, to November 4 and November 18, 2005, respectively. *Id.* The hearing date of January 30, 2006, was unchanged.

On October 7, 2005, the Director received a motion from the Surface Water Coalition requesting more time to prepare expert reports and requesting a continuation of the scheduled hearing date for six months. *Order Extending Time for Filing Expert Reports and for Hearing* (October 17, 2005) ("Order Extending Time"). On October 13, 2005, the Director received a response from IGWA in which it stated its opposition to delaying the hearing, but agreed to extend deadlines for submission of expert witness reports. *Id.* On October 14, 2005, the Director received a motion from Pocatello seeking to extend the deadline for submission of

expert witness reports and to postpone the hearing for a short period. *Id.* Based on the filings by the parties, the Director ordered that the time for submission of expert witness reports be extended from November 4, 2005, to December 30, 2005. *Id.* The date for commencement of hearing was moved from January 30, 2006, to March 6, 2006. *Id.* The Director stated that he would later issue a Second Amended Scheduling Order. *Id.*

On November 15, 2005, IGWA filed a Request for Issuance of Amended Scheduling Order and Clarification of Deadlines ("Request for Issuance of Amended Scheduling Order") in which it sought the issuance of a revised scheduling order. Prior to IGWA filing its Request for Issuance of Amended Scheduling Order and the Director's entry of his Order Extending Time, the Surface Water Coalition filed a Motion for Protective Order and Motion to Continue Hearing on Director's May 2, 2005 Amended Order ("Motion for Protective Order"). In its Motion for Protective Order, the Surface Water Coalition alleged various reasons for the issuance of a protective order and stated that the hearing in this matter should be delayed until a time no sooner than June 2006. In its memorandum in support of its Motion for Protective Order, the Surface Water Coalition stated that the original hearing date of January 30, 2006, was "arbitrarily chosen" and "every party" expressed concerns that this "would abbreviate a reasonable time to prepare for a hearing of the magnitude contemplated by all of the petitions filed challenging the Director's May 2, 2005 *Amended Order*. . . ."

On November 25, 2005, the Director issued a Second Amended Scheduling Order; Order Regarding Motion for Protective Order and Motion for Continuance ("Second Amended Scheduling Order"). In the Second Amended Scheduling Order, the Director denied the Surface Water Coalition's Motion for Protective Order. The Order revised the deadlines established in the Scheduling Order to comport with the deadlines established in the Order Extending Time. *Id.*

On November 30, 2005, the Director conducted a status conference to discuss whether the scheduled hearing date should be changed or stayed due to the pendency of related litigation initiated by the Surface Water Coalition in district court in the Fifth Judicial District, Gooding County, other proposed changes to the hearing schedule, and other matters to expedite the disposition of the proceeding. *See Order on Hearing Schedule* (December 27, 2005). At the status conference, counsel for the Surface Water Coalition generally argued that the hearing should be stayed pending resolution of litigation in the district court; counsel for the ground water right holders argued that the Second Amended Scheduling Order be maintained with minor modification. On December 27, 2005, the Director issued his Order on Hearing Schedule, which stated that "Based upon the consideration of the contrasting views of the parties expressed at the status conference and the status of related litigation pending before the district court, IT IS HEREBY ORDERED that the Second Amended Scheduling Order . . . shall not be modified at this time." *Id.* at p. 1.

On January 25, 2006, the Surface Water Coalition, IGWA, and Pocatello filed a Stipulated Motion for Entrance of Protective Order in which the parties sought to stay the proceeding for a period of sixty days for the purposes of allowing the parties to investigate settlement. On February 10, 2006, after a status conference on February 3, 2006, the Director entered his Order Staying Proceedings and Amended Scheduling Order. In that Order, the

Director stayed the proceeding for sixty days to allow the parties to investigate settlement. *Id.* at p. 2, ¶ 1. Upon expiration of the sixty-day stay, the remaining applicable deadlines and dates established in the Second Amended Scheduling Order were moved forward by an additional twenty-one days. *Id.* at p. 2, ¶ 4. The date scheduled for hearing was therefore rescheduled from March 6, 2006, to May 31, 2006. *Id.* at p. 3, ¶ 4(g).

After the sixty-day stay was over, the Director sent a letter apprising the parties of its expiration. On May 2, 2006, the Director issued his Order Inviting Responses to Motions for Changes in Scheduling Order ("Order Inviting Responses") in response to the Motion for Extension of Deadlines and to Reset Hearing filed by Pocatello. The Order Inviting Responses asked the parties to submit proposed modifications to the hearing schedule. IGWA, Pocatello, and the Surface Water Coalition proposed the extension of various deadlines, including the date for commencement of hearing. Pocatello requested that the hearing be moved from May 31, 2006, to June 21, 2006; IGWA requested an extension to September 5, 2006; and the Surface Water Coalition requested an extension to September 26, 2006. The USBR filed a response joining with the Surface Water Coalition.

On May 19, 2006, the Director entered his Third Amended Scheduling Order in which the date for commencement of hearing was set for September 26, 2006, at 9:00 a.m. at the Department.

In the six months following the filing by the Surface Water Coalition of its Letter alleging material injury, the Director found that the Surface Water Coalition had been materially injured, *February 2005 Order*, determined the amount of material injury, *April* and *May 2005 orders*, required the submittal of replacement water plans, *id.*, and reviewed and approved those plans for implementation, *see Order Regarding Water Resource Coalition Replacement Water Plan* (May 6, 2005); *Order Regarding Simplot Replacement Water Plan* (May 6, 2005); *Order Regarding IGWA Replacement Water Plan* (May 6, 2005); *Order Approving IGWA Replacement Water Plan for 2005* (June 24, 2005).

While a hearing in this proceeding was originally scheduled for January 30, 2006, *Scheduling Order*, the actions of the parties, as discussed above, have led to the postponement of the hearing until September 26, 2006. The Director has determined that further delay in this proceeding would undermine timely administration of water rights and therefore denies Pocatello's Motion for Stay. Nonetheless, given the uncertainty surrounding the effects of the judicial action, the Director has determined that an adjustment in the remaining deadlines in the administrative proceeding is appropriate. Thus, the existing deadlines will be extended by approximately thirty days. If circumstances in the judicial action change, and upon motion by the parties, the Director should revisit staying the administrative proceeding.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

1. The City of Pocatello's *Motion for Stay* is DENIED WITHOUT PREJUDICE, and may be renewed at a later date.

2. All remaining applicable deadlines and dates in this proceeding are advanced approximately thirty (30) days from the date of this Order, illustrated as follows:

a.	July 1 - 30, 2006:	Period for conducting expert depositions;
b.	September 6, 2006:	Submission of expert rebuttal reports;
c.	October 2, 2006:	Parties identify exhibits, data, scientific information, and all documents that may be used at hearing;
d.	October 2, 2006:	Parties may submit proposed orders to govern procedures at the hearing;
e.	October 9, 2006:	Prehearing conference at 9:00 a.m. at the Idaho Department of Water Resources;
f.	October 23, 2006:	Parties submit written opening arguments, and, if desired, trial brief;
g.	October 30, 2006:	Hearing commences at 9:00 a.m. at the Idaho Department of Water Resources.

3. The Director will continue to issue orders on any outstanding matters related to the proceeding.

DATED this 14th day of June 2006.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of June, 2006, the above and foregoing, was served by the method indicated below, and addressed to the following:

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