RECEIVED
NOV 0 2 2005
DEPARTMENT OF
WATER RESOURCES

Fax Filed 10-31-05
VW

Josephine P. Beeman #1806
Beeman & Associates, P.C.
409 West Jefferson Street
Boise, ID 83702
(208) 331-0950
(208) 331-0954 (Facsimile)
office@beemanlaw.com

Sarah A. Klahn
William A. Hillhouse II
White & Jankowski, LLP
511 16th St., Ste. 500
Denver, CO 80202
(303) 595-9441
(303) 825-5632 (Facsimile)
sarahk@white-jankowski.com
billh@white-jankowski.com

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	**POCATELLO'S MOTION TO BIFURCATE THE HEARING INTO INJURY AND MITIGATION PHASES**

SUMMARY

The City of Pocatello ("Pocatello" or "City") respectfully requests that the Director bifurcate this Delivery Call matter into "injury" and "mitigation" phases. By addressing the issues of what constitutes injury and whether the Surface Water Coalition ("SWC") members have been injured first, the Director may make a hearing into the proper remedy for an injury

unnecessary. A bifurcation of this matter into "injury" and "mitigation" matters is proper, and it will lead to a more expedient resolution of the matter.

BACKGROUND

This matter began on January 14, 2005, when the Surface Water Coalition ("SWC") placed a delivery call against junior ground water users in the Eastern Snake River Plain. Out of concern that 2005 might be the worst year of drought on record,[1] the Director took action on SWC's Delivery Call, without first holding a hearing. In his ruling of May 2, 2005, based upon predicted inflows and historical diversions, the Director predicted that the SWC would be short by approximately 133,400 acre-feet of water,[2] and that this shortage amounted to material injury. The Director also recognized that the actual injury, if any, occurring during 2005 could be different from what he had projected, depending upon the actual climatic conditions.[3]

Subsequently, on July 22, 2005, the Director revisited his earlier ruling concerning injury. Based on additional information, he concluded that only the American Falls Reservoir District #2 and the Twin Falls Canal Company might be injured, in a total of approximately 69,800 acre-feet of water.[4] Again, he recognized that further climatic information could change the numbers. Therefore, there is a threshold question, now that the 2005 irrigation season has concluded, whether the SWC members suffered any injury during 2005.

After predicting material injury, the Director ran the ESPA Model to determine which wells should be curtailed to avoid injury to the SWC. The model was **not** used to forecast injury. Rather, it was the tool used by the Department to develop a remedy for the Director's determinations of injury. Various ground water users, including the City, filed replacement plans in response to the Director's Order, and to avoid being curtailed.

---

[1] See paragraph 78 of the May 2, 2005 Order, and Deposition of Dave Tuthill.

[2] See paragraph 120 of the May 2, 2005 Order.

[3] Paragraph 121 of the May 2, 2005 Order.

[4] See paragraph 17 of the July 22, 2005 Supplemental Order.

In an Order dated June 3, 2005, the Director granted the various parties' requests for a hearing regarding material injury to SWC's water rights. The Director issued an aggressive Scheduling Order on July 22, 2005. This Order was amended on September 1, 2005. On October 17, 2005, the Director extended the time for filing expert reports and ordered that the hearing date would be moved to March 6, 2006. *See Director's Order Extending Time for Filing Expert Reports and for Hearing*, at 1. The Order stated that the Director would provide a more extensive order with respect to the schedule at a later date.

A BIFURCATION OF THIS MATTER INTO "INJURY" AND "MITIGATION" PHASES WILL ENCOURAGE AN EXPEDIENT AND ECONOMICALLY SENSIBLE RESOLUTION OF THE MERITS AND WILL RESOLVE THE SWC'S REQUEST FOR A CONTINUANCE

The information involved in both the material injury and mitigation phases of this case is complicated. For a meaningful resolution of this case of first impression, the experts on all sides of this case must have sufficient time to investigate and analyze relevant information. However, the threshold issue is whether or not SWC has been materially injured by a shortage of water during 2005. As such, the Director should bifurcate this matter into "injury" and "mitigation" phases and hear the injury matter first, consistent with the timelines set out in Pocatello's Request for Extension of Time filed October 14, 2005.

While the Department's Procedural Rules contain no specific provisions regarding the bifurcation of issues, guidance may be found in I.R.C.P. 42(b) and the relevant case law. I.R.C.P. 42(b) states in relevant part: "[t]he court, in furtherance of convenience ... or when separate trials will be conducive to expedition and economy may order a separate trial ... of any separate issue ...." A bifurcation of the issues in this matter would be expedient and promote economy for both the Department and the parties.

The bifurcation of trials is readily employed when questions of injury and remedies are at issue. *See Miller v. Estate of Prater*, 108 P.3d 355, 358 (Idaho 2005) ("The judge bifurcated the trial into two phases – the first to determine liability and the second to determine damages."); *Burgess v. Salmon River Canal Co.*, 805 P.2d 1223, 1226 (Idaho 1991) ("The case was

bifurcated and trial was held to determine liability only; the issue of damages was reserved until the liability issues were determined."). Bifurcation is especially appropriate when the trial of a preliminary issue is dispositive of other issues in the case and has the potential for obviating the need for further proceedings. *See Jinro Am. Inc. v. Secure Inv., Inc.*, 266 F.3d 993, 998 (9th Cir. 2001) (court may order separate trial on preliminary issue of whether contract existed before deciding rights and liabilities of parties under that agreement), *citing Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 575 (9th Cir. 1995).

If the Director determines during the injury phase of this matter that the SWC is not injured then no hearing regarding mitigation will be necessary. Only if the Director determines following a hearing that the SWC was injured are modeling and mitigation issues ripe for hearing. Bifurcating the matter streamlines the case and allows parties to more effectively prepare for each phase of the case. For example, if the Director finds that there is no injury or that injury to the SWC is *de minimus,* parties may elect to appeal any final order on injury before pursuing claims regarding the mitigation necessary to rectify injury.

Pocatello respectfully requests that the Director refine the scheduling order in this case to reflect a hearing only on material injury issues, and state that the Department intends to issue a final order on these issues at the close of the hearing currently scheduled to begin on March 6, 2006. At a later time the Department can set a schedule relating to mitigation.

Respectfully submitted this 31st day of October 2005.

BEEMAN & ASSOCIATES, P.C.

By Josephine P. Beeman
Josephine P. Beeman

WHITE & JANKOWSKI, LLP

By Josephine P. Beeman
for Sarah A. Klahn

Attorneys for the City of Pocatello

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October 2005, I caused to be served a true and correct copy of the foregoing document by regular U.S. Mail, postage prepaid, to:

Roger D. Ling
Ling Robinson & Walker
PO Box 396
Rupert, Idaho 83350

John A. Rosholt
Travis L. Thompson
Barker Rosholt & Simpson
113 Main Ave. West, Suite 303
Twin Falls, Idaho 83301-6167

John Simpson
Barker Rosholt & Simpson
PO Box 2139
Boise, Idaho 83301-2139

Jeffrey C. Fereday
Michael C. Creamer
Givens Pursley
601 Bannock Street, Suite 200
PO Box 2720
Boise, Idaho 83701-2720

Kathleen Marion Carr
Office Of The Field Solicitor
550 W. Front Street, MSC 020
Boise, Idaho 83724

Ron Carlson
Lewis Rounds
IDWR Eastern
900 N. Skyline Drive
Idaho Falls, ID 83402-6105

James S. Lochhead
Adam T. DeVoe
Brownstein Hyatt & Farber
410 17th Street, 22nd Floor
Denver, CO 80202

Terry Uhling
J. R. Simplot
P. O. Box 27
Boise, ID 83707

C. Tom Arkoosh
Arkoosh Law Offices, Chtd.
PO Box 32
Gooding, Idaho 83330

W. Kent Fletcher
Fletcher Law Office
PO Box 248
Burley, Idaho 83318

Scott L. Campbell
Moffatt Thomas
101 S. Capitol Blvd., 10th Floor
PO Box 829
Boise, Idaho 83701-0829

Michael S. Gilmore
Deputy Attorney General
Statehouse, Room 210
P. O. Box 83720
Boise, ID 83720-0010

Matt Howard, PN-3130
U.S. Bureau of Reclamation
1150 N. Curtis Road
Boise, ID 83706

Allen Merritt
Cindy Yenter
IDWR Southern
1341 Fillmore Street, Suite 200
Twin Falls, ID 83301

James Tucker
Idaho Power Company
1221 West Idaho street
Boise, ID 83702

Josephine P. Beeman

Josephine P. Beeman [6885]