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 DENYING CITY OF POCATELLO'S MOTION TO BIFURCATE THE HEARING**

This matter is before the Director of the Department of Water Resources ("Director" or "Department") as a result of the City of Pocatello's ("Pocatello") October 31, 2005, *Motion to Bifurcate the Hearing into Injury and Mitigation Phases* ("Motion").

Pocatello's Motion and Responses in Opposition Thereto

By its Motion, Pocatello seeks to bifurcate the upcoming hearing in this matter into an injury phase and a mitigation phase. According to Pocatello, the first phase of the upcoming hearing should be focused solely on injury. If a finding of injury is not made, then it would not be necessary to proceed on the issue of mitigation. Thus, only if a determination of injury has been made would it be necessary to move forward on mitigation. "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." *Motion* at p. 4. Pocatello states that its proposal would "lead to a more expedient resolution of the matter." *Id.* at p. 2.

On November 10, 2005, the Surface Water Coalition ("SWC") filed its *Response to Pocatello's Motion to Bifurcate the Hearing into Injury and Mitigation Phases* ("SWC Response"). The SWC opposed Pocatello's Motion for various reasons. In the SWC's view, there would be little cost savings resulting from bifurcation of the issues at this late date. *SWC Response* at p. 4. The SWC further argues that if bifurcation were ordered, "the SWC would be left without a remedy (i.e. water) until another hearing could be scheduled, compounding the injury resulting to the SWC without any ability to recover losses occurring during the delay in the proceedings." *Id.* The SWC's position is that, "The Director should consider all issues set before him in the various petitions filed challenging the May 2, 2005 Amended Order, not just issues regarding "material injury" as suggested by Pocatello." *Id.* at p. 5.

On November 14, 2005, the United States Bureau of Reclamation ("USBR") filed its *Response to Pocatello's Motion to Bifurcate the Hearing into Injury and Mitigation Phases* ("USBR Response"). The USBR Response stated that it opposed Pocatello's Motion on the same grounds as the SWC.

On November 14, 2005, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed its *Response to Pocatello's Motion to Bifurcate* ("IGWA Response"). IGWA stated that it opposed Pocatello's Motion because "it is necessary and appropriate that the sufficiency of [IGWA's] mitigation be determined coincident with any determination of whether material injury actually exists that will require mitigation, and that [IGWA is] entitled to develop [its] record and have both of these issues determined at the earliest opportunity." *IGWA Response* at p. 2. Additionally, IGWA stated that "evidence that may pertain to material injury . . . has substantial overlap with evidence pertaining to administration and appropriate mitigation . . . . Thus, it is not likely that bifurcating the proceedings would result in significant judicial economy or other savings to the parties. Rather, bifurcation likely would require the parties' . . . experts to prepare for and appear at two separate hearings." *Id.*

In reviewing the Motion and the responses filed in opposition thereto, bifurcation of the upcoming hearing into an injury phase and a mitigation phase will not lead to judicial economy, save the parties expense, or lead to a more expedient result. Judicial economy will not be promoted because evidence regarding material injury may be relevant in determining the extent of mitigation. Thus, duplicative efforts would have to be expended by the Department and the parties if bifurcation were ordered. Furthermore, if bifurcation were ordered, the parties would be required to pay additional fees to their attorneys and expert witnesses for preparation and appearance at two hearings. Finally, by breaking the case into two hearings, bifurcation would delay the outcome of the proceeding, resulting in a less expeditious result. Therefore, the Director should not bifurcate the upcoming hearing.

ORDER

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

The City of Pocatello's *Motion to Bifurcate the Hearing into Injury and Mitigation Phases* is DENIED.

DATED this 27th day of December, 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of December, 2005, the above and foregoing, was served by the method indicated below, and addressed to the following:

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