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	)	**SECOND AMENDED SCHEDULING ORDER; ORDER REGARDING MOTION FOR PROTECTIVE ORDER AND MOTION FOR CONTINUANCE**

On July 22, 2005, the Director of the Department of Water Resources ("Director" or "Department") issued a *Scheduling Order*, which established a prehearing schedule and set the hearing in this matter for January 30, 2006. On September 1, 2005, the Director issued an *Order Amending Scheduling Order of July 22, 2005* ("Amended Scheduling Order"). The Amended Scheduling Order did not adjust the commencement of the hearing, but did alter the time for filing of various prehearing documents. On October 17, 2005, the Director issued an *Order Extending Time for Filing Expert Reports and for Hearing* ("Order Extending Time"), which, among other things, moved the commencement of the hearing from January 30, 2006, to March 6, 2006. The Order Extending Time also stated that the Director would issue a Second Amended Scheduling Order.

On November 15, 2005, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed a *Request for Issuance of Amended Scheduling Order and Clarification of Deadlines* ("IGWA Request"), seeking the issuance of "a revised scheduling order in this matter resetting and clarifying the deadlines for discovery and pre-hearing motions in this matter." *IGWA Request* at p. 1. The IGWA Request also set forth a proposed prehearing schedule.

On November 18, 2005, the Director issued a *Notice of Status Conference*, scheduling a 9:00 a.m. status conference for November 30, 2005 at the Department.

Motion for Protective Order and Motion to Continue Hearing

Prior to the Director's 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* ("SWC Motion"). Included with the SWC Motion were the following documents: *Memorandum in Support of Motion for Protective Order and Motion to Continue Hearing on Director's May 2, 2005 Amended Order* ("SWC Memorandum"); *Affidavit of Charles E. Brockway*; *Affidavit of John S. Koreny*; and *Affidavit of David B. Shaw*. The SWC Memorandum alleges various reasons for the issuance of a protective order and states that the hearing in this matter should be delayed until a time no sooner than June 2006.

The SWC Memorandum first alleges that the original hearing date in January 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*. . . ." *SWC Memorandum* at p. 3.

The January 2006 hearing date was not arbitrarily chosen but was set to allow for a four-week long hearing and the issuance of a final order prior to April 1, 2005, when the Director would begin the assessment of material injury likely to occur, if any, during the 2006 irrigation season. IGWA is a party to this proceeding and did not express concerns regarding the time provided to prepare for hearing, contrary to the assertion by the Surface Water Coalition that "every party" expressed concerns.

The SWC Memorandum next claims that the Department has failed to provide all of the files necessary for the Surface Water Coalition experts to run version 1 and version 1.1 of the Eastern Snake Plain Aquifer ("ESPA") ground water model, particularly for the Base Case Scenario and ground water Curtailment Scenario.

The Department and the Idaho Water Resources Research Institute have completed simulations using version 1.1 of the ESPA ground water model for the Base Case Scenario and the Curtailment Scenario. The results from the Curtailment Scenario simulations using version 1.1 of the ESPA ground water model were posted to the Department's FTP site on November 2, 2005. The results from the Base Case Scenario simulations using version 1.1 of the model, together with the input and output files for both scenarios, were posted to the Department's FTP site on November 23, 2005. Reports documenting the simulations using version 1.0 of the ground water model have been available since October 2004 for the Curtailment Scenario and November 2004 for the Base Case Scenario. The reports documenting the simulations using version 1.1 of the ground water model are nearly complete and will be available to the Surface Water Coalition experts, as well as all other parties, in the near future.

Furthermore, the files necessary to run version 1 of the ESPA ground water model were previously provided to the experts for the Surface Water Coalition in May of 2004, nearly 18 months ago. Identification of necessary files that have not been provided, if any, is apparently related to the Surface Water Coalition experts not attempting to run the ESPA ground water model until the last month or two. The assertion that one of the Surface Water Coalition experts is unable to run either version of the ESPA ground water model may indicate a lack of experience or familiarity with the MODFLOW and the ESPA ground water model rather than the Department's failure to provide the necessary input files, given that this expert did not attend the training on use of the ESPA ground water model that was provided in May 2004.

The SWC Memorandum next states that on July 29, 2005, the Surface Water Coalition experts requested other information necessary to render expert opinions, which has not yet been provided.

The only information requested by the Surface Water Coalition experts on July 29, 2005, that was not initially provided, were copies of information requests from other entities or their

experts. It is not at all apparent how not having the copies of the actual requests for information from others, when the information itself was provided, would prevent the experts for the Surface Water Coalition from rendering expert opinions. Nonetheless, copies of the actual requests for information from other entities or their experts were provided on October 18, 2005. The Department has since posted copies of all subsequent requests for information and the Department's responses to those requests on the Department's FTP site and notified all parties of the postings by email or letter.

The SWC Memorandum next alleges that the results of the simulations using the ESPA ground water model for the Base Case Scenario and the Curtailment Scenario serve as part of the basis for the analysis and determinations by the Director in response to the Surface Water Coalition's request for water right administration.

Although the Director referred to results from simulations using the ESPA ground water model for the Base Case Scenario and the Curtailment Scenario in Findings of Fact Nos. 80 – 83 in the May 2 Amended Order for the purpose of generally describing the condition of the ESPA and the effects of ground water depletions, the Director did not in any way rely on these simulations in making his determination of injury or the action required by holders of junior priority ground water rights. Therefore, the results from the simulations for the Base Case Scenario and the Curtailment Scenario using either version of the ESPA ground water model are not material to the Director's determinations.

The SWC Memorandum finally claims that until the May 2 Amended Order is further amended and modified to reflect the results of simulations using version 1.1 of the ESPA ground water model, this matter cannot reasonably proceed.

The May 2 Amended Order included a provision 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." *May 2 Amended Order* at p. 47, ¶ 11. Since the 2005 irrigation season is over and the replacement water required from the ground water districts in 2005 was not based on simulations using the ESPA ground water model, there is no purpose in further amending the May 2 Amended Order. Instead, the Director intends to issue one or more additional supplemental orders finalizing the replacement water obligation for 2005, which the ground water districts must provide in lieu of curtailment by priority as provided in the May 2 Amended Order. To the extent Findings of Fact, Conclusions of Law, and provisions of the May 2 Amended Order should be revised as a result of using version 1.1 of the ground water model for the ESPA, those revisions will be accomplished through issuance of the supplemental orders.

ORDER

Based upon consideration of the foregoing, the Director enters the following order:

Subject to possible further amendment following the status conference on November 30, 2005, IT IS HEREBY ORDERED as follows:

1. December 30, 2005, parties submit expert witness reports.

2. January 13, 2006, parties submit rebuttal expert opinions.

3. January 23, 2006, deadline for all dispositive motions.

4. February 6, 2006, deadline for responses to all dispositive motions.

5. February 10, 2006, parties identify exhibits, data, scientific information, and all documents that may be used at hearing.

6. February 10, 2006, parties may submit proposed orders to govern procedures at the hearing.

7. February 13, 2006, deadline for replies to all dispositive motions.

8. February 17, 2006, prehearing conference at 9:00 a.m. at the Idaho Department of Water Resources.

9. February 24, 2006, parties submit written opening argument, and, if desired, trial brief.

10. March 6, 2006, hearing commences at 9:00 a.m. at the Idaho Department of Water Resources.

IT IS FURTHER ORDERED that the Surface Water Coalition's motion for a protective order is DENIED.

IT IS FURTHER ORDERED that the Surface Water Coalition's motion for continuance of the hearing in this matter is GRANTED in part and DENIED in part, in accordance with the above schedule.

DATED this 25th day of November 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of November, 2005, the above and foregoing, was served by the method indicated below, and addressed to the following:

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