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ATTORNEYS FOR THE CITY OF POCATELLO

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

In the Matter of The Petition for Delivery Call of A&B Irrigation district for the Delivery of Ground Water and for the Creation of a Ground Water Management Area	DOCKET NO. 37-03-11-1 **JOINT RESPONSE TO STIPULATED MOTION TO AMEND SCHEDULE**

The City of Pocatello ("Pocatello") and the Idaho Ground Water Appropriators ("IGWA") oppose A&B's stipulated motion to amend the schedule in this matter. Pocatello and IGWA offer two alternatives: first, that the matter be stayed in its entirety until the orders issue

by the Hearing Officer in the TSP and SWC matters; and second, if a stay is not acceptable, that the Hearing Officer adopt the proposed amendments to the schedule outlined below rather than A&B's proposal.

As grounds therefore, Pocatello and IGWA would show the court:

A. Pocatello and IGWA oppose the proposed Amended Schedule because it will prejudice the junior ground water users' ability to prepare for trial in this matter.

1. The current schedule in this matter requires disclosure of expert opinions and testimony on December 28, 2007. There follows rebuttal testimony and opinions to be disclosed during the middle of the SWC hearing (January 30, 2008), and a deadline for discovery 14 days after the SWC hearing (February 20, 2008). While some parties to the A&B case are not involved in the SWC hearing, IGWA and Pocatello are involved in both hearings and desire to present expert testimony in the A&B hearing.

2. While the current schedule is onerous and will be extremely difficult to meet, A&B's amendments make the situation worse. At this time, Pocatello and IGWA are unaware of the technical basis for A&B's delivery call. A December 28, 2007 disclosure of A&B's opinions and testimony would allow the junior ground water users the chance to take a look at the bases of the A&B claims of injury. By contrast, the proposed amendment would further delay the disclosure of the technical bases of A&B's claims to the junior ground water users in this matter. Without the technical basis of A&B's claims, it is nearly impossible for the junior ground water users to develop their own opinions and testimony regarding those claims.

   a. Although the case was filed in 1994, there was an interim settlement entered and no discovery has taken place.

   b. We know that A&B alleges approximately 40 wells in its system have suffered injury, but we do not know which wells A&B alleges have been injured. We do not know what amounts of water A&B alleges have been shorted these wells, specifically. We do not know as a matter of law whether A&B can even plead its delivery call in the form it has, given the nature of its SRBA decrees.

   c. In addition to all of these unknowns, we do not know the technical basis for these claims. Is the basis merely reductions in water levels in the yet-to-be-identified wells? Is it the IWWRI A&B model run that purportedly examined the impacts to the A&B wells from junior ground water pumping? Are there problems with the A&B delivery system that contribute or cause the impacts A&B alleges? Are there bases to argue that, based on crop type and acreage, A&B has received less water but has not suffered any shortages in terms of water to be applied to beneficial use? These are among a long list of foundational technical issues that

expert reports and testimony from A&B would flesh out for the ground water users.

3. Thus, the primary problem with A&B's proposed amendment to the schedule is that it would further delay revelations regarding A&B's technical basis for its delivery call until scarcely one month before the hearing, February 19, 2008. It is impossible to prepare for a trial like this without the benefit of depositions and written discovery. Yet the time will not be ripe for depositions and written discovery on expert opinions until one month before the trial, and only 12 days before the end of discovery. In addition, IGWA, Pocatello, and A&B will all be involved in a three week hearing that concludes on February 6, 2008, making preparation and provision of expert materials, and preparation for deposition or written discovery difficult.

B. Instead of amending the schedule, judicial economy as well as the importance of this case of first impression—a ground water against ground water call—supports a stay in the captioned matter until the last of the final orders are entered in the SWC and TSP matters.

4. While IGWA and Pocatello cannot agree to the amended schedule, we would agree to staying the schedule, and to scheduling a status conference 30 days after the Hearing Officer enters his final orders in both the TSP and SWC cases. At that time, and based on the results of the SWC and TSP hearings, a schedule could be developed that takes into account either the narrowing or broadening of issues to be heard in the captioned matter.

5. A stay would promote judicial economy. While the A&B matter raises unique questions of fact, it raises some common questions of law with the delivery calls made by Thousand Springs ("TSP") and the Surface Water Coalition ("SWC"). Resolution of questions of law in the TSP or SWC matters may narrow the issues in the A&B case. Yet under the amended schedule it will be difficult, if not impossible, to change course once those rulings have been made. It is a more efficient use of judicial resources to first resolve common questions of law, in order to determine how it may impact the scope of the A&B case.

   i. The TSP matter is particularly analogous to the A&B case, as the TSP water users essentially seek a "full bathtub" to maintain flows from the springs that they claim to be adequate under their water rights; TSP also claims that only curtailment can keep the bathtub full.

   ii. Similarly, A&B alleges a loss of water production associated with some sub-set of their 173 wells because aquifer levels have dropped. A&B also alleges that only curtailment will resolve their injury. If it is not appropriate to maintain a full bathtub through well curtailment to ensure delivery of a certain flow to TSP, it is not likely to be legally appropriate to use the same method to keep the bathtub full for A&B's wells.

6. A stay is not foreclosed by the actions of the District Court in Case No. CV-2007-665, in which A&B sought a writ of mandamus to require the IDWR to proceed with a

determination of injury. On October 31, 2007, the judge in that case ordered that the Director of IDWR issue an order regarding injury to A&B's wells on or before January 15, 2008 (an order made specific to the Director in the November 6, 2007 Writ).[1] The Director will meet the deadline of January 15, 2007, and may even order curtailment if he finds injury. Thus, A&B's initial right to a determination by IDWR of the merits of their delivery call will be satisfied.

7. Finally, administration between senior and junior ground water users under the Conjunctive Management Rules presents a case of first impression in Idaho. Sufficient time should be devoted to developing the facts and the law in this matter.

C. If a stay is not acceptable, Pocatello and IGWA would propose the following amendments to the schedule.

8. Alternatively, if staying this matter is not acceptable for some reason, Pocatello and IGWA suggest the following amendments to the schedule:

a. December 28, 2007, A&B discloses direct testimony and expert report (including all exhibits to be used at trial) regarding the bases of its claims of injury in this matter. This should not be a burden on A&B, who has been working on this case for more than 13 years. Presumably, A&B *has* a thorough knowledge of the technical basis for its claims. By contrast, junior ground water users have no clue regarding the basis of the A&B claims. An initial disclosure by A&B would be a means to level this playing field.

b. January 30, 2007, A&B may amend its direct testimony and expert report, to incorporate responses to the IDWR Order on its claims of injury, which must be issued on or around January 15, 2007. Any additional exhibits would be disclosed at the same time.

c. February 19, 2007, ground water users would disclose their expert reports, testimony, and exhibits, responding to both A&B's December 28, 2007 report and its January 30, 2007 update.

d. A&B could file rebuttal reports and testimony (and exhibits) on March 3, 2007, if it wanted.

e. Discovery would conclude on March 11, 2007. Pre-trial briefs, if desired, due the same day.

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[1] In Case No. CV-6007-665, the District Court issued a Memorandum Decision Re: Respondent's Motion to Dismiss ("Order") on October 31, 2007 requiring: "The Director is hereby Ordered to make a determination of material injury, if any, in accordance with Rule 42 of the Conjunctive Management Rules on or before January 15, 2008." Order at ¶2, page 15. The Order goes on to say, *inter alia*, that any party who desires to contest any finding of material injury "such contest may be the subject of the hearing presently scheduled by the Director for March 18, 2008." Conclusion and Order at ¶3. Thus, the District Court does not seem to have adopted the present hearing schedule for purposes of its Order. *See also*, Case No. 07-655 Peremptory Writ of Mandate at page 2.

9. While Pocatello and IGWA would prefer a stay be entered as described in part B. above, the primary benefit of the amendments proposed above is that, unlike A&B's proposed amendment to the schedule, ground water users would learn the nature and basis of A&B's claims by December 28, 2007. This avoids prejudice to the ground water users, and provides at least a chance that the factual record in this matter could be properly developed.

CONCLUSION

IGWA and Pocatello respectfully request that the Hearing Officer deny the Motion to Amend, enter an order staying this matter and scheduling a status conference in this matter 30 days following his entry of the final order in both the TSP and SWC matters. In the alternative, Pocatello and IGWA request that the amended schedule proposed above be adopted by the Hearing Officer.

DATED this 30th day of November, 2007.

RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED

By Sarah Klahn for
RANDALL C. BUDGE
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WHITE & JANKOWSKI

By Sarah Klahn
SARAH A KLAHN
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CERTIFICATE OF MAILING

I hereby certify that on this 30th day of November, 2007, the above and foregoing **Joint Response to Stipulated Motion to Amend Schedule** was served by placing a copy in the U.S. Mail, postage prepaid and addressed to the following:

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