

Sarah A. Klahn (ISB# 7928)
SOMACH SIMMONS & DUNN
Attorneys for City of Pocatello

Robert L. Harris (ISB# 7018)
HOLDEN KIDWELL HAHN & CRAPO
Attorneys for City of Idaho Falls

Candice M. McHugh (ISB# 5908)
Chris M. Bromley, ISB # 6530
MCHUGH BROMLEY, PLLC
Attorneys for the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell

Thomas J. Budge (ISB# 7465)
Elisheva M. Patterson (ISB# 11746)
RACINE OLSON, PLLP
Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)

Skyler C. Johns (ISB# 11033)
Nathan M. Olsen (ISB# 7373)
Steven L. Taggart (ISB# 8551)
OLSEN TAGGART PLLC
Attorneys for Bonneville-Jefferson Ground Water District

Dylan Anderson (ISB# 9676)
DYLAN ANDERSON LAW
Attorney for Bingham Groundwater District

**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

Docket No. CM-DC-2010-001

MOTION FOR RECONSIDERATION OF DENIAL OF CONTINUANCE

COME NOW, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (“Coalition of Cities”), by and through their attorneys of record, Candice M. McHugh and Chris M. Bromley, the City of Idaho Falls, by and through its attorney of record, Robert L. Harris, and the City of Pocatello by and through its attorney of record Sarah A. Klahn (collectively the “Cities”), Idaho Ground Water Appropriators (“IGWA”) by and through its attorney of record Thomas

J. Budge, Bingham Ground Water District by and through its attorney, Dylan Anderson and Bonneville-Jefferson Ground Water District, by and through its attorney Skyler Jones, (collectively the “Parties”) pursuant to IDAPA 37.01.01.711 of the Department’s rules of procedure and hereby file this *Motion for Reconsideration of the Denial of the Continuance* (“Motion”) and move for reconsideration of the Director’s interlocutory order denying a continuance of the hearing scheduled for June 6-10, 2023, in the above-captioned matter. Additional reasons for a continuance have come to light since the pre-hearing conference in addition to the reasons already set forth in the original motion.

On April 21, 2023, the Director issued a series of orders regarding the Surface Water Coalition (“SWC”) delivery call: *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”); *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (“As-Applied Order”), (collectively the “2023 Orders”). On April 28, 2023, the Director held a pre-hearing conference on the 2023 Orders. The Cities filed a *Motion for Continuance* which was joined by IGWA, GWDs and McCain. The Director orally denied the *Motion for Continuance*. But, he also left the door slightly open by saying: “if ... water users as a whole, whose priority dates are junior to the senior water right holders, are either complying with a mitigation plan or have arranged somehow with the senior water right holders to satisfy the obligation, I’m willing to listen to some reasonable requests for delay.” Tr. 24: 21- 25: 1.3. Because there is enough water secured to provide the predicted shortage, a reasonable delay is warranted as discussed below.

ARGUMENT

IDWR’s procedural rule 711 allows any party affected by an “interlocutory order” to

petition the presiding officer and ask him to “rescind, alter or amend” such order. After further review of the 2023 Orders, the data and documents provided thus far and after consultation with the Cities and Groundwater Users’ clients and experts it is apparent that a continuance is necessary because the expert for the City, Greg Sullivan, is unavailable in the weeks leading up to the hearing and IGWA’s two experts are also unavailable to attend the hearing and there is not sufficient time to review and respond to the orders and their underlying data and information, take depositions of key Department personnel or witnesses. (See Declarations of Greg Sullivan, Jaxon Higgs, Sophia Sigstedt, Bryce Contor, and Thane Kindred.) Furthermore, IGWA, the Cities and Groundwater users are providing sufficient mitigation this upcoming season so little to no injury will occur to the senior users.

This Motion is supported by the argument below and Declarations filed by the Parties from: Greg Sullivan, Candice McHugh, Jaxon Higgs, Sophia Sigstedt, Bryce Contor and Thane Kindred.

The Parties to this Motion request that the Director reconsider his order denying the continuance and alter and amend the existing hearing date and schedule for the reasons set forth below.

A. Unavailability of Key Witnesses for Cities and Ground Water Users

- 1) The long-standing Cities’ expert, Greg Sullivan, will be out of the country between May 17 and June 2, 4 days before the scheduled hearing. These dates include the date when expert reports are due, which means Mr. Sullivan will have to prepare his report in the middle of discovery and will have no opportunity to review other expert reports until he returns. The Declaration of Greg Sullivan

filed herewith contains further details as to why a continuance is necessary and are incorporated herein. Mr. Sullivan's absence will prejudice the Cities ability to adequately prepare for hearing.

- 2) Ms. McHugh will be out of town during the week of the hearing and this compromises her ability to adequately represent her clients causing them prejudice. (Declaration of Candice McHugh)
- 3) Sophia Sigstedt has been a long-standing expert for the Idaho Ground Water Appropriators and participated in the SWC Technical Working Group. She is IGWA's modelling expert with expertise in surface and ground water interactions, hydrogeology, consumptive use analysis among others. As detailed her in Declaration filed in support of this Motion, she is not able to "perform all of the work required to properly analyze" the orders in this case. Declaration of Sophia Sigstedt at 5. Furthermore, and most significantly, Ms. Sigstedt is not available for the hearing as schedule because of medical reasons. Id. Ms. Sigstedt's testimony and expertise is material to the development of the record and issues raised by IGWA. IGWA will be severely prejudiced if she is not able to attend the hearing.
- 4) Jaxon Higgs is an expert for the IGWA as a Geologist and Hydrologist and has expertise with issues relevant to this matter including groundwater modelling, the technical working group that was a pre-cursor to the orders in this matter, and water measurement, aquifer recharge and management to name a few. Mr. Higgs is unavailable the week of the hearing, due to an out of country trip already scheduled. Declaration of Jason Higgs. Mr. Higgs' testimony is material to the

development of the record and issues raised by IGWA. IGWA having to hire a different expert to present the testimony is not possible at this late date and replacing his expertise will require significant additional expense for another expert which is not necessary. IGWA will be severely prejudiced if he is not able to attend the hearing.

The availability of these people before and/or during the hearing will cause prejudice to their respective client's real property interests and rights to due process.

B. Insufficient time to obtain, review, and develop evidence and legal argument for Bonneville- Jefferson's experts and legal counsel.

The scheduled hearing date does not provide adequate time for Bonneville-Jefferson's experts to obtain, review, and develop testimony regarding the relevant information in this matter. Bonneville-Jefferson has retained Bryce Contor and Thane Kindred from Rocky Mountain Environmental Associates, Inc., in Idaho Falls, Idaho, to review the technical information pertaining to the Fifth Amended Methodology Order and April 2023 As-Applied Order. Their expertise is critical to Bonneville-Jefferson's opposition to these orders because Bonneville-Jefferson and its retained experts were not involved in the Department meetings or discussions regarding the technical basis for either Order. See Declaration of Skyler C. Johns, Declaration of Bryce Contor, and Declaration of Thane Kindred. Thus, Bonneville-Jefferson and its experts have not received, nor do they have access to any information the Department relied upon in these orders as of the date of this filing. *Id.* Once all discovery is complete, Bryce Contor and Thane Kindred require at least two months to adequately review the information and prepare their testimony regarding the technical basis of the Orders.

Counsel for Bonneville-Jefferson also cannot adequately develop evidence or legal arguments in opposition to the Orders until Bryce and Thane complete their review. Id. As such, counsel will require an additional one to two months to consult with Bonneville-Jefferson's experts once they have completed their review of all the relevant information. See Declaration of Skyler C. Johns.

Based on the foregoing, not granting additional time for Bonneville-Jefferson to obtain review and evidence and legal arguments will cause prejudice to its members real property interests and rights to due process.

C. Mitigation Has Been Secured for the Upcoming Season, Thereby Causing Little to No Prejudice to the Senior Users

- 1) At the Pre-Hearing conference, the Director denied the continuance but left the door open, "if ... water users as a whole, whose priority dates are junior to the senior water right holders, are either complying with a mitigation plan or have arranged somehow with the senior water right holders to satisfy the obligation, I'm willing to listen to some reasonable requests for delay." Tr. 24: 21- 25: 1.3.
- 2) IGWA has enough the water to mitigate for its 2021 breach and for the predicted demand shortfall for the upcoming 2023 season. See IGWA's Notice of Mitigation.
- 3) The Cities are in compliance with their mitigation obligations and will meet their obligations this year.
- 4) At least two other junior groundwater users, McCain Foods USA, Inc. ("McCain") and Amalgamated Sugar Company ("Amalgamated") are also mitigated for their use. See McCain Notice of Mitigation and Amalgamated's Notice of Mitigation.

- 5) It is also understood that IDWR is issuing curtailment letters to the remaining, non-mitigated juniors. These other remaining junior users account a fractional percentage of the groundwater depletions which are allegedly causing injury to Twin Falls Canal Company. It is anticipated that some of these users will also provide mitigation, but given the tiny amount of water they are responsible for, the fact that IGWA has enough water for this season to offset the entire injury forecasted to TFCC and the fact that the Cities' have over-mitigated in the past several years, the Director should consider that the junior water users "as a whole" are complying with mitigation plans. Thus, a reasonable continuance is in order.
- 6) This leaves the final piece—that the Director effectively delegated to the SWC the ability to veto a continuance to a reasonable hearing date. Tr: 24:21-25: 1. 3. The Parites are unaware of any statutory authority for this action, and in fact it appears the Director is attempting to set a hearing that will end up with a per se inadequate record for appeal.

In addition, because mitigation water has been secured and the Director has a final Fourth Methodology order administration can occur this year. And, while the Parties to this motion prefer to wait for implementation of the 2023 Orders, they will not object to the Director implementing the 2023 Orders and pursuing curtailment of non-mitigated groundwater users this season.

D. Experts and Counsel Involved Here Are Available For A Hearing in This Matter the Week of October 16, 2023 And the Moratorium Hearing Could be Rescheduled

Over a dozen attorneys and/or experts for the key parties in this matter and twenty-four parties are the same as those in *The Matter of the Big Wood River Ground Water Management Area and In The Matter of Applications for Permit for the Diversion and Sue of Surface and Grud Water Within the Snake Rier Basin* (the “Moratorium Matters”). There is a hearing set for October 16-19, 2023 at the Department in Moratorium Matters. The overlapping parties, counsel and experts in the Moratorium Matters and this action are: 14 cities in the Coalition of Cities and their attorneys Candice McHugh, Chris Bromley, the City of Pocatello and its attorney Sarah Klahn and the City of Idaho Falls and its attorney Rob Harris along with their collective expert Greg Sullivan; Idaho Ground Water Appropriators and its nine groundwater districts and its attorneys Thomas J. Budge, Elisheva Patterson, and its experts Sophia Sigstedt and Jaxon Higgs; Kent Fletcher, Travis Thompson and John Simpson.

The City of Bellevue, the City of Pocatello, the Coalition of Cities, Wellsprings Group and IGWA all agree to move the hearing in this matter to the days set for hearing in the Moratorium Matters. And, because Mr. Fletcher, Mr. Thompson and Mr. Simpson represent parties in the Moratorium Matters that are all in support of the Moratoriums, which is in place, moving that hearing will not prejudice their clients.

Moving this hearing to the proposed October dates or some other week in this coming fall or early winter is a reasonable delay given the detail and evidence needed in this case. Because the key players are all available for the dates set forth in October, this seems like the easiest and fairest resolution, but regardless, delaying the hearing to dates this fall

allows a full and fair development of the record by all parties and it will allow the Director time to issue an order prior to having to determine carry-over storage issues in November and in time for the upcoming 2024 irrigation season.

E. Rescheduling the Hearing Saves All Parties and IDWR Time, Money and Expense and Honors the Civility and Professional Conduct of the Legal Profession

Without moving the hearing, the parties to this Motion will be forced to take action in District Court requiring IDWR and the other parties to the case to respond. It is a much more reasonable and prudent use of state resources as well as resources of the parties to reschedule this hearing later this fall, especially because there are dates available in October for all the necessary parties, the senior user's forecasted injury will be fully mitigated this season and without a delay the junior users are highly prejudiced.

CONCLUSION

Based on the foregoing, the Parties to this Motion request that the Director grant a continuance to the Moratorium Hearing Dates in October or to some other week this fall; the Parties to this motion and their experts are also available the weeks of November 27 or December 6, 2023.

In addition, the Parties to this Motion recognize that the Surface Water Coalition has a right to respond to this motion but given the compressed hearing schedule, the Parties request that the Director order them to respond by the end of business Tuesday, May 9, 2023 and issue an order on this Motion by Wednesday, May 10, 2023.

Submitted this 5th day of May, 2023.

/s/ Sarah Klahn

Sarah A. Klahn
SOMACH SIMMONS & DUNN
Attorneys for City of Pocatello

/s/ Candice M. McHugh

Candice M. McHugh
MCHUGH BROMLEY
Attorneys for Coalition of Cities

/s/ Robert Harris

Robert L. Harris
HOLDEN KIDWELL HAHN & CRAPO
Attorneys for City of Idaho Falls

/s/ Chris M. Bromley

Chris M. Bromley
MCHUGH BROMLEY
Attorneys for Coalition of Cities

/s/ Thomas J. Budge

Thomas J. Budge
Elisheva M. Patterson
RACINE OLSON, PLLP
*Attorneys for Idaho Ground Water
Appropriators, Inc. (IGWA)*

/s/ Skyler C. Johns

Skyler C. Johns
OLSEN TAGGART PLLC
*Attorneys for Bonneville-Jefferson Ground
Water District*

/s/ Dylan Anderson

Dylan Anderson
DYLAN ANDERSON LAW
Attorney for Bingham Groundwater District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of May, 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

Idaho Dept. of Water Res.

file@idwr.idaho.gov

garrick.baxter@idwr.idaho.gov

John K. Simpson

MARTEN LAW LLP

P.O. Box 2139 Boise, ID 83701-2139

jsimpson@martenlaw.com

Travis L. Thompson

MARTEN LAW LLP P.O. Box 63

Twin Falls, ID 83303-0063

tthompson@martenlaw.com

jnielsen@martenlaw.com

W. Kent Fletcher

FLETCHER LAW OFFICE

P.O. Box 248 Burley, ID 83318

wkf@pmt.org

Thomas J. Budge

Elisheva M. Patterson

RACINE OLSON

P.O. Box 1391 Pocatello, ID 83204-1391

tj@racineolson.com

elisheva@racineolson.com

Candice McHugh

Chris Bromley

MCHUGH BROMLEY, PLLC

380 South 4th Street, Suite 103 Boise, ID

83702 cbromley@mchughbromley.com

cmchugh@mchughbromley.com

Kathleen Marion Carr

US Dept. Interior 960 Broadway Ste 400

Boise, ID 83706

kathleenmarion.carr@sol.doi.gov

David W. Gehlert

Natural Resources Section Environment and

Natural Resources Division U.S. Department

of Justice

999 18th St., South Terrace, Suite 370

Denver, CO 80202

david.gehlert@usdoj.gov

Matt Howard

US Bureau of Reclamation

1150 N Curtis Road Boise, ID 83706-1234

mhoward@usbr.gov

Sarah A Klahn

Somach Simmons & Dunn

1155 Canyon Blvd, Ste. 110 Boulder, CO

80302 sklahn@somachlaw.com

dthompson@somachlaw.com

Rich Diehl

City of Pocatello

P.O. Box 4169 Pocatello, ID 83205

rdiehl@pocatello.us

Robert L. Harris

HOLDEN, KIDWELL, HAHN & CRAPO,

PLLC

P.O. Box 50130 Idaho Falls, ID 83405

rharris@holdenlegal.com

Robert E. Williams
WILLIAMS, MESERVY, & LOTHSPREICH,
LLP P.O. Box 168 Jerome, ID 83338
rewilliams@wmlattys.com

Skyler C. Johns
Nathan M. Olsen Steven L. Taggart
OLSEN TAGGART PLLC P.O. Box 3005
Idaho Falls, ID 83403
sjohns@olsentaggart.com
nolsen@olsentaggart.com
staggart@olsentaggart.com

Randall D. Fife City
Attorney, City of Idaho Falls
P.O. Box 50220 Idaho Falls, ID 83405
rfife@idahofallsidaho.gov

Corey Skinner
IDWR—Southern Region
1341 Fillmore St., Ste. 200 Twin Falls, ID
83301-3033
corey.skinner@idwr.idaho.gov

Tony Olenichak IDWR—Eastern Region
900 N. Skyline Drive, Ste. A Idaho Falls, ID
83402
Tony.Olenichak@idwr.idaho.gov

William A. Parsons
PARSONS SMITH & STONE
P.O. Box 910 Burley, ID 83318
wparsons@pmt.org

/s/ Candice McHugh

Candice M. McHugh