

**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

**ORDER DENYING MOTION FOR
RECONSIDERATION OF DENIAL
OF CONTINUANCE**

BACKGROUND

On April 21, 2023, the Director of the Idaho Department of Water Resources (“Department”) issued his *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”) and his *Final Order Regarding April 2023 Forecast Supply* (“As-Applied Order”). The Methodology Order revises the nine steps used to determine material injury to members of the Surface Water Coalition (“SWC”). The As-Applied Order predicts a shortfall for the 2023 irrigation season, which will result in mitigation requirements or curtailment for ground water rights with priority dates junior to December 30, 1953.

Anticipating that one or more parties would request a hearing pursuant to Idaho Code § 42-1701A(3) in response to one or both of the orders, the Director also issued a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* (“Notice of Hearing”) on April 21, 2023. The Notice of Hearing scheduled a prehearing conference for April 28, 2023, and an in-person evidentiary hearing on the Methodology Order and As-Applied Order for June 6–10, 2023.

Immediately before the April 28, 2023 prehearing conference, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Idaho Falls, Jerome, Paul, Pocatello, Richfield, Rupert, Shoshone, and Wendell (collectively the “Cities”) filed a *Motion for Continuance* requesting that the Director continue the June 6-10 evidentiary hearing “until a date in December or January 2024” Mot. for Continuance at 8.

During the April 28, 2023 prehearing conference, the Cities presented argument in support of their *Motion for Continuance*. The Idaho Ground Water Appropriators, Inc. (“IGWA”), Bonneville-Jefferson Groundwater District (“BJGD”), and McCain Foods orally moved to join the Cities’ *Motion for Continuance*. The Cities requested that the hearing be delayed approximately six months. *Id.* The Cities asserted that additional time is needed to conduct discovery, prepare witnesses, properly evaluate the updated Methodology Order and As-Applied Order, and because one of its attorneys (Ms. Candice McHugh) will be unable to appear in person June 6–10. *Id.* at 4–6. The Cities further asserted the Director should grant their

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request because no exigency exists given the above-average snowfall this year. *Id.* at 6–8. The SWC opposed the Cities’ motion, arguing the hearing should remain as scheduled on June 6–10, 2023.

The Director orally denied the Cities’ request to delay the hearing until December or January 2024. The Director stated he was, however, willing to move the hearing anytime within the first three weeks of June 2023 if all the parties agreed to move the hearing. In denying the Cities’ request, the Director emphasized his court-ordered obligation to timely predict water supplies and issue orders timely to ensure senior water right holders are protected.

On May 5, 2023, the Director issued an *Order Denying the Cities’ Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* (“Order Denying Motion to Continue”). In the order, the Director memorialized his oral denial of the Motion for Continuance but advised that he was willing to move the hearing within the first three weeks of June 2023 if the parties filed a stipulated motion requesting the change. *Order Denying Motion to Continue* at 2. By separate order, the Director authorized Ms. McHugh to appear at the hearing remotely. Scheduling Order and Order Authorizing Remote Appearance at Hr’g at 3.

On May 5, 2023, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Idaho Falls, Jerome, Paul, Pocatello, Richfield, Rupert, Shoshone, and Wendell along with IGWA, BJGD, and Bingham Groundwater District (collectively the “Groundwater Users”) filed a *Motion for Reconsideration of Denial of Continuance* (“Motion for Reconsideration”) asking the Director to reconsider his order denying the request to continue the hearing. In support of its Motion for Reconsideration, the Groundwater Users filed declarations from the following individuals: Candice McHugh, counsel for the Coalition of Cities, Amalgamated Sugar Company, and McCain Foods; Skyler Johns, Counsel for BJGD; Thane Kindred and Bryce Contor, experts for BJGD; and Sophia Sigstedt and Jaxon Higgs, experts for IGWA.

On May 8, 2023, the SWC filed *Surface Water Coalition’s Opposition to Groundwater Users’ Motion for Reconsideration of Order Denying Motion for Continuance* (“Objection”).

ANALYSIS

Rule 560 of the Department’s Rules of Procedure grants the presiding officer the discretion to continue a proceeding. IDAPA 37.01.01.560. Rules 710 and 711 advise that scheduling orders are interlocutory orders, and that the presiding officer has the discretion to “rescind, alter or amend any interlocutory order...”. IDAPA 37.01.01.710–711.

A. Unavailability of Counsel and Experts.

The Groundwater Users contend the June 6–10 hearing should be continued due to the unavailability of numerous witnesses and an attorney. *Motion for Reconsideration* at 3–5. The Groundwater Users further contend that a failure to continue the hearing will result in prejudice to the Groundwater Users. *Id.* at 5. To support their unavailability argument, the Groundwater Users submitted declarations from the following individuals:

Jaxon Higgs. Mr. Higgs is a hydrogeologist who provides technical analysis to IGWA. Decl. of Jaxon Higgs ¶¶ 3, 4. Mr. Higgs advises that he will be on a road trip vacation in Mexico from May 27–June 10 and will be unavailable to attend the hearing on June 6–10. *Id.* ¶ 7.

Sophia Sigstedt. Ms. Sigstedt is a hydrogeologist who provides technical analysis to IGWA. Decl. of Sophia Sigstedt ¶¶ 2, 3. Ms. Sigstedt advises she is dealing with a medical condition that prohibits her from leaving her home state of Colorado until July 10, 2023, and limits the amount of work she can perform during this time. *Id.* ¶ 15.

Candice McHugh. Ms. McHugh is an attorney representing the Coalition of Cities, Amalgamated Sugar, and McCain Foods. Decl. of Candice McHugh ¶ 2. Ms. McHugh advises that her partner Chris Bromley has an argument before the Idaho Supreme Court on June 5, and will need the week of May 29 to prepare for that argument. *Id.* Ms. McHugh advises that she will be out of state from June 4–8, and that she will be flying “virtually all day” on June 4 and June 8. *Id.* ¶ 6. Ms. McHugh contends that, given their schedules, she and Mr. Bromley will be unable to fully and fairly represent their clients if the hearing is held on June 6–10. Decl. of Candice McHugh ¶ 7.

In response, the SWC points out that the Department has already authorized Ms. McHugh to appear remotely to accommodate her travel, and that the SWC would stipulate to Ms. Sigstedt’s appearing remotely to accommodate her medical condition. *Objection* at 8–9 n.8.

The Director recognizes that some flexibility with witnesses and attorneys is necessary. Ms. McHugh has already been granted the ability to appear remotely. Mr. Bromley, Ms. McHugh’s law partner, will be available to attend on the one day that Ms. McHugh will be traveling and unavailable. Clients of the McHugh Bromley law firm will have representation during all days of the hearing. Regarding the participation by experts, the Director will authorize Ms. Sigstedt and Mr. Higgs to participate in the hearing remotely.

B. Insufficient time to prepare.

The Groundwater Users next assert that the June 6–10 hearing should be continued because they are without sufficient time to prepare, resulting in prejudice. *Motion for Reconsideration* at 5–6. To support this claim, the Groundwater Users submitted declarations from the following individuals:

Greg Sullivan. Mr. Sullivan is an expert for the Coalition of Cities and the City of Pocatello. Decl. of Greg Sullivan ¶¶ 3–5. Mr. Sullivan asserts he will be on a trip in Europe from May 17–June 3, leaving him an insufficient amount of time to prepare for a hearing. *Id.* ¶¶ 20–21.

Mr. Sullivan estimates he needs 3–5 months to prepare for the hearing. *Id.* ¶ 25.

Bryce Contor. Mr. Contor is a hydrologist who consults for BJGWD. Decl. of Bryce Contor ¶¶ 2, 6. Mr. Contor asserts he does not have time to perform an adequate technical review of the information prior to the hearing. *Id.* ¶¶ 8, 10.

Thane Kindred. Mr. Kindred is a geologist hired by BJGWD to provide technical advice and conduct a comprehensive review of the Methodology Order. Decl. of Thane Kindred ¶¶ 3, 5. Mr. Kindred advises he will not have sufficient time to conduct his review prior to the June 6–10 hearing. *Id.* ¶¶ 5, 7. Mr. Kindred further advises he does not have all the information he needs and will need at least two months to conduct his analysis. *Id.* ¶¶ 5, 7.

Sophia Sigstedt. Ms. Sigstedt is a hydrogeologist who provides technical analysis to IGWA. Decl. of Sophia Sigstedt ¶¶ 2, 3. Ms. Sigstedt advises she would like to analyze *inter alia* the number of acres irrigated by the Twin Falls Canal Company, the Forecast Supply Predictors from 1900–2022, and whether the data supports the Director’s decision to use 2018 as the Baseline Year. *Id.* ¶¶ 8–10. Ms. Sigstedt advises she lacks sufficient time to conduct her analysis prior to the hearing on June 6–10, and further advises she will need until October of 2023 to complete her work. *Id.* ¶ 14.

Skyler Johns. Mr. Johns is an attorney for BJGWD. Decl. of Skyler Johns ¶¶ 2. Mr. Johns asserts he did not receive “formal notice” from the Department that it would transition from steady-state to transient-state analysis. *Id.* ¶ 5. Mr. Johns advises that neither himself nor his experts were part of the technical working group. *Id.* Mr. Johns further advises that as of the date he signed his declaration (May 5, 2023), he did not have access to all the documents he needs to conduct a review and prepare his legal arguments. *Id.* ¶ 7. Mr. Johns contends he will need at least 6 months to prepare for the hearing, and that without such time his clients will be prejudiced. *Id.* ¶¶ 8–10.

Candice McHugh. Ms. McHugh is an attorney representing the Coalition of Cities, Amalgamated Sugar, and McCain Foods. Decl. of Candice McHugh ¶ 2. Ms. McHugh further advises that “[t]he hearing as currently set will not allow me to assist or attend the hearing in any meaningful manner and prejudices the interest of McHugh Bromley, PLCC’s clients.” *Id.* ¶ 9.

The SWC responds that six weeks is plenty of time to prepare for a hearing, as evidenced by the fact that the First Methodology Order in this exact case was issued on April 7, 2010, with

an evidentiary hearing held on May 24, 2010. *Objection* at 7–8. The SWC further advises that this type of scheduling in a conjunctive management administration should surprise no one. *Id.*

While the Director recognizes that the current schedule may be a burden on the parties, it is a burden being born by all parties, both the senior water users and the junior ground water users. Plus, an accelerated schedule is not unheard of in water administrative proceedings. Furthermore, while Bonneville- Jefferson Groundwater District has decided to hire new counsel and hire its own new experts, this does not justify a continuance. BJGD has long been a party to this proceeding. The Director will not allow a junior ground water user that has long been a party to the proceeding to delay administration because new counsel and experts are hired.

The ground water users claim being surprised by changes to the Methodology Order. In the fall of 2022, the Department conducted multiple presentations regarding possible amendments to the *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fourth Methodology Order”). The Director also publicly expressed his intention to update the Fourth Methodology Order. The parties were notified that the Director was considering changes and the issues being considered by the Director. The Department distributed data, technical analysis, and recommendations to the parties’ technical experts. For some of the Department presentations, the experts submitted comments to the Department on the proposed changes. As the declarations show, the experts for IGWA and the Cities have represented those entities for many years. The experts have a familiarity with the methodology order. After considering the need of the senior water user to have timely administration versus the ground water users desire to have more time to prepare for hearing, the Director will adhere to the current schedule.

C. Current Conditions and Lack of prejudice to Groundwater Users.

In both their Motion for Continuance and Motion for Reconsideration, the Groundwater Users argue that there will be no prejudice to the senior surface water users this year because of high snowpack. The Director disagrees that high snowpack means the SWC will not be injured. While there is a good snowpack in the hills above the ESPA, snowpack is only part of the SWC’s water supply, and recharge from the aquifer is at a record low. Additionally, southern Idaho is emerging from a two-year drought, and the existing storage supply going into this irrigation season is low. Forecasters are uncertain whether the storage supply system will fill this year. The Director agrees with the SWC that the “current snowpack does not tell the whole story.” *Objection* at 9–10.

The Groundwater Users also contend that they have provided “sufficient mitigation this season so little to no injury will occur to the senior users.” *Motion for Reconsideration* at 3. Citing to IGWA’s *Notice of Ground Water District Mitigation* (“Notice of Mitigation”), the Groundwater Users argue that IGWA has “enough water to mitigate for its 2021 breach and for the predicted shortfall for the upcoming 2023 season.” *Id.* at 6. The Groundwater Users state, “[G]iven the fact that IGWA has enough water for this season to offset the entire injury forecasted to [Twin Falls Canal Company] ... the Director should consider that the junior water users ‘as a whole’ are complying with mitigation plans.” *Id.* at 7.

The problem with this argument is that IGWA's Notice of Mitigation does not say that it is agreeing to provide storage water "to offset the entire injury forecasted to [Twin Falls Canal Company]." IGWA's Notice of Mitigation states that it is acting on behalf of its member ground water districts and that IGWA is mitigating for its districts' "proportionate share" of the demand shortfall. *Notice of Mitigation* at 1–3.

But even more important, the Director is currently reviewing IGWA's Notice of Mitigation to determine whether the proposal would mitigate for the 2023 demand shortfall to the SWC. The Notice of Mitigation has several potential shortcomings:(1) Instead of relying on one single mitigation plan for all members, individual ground water districts are seeking to mitigate under different mitigation plans. This "hybridization" of mitigation plans presents serious questions about whether mixing of mitigation plans is allowable and whether there is compliance with a mitigation plan at all. (2) One of the mitigation plans, proposed in 2009 and approved in 2010, could be read to require IGWA, not individual ground water districts, to supply the entire demand shortfall to the SWC from rented storage water. The 2010 order approving the mitigation plan does not recognize a reduced mitigation obligation for IGWA based on IGWA's share of the mitigation obligation. Furthermore, the approved 2010 mitigation plan does not recognize an additional division of IGWA's obligation into fractional mitigation components for each of IGWA's members. (3) The ground water districts wanting to mitigate pursuant to the 2016 Stipulated Mitigation Plan have proportionately determined their individual obligations. But the mitigation plan does not recognize proportionate sharing of the storage water component. Further, the ground water districts are ignoring the additional requirement of an additional 30,000 acre-feet of storage to be rented for mitigation that was a component of an agreement to cure a breach of the 2016 Stipulated Mitigation Plan. (4) Jefferson-Clark Groundwater District is claiming to mitigate with storage water but none of the storage water agreements presented to the Director are in the name of Jefferson-Clark Groundwater District. (5) The Notice of Mitigation was filed by Thomas Budge on behalf of all IGWA members and purports to provide storage agreements for BJGWD and BGWD. Yet both BJWD and BGWD have recently hired independent counsel. It is unclear therefore whether IGWA's Notice of Mitigation would bind BJGWD and BGWD. Moreover, as the SWC observes, there are concerns about whether IGWA breached the 2016 Stipulated Mitigation Plan. In conclusion, it is far from clear that the IGWA's Notice of Mitigation complies with the requirements of an approved mitigation plan.

The Director has a responsibility to timely respond to injury incurred by senior water users and there should be no unnecessary delays in that process. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 874, 154 P.3d 433, 445 (2007). "Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call." *Id.* The Department also agrees with the SWC that "[i]n practice, an untimely decision effectively becomes the decision; i.e. no decision is the decision." *Objection* at 3 (citing *Order on Plaintiffs' Motion for Summary Judgment* at 97 (*AFRD#2 et al. v. IDWR*, No. CV-2006-600 (Gooding County Dist. Ct. Idaho June 2, 2006))). The Director will not be issuing a curtailment order until after a hearing in this matter so that junior ground water users have the opportunity for a hearing before being curtailed. To ensure timely administration for predicted material injury in this current irrigation season, the Director cannot agree to continue the hearing beyond

June. The Director reiterates that he is willing to work with the parties to move the hearing to any time within the first three weeks of June 2023.¹

ORDER

Based on the forgoing discussion, IT IS HEREBY ORDERED that the Groundwater Users' *Motion for Reconsideration of Denial of Continuance* is DENIED.

IT IS FURTHER ORDERED that Sophia Sigstedt and Jaxon Higgs may appear virtually by video link on June 6–10, 2023. Sarah Tschohl, on behalf of the Department, will email the remote participation link to Ms. Sigstedt and Mr. Higgs no later than May 30, 2023.

DATED this 19th day of May 2023.



Gary Spackman
Director

¹ The Groundwater Users allege that the Director has “delegated to the SWC the ability to veto a continuance to a reasonable hearing date.” *Motion for Reconsideration* at 7. This is inaccurate. Consistent with the obligation to timely respond, the Director settled on a hearing date that would provide the parties time to prepare for hearing but also allow for curtailment during this irrigation season if necessary. The Director has repeatedly expressed his willingness reset the hearing within the first three weeks of June.

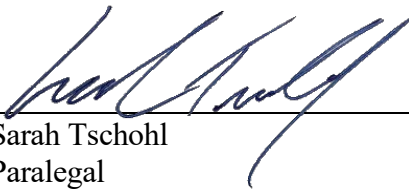
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of May 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

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