

**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:

TOM C. ARKOOSH
ARKOOSH LAW OFFICES
PO BOX 32
GOODING ID 83330
(208) 934-8873
alo@cableone.net

U.S Mail, Postage Prepaid
 Facsimile
 E-mail

W. KENT FLETCHER
FLETCHER LAW OFFICE
PO BOX 248
BURLEY ID 83318-0248
(208) 878-2548
wkf@pmt.org

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

ROGER D. LING
LING ROBINSON
PO BOX 396
RUPERT ID 83350-0396
(208) 436-6804
rdl@idlawfirm.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

JOHN A. ROSHOLT
TRAVIS L. THOMPSON
BARKER ROSHOLT
113 MAIN AVENUE WEST, SUITE 303
TWIN FALLS ID 83301-6167
(208) 735-2444
jar@idahowaters.com
tlt@idahowaters.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

JOHN K. SIMPSON
BARKER ROSHOLT
PO BOX 2139
BOISE ID 83701-2139
(208) 344-6034
jks@idahowaters.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

JEFFREY C. FEREDAY
MICHAEL C. CREAMER
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701-2720
(208) 388-1200
cf@givenspursley.com
mcc@givenspursley.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

SCOTT L. CAMPBELL
MOFFATT THOMAS
PO BOX 829
BOISE ID 83701
(208) 385-5384
slc@moffatt.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

KATHLEEN M. CARR
OFFICE OF THE SOLICITOR
960 BROADWAY, SUITE 400
BOISE ID 83706
(208) 334-1378

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

MATT HOWARD PN-3130
US BUREAU OF RECLAMATION
PACIFIC NORTHWEST REGION
1150 NORTH CURTIS ROAD
BOISE ID 83706-1234
(208) 378-5003
mhoward@pn.usbr.gov

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

JOSEPHINE P. BEEMAN
BEEMAN & ASSOCIATES
409 WEST JEFFERSON STREET
BOISE ID 83702
(208) 331-0954
jo.beeman@beemanlaw.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

SARAH A. KLAHN
WHITE & JANKOWSKI
511 16TH STREET, SUITE 500
DENVER CO 80202
sarahk@white-jankowski.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

MICHAEL S. GILMORE
ATTORNEY GENERAL'S OFFICE
PO BOX 83720
BOISE ID 83720-0010
(208) 334-2830
mike.gilmore@ag.idaho.gov

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

TERRY T. UHLING
J.R. SIMPLOT COMPANY
999 MAIN STREET
BOISE ID 83702
(208) 336-2110
tuhling@simplot.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

JAMES C. TUCKER
IDAHO POWER COMPANY
1221 WEST IDAHO STREET
BOISE ID 83702
(208) 388-2112
jamestucker@idahopower.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

JAMES S. LOCHHEAD
BROWNSTEIN HYATT & FARBER
410 17TH STREET, 22ND FLOOR
DENVER CO 80202
(303) 223-1100
jlochhead@bhf-law.com

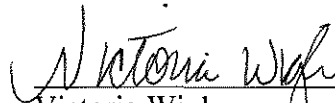
U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

RON CARLSON
LEWIS ROUNDS
IDWR
900 NORTH SKYLINE DRIVE
IDAHO FALLS ID 83402-6105
(208) 525-7177
ron.carlson@idwr.idaho.gov
lewis.rounds@idwr.idaho.gov

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

ALLEN MERRITT
CINDY YENTER
IDWR
1341 FILLMORE STREET, SUITE 200
TWIN FALLS ID 83301-3033
(208) 736-3037
allen.merritt@idwr.idaho.gov
cindy.yenter@idwr.idaho.gov

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail



Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources