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**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, ) **IGWA AND POCATELLO'S**  
AMERICAN FALLS RESERVOIR DISTRICT #2, ) **JOINT MOTION TO CLARIFY**  
BURLEY IRRIGATION DISTRICT, MILNER ) **SCHEDULING ORDER**  
IRRIGATION DISTRICT, MINIDOKA IRRIGATION )  
DISTRICT, NORTH SIDE CANAL COMPANY, )  
AND TWIN FALLS CANAL COMPANY )  
\_\_\_\_\_ )

COMES NOW, Idaho Ground Water Appropriators and its Ground Water District members for and on behalf of their members, and its other members collectively referred to herein as "IGWA" and City of Pocatello ("Pocatello") and hereby submit this *Joint Motion to Clarify Scheduling Order* dated August 1, 2007.

In recent conversations with opposing counsel in this matter, it appears that the Parties to this case (Surface Water Coalition, Bureau of Reclamation, IGWA and Pocatello) may be interpreting the requirements of the August 1, 2007 Scheduling Order differently. In order to clarify the intent of the August 1 Scheduling Order, and in the hope of creating the most robust record possible of this proceeding, IGWA and Pocatello seek clarification of the materials to be filed on September 26, 2007. IGWA and Pocatello also seek clarification of the scope of the testimony to be presented by experts in the hearing, scheduled to begin on January 16, 2008.

1. A little background on the origins of the current scheduling order may be useful to the Hearing Officer in order to resolve the confusion. During a June 2007 status conference before the Director, the Parties announced that they had reached a written stipulation about the conduct of the hearing in this matter. The Parties' discussions were somewhat complicated by the fact that earlier scheduling orders and hearing efficiencies had been established by Director Dreher.
  - a. Unlike in the Thousand Springs dispute, currently ongoing, the Parties in the above captioned matter had conducted substantial discovery and had developed, pursuant to the ground rules of the July 22, 2005 Scheduling Order, expert witness reports.
  - b. The Parties talked about how to shorten the time necessary for live testimony, as well as what to do with the already-in-existence expert reports.<sup>1</sup>
  - c. The fundamental agreement was that, in order to shorten the hearing, pre-filed written direct testimony for expert witnesses would be submitted by a date certain along with the exhibits to be used with that testimony.
  - d. Further, updated expert reports of previously disclosed expert witnesses could also be submitted. It was also agreed, that the Parties would pre-file a rebuttal report, or written

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<sup>1</sup> Although the Parties exchanged expert reports, the Director declined to receive them in advance of trial out of concerns that the record would be prejudiced if the expert reports were submitted prior to the establishment of a testimonial basis for the opinions expressed therein. See, Order Regarding Service of Expert Reports dated January 9, 2006.

expert rebuttal testimony, and exhibits to be used with the rebuttal testimony by a date certain.

- e. With regard to lay witnesses, it was left to the discretion of the Parties whether they wanted to provide pre-filed written direct testimony, pre-filed written rebuttal testimony and associated exhibits.
  - f. The hearing, now set to commence January 16, 2008, would be limited to cross-examination and redirect testimony of experts; as for lay witnesses, they would be limited to cross-examination and redirect testimony only if pre-filed testimony was provided by the relevant deadlines. (Based on the current scheduling order, November 14, 2007 is the current deadline for pre-filed direct testimony for lay witnesses).
2. This agreement between the Parties about hearing efficiencies was reflected in the Director's Scheduling Order of June 20, 2007. The relevant language from the June 20, 2007 scheduling order is:

August 22, 2007—deadline for updating expert reports previously disclosed;

August 22, 2007—deadline for pre-filed testimony (required for retained consultants/optional for others), and all exhibits to be used at hearing with experts.

The language was modified in August 1, 2007 (an order entered without any discussion by the Parties that the meaning of the language would differ):

September 26, 2007---Deadline for updating expert reports previously disclosed; deadline for pre-filed direct testimony (required for retained consultants/optional for others), and all exhibits to be used at hearing with experts;

3. It appears from recent conversations with various opposing counsel that different Parties may be reading the scheduling order to require different types of materials to be filed on September 26.
  - a. Certain of the SWC parties appear to be poised to file only updated expert reports—no exhibits and no written testimony.
  - b. IGWA and Pocatello are planning to file written direct testimony and exhibits as specified in the Scheduling Order.
4. Pocatello and IGWA seek clarification of what materials must be filed on September 26, 2007. It will improve the record if all Parties submit the same materials.

Further, IGWA and Pocatello request that the Hearing Officer clarify the scope of the hearing in this matter to limit the presentation at the hearing to submission of the pre-filed testimony or report, and the pre-filed exhibits, with no live direct testimony and to allow cross-examination of the expert witnesses, regardless of what the parties chose to file for pre-filed testimony.

IGWA and Pocatello ask that the Hearing Officer expedite a ruling on this to rule no later than Friday, September 21, 2007 in order to facilitate compliance with the Scheduling Order on the filing deadline next Wednesday, September 26, 2007.

DATED this 18<sup>th</sup> day of September, 2007.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 18<sup>th</sup> day of September, 2007, I served a true and correct copy of the foregoing MOTION TO CLARIFY SCHEDULING ORDER by delivering it to the following individuals by the method indicated below, addressed as stated.

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