

District Court - SRBA Fifth Judicial District In Re: Administrative Appeals County of Twin Falls - State of Idaho	
JAN 13 2017	
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

SUN VALLEY COMPANY,

Petitioner,

vs.

GARY SPACKMAN, Director of the Idaho  
 Department of Water Resources, and IDAHO  
 DEPARTMENT OF WATER RESOURCES,

Respondents.

Case No. CV01-16-23185

**MEMORANDUM IN SUPPORT OF  
 MOTION TO DETERMINE  
 JURISDICTION**

## I. INTRODUCTION

On July 7, 2016, the Director of the Idaho Department of Water Resources (“Director”) sent a letter to potentially interested water users stating he intended to consider creating a ground water management area (“GWMA”) for the Eastern Snake Plain Aquifer (“ESPA”), after conducting several public meetings relating thereto. On the afternoon of July 25, 2016,<sup>1</sup> the Company filed a Petition for Declaratory Ruling with the Department seeking to clarify a number of legal questions involving the Director’s interpretation of Idaho Code Section 42-233b, and the applicability of certain Department rules to the creation of a proposed ESPA GWMA.

On November 2, 2016, the Director issued an Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area, which is attached as Exhibit C to the Petition for Judicial Review (the “GWMA Order”). On November 3, 2016, the Director issued an Order Denying Petition for Declaratory Rulings, which is attached as Exhibit D to the Petition for Judicial Review (the “Declaratory Ruling Order,” and collectively with the GWMA Order, the “Orders”). The Director identified both Orders as final orders issued by the Department pursuant to Idaho Code Section 67-5246.

Pursuant to Idaho Code Section 67-5246(4) and Rule 740 of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01), on November 16, 2016, the Company filed a Petition for Reconsideration of the GWMA Order, as well as a Petition for Reconsideration of the Declaratory Ruling Order. On the same day, pursuant to

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<sup>1</sup> July 25, 2016 was the date of the first public meeting, conducted in Hailey, Idaho. Company officials and counsel attended that public meeting in the morning to evaluate and learn about the possible creation of an ESPA GWMA.

Idaho Code Section 42-1701A(3), and as specified by the explanatory information accompanying the Orders pursuant to Rule 740, the Company filed a request for hearing as to each of the Orders.

On December 2, 2016, the Director granted hearings pursuant to the foregoing requests for hearing. The Director did not, however, grant the Petitions for Reconsideration of either the GWMA Order or the Declaratory Ruling Order within 21 days. Therefore, the Petitions for Reconsideration were deemed denied by operation of law. *See* IDAHO CODE § 67-5246(5); IDAPA 37.01.01.740.02(a). The 28 day appellate deadline relating to each of the GWMA Order and the Declaratory Ruling Order commenced to run. *See* IDAHO CODE § 67-5246(5); IDAPA 37.01.01.740(d).

On December 23, 2016, the Company filed two petitions for judicial review—one seeking review of the GWMA Order and one seeking review of the Declaratory Ruling Order. The Company seeks a determination that this Court has jurisdiction to review each.

## II. ARGUMENT

### A. The Court Has Jurisdiction

Pursuant to Idaho Code Section 67-5246(5), each of the Orders became “effective” when the Director took no action on the Company’s timely petitions for reconsideration within 21 days of filing. *See also* IDAPA 37.01.01.740.02(a). Each of the Orders was designated, and remains, a final and effective order under Idaho law and the Department’s Procedural Rules. *See* IDAHO CODE § 67-5246(1); IDAPA 37.01.01.740.01. The Company, having received notice of the Orders, is required to comply with them. *See* IDAHO CODE § 67-5246(6).

A party's right to appeal an administrative decision is governed by statute.

*Giltner Dairy, LLC v. Jerome County*, 150 Idaho 559, 249 P.3d 1175 (2011). Pursuant to Idaho Code Section 67-5270(3), the Company is entitled to judicial review under the Idaho Administrative Procedure Act once it has complied with the requirements of Sections 67-5271 through 67-5279, Idaho Code. See IDAHO CODE § 67-5270(3); see also IDAHO CODE § 42-1701A(4) ("Any person who is aggrieved by a final decision or order of the director is entitled to judicial review."). The Company has a right to judicial review of the Orders once it has "exhausted all administrative remedies required" in the Act. See IDAHO CODE § 67-5271(1).

The exhaustion requirement is met as to the Orders. Reconsideration of the Orders was deemed denied pursuant to the Department's Procedural Rules and the Idaho Administrative Procedures Act. The Orders are final orders of the Director, subject to judicial review, as the Director acknowledged when he issued them. While pursuant to Idaho Code Section 42-1701A(3), the Director might issue an appealable final order at some time in the future "following the hearing," such an order will nevertheless constitute a separate final order because he has elected not to reconsider the Orders at issue. Importantly, chapter 17, title 42, Idaho Code does not require that the "final decision or order of the director" (§ 42-1701A(4)) be a "final order of the director issued *following the hearing*" (§ 42-1701A(3)) in order for such final decision or order to be the subject of judicial review. In short, unless the Director has granted the hearing for the purpose of reconsidering the Orders in question—which he has not done in this case—a hearing pursuant to Section 42-1701A(3) is not a remedy that must be exhausted in advance of this Court's review. Furthermore, at present, the Orders are "effective," see IDAHO CODE § 67-5246(5); see also IDAHO R. CIV. P. 84(m), and aggrieved parties are left without an adequate remedy absent appeal.

Critically, the filing of a petition for judicial review within the time permitted by statute is jurisdictional. *See Horne v. Idaho State University*, 138 Idaho 700, 703, 69 P.3d 120, 123 (2003) (citing *Grand Canyon Dories, Inc. v. Idaho State Tax Comm'n*, 121 Idaho 515, 826 P.2d 476 (1992)). In fact, the Department has recently taken that very position, adopted by the Idaho Supreme Court, in *City of Eagle v. Idaho Department of Water Resources*, 150 Idaho 449, 247 P.3d 1037 (2011). There, the district court dismissed a petition for judicial review filed by the City of Eagle after the City was not timely and effectively served with the Department's decision on a petition for reconsideration of an administrative action. It would certainly be disingenuous for the Department to now take the position that, notwithstanding the finality of the Orders after petitions for reconsideration and the timeliness of the petitions for judicial review, the reviewing Court still does not have jurisdiction.

The Orders are final and effective orders, the Director has denied reconsideration thereof, and the 28 day period in which to seek judicial review has now run. The Company timely sought review. If the Company had not petitioned this Court for judicial review, and if the Court fails to exercise jurisdiction, the only meaningful opportunity for judicial review of the Orders will have been denied. The Court should therefore find that it has jurisdiction to review each of the Orders.

**B. The Director Does Not Have Jurisdiction.**

The Company requests that the Court also find that, by virtue of the timely filed petitions for judicial review, the Director does not have jurisdiction to proceed with a hearing. In *H&V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors*, 113 Idaho 646, 747 P.2d 55 (1987), an engineering firm subject to administrative discipline sought review of the Board's determination in district court. *Id.* at 647-78, 747 P.2d at 56-57. The

district court ordered remand, and the engineering firm timely perfected its appeal to the Supreme Court from that order for remand. *Id.* Thereafter, on remand, the Board amended its findings, and the district court then affirmed the Board. *Id.* The Idaho Supreme Court held that the district court was without jurisdiction to subsequently affirm the Board's findings upon the engineering firm's timely perfection of its appeal from the prior order for remand. *Id.*

Those circumstances are analogous to the posture of these matters. The Director issued final appealable Orders, and thereafter declined to reconsider them. The Company timely petitioned this Court to review the Orders. The Petitions for Judicial Review of the Orders, which Orders were final and appealable to this Court as a matter of right, divested the Department of jurisdiction to thereafter substantively modify or amend the Orders, by virtue of a hearing or otherwise. The Department's Procedural Rules clearly provide as much:

The agency head may modify or amend a final order of the agency (be it a preliminary order that became final because no party challenged it or a final order issued by the agency head itself) *at any time before notice of appeal to District Court has been filed or the expiration of the time for appeal to District Court, whichever is earlier*, by withdrawing the earlier final order and substituting a new final order for it.

IDAPA 37.01.01.760 (emphasis added).

The Department's Procedural Rules state that the Director only had the authority to modify or amend the Orders *before* the Company filed the Petitions for Judicial Review. Because the petitions have been filed, the Director no longer has the authority to withdraw, modify or amend the Orders. While the Orders remain effective and the Director has jurisdiction to enforce the Orders during the pendency of this Court's review pursuant to Idaho Code Section 67-5274 and Rule 84(m), Idaho Rules of Civil Procedure, he does not have jurisdiction to proceed with any hearing that may result in the modification or amendment of the Orders.

### III. CONCLUSION

For the foregoing reasons, the Company respectfully requests that the Court find it has jurisdiction to review the Orders, and that the Director does not have jurisdiction to proceed with hearings related thereto.

DATED this 13th day of January, 2017.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13th day of January, 2017, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DETERMINE JURISDICTION** to be served by the method indicated below, and addressed to the following:

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