

deny SVC's motion. In addition, the Coalition joins in the *Response* filed by IDWR Director Gary Spackman on January 27, 2017 (hereafter "*IDWR Br.*").

BACKGROUND

The factual background related to SVC's motion is set forth in the Director's *Response*. See *IDWR Br.* at 2-3. The Coalition adopts that information for purposes of its response brief.

ARGUMENT

I. SVC Has Failed to Exhaust its Administrative Remedies.

The Idaho Administrative Procedures Act ("Idaho APA"), I.C. § 67-5201 *et seq.*, sets out the process for challenging a state agency's action. Further, Title 42, Idaho Code, complements this process with respect to actions by IDWR's Director. See I.C. § 42-1701A. Importantly for purposes of SVC's motion, the statute provides:

(3) Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, . . . who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.

I.C. § 42-1701A(3).

The statute allows a person who believes they are "aggrieved" by a Director's action or order the opportunity for an administrative hearing on the matter.¹ On November 16, 2016, SVC availed itself of this statutory remedy and requested a hearing before the Director. See *Ex. A; SVC Petition Requesting a Hearing* at 1-2. The Director granted SVC's request and held an initial pre-hearing conference in the matter on January 12, 2017.

¹ The Coalition disputes the claim that SVC is "aggrieved" by the Director's GWMA Order, and reserves the right to file the appropriate motion before the Director regarding SVC's legal standing to contest the same. SVC erroneously claims that it "is required to comply with" the Director's orders in this matter. *SVC Br.* at 3. To the best of the Coalition's knowledge, SVC does not own any water rights subject to the area designated as a GWMA. SVC operates properties outside the designated ESPA GWMA.

The Idaho APA plainly provides that a “person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter.” I.C. § 67-5271(1) (emphasis added). Idaho Code § 67-5270(1) further provides that “[j]udicial review of agency action shall be governed by the provisions of this chapter unless other provision of law is applicable to the particular matter.” Clearly, the hearing opportunity outlined in I.C. § 42-1701A(3) is an “other provision of law” that applies to the Director’s GWMA Order and SVC requested an administrative hearing accordingly.

As such, the Idaho Supreme Court has held that “where an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before the courts will act.” *Regan v. Kootenai Cty.*, 140 Idaho 721, 724 (2004). Since SVC has not exhausted its administrative remedies, the Court should deny SVC’s motion.

II. The Administrative Hearing will Provide Aggrieved Parties With a Forum to Present Evidence and Have the Director Address the Issues First.

SVC’s motion raises the practical issue of where this dispute should be heard first, i.e. before IDWR or this Court. SVC wrongly claims that its present petition is “the only meaningful opportunity for judicial review” of the GWMA Order. *SVC Memo.* at 5. This is not true as recognized by SVC’s own filing with the Director. Notably, every issue that SVC raised in its *Petition for Reconsideration* was incorporated by SVC as an issue for the administrative hearing. *See Ex. A, SVC Petition Requesting a Hearing* (Nov. 16, 2016) (“The grounds for contesting the action are set forth in Sun Valley’s *Petition for Reconsideration*”). Once the hearing is held – and the issues raised by SVC are heard and determined by the Director – any proper party will be afforded the opportunity for judicial review at that time. *See* I.C. § 42-1701A(3) & (4). The Director confirmed this in his *Response*. *See IDWR Br.* at 5.

The Director is the agency head statutorily charged with administering water rights and managing the State's water resources. *See* I.C. §§ 42-237a; 42-602, 603. The Director is even required to have specialized education, training, and experience to carry out his duties. *See* I.C. § 42-1701(2) (list of qualifications); *see also*, *A&B Irr. Dist. v. State of Idaho (In re SRBA)*, 157 Idaho 385, 394 (2014) (“This reaffirms the need for the Director to have the technical expertise to properly administer water rights”).

Therefore, an administrative hearing before the Director will provide SVC (assuming it is a proper party) and others a forum to address lawful challenges to the GWMA Order. If SVC believes it has evidence to further inform the Director's decision-making then it is certainly more practical to have the same first presented to the agency for review and consideration. *See e.g.* *White v. Bannock Cty. Comm'rs*, 139 Idaho 396, 401-02 (2003) (“Important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body”). Stated another way, the Director should hear the technical and other information first so that any future judicial review is conducted with a complete and comprehensive administrative record. Moreover, even if SVC prevails in some fashion now, it is foreseeable that the matter would be remanded to the Director anyway. *See* I.C. § 67-5279(2) (“If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary”).

In sum, SVC has presented no valid reason why this Court at this time is in a better position to review grievances with the GWMA Order.

Finally, judicial review at this point is a waste of the parties' and this Court's time and resources. Since SVC has requested an administrative hearing and the Director is prepared to proceed with the contested case, this Court should allow the agency to address such challenges first and then proceed with judicial review on a complete record later.² Such a process provides an efficient and logical sequence to any litigation over the GWMA Order. The general policy behind this approach is also supported by Idaho law. *See e.g., Grever v. Idaho Tele. Co.*, 94 Idaho 900, 902 (1972) ("The doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision. The doctrine of primary jurisdiction is not an inflexible mandate but rather is predicated on an attitude of judicial self-restraint, and is generally applied when the court believes that considerations of policy recommend that the issue be left to the administrative agency for initial determination.").

Moreover, this sequence has already been approved by this Court in a separate action concerning the GWMA Order. *See e.g. Order Granting Joint Motion to Stay Proceeding* at 1, (Fourth Jud. Dist., Ada County, Case No. CV-01-16-21480, Dec. 7, 2016) ("The above-captioned proceeding is hereby stayed pending issuance of a final order by the Director following his hearing on his *Order*").³ The Court should deny SVC's motion accordingly.

CONCLUSION

SVC requested an administrative hearing on the Director's GWMA Order. The Director is prepared to proceed with the administrative case and hold a hearing pursuant to Idaho law.

² SVC's premature appeal and present motion has already delayed the administrative case. *See Notice of Continued Pre-Hearing Conference; Order Staying Proceedings Except Intervention* (Docket No. P-DR-2016-001) (Jan. 17, 2017) (continuing pre-hearing conference until March 22, 2017).

³ Even if the Court retains jurisdiction at this time, in the interest of judicial economy the Court could, in an exercise of discretion, consolidate and stay all appeals related to the GWMA Order until the administrative process is completed. *See* I.R.C.P. 84(r); 42.

See I.C. § 42-1701A(3). Given this status, SVC has failed to exhaust its administrative remedies and the Court should deny SVC's motion accordingly.

Respectfully submitted this 2nd day of February, 2017.

BARKER ROSHOLT & SIMPSON LLP

FLETCHER LAW OFFICE



John K. Simpson
Travis L. Thompson
Paul L. Arrington



*Attorneys for American Falls Reservoir
District #2 and Minidoka Irrigation District*

*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company, and Twin Falls
Canal Company*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of February, 2017, I served a true and correct copy of the foregoing to the following by the method indicated:

By Hand Delivery:

SRBA District Court
253 3rd Ave. North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

By U.S. Mail:

Director of IDWR
P.O. Box 83720
Boise, Idaho 83720-0098

By Email Only:

Garrick Baxter
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
garrick.baxter@idwr.idaho.gov
emmi.blades@idwr.idaho.gov

Albert P. Barker
Barker Rosholt & Simpson LLP
P.O. Box 2139
Boise, Idaho 83701-2139
apb@idahowaters.com

Scott L. Campbell
Campbell Law Chartered
P.O. Box 170538
Boise, Idaho 83717
scott@slcexh2o.com

Chris M. Bromley
Candice McHugh
McHugh Bromley PLLC
380 S 4th St., Ste. 103
Boise, Idaho 83702
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

Sarah A. Klahn
Mitra M. Pemberton
White & Jankowski LLP
511 Sixteenth Street, Ste. 500
Denver, CO 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com

Randall C. Budge
Thomas J. Budge
Racine Olson Nye Budge
P.O. Box 1391
Pocatello, Idaho 83204-1391
rcb@racinelaw.net
tjb@racinelaw.net

Dylan B. Lawrence
J. Will Varin
Varin Wardwell LLC
P.O. Box 1676
Boise, Idaho 83701-1676
dylanlawrence@varinwardwell.com
willvarin@varinwardwell.com

Michael C. Creamer
Michael P. Lawrence
Givens Pursley LLP
P.O. Box 2720
Boise, Idaho 83701-2720
mcc@givenspursley.com
mpl@givenspursley.com

A Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello, Idaho 83201
dtranmer@pocatello.us

Robert E. Williams
Williams Mcservy & Lothspeich LLP
P.O. Box 168
Jerome, Idaho 83338
rewilliams@wmlattys.com

W. Kent Fletcher
Fletcher Law Office
P.O. Box 248
Burley, Idaho 83318
wkf@pmt.org

Matthew J. McGee
Moffatt Thomas Barrett Rock
P.O. Box 829
Boise, Idaho 83701
mjm@moffatt.com


Travis L. Thompson

Exhibit A

RECEIVED

NOV 16 2016

DEPARTMENT OF
WATER RESOURCES

ORIGINAL

Scott L. Campbell, ISB No. 2251
Matthew J. McGee, ISB No. 7979
Sarah A. McCormack, ISB No. 9683
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
slc@moffatt.com
mjm@moffatt.com
sam@moffatt.com
16845.0030

Attorneys for Sun Valley Company

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

SUN VALLEY COMPANY,

Petitioner,

vs.

GARY SPACKMAN, Director of the Idaho
Department of Water Resources,

Respondent.

Docket No. P-DR-2016-001

**PETITION REQUESTING A HEARING
ON ORDER DENYING PETITION FOR
DECLARATORY RULING**

COMES NOW Sun Valley Company ("Sun Valley"), by and through its attorneys
of record and pursuant to Idaho Code Section 42-1701A(3) and Rule 740 of the Rules of
Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01), and hereby petitions

**PETITION REQUESTING A HEARING ON ORDER DENYING
PETITION FOR DECLARATORY RULING - 1**

Client 4267792 1

the Idaho Department of Water Resources (the "Department") for a hearing to contest the Director of the Department's action issuing his final *Order Denying Petition for Declaratory Rulings* ("Petition Order"), served on November 4, 2016. The grounds for contesting the action are set forth in Sun Valley's Petition for Reconsideration of Final Order Denying Petition for Declaratory Ruling, filed contemporaneously herewith in IDWR Docket No. P-DR-2016-001.

DATED this 16th day of November, 2016.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By  / For

Scott L. Campbell – Of the Firm
Attorneys for Sun Valley Company

By  / For

Matthew J. McGee – Of the Firm
Attorneys for Sun Valley Company