

**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 THE CITIES’
MOTION FOR APPOINTMENT
OF INDEPENDENT HEARING
OFFICER AND MOTION FOR
CONTINUANCE AND LIMITING
SCOPE OF DEPOSITIONS**

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”) as well as 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 Appointment of Independent Hearing Officer* (“Motion to Appoint”) requesting that the Director appoint an independent hearing officer to preside over the hearing set for June 6–10, 2023. The Cities also filed a *Motion for Continuance*, asking the Director to continue the evidentiary hearing “until a date in December or January 2024” Mot. for Continuance at 8.

The prehearing conference was held on April 28, 2023. During the prehearing conference, the Cities presented argument in support of their *Motion for Continuance*. The Idaho Ground Water Appropriators, Inc. (“IGWA”), Bonneville-Jefferson Groundwater District, and McCain Foods orally moved to join the Cities’ *Motion for Continuance*. 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

ORDER DENYING THE APPOINTMENT OF AN INDEPENDENT HEARING OFFICER
AND MOTION FOR CONTINUANCE AND LIMITING SCOPE OF DEPOSITIONS —Page 1

but left open the possibility of moving the hearing dates to another week in June. This order memorializes the Director’s oral ruling.

ANALYSIS

A. Motion for Continuance.

The Cities request that the hearing, currently scheduled for June 6–10, 2023, be delayed approximately six months. Mot. for Continuance at 8. The Cities assert 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 assert the Director should grant its request because no exigency exists given the above-average snowfall this year. *Id.* at 6–8.

During the April 28, 2023 prehearing conference, the Director orally denied the Cities’ request to move the hearing to December or January 2024 but offered limited flexibility regarding the June hearing dates. The Director stated he was willing to move the hearing anytime within the first three weeks of June 2023 if all the parties agreed to move the hearing. In response to the Cities’ claims of being surprised by the changes, the Director observed that last fall 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 reminded the parties he had, multiple times, publicly expressed his intention to revisit the Fourth Methodology Order. 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. The Director reaffirms his denial of the Cities’ *Motion for Continuance* but remains willing to move the hearing within the first three weeks of June 2023 if the parties file a stipulated motion requesting a change.¹

B. Motion to Appoint an Independent Hearing Officer.

The Cities move the Director to appoint an independent hearing officer pursuant to Idaho Code § 42-1701A(2), which states in relevant part that “[t]he director, *in his discretion*, may direct that a hearing be conducted by a hearing officer appointed by the director.” (Emphasis added). Accordingly, the Director has the discretion to grant or deny the Cities’ request.

In support of the Motion, the Cities argue that “the only evidentiary hearing of any magnitude” in the SWC delivery call proceedings occurred in 2008 when former Idaho Supreme Court Chief Justice Gerald Schroeder was appointed to serve as a hearing officer. *Motion to Appoint* at 3–4. The Cities assert that the updated Methodology Order constitutes a “sea-change”

¹ At the April 28, 2023 prehearing conference, Ms. McHugh asked that she be allowed to participate in the hearing remotely if the Director was going to keep the June hearing date. The Director granted Ms. McHugh’s request to appear at the hearing remotely in his *Scheduling Order and Order Authorizing Remote Appearance at Hearing* (issued May 2, 2023).

and that “the Methodology Order fails to update data as to SWC irrigation efficiencies, irrigation practices, irrigated area, among other topics that will need to be addressed at an evidentiary hearing with a fully developed record.” *Id.* at 4. The Cities argue that it has been 15 years since “an evidentiary hearing of any consequence has taken place,” and recommend that an independent hearing officer be appointed to hold this upcoming evidentiary hearing. *Id.* at 5. The Cities suggest the Department has established a “practice” of appointing an independent hearing officer in the SWC delivery call and encourages the Director to continue with this “practice.” *Id.*

The Director declines to grant the Cities’ request to appoint an independent hearing officer. The Director has held many evidentiary hearings related to conjunctive administration of water rights. For example, the Director held a multi-day evidentiary hearing in the Rangen delivery call matter. *See Rangen, Inc. v. Idaho Dep’t of Water Res.*, 159 Idaho 798, 801, 367 P.3d 193, 196 (2016) (“IDWR Director Gary Spackman (‘Director’) presided over an evidentiary hearing.”). The Director held a multi-day evidentiary hearing in the Basin 37 administrative matter. *See Final Order, In re Basin 37 Administrative Proceeding*, No. AA-WRA-2021-001 (Idaho Dep’t of Water Res. June 28, 2021) (The Director presided over evidentiary hearing held June 7–12, 2021).

The Director has held evidentiary hearings related to mitigation plans in the SWC delivery call matter. *See Am. Final Order Re. Compliance with Approved Mitigation Plan, In re IGWA’s Settlement Agreement Mitigation Plan*, No. CM-MP-2016-001 (Idaho Dep’t of Water Res. April 24, 2023). Significantly, the Director has held an evidentiary hearing on previous updates to the methodology order. *See Am. Final Order Re. Method. for Determ’g Material Injury to Reasonable In-Season Demand & Carryover.*

These examples are just a few of the many administrative hearings the Director has held. As these examples illustrate, there is no fixed practice of appointing a hearing officer in this or other contested administrative matters. The Director has presided over many evidentiary hearings related to significant water administration issues and is able to preside over the upcoming evidentiary hearing.

Furthermore, time is of the essence given that the As-Applied Order predicts a shortfall for the 2023 irrigation season resulting in mitigation requirements or curtailment for ground water rights junior to December 30, 1953. The urgency for water administration mandates a timely decision because “[w]hen a junior appropriator wrongfully takes water that a senior appropriator is entitled to use, there is often the need for very prompt action.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815, 252 P.3d 71, 96 (2011); *see also IGWA v. Idaho Dep’t of Water Res.*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho).

The Director is thoroughly familiar with all aspects of the Methodology Order and the As-Applied Order and is the person in the best position to preside over this matter and consider the arguments raised by the parties. Appointing an independent hearing officer would unreasonably delay the proceedings and delay administration of hydraulically connected surface and ground water rights.

C. Scope of Depositions of Department Employees

During the prehearing conference, the Director also identified Matthew Anders and Jennifer Sukow as the witnesses that will testify on behalf of the Department at the hearing to explain the facts and information the Department considered in updating the Methodology Order and As-Applied Order. Questions were raised regarding the appropriate scope of the depositions. As indicated at the prehearing, the deposition process is not an opportunity for parties to question Department employees about the Director's deliberative process related to legal and policy considerations. The Methodology Order clearly explains the Director's views regarding the legal and policy considerations on the issues like why the Director is updating the methodology order and steady-state vs. transient-state modeling. Rule 521 of the Department's Rules of Procedure states: "The presiding officer may limit the type and scope of discovery." IDAPA 37.01.01.521. Accordingly, the Director will limit the scope of the depositions to preclude questions regarding the Director's deliberative process on legal and policy considerations.

ORDER

Based on the forgoing discussion, IT IS HEREBY ORDERED that the Coalition of Cities' *Motion for Continuance* is DENIED. The Director will consider moving the hearing to other dates within the first three weeks of June 2023 if the parties file a stipulated motion requesting the change.

IT IS FURTHER ORDERED that the Coalition of Cities' *Motion for Appointment of Independent Hearing Officer* is DENIED.

IT IS FURTHER ORDERED that the scope of any deposition of a Department employee will preclude questions regarding the Director's deliberative process on legal and policy considerations.

DATED this 5th day of May 2023.



Gary Spackman
Director

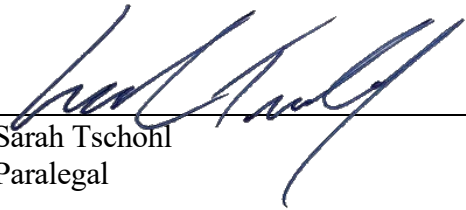
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of May 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

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