

**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 REQUEST FOR
HEARING AND MOTION
AUTHORIZING DISCOVERY**

BACKGROUND

On June 6–9, 2023 a hearing was held on the Department’s April 21, 2023 *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fifth Methodology Order”). On July 19, 2023, the Director of the Idaho Department of Water Resources (“Department”) issued his *Post-Hearing Order Regarding Fifth Amended Methodology Order* (“Post-Hearing Order”) and *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Sixth Methodology Order”). The Sixth Methodology Order corrects data in the Department’s Fifth Methodology Order found to be in error during the hearing held in this matter. The Sixth Methodology Order, like the Fifth Methodology Order, comprises nine steps to determine material injury to members of the Surface Water Coalition (“SWC”).

On August 3, 2023, the Department received the *City of Pocatello’s, City of Idaho Falls’, and Coalition of Cities’ Request for Hearing and Order Authorizing Discovery* (“Request for Hearing and Discovery”). The Request for Hearing and Discovery asks the Director to hold a status conference to schedule a four-day hearing, pursuant to Idaho Code § 42-1701(A)(3), on the Sixth Methodology Order and for an order authorizing discovery, pursuant to IDAPA 37.01.01.521. *Request for Hearing and Discovery* at 2–3. Four issues for hearing are identified in the Request for Hearing and Discovery:

- a) Whether the members of the Surface Water Coalition (“SWC”) operate reasonably and without waste;
- b) Whether the irrigated acreage numbers for the SWC members in the Sixth Methodology Order are accurate;
- c) Whether the number of acres irrigated with supplemental groundwater rights within the service areas of the SWC members can be accurately determined; [and]

d) Whether the number of acres irrigated with enlargement rights within the service areas of the SWC members can be accurately determined[.]

Id. at 2.

On August 22, 2023, the Department received the *Surface Water Coalition's Response to Cities' Request for Hearing and Order Authorizing Discovery* ("SWC's Response"). The SWC's Response requests the Director "deny or limit the Cities' request for hearing and an order authorizing discovery" *SWC's Response* at 7.

ANALYSIS AND CONCLUSIONS OF LAW

A. Request for hearing.

Idaho Code § 42-1701A(3) states in relevant part:

Unless the right to a hearing before the director . . . is otherwise provided in 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) (emphasis added). The parties have previously been afforded an opportunity for hearing on the issues identified related to the Sixth Methodology Order and are not entitled to a hearing pursuant to Idaho Code § 42-1701A(3).

Over the course of four days, the Director heard testimony regarding the Fifth Methodology Order, including testimony on the reasonableness of the SWC's efficiency and waste and the accuracy of the irrigated acreage numbers utilized. "Testimony at the hearing established that the SWC entities operated efficiently within the limits of their delivery system." *Post-Hearing Order* at 23. "The ground water users did not establish an alternative number of acres irrigated by clear and convincing evidence." *Id.* at 19. "The record in this matter . . . lacks sufficient evidence to justify a reduction of the total number of acres irrigated with surface water by SWC members." *Id.*

A hearing on the Fifth Methodology Order was held less than one month before the Request for Hearing and Discovery was filed. The Sixth Methodology Order was issued as a direct result of the hearing. While methodology orders in this matter are subject to review and revision as conditions and the best available science change, *see In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 653, 315 P.3d 828, 841 (2013), that review cannot reasonably be interpreted to equate to a right to a revolving door of administrative hearings. The Director therefore denies the request for hearing.¹

¹ The Director emphasizes that this denial does not prevent the ground water users from presenting updated scientific information or data to the Director in the future. For example, if the ground water users prepare a new
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DISCOVERY—Page 2


B. Motion to Authorize Discovery.

The Request for Hearing and Discovery requests “an order authorizing discovery so that they can investigate SWC members’ operations and obtain the information and data necessary to properly litigate the issues listed above.” *Request for Hearing and Discovery* at 2–3. Because the Director is denying the request for hearing, the request to authorize discovery is moot. The Director therefore denies the request for discovery.

ORDER

IT IS HEREBY ORDERED that the *City of Pocatello’s, City of Idaho Falls’, and Coalition of Cities’ Request for Hearing and Order Authorizing Discovery* is DENIED.

DATED this 23rd day of August 2023.


GARY SPACKMAN
Director

analysis of hardened acres within the boundary of a SWC member, this would be new information the Director may consider in the future.

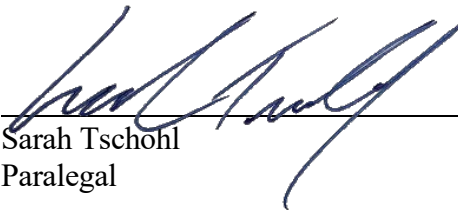
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of August 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

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Sarah Tschohl
Paralegal

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person 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. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.