

Sep 05, 2023

DEPARTMENT OF
WATER RESOURCES

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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, 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

**MOTION FOR CLARIFICATION
 AND RECONSIDERATION OF
 DENIAL OF REQUEST FOR
 HEARING AND TO ENGAGE IN
 DISCOVERY**

COME NOW, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (“Coalition of Cities”), by and through their attorneys of record, Candice M. McHugh and Chris M. Bromley, the City of Idaho Falls, by and through its attorney of record, Robert L. Harris, and the City of Pocatello, by and through its attorneys of record, Sarah A. Klahn and Maximilian C. Bricker

(collectively the “Cities”), pursuant to IDAPA 37.01.01.740.02.b and 770 of the Department’s rules of procedure and hereby file this *Motion for Reconsideration and Clarification* of the August 23, 2023, *Order Denying Request for Hearing and Motion Authorizing Discovery* (“Order Denying Hearing”) and move for reconsideration of the Director’s order denying the Parties’ request for a hearing on the *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Sixth Methodology Order”).

ARGUMENT

1. The Cities seek clarification on the nature of the Sixth Methodology Order.

On July 19, 2023, the Director of the Idaho Department of Water Resources (“Department”) issued, as relevant here, two orders: a *Post-Hearing Order Regarding Fifth Amended Methodology Order* (“Post-Hearing Order”) and the *Sixth Methodology Order*. Rather than amending 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”), which was subject to a hearing on June 6-9, 2023, the Director chose to issue a new final order.

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.

The Director denied the Parties’ request for a hearing on the *Sixth Methodology Order* because: “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).” However, no hearing has actually been held on the *Sixth Methodology Order*. Thus, the Parties request clarification of the nature and status of the *Sixth Methodology Order*—is it, in fact, merely an “amended” *Fifth Methodology Order* that is ripe for immediate appeal?

2. Regardless of the answer to the clarification question above, the Parties seek reconsideration and clarification of the denial of the request to engage in discovery.

The Director has stated on numerous occasions that the SWC Delivery Call is a continuing contested case, requiring the Department to periodically update the Methodology Order, which is a “living document.” Tr. Hearing Vol. I, 18:21. The Director has also acknowledged on numerous occasions that the Department would consider data or analyses brought forward by the Cities in updating or applying the Methodology Order—even the *Order Denying Hearing* asserted that the Director would welcome “new information [developed by the Cities that] the Director may consider in the future.” *Id.* at 2-3 n.1.¹ The Parties have been down this road before, as their April 28, 2023 *Motion for Continuance*, which requested adequate time to conduct investigations prior to a hearing on the *Fifth Methodology Order*, was denied on the ground that the Director had sufficiently notified the junior groundwater users that changes to the *Fourth Methodology Order* were impending (i.e., they had had plenty of “opportunities” to develop data and analyses). *Order Denying the Cities’ Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* at 2. To be adequately prepared for the hearing, however, the Cities needed authorization to access SWC’s lands, under IDAPA

¹ For example, at the *Fifth Methodology Order* hearing, the Director said at one point: “there have been opportunities for people to gather data; there have been opportunities for folks to take on responsibility to prepare [analyses].” Tr. Hearing Vol. IV, 205:12-14.

37.01.01.520.01.e and I.R.C.P. Rule 34, to develop data associated with the nature and extent of irrigation on SWC lands; the Cities also needed adequate time to analyze the results of these inspections and investigations. The Cities did not have such authorization prior to April 21, 2023, so any “presentations” that the “Department conducted” in fall 2022 fell far short of what was reasonably needed to prepare for the hearing on the *Fifth Methodology Order*. *Id.*

The instant request to engage in discovery reflects the Cities’ efforts to take seriously the Director’s invitation to present “new information” to the Department update the Methodology Order with the best available science, and to be prepared to challenge the Department’s application of the *Sixth Methodology Order* in 2024 on the basis of erroneous or outdated inputs. Accordingly, the Cities request that the Director reconsider his denial of the Cities’ request to conduct discovery.

However, if this is indeed a continuing contested case, perhaps no new order authorizing such discovery is necessary. In that case, the Cities seek clarification as to whether it is entitled to proceed with serving requests on SWC members notwithstanding the *Order Denying Hearing* and whether the SWC members are obligated to comply.

Submitted this 6th day of September, 2023.

/s/ Sarah Klahn

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September, 2023, the above and foregoing, was filed and served via electronic service as set forth below:

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