

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
MARTEN LAW LLP
163 Second Ave. West
P.O. Box 63
Twin Falls, Idaho 83303-0063
Telephone: (208) 733-0700
Email: jsimpson@martenlaw.com
tthompson@martenlaw.com

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

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Email: wkf@pmt.org

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

**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

**SURFACE WATER COALITION'S
RESPONSE TO CITIES' MOTION FOR
CLARIFICATION AND
RECONSIDERATION**

COME NOW, 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 ("Surface Water Coalition" or "Coalition"), by and through counsel of
record, and hereby respond to the *Motion for Clarification and Reconsideration of Denial of*

Request for Hearing and to Engage in Discovery (“Motion”) filed on September 5, 2023.¹ The Coalition requests the Director to deny the Cities’ Motion for the reasons set forth below.

BACKGROUND

The Sixth Methodology Order was issued as a “final” administrative order subject to reconsideration and/or appeal to district court. *See* I.C. §§ 67-5246; 67-5270 to 5272; *see also*, Explanatory Information to Accompany a Final Order (attached to the Director’s Sixth Methodology Order). The Cities filed a notice of appeal and petition for judicial review concerning the Director’s related *Post-Hearing Order*, another order issued as part of the matter resulting in the Sixth Methodology Order. *See City of Idaho Falls et al. v. IDWR*, Fourth Jud. Dist., Ada County Dist. Ct., Case No. CV01-23-13238 (appeal filed August 16, 2023). IGWA filed a notice of appeal and petition for judicial review of various orders as well, including specifically the Sixth Methodology Order. *See IGWA v. IDWR*, Fourth Jud. Dist., Ada County Dist. Ct., Case No. CV01-23-13173 (appeal filed August 16, 2023). The Coalition of Cities and the City of Pocatello filed notices of appearance in that case. The two appeals are pending in district court and it is anticipated the cases will be consolidated.

ARGUMENT

I. The Director Properly Denied the Cities’ Request for Hearing.

The Cities request clarification of the Director’s Sixth Methodology Order claiming “no hearing has actually been held on the *Sixth Methodology Order*.” Motion at 2-3. Yet, the Cities’ feigned ignorance about the order is merely form over substance. The Cities fully participated in the contested case and administrative hearing that resulted in the issuance of the Sixth Methodology Order. They cannot dispute this fact. There is no basis to hold a second hearing

¹ The motion was filed the Coalition of Cities (cities of Bliss et al.), the City of Idaho Falls, and the City of Pocatello.

on the Sixth Methodology Order that fully addressed all of the information either presented at or before the administrative hearing. As such, the Director properly denied the requested hearing. *See Order Denying Request for Hearing and Motion Authorizing Discovery* at 2-3.

Moreover, the Cities have appealed the Director's *Post-Hearing Order* that addresses the issues raised on the Fifth Methodology Order, including the updated data the Director included in the Sixth Methodology Order. Although the Cities had a right to appeal the Sixth Methodology Order they failed to do so. Regardless, all of the Cities except Idaho Falls have appeared in IGWA's appeal of the Sixth Methodology Order.² Consequently, there is nothing to clarify and the petitions for judicial appeal will proceed pursuant to Idaho's civil rules.

II. The Director Properly Denied the Cities' Request for Discovery.

The Cities have also requested the Director to reconsider the denial of their motion to authorize discovery. *See Motion* at 2-3. Since the request for hearing was denied, the request to authorize discovery was properly denied as well. The Cities misconstrue this matter as a "continuing contested case" with no end. *Motion* at 2. Although the Director's methodology regarding the SWC delivery call may be updated at some point in time, that does not mean the prior contested cases resulting in "final orders" that have been appealed or are currently on appeal to the District Court are continuing *ad infinitum* as the Cities suggest. To find otherwise would keep the parties in a perpetual state of discovery, motion practice, and litigation, without any culminating hearing or end.³ Such a scenario has no basis in statute or rule and would be unduly burdensome and mire the parties in endless litigation expense.

² Whether the City of Idaho Falls will file a notice of appearance is unknown. If the cases are ultimately consolidated it may not matter as all parties will be participating.

³ It is curious why the Cities seem determined to re-litigate prior contested cases and outcomes in the face of their approved mitigation plan for the SWC delivery call and safe harbor from curtailment pursuant to the CM Rules. The request for discovery is unwarranted and would be overly burdensome in the context of what has already

Finally, the Cities’ argument that they could not “adequately prepare” for the prior hearing is also erroneous and does not support their present reconsideration request. These arguments have been previously addressed by both the Director and the District Court. The Cities’ continued efforts to “redo” prior contested cases is unwarranted and was properly denied by the Director. Since the final agency orders are presently on appeal to the district court, the agency should refrain from restarting contested cases as requested by the Cities.

CONCLUSION

The Cities have pointed to no new authority or information that would warrant reconsideration of the Director’s August 23, 2023 order. The Coalition respectfully requests the Director to deny the Cities’ Motion accordingly.

DATED this 19th day of September, 2023.

MARTEN LAW LLP



Travis L. Thompson

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

FLETCHER LAW OFFICE



for

W. Kent Fletcher

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

preceded in this matter. The Department is right to deny such tactics that would result in wasted time and resources for the various canal companies and irrigation districts.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

<p>Director Mat Weaver Garrick Baxter Sarah Tschohl State of Idaho Dept. of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail</p> <p>mat.weaver@idwr.idaho.gov garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov file@idwr.idaho.gov</p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only</p> <p>mhoward@usbr.gov</p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only</p> <p>tony.olenichak@idwr.idaho.gov</p>
<p>T.J. Budge Elisheva Patterson Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only</p> <p>tj@racineolson.com elisheva@racineolson.com</p>	<p>Sarah A. Klahn Max C. Bricker Diane Thompson Somach Simmons & Dunn 2033 11th St., Ste. 5 Boulder, CO 80302 *** service by electronic mail only</p> <p>sklahn@somachlaw.com mbricker@somachlaw.com dthompson@somachlaw.com</p>	<p>David Gehlert ENRD – DOJ 999 18th St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only</p> <p>david.gehlert@usdoj.gov</p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only</p> <p>rdiehl@pocatello.us</p>	<p>William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only</p> <p>wparsons@pmt.org</p>	<p>Corey Skinner IDWR – Southern Region 650 Addison Ave W, Ste. 500 Twin Falls, ID 83301-5858 *** service by electronic mail only</p> <p>corey.skinner@idwr.idaho.gov</p>
<p>W. Kent Fletcher Fletcher Law Offices P.O. Box 248 Burley, ID 83318 *** service by electronic mail only</p> <p>wkf@pmt.org</p>	<p>Kathleen Carr U.S. Dept. Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway, Ste. 400 Boise, ID 83706 *** service by electronic mail only</p> <p>kathleenmarion.carr@sol.doi.gov</p>	<p>Candice McHugh Chris M. Bromley McHugh Bromley, PLLC 380 South 4th Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only</p> <p>cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>

<p>Robert E. Williams Williams, Meservy & Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only</p> <p>rewilliams@wmlattys.com</p>	<p>Robert L. Harris Holden, Kidwell, Hahn & Crapo, PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only</p> <p>rharris@holdenlegal.com</p>	<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only</p> <p>rfife@idahofallsidaho.gov</p>
<p>Skyler Johns Steven Taggart Nathan Olsen Olsen Taggart PLLC P.O. Box 3005 Idaho Falls, ID 83403 *** service by electronic mail only</p> <p>sjohns@olsentaggart.com staggart@olsentaggart.com nolsen@olsentaggart.com</p>	<p>Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, ID 83440 *** service by electronic mail only</p> <p>dylan@dylanandersonlaw.com</p>	

Jessica Nielsen
Assistant for Travis L. Thompson