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STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION
OF WATER TO VARIOUS WATER RIGHTS
HELD BY AND FOR THE BENEFIT OF A&B
IRRIGATION DISTRICT, AMERICAN FALLS
RESERVOIR DISTRICT #2, BURLEY IRRI-
GATION DISTRICT, MILNER IRRIGATION
DISTRICT, MINIDOKA IRRIGATION DIS-
TRICT, NORTH SIDE CANAL COMPANY,
AND TWIN FALLS CANAL COMPANY

IN THE MATTER OF IGWA’S SETTLEMENT
AGREEMENT MITIGATION PLAN

Docket No. CM-MP-2016-001

**Petition for Reconsideration
and Request for Hearing**

Idaho Ground Water Appropriators, Inc. (“IGWA”) submits this petition for reconsideration pursuant to Idaho Code § 67-5246(4) and rule 740.02.b of the Department’s rules of procedure in response to the *Final Order Regarding Compliance with Approved Mitigation Plan* (“Final Order”) issued September 8, 2022. This petition requests that the Director withdraw those parts of the Final Order that adjudicate IGWA’s contractual obligations under the IGWA-SWC Settlement Agreement¹ (the “Settlement Agreement”).

If the Director declines to amend the Final Order as requested in IGWA’s petition for reconsideration, then IGWA requests a hearing pursuant to Idaho Code § 67-5242 and/or § 42-1701A(3) and rule 740.02.c of the Department’s rules of procedure to address the merits of the Director’s adjudication of IGWA’s contractual obligations under the Settlement Agreement.

¹ The “IGWA-SWC Settlement Agreement” consists of the *Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of Idaho Ground Water Appropriators, Inc.*, the *Addendum to Settlement Agreement*, and the *Second Addendum*.

PETITION FOR RECONSIDERATION

The Director should withdraw those parts of the Final Order that adjudicate IGWA's contractual obligations under the Settlement Agreement because (1) the adjudication of contractual disputes between third parties exceeds the Director's statutory authority, (2) IGWA's 2021 compliance with the Settlement Agreement is a moot issue, and (3) the Director's adjudication of the Settlement Agreement was made upon unlawful procedure.

1. The Director does not have statutory authority to adjudicate IGWA's contractual obligations under the Settlement Agreement.

Idaho state agencies have no inherent authority; they have only those powers granted by the legislature. *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 102 Idaho 744, 750 (1981); *Idaho Retired Firefighters Assoc. v. Pub. Emp. Ret. Bd.*, 165 Idaho 193, 196 (2019). They are, in other words, "tribunals of limited jurisdiction." *In re Idaho Workers Comp. Bd.*, 167 Idaho 13, 20 (2020) (citing *Washington Water Power Co. v. Kootenai Env'tl. Alliance*, 99 Idaho 875, 879 (1979)). When implementing express statutory powers, "administrative agencies have the implied or incidental powers that are reasonably necessary in order to carry out the powers expressly granted." *Vickers v. Lowe*, 150 Idaho 439, 442 (2011) (citing 2 Am.Jur.2d *Administrative Law* § 57 (2004)). If an agency acts outside of its express and implied powers, such actions are void. *Wernecke v. St. Maries Joint Sch. Dist. No. 401*, 147 Idaho 277, 286 n.10 (2009) (citing 73 C.J.S. *Public Administrative Law & Procedure* § 112).

Adjudication of contract disputes is not among the powers granted to the Director. Such power is vested in the judiciary. The Director's statutory authority is confined to the distribution of water among water users and matters related thereto. While the Director's water distribution duties may be affected by third party contracts, and while the Director may need to interpret such contracts for the purpose of performing such duties, that is the extent of his interpretive authority. The Director does not have legal authority to definitively adjudicate disputes between third parties over contract interpretation. That authority remains with the judiciary.

The Second Addendum provides a process for resolving disputes over IGWA's compliance with the Settlement Agreement, but it does empower the Director to adjudicate disputes over contract interpretation. Section 3.m of the Second Addendum provides that disputes over compliance will be resolved by the Steering Committee, but if the Steering Committee cannot resolve the dispute then it will be submitted to the Director. Section 3.m pertains specifically to disputes over compliance. It does not empower the Director to adjudicate disputes over contract interpretation. Nor could it since that authority has not been given to the Director by the legislature. In fact, the Second Addendum recognizes that judicial action is necessary to resolve some disputes, as stated in section 4: "The parties further reserve all remedies, including the right to judicial action, to enforce the terms of the Settlement Agreement and this Second Addendum."

The *Surface Water Coalition's Notice of Steering Committee Impasse / Request for Status Conference* ("SWC Notice") placed before the Director two questions of contract interpretation, two questions regarding IGWA's 2021 compliance with the Settlement Agreement, and a final question asking what actions the Director would take in response to the alleged non-compliance. (SWC Notice, p. 4.) Had the parties not resolved their dispute over IGWA's 2021 compliance, the Director would have had to interpret the Settlement Agreement for the limited purpose of performing his water distribution duties. However, the parties did resolve their dispute. Once the 2022 Settlement Agreement ("2022 Agreement") was signed, there was no longer a need for the Director

to evaluate IGWA's 2021 performance in order to perform his water distribution duties. And since there was no need to evaluate IGWA's 2021 performance, there was no need to interpret its contractual obligations under the Settlement Agreement. Therefore, that part of the Final Order that adjudicates IGWA's contractual obligations under the Settlement Agreement constitutes an advisory opinion in excess of the Director's statutory authority.

The 2022 Agreement includes a statement that the Director "shall issue a final order regarding the interpretive issues raised by the SWC Notice." The Final Order should have dismissed the interpretive issues since the 2022 Agreement resolved IGWA's 2021 compliance. The Director does not have statutory authority to issue decisions granting prospective relief in the absence of a petition for declaratory ruling filed in accordance with the Idaho Administrative Procedures Act ("APA") and the rules of procedure of the Department, which has not occurred in this case.

Since the Director's advisory opinion adjudicating the contract dispute between IGWA and the SWC exceeds his statutory authority, those parts of the Final Order should be withdrawn.

2. The Director's ruling that IGWA's 2021 performance breached the Settlement Agreement violates due process because the issue is moot.

A fundamental right afforded by the U.S. Constitution is that "No state ... shall deprive any person of life, liberty, or property without due process of law." U.S. Const., Amend. 14 §1; Idaho Const. art. I, § 13. Among other things, due process precludes courts and state agencies from adjudicating matters where no justiciable controversy exists. "Justiciability is generally divided into subcategories—advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political question and administrative questions." *Westover v. Idaho Ctys. Risk Mgmt. Program*, 164 Idaho 385, 389 (2018), *Wylie v. State*, 151 Idaho 26, 31 (2011), *Miles v. Idaho Power Co.*, 116 Idaho 635, 639 (1989). The Director's ruling that IGWA's 2021 performance breached the Settlement Agreement violates due process because the issue is moot.

"An issue is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome." *Farrell v. Whiteman*, 146 Idaho 604, 610 (2009). In other words, a case becomes moot "when the issues presented are no longer live." *Franz v. Osborn*, 167 Idaho 176, 180 (2020) (quoting *Ferrell*, 146 Idaho at 610). Justiciability requires an actual controversy that is "definite and concrete." *Bliss v. Minidoka Irr. Dist.*, 167 Idaho 141, 158 (2020) (citing *Bettwieser v. New York Irr. Dist.*, 154 Idaho 317, 326 (2013)). It does not exist when "only a hypothetical question remains, and it is impossible for the court to grant that party any other or additional relief." *Sallaz v. Rice*, 161 Idaho 223, 230 (2016) (citing *Dorman v. Young*, 80 Idaho 435-37 (1958)). The doctrine "precludes courts from deciding cases which are purely hypothetical or advisory." *State v. Rhoades*, 119 Idaho 594, 597 (1991).

IGWA's 2021 compliance with the Settlement Agreement is moot because the matter was resolved by the 2022 Agreement. There is no longer a live controversy. The Director is not in a position to grant any other or additional relief concerning IGWA's 2021 compliance. In fact, the Final Order acknowledges this. The Director refused to consider IGWA's due process argument because he deemed it to be "moot in light of the Remedy Agreement," explaining that he was no longer in a position to order curtailment due to IGWA's 2021 performance (i.e. the Director was unable to grant any other or additional relief). (Final Order, p. 17-18).

Since IGWA's 2021 compliance with the Settlement Agreement is a moot issue, those parts of the Final Order that adjudicate IGWA's 2021 compliance, including the contractual interpretations upon which they are based, should be withdrawn.

3. The Director’s ruling that IGWA breached the Settlement Agreement should be withdrawn because it was made upon unlawful procedure.

Even if the Director has authority to adjudicate contractual disputes between IGWA and the SWC, his ruling that IGWA breached the Settlement Agreement must be withdrawn because it was made in violation of due process and the Idaho Administrative Procedures Act (“APA”).

3.1 The Director violated due process by adjudicating IGWA’s property rights without first holding a hearing.

“Due process of law under the federal and state constitutions requires that one be heard before his rights are adjudged.” *Duggan v. Potlatch Forests, Inc.*, 92 Idaho 262, 264 (1968) (quoting *Lovell v. Lovell*, 80 Idaho 251 (1958)). “This principle of equity embedded in our constitutions is applicable in proceedings before administrative bodies.” *Id.* (citing *Washington Water Power Co. v. Idaho Public Util. Comm.*, 84 Idaho 341, 372 P.2d 409 (1962)). Due process requires a hearing “before he is deprived of any significant property interest, except for extraordinary situations when some valid governmental interest is at stake that justifies postponing the hearing until after the event.” *Fuentes v. Shevin*, 407 U.S. 67, 81 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378–79 (1971) (emphasis in original)).

Before the Final Order was issued, IGWA argued that due process requires the Director to hold a hearing before interpreting or enforcing the Settlement Agreement. (IGWA’s Obj. to Notice of Intent to Take Off. Notice, p. 2–5). The Director declined, concluding that due process only affords a hearing prior to a curtailment, and that the Final Order “does not deprive IGWA of any property right.” (Final Order, p. 17.) This conclusion is mistaken. The Settlement Agreement and its accompanying IDWR-approved mitigation plan directly control how much water IGWA’s members are permitted to divert under their water rights. Therefore, the Director’s adjudication of IGWA’s obligations under the Settlement Agreement and mitigation plan directly affects its members’ property rights. This is obvious from the fact that Director’s decision reduces the amount of water IGWA can divert by more than 34,000 acre-feet. (Final Order, p. 9–11.) The Final Order unequivocally deprives IGWA of property rights, effective immediately.

There is no “extraordinary circumstance” that requires a rushed interpretation of the Settlement Agreement without first holding a hearing. The dispute giving rise to the SWC Notice began last April. The SWC did not file the SWC Notice until July 21, 2022, and it was not accompanied by a motion requesting expedited action. Most importantly, the 2022 Agreement removed any need for immediate action by the Department.

Since there was no need for an immediate decision, due process requires that the Director hold a hearing before adjudicating IGWA’s property rights under the Settlement Agreement. Since that was not done, those parts of the Final Order that purport to adjudicate IGWA’s contractual obligations should be withdrawn.

3.2 The Director violated the APA by making a decision in contested case without holding a hearing or declaring an emergency.

To ensure that Idaho agencies afford due process, the APA prescribes procedures that must be followed in any contested case. Under the APA, any proceeding “which may result in the issuance of an order is a contested case.” Idaho Code § 67-5240. A contested case may be disposed of either formally or informally. Informal disposition may occur “by negotiation, stipulation, agreed

settlement, or consent order.” Idaho Code § 67-5240. Formal disposition, on the other hand, must comply with specific procedures, including a hearing, to assure that “there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary,” and that all parties have “the opportunity to respond and present evidence and argument on all issues involved.” Idaho Code §§ 67-5242(3)(a)-(b).

The APA allows state agencies to take action without a hearing only “in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate government action.” Idaho Code § 67-5247(1). Even then, the agency must “proceed as quickly as feasible to complete any proceedings that could be required.” Idaho Code § 67-5247(4).

Before the Final Order was issued, IGWA argued that the APA requires the Director to hold a hearing before interpreting or enforcing the Settlement Agreement. (IGWA’s Obj. to Notice of Intent to Take Off. Notice, p. 5). The Director declined, concluding that Idaho Code § 42-1701A(3) allows him to make decisions first and hold hearings later. (Final Order, p. 17-18.) Section 42-1701A(3) reads, in relevant part:

Unless the right to a hearing before the director ... is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, 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 Final Order asserts that § 42-1701A(3) trumps the APA because it applies specifically to hearings before the Director. (Final Order, p. 18). However, this argument disregards the plain language of § 42-1701A(3) which limits its application to circumstances where “the right to a hearing before the director is [not] otherwise provided by statute.”

The Director takes actions in a wide range of contexts that frequently do not qualify as contested cases under the APA. In those contexts, § 42-1701A(3) entitles aggrieved parties to an after-the-fact hearing to contest the action. By contrast, when the Director takes action “which may result in the issuance of an order,” such action qualifies as a “contested case” under the APA. Idaho Code § 67-5240. Under the APA, a hearing is provided by statute: Idaho Code § 67-5242. Therefore, § 42-1701A(3) does not apply in contested cases governed by the APA.

Both the SWC Notice and the Final Order were filed in existing contested cases that have been conducted under the APA from the beginning. The original Department order issued in 2005 in response to the SWC delivery call states: “A contested case is initiated pursuant to Idaho Code § 67-5240 to consider the relief requested.” (Order, Feb. 15, 2005, p. 33.) The Department orders approving the Settlement Agreement and the Amendment to Settlement Agreement similarly include the following statement: “The accompanying order is a “Final Order” issued by the department pursuant to section 67-5246, Idaho Code.” The SWC Notice was filed under a caption that cites the IDWR document numbers for both the SWC delivery call and the Settlement Agreement contested cases (Docket Nos. CM-DC-2010-011 and CM-MP-2016-001), and the Final Order was filed in the contested case governing the Settlement Agreement (Docket No. CM-MP-2016-001).

After many years of the SWC delivery and the Settlement Agreement being governed by the APA, the Director’s decision to circumvent the APA and avoid hearing all evidence before passing

judgment on IGWA's contractual obligations under the Settlement Agreement is very troubling. In any case, the decision was issued in violation of the APA.

Since the Director's adjudication of IGWA's contractual obligations under the Settlement Agreement was made without a hearing and without an emergency declaration, in violation of the APA, those parts of the Final Order should be withdrawn.

REQUEST FOR HEARING

If the Director grants IGWA's petition for reconsideration by withdrawing those parts of the Final Order that adjudicate IGWA's obligations under the Settlement Agreement, then the Director need not grant IGWA's request for hearing. However, if the Director declines to withdraw those parts from the Final Order, then IGWA requests a hearing to address the merits of the Director's decision.

The merits of developing a full evidentiary record and considering all arguments before making critical decisions need not be recited here. Suffice it to say that the APA as well as the Department's rules of procedure contemplate that such a process will be the norm, not the exception. Department rules of procedure require the Director to hold a hearing (Rules 550-553) where testimony is received under oath (Rule 558), "base its decision in a contested case on the official record in the case" (Rule 650.01), "maintain an official record including the items described in section 67-5249, Idaho Code" (Rule 650.01), and instruct that evidence be accepted "to assist the parties' development of a record, not excluded to frustrate that development" (Rule 600). Rule 602 allows the Director to take official notice of certain documents, but this must occur within the context of a contested case hearing and "[p]arties must be given an opportunity to contest and rebut the facts or material officially noticed."

No hearing has been held in accordance with the APA and Department rules of procedure. The Director's "discussion with counsel for the parties regarding possible curative remedies should the Director find a breach" at a status conference (Final Order, p. 4) does not even approach the hearing process required by constitution, the APA, and Department rules of procedure. The Final Order asserts that the Director may "liberally construe" the Department rules of procedure when "impracticable, unnecessary or not in the public interest," but any deviation must still provide a "just, speedy and economical determination of all issues presented to the agency" (Rule 51), and must still comply with due process or the APA. *A&B Irr. Dist. v. Idaho Dep't of Water Res.*, 154 Idaho 652, 654 (2012) ("[A]ny interpretation by IDWR of the provisions of the section 67-5246 is not entitled to deference."). A discussion at a status conference, with no motion or petition having been filed, and no opportunity to conduct discovery, present evidence, or examine witness, falls far short what is legally required.

The Settlement Agreement expressly provides that when the Steering Committee does not agree as to whether a breach occurred, the Director must "evaluate all available information" to determine if a breach has occurred. (Second Addendum, § 2.c.iv (emphasis added)). IGWA requested an evidentiary hearing before the Director construed IGWA's obligations under the Settlement Agreement because additional information was necessary for the decision to be fully informed. (IGWA's Obj. to Not. of Intent to Take Off. Not., p. 6).

IGWA requests hearing for reconsideration of the following determinations in the Final Order: (a) that the Settlement Agreement is unambiguous as to IGWA's share of the 240,000-acre-foot groundwater reduction; (b) that Settlement Agreement is unambiguous as to the means by which compliance with IGWA's conservation obligation is measured; (c) that the Settlement

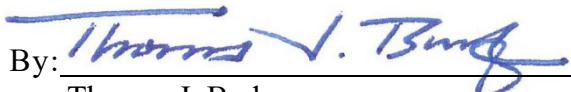
Agreement unambiguously precludes averaging for the purpose of measuring compliance with IGWA's conservation obligation; (d) that the Director is permitted to look outside the four corners of the Settlement Agreement to interpret unambiguous terms; (e) that the Director is permitted to selectively consider parole evidence when interpreting ambiguous terms; (f) that certain IGWA members breached the Settlement Agreement and accompanying Mitigation Plan in 2021; (d) that certain IGWA members are not covered by an effectively operating Mitigation Plan; and (e) that the 90-day cure period is inapplicable when the Steering Committee does not reach agreement as to whether a breach has occurred. IGWA reserves the right to raise additional issues based on evidence presented at the hearing.

CONCLUSION

For the reasons set forth above, IGWA requests that the Director withdraw those parts of the Final Order that adjudicate IGWA's contractual obligations under the Settlement Agreement, and issue an amended order that simply approves the 2022 Agreement. If the Director withdraws those parts of the Final Order, he need not grant IGWA's request for hearing. However, if the Director declines to grant IGWA's petition for reconsideration as requested, IGWA respectfully requests a hearing to address the merits of the Director's decision.


DATED September 22, 2022.

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By: 
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2022, I served the foregoing document on the persons below via email as indicated:



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