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RECEIVED

Jan 02, 2024

DEPARTMENT OF
WATER RESOURCES

**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

IN THE MATTER OF IGWA'S
SETTLEMENT AGREEMENT
MITIGATION PLAN

Docket No. CM-MP-2016-001

**SURFACE WATER COALITION'S
OBJECTION TO CITIES' PETITION
TO INTERVENE**

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 pursuant to IDAPA 37.01.01.354 and the Hearing Officer’s December 29, 2023 *Scheduling Order*, hereby submits this brief in opposition to the *Coalition of Cities’ and City of Pocatello’s Petition to Intervene* (“*Petition*”).

INTRODUCTION

This contested case concerns limited issues related to certain ground water districts’ 2022 breach of their 2016 Mitigation Plan. Where the Director granted the Coalition’s request for hearing back in September, and the parties have held multiple scheduling conferences, the Cities filed their petition to intervene just days ago after showing up at the latest conference as “observers.” As set forth below, the Cities cannot show a “direct and substantial” interest in this case that solely addresses certain ground water districts’ actions pursuant to their mitigation plan. Granting party status to the Cities, with full rights of discovery, filing expert reports, and participation at the hearing, stands to prejudice the Surface Water Coalition and the Districts, the parties with real interests in the case. At most, the Hearing Officer, in his discretion, should condition any intervention to limit the Cities’ participation similar to “amicus curiae” for purposes of filing a response brief regarding any dispositive motions with pertinent legal issues.

BACKGROUND

The Director found that four ground water districts did not comply with their respective mitigation obligations in 2022. *See Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance* at 8 (Aug. 3, 2023) (“2022 Compliance Order”) (American Falls-Aberdeen, Bingham, Bonneville-Jefferson, and Jefferson-Clark). Collectively, the four districts’ reduction obligation fell 57,637 acre-feet short of what was required in their mitigation plan.

The Surface Water Coalition requested reconsideration and a hearing on the 2022 Compliance Order. *See SWC Request* (Aug. 16, 2023). The Director granted the request for hearing and set a scheduling conference for November 7, 2023. *See Order Granting Request; Notice of Scheduling Conference* (Sept. 6, 2023). Prior to the scheduling conference, the Coalition and the American Falls-Aberdeen Ground Water District executed an agreement to satisfy the District’s 2022 mitigation deficit. *See Notice of Filing of Agreement Satisfaction of AF-A-2022 Mitigation Deficit* (Nov. 3, 2023). The District performed its obligation under the agreement and accomplished the required groundwater recharge. *See Notice of Satisfaction of American Falls-Aberdeen Ground Water District 2022 Mitigation Obligation* (Nov. 7, 2023).

The Director held the first scheduling conference and continued it until December 12, 2023. *See Notice of Continued Scheduling Conference* (Nov. 15, 2023). The Director then appointed the honorable Justice Roger S. Burdick to preside as the independent hearing officer and the scheduling conference was continued a second time to December 28, 2023. *See Order Appointing Hearing Officer* (Dec. 12, 2023), *Notice of Second Continued Scheduling Conference* (Dec. 14, 2023).

The Hearing Officer identified four (4) discrete issues to be addressed in this contested case. *See Scheduling Order* at 4. Those issues specifically address certain ground water districts 2022 breach of their 2016 Mitigation Plan and the Director’s actions related thereto. *See id.*

STANDARD OF REVIEW

IDWR Rule of Procedure 350 allows persons not a party to a contested case that have a “direct and substantial interest in the proceeding” the opportunity to petition to intervene. *See* IDAPA 37.01.01.350. The petition must set forth “the name and address of the potential intervenor and must state the direct and substantial interest of the potential intervenor in the

proceeding.” See IDAPA 37.01.01.351. The criteria is similar to what is required pursuant to I.R.C.P 24(a) where a petitioner must show an “interest” subject to the action or that disposing of the action would impair or impede the petitioner’s ability to protect its interest.

If a petition shows a “direct and substantial interest in any part of the subject matter of a contested case and does not unduly broaden the issues, the agency shall grant intervention, subject to reasonable conditions, unless the applicant’s interest is adequately represented by existing parties.” See IDAPA 37.01.01.353.01.

Under Idaho’s civil rules of procedure, decisions to grant or deny a motion to intervene are a matter of discretion for the trial court. See *Ellis v. Ellis*, 167 Idaho 1, 467 P.3d 365 (2020).

ARGUMENT

I. The Cities Have Not Shown a “Direct and Substantial Interest” in this Proceeding.

Fifteen different cities filed a joint petition to intervene in this proceeding. See *Petition* at

1. Although a “joint” filing, each city indicates that it “reserves the right to proceed independently.” *Id.* at 1, n. 1.

Collectively the Cities vaguely allege they have an interest in this proceeding on the grounds that “each member and their respective constituents’ interest may be affected by the outcome of this formal proceeding” and that the identified issues “may impact the *Cities-SWC Agreement* or future negotiations with the SWC on such an agreement and obligations moving forward.” *Petition* at 2-3 (emphasis added). The Cities erroneously overstate the issues related to this contested case in an effort to gain party status to this proceeding. Regardless, the Cities admit the case “may” affect their interests in some way, not that it “will.” See *e.g.* I.R.C.P 24(a) (intervention of right); I.R.C.P. 24(b) (permissive intervention).

As noted, the Hearing Officer has identified the following issues to be resolved in this contested case:

- 1) Did the Director error by not issuing an order specifying the actions needed to cure the 2022 breach of the 2016 Mitigation Plan by certain ground water districts?
- 2) Did the Director error by not immediately issuing an order curtailing ground water districts that breached the 2016 Mitigation Plan in 2022?
- 3) Can the 2009 mitigation plan be used to cure the ground water districts' 2022 breach of the 2016 Mitigation Plan?
- 4) What actions must be taken by the ground water districts to cure their 2022 breach of the 2016 Mitigation Plan?

Scheduling Order at 4.

The stated issues are plainly limited to an evaluation of certain ground water districts' 2022 breach of their 2016 Mitigation Plan and the subsequent actions of the Director concerning that mitigation plan. Nothing in these issues implicates the Cities or their 2019 Mitigation Plan and its implementation.

Unable to identify a "direct and substantial interest," the Cities erroneously attempt to tie the adaptive management provisions of the Districts' 2016 Mitigation Plan and potential changes in the Cities' mitigation obligation in an effort to seek intervention. However, a careful review of those provisions reveals the Cities' mitigation plan is not relevant to this case. The Cities' 2019 Mitigation Plan provides the following:

1. In the event IGWA's required annual mitigation obligation as set forth in paragraph 3.a.i of the IGWA-SWC Settlement Agreement equals or exceeds 340,000 AF/y and the goals as set forth in paragraph 3.e. of the IGWA-SWC Settlement Agreement are not met, the Signatory Cities' collective annual mitigation obligation will increase from 7,650 AF/y to 9,640 AF/y commencing on January 1 following notice of the increase.

Cities Settlement Agreement at 4, ¶ II.B (page 19 of the *Petition* pdf).¹

¹ A copy of the Cities' Joint Mitigation Plan (agreement attached) and the Director's order approving the plan is included in Attachment 1 to Cities' *Petition to Intervene*.

The Ground Water Districts’ annual mitigation obligation (i.e. 240,000 acre-feet) is subject to an “adaptive management” process if the sentinel well benchmark and ultimate goal are not achieved. *See SWC-IGWA 2015 Agreement* at 4-5, ¶ 4.a; *Second Addendum* at 3-4, ¶ 2.c. The SWC and IGWA Steering Committee is presently addressing the 2023 sentinel well benchmark through the separate procedure provided by the *Second Addendum*.² *See id.* IGWA’s annual mitigation has not been changed yet and there has not been any formal “notice” of any increase. Even if that obligation does increase, the Cities have already agreed to increase their obligation as well (provided IGWA’s obligation equals or exceeds 340,000 AF/y). Again, at most the Cities only have a direct or substantial interest once the Ground Water Districts’ annual obligation “equals or exceeds 340,000 AF/y”, as it is only at that time the Cities’ obligation increases to the pre-determined quantity of 9,640 AF/y. *See Cities Settlement Agreement* at 4, ¶ II.B (page 19 of the *Petition* pdf).³

The Cities have failed to show how the above provisions are implicated by the “issues in this proceeding.” *Petition* at 3. Contrary to their claim, the Districts’ 2022 breach has nothing to do with the Cities’ 2019 Mitigation Plan and alleging it “may impact . . . future negotiations with the SWC” is insufficient to show a “direct and substantial interest” in this contested case. *See e.g. State v. United States*, 134 Idaho 106, 110, 996 P.2d 806, 810 (2000) (“The SRBA Court affirmed, concluding that the generalized interest the irrigators had in the subcase were insufficient to support intervention of right”). Speculation about potential future negotiations does not satisfy the rule’s criteria to intervene in a contested case.

² The Steering Committee held an in-person meeting on November 2, 2023 and is presently awaiting certain information to be provided by the parties’ consultants.

³ A copy of the Cities’ Joint Mitigation Plan (agreement attached) and the Director’s order approving the plan is included in Attachment 1 to Cities’ *Petition to Intervene*.

II. The Cities’ Intervention Should be Limited Upon “Reasonable Conditions.”

In the event the Hearing Officer grants the Cities’ petition to intervene, the Coalition respectfully requests that such participation be limited to responding to legal issues in any dispositive motions, similar to amicus curiae status in an appeal. *See* IDAPA 37.01.01.353.01 (“subject to reasonable conditions”); *see e.g.*, Idaho Appellate Rule 8. Notably, each of the fifteen cities has requested the right to participate individually without any limitation. *See Petition* at 1, n. 1. Full party status to fifteen separate cities stands to prejudice the existing parties with additional discovery, witnesses, and expert reports to address.

Consequently, as most, the Hearing Officer should limit intervention upon conditions to preserve the existing hearing schedule and limited issues. *See e.g. Stilwyn, Inc. v. Rokan Corp.*, 158 Idaho 833, 842, 353 P.3d 1067, 1076 (2015) (“a party is allowed to participate in the role identified by the court and to protect the specific interests identified by the court”).

CONCLUSION

The contested case is limited to discrete issues related to the Ground Water Districts’ 2016 Mitigation Plan and its implementation. While certain Districts breached the plan in 2022, the contested case regarding that breach does not concern the Cities or their separate mitigation plan. Without a “direct and substantial” interest in this proceeding, the Cities’ petition to intervene should be denied pursuant to IDWR’s rule of procedure. However, in the event intervention is granted, the Coalition respectfully requests the Hearing Officer to condition and limit that intervention as noted above. Limiting intervention will ensure the proceeding addresses the relevant issues as stated by the Hearing Officer and protect the existing parties and their interests.

DATED this 2nd day of January 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of January 2024, I served a true and correct copy of the foregoing on the following by the method indicated:

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