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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

IDAHO GROUND WATER
APPROPRIATORS, INC., BONNEVILLE-
JEFFERSON GROUND WATER DISTRICT,
and BINGHAM GROUND WATER
DISTRICT,

Petitioners,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES, and GARY SPACKMAN in his
capacity as the Director of the Idaho
Department of Water Resources,

Respondents.

Case No. CV01-23-08187

**DEPARTMENT'S BRIEF IN
SUPPORT OF MOTION TO
DISMISS PETITION FOR
JUDICIAL REVIEW AND
MOTION TO VACATE
HEARING**

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 IRRIGATION DISTRICT,
MILNER IRRIGATION DISTRICT,
MINIDOKA IRRIGATION DISTRICT,
NORTH SIDE CANAL COMPANY, AND
TWIN FALLS CANAL COMPANY

Respondents, the Idaho Department of Water Resources and its Director, Gary Spackman (collectively, “Department”), file this brief pursuant to Idaho Rule of Civil Procedure (“I.R.C.P.”) 84(p) in support of the concurrently filed *Department’s Motion to Dismiss Petition for Judicial Review and Motion to Vacate Hearing*. The motion is brought pursuant to I.R.C.P. 12(b)(1), 84(o), Idaho Code § 42-1701A(3), and other applicable law discussed below. The Court should dismiss the *Ground Water Districts’ Petition for Judicial Review* for lack of jurisdiction because Petitioners have failed to exhaust their administrative remedies. The Department further requests that the Court vacate the hearing scheduled for June 1, 2023, at 1:30 P.M. given the Court’s lack of jurisdiction.

BACKGROUND

On April 21, 2023, the Director issued his *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). See Budge Decl. Ex. A-1, at 10–56. The Methodology Order updates the process used to determine material injury to members of the Surface Water Coalition (“SWC”).

On the same day, the Director also issued his *Final Order Regarding April 2023 Forecast Supply* (“As-Applied Order”). See Budge Decl. Ex. A-2, at 58–71. The As-Applied Order applies the new Methodology Order for the 2023 irrigation season and predicts a shortfall for Twin Falls Canal Company, which will result in mitigation requirements or curtailment for ground water rights with priority dates junior to December 30, 1953.

To help prevent delay in administration, in case one or more parties requested a hearing pursuant to Idaho Code § 42-1701A(3), the Director also issued a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* (“Notice of Hearing”) on April 21, 2023. *See* Budge Decl. Ex. A-3, at 73–78. The Notice of Hearing scheduled a prehearing conference for April 28, 2023, and an in-person evidentiary hearing on the Methodology Order and As-Applied Order for June 6–10, 2023.

On May 19, 2023, the Idaho Ground Water Appropriators, Inc. (“IGWA”), Bonneville-Jefferson Ground Water District and Bingham Ground Water District (collectively the “Ground Water Districts”) filed the *Ground Water Districts’ Petition for Judicial Review* (“Petition”). Within the petition for judicial review case, numerous motions were concurrently filed—*Ground Water Districts’ Motion for Stay, Ground Water Districts’ Motion for Injunctive Relief, Ground Water Districts’ Motion for Expedited Decision, Ground Water Districts’ Motion to Compel*; and *Ground Water Districts’ Motion for Order to Show Cause*. The purpose of each of these motions is to persuade the Court to step in and stop the administrative hearing set for June 6–10, 2023.

On May 25, 2023, the Ground Water Districts filed an *Amended Notice of Hearing* for their various motions to be heard on June 1, 2023, at 1:30 P.M.

ARGUMENT

The Court lacks jurisdiction over the Ground Water Districts’ Petition because the Ground Water Districts have failed to exhaust their administrative

remedies. Because the Court lacks jurisdiction, the Petition must be dismissed, the motions must be denied, and the June 1, 2023 hearing vacated.

I. The Ground Water Districts have an available administrative remedy—a hearing under Idaho Code § 42-1701A(3).

I.R.C.P. 12(b)(1) authorizes a party to motion a court for dismissal for lack of subject matter jurisdiction. “Failure to exhaust administrative remedies is a subset of errors of ‘subject matter jurisdiction,’ and can also be brought under a 12(b)(1) motion.” *Owsley v. Idaho Indus. Comm’n*, 141 Idaho 129, 133, 106 P.3d 455, 459 (2005). The Department moves this Court to dismiss the Petition because the significant body of caselaw regarding exhaustion of administrative remedies that has been developed both before the Idaho Supreme Court and this Court clearly establishes that the Ground Water Districts’ failure to exhaust their administrative remedies renders this Court without jurisdiction to hear their Petition.

Pursuit of statutory administrative remedies is a condition precedent to judicial review. *Park v. Banbury*, 143 Idaho 576, 578, 149 P.3d 851, 853 (2006). Generally stated, administrative exhaustion “requires that where an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before the courts will act.” *Regan v. Kootenai Cnty.*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004); *see also* I.C. § 67-5271(1) (“A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter.”). The doctrine of exhaustion requires a case “run the full gamut of administrative proceedings before an

application for judicial relief may be considered.” *Regan*, 140 Idaho at 724, 100 P.3d at 618.

In this case, the Ground Water Districts have an available administrative remedy—a hearing under Idaho Code § 42-1701A(3). Idaho Code § 42-1701A governs hearings before the Director. According to its plain terms, Idaho Code § 42-1701A(3) provides a mandatory administrative remedy when no statute requires a pre-decision hearing and the Director takes action without a hearing:

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 . . . approval . . . 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.

I.C. § 42-1701A(3) (emphasis added). The aggrieved 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.” *Id.* (emphasis added); see also *Munden v. Bannock Cnty.*, 169 Idaho 818, 835–36, 504 P.3d 354, 371–72 (2022) (“The word *shall*, when used in a statute, is mandatory.” (cleaned up)). And, if the aggrieved person does so, the Director “shall” give notice of the hearing to other affected persons and the hearing “shall” be conducted in accordance with § 42-1701A(1)–(2). I.C. § 42-1701A(3).

The Ground Water Districts have not previously been afforded a hearing regarding the changes in the Methodology Order and are entitled to one under § 42-

1701A(3).¹ The Methodology Order is an “order” within the meaning of § 42-1701A(3), and there is no statutory right to a pre-decision hearing regarding an amendment to the Methodology Order.

Under the plain language of § 42-1701A(3), the Ground Water Districts are not entitled to judicial review until the Director issues a written decision after hearing. This Court has made it clear that “[t]his procedural step is mandatory.” Order on Mot. to Determine Jurisdiction at 4, *Sun Valley Co. v. Spackman*, No. CV01-16-23185 (Ada Cnty. Dist. Ct. Idaho Feb. 16, 2017) [hereinafter “Sun Valley Order”];² *see also* Order *Sua Sponte* Dismissing Pet. for Jud. Rev., *McCain Foods USA, Inc. v. Spackman*, No. CV01-16-21480 (Ada Cnty. Dist. Ct. Idaho Apr. 10, 2017) [hereinafter “McCain Order”].³ Because the step is mandatory, the Ground Water Districts must go through the hearing process *before* filing a petition for judicial review. Section 42-1701A(3)’s final sentence authorizes judicial review of “any final order of the director issued *following the hearing . . .*” (emphasis added). Under the plain language of § 42-1701A(3), the Ground Water Districts are not entitled to judicial review until the Director issues a written decision after hearing.

¹ Consistent with Idaho Code § 42-1701(A), the Ground Water Districts have asked for and the Director has granted their request for hearing. *See* Thompson Decl. Ex. S, at 204–208.

² Available at: <http://www.srba.idaho.gov/Images/2017-02/0080053xx00046.pdf>.

³ Available at: <http://www.srba.idaho.gov/Images/2017-04/0080051xx00013.pdf>.

II. The Idaho Administrative Procedures Act does not supplant Idaho Code § 42-1701A.

The Ground Water Districts argue that the Idaho Administrative Procedures Act (“IDAPA”) requires a hearing before the Director can issue an order. Ground Water Dists.’ Br. Supp. of Mot. for Stay, Mot. for Inj. Relief, Mot. to Compel, Mot. for Expedited Decision, and Appl. for Order to Show Cause at 12 [hereinafter “Brief in Support”]. This Court has already considered this argument and rejected it. In *Idaho Ground Water Appropriators, Inc. v. Idaho Department of Water Resources* IGWA argued, as they do here, that IDAPA requires the Director to first hold a hearing before issuing an order. Order Granting Mot. to Dismiss at 7, *Idaho Ground Water Appropriators, Inc. v. Idaho Department of Water Resources*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho Dec. 8, 2022) [hereinafter “IGWA Order”].⁴ The Court rejected the argument concluding that Idaho Code § 42-1701A specifically governs hearings before the Director:

The Idaho Administrative Procedure Act “controls agency decision-making procedures only in the absence of more specific statutory requirements.” Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 277 (1994). Indeed, Idaho Code § 67-5240 directs that its provisions apply “except as provided by other provisions of law.” This directive is consistent with the basic tenant of statutory construction that “a more general statute should not be interpreted to encompass an area already covered by a special statute.” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 743, 947 P.2d 409, 416 (1997). Here, Idaho Code § 42-1701A specifically governs hearings before the Director. As the more specific statute, it is Idaho Code § 42-1701A that governs.

Id.

⁴ Available at: <http://www.srba.idaho.gov/Images/AdminApp/CV27-22-00945/021-Order%20Granting%20Motion%20to%20Dismiss.pdf>.

The Ground Water Districts therefore have an adequate administrative remedy—a hearing under § 42-1701A(3)—rendering their petition for judicial review improper, warranting dismissal under I.R.C.P. 12(b)(1).

III. Exceptions to the exhaustion requirement do not apply.

Recognizing that exhausting administrative remedies is requirement before filing a petition for judicial review, the Ground Water Districts attempt to address the issue in their Brief in Support. The Ground Water Districts point to Idaho Code § 67-5271(2), which provides an exception to the exhaustion requirement when “review of the final agency action would not provide an adequate remedy.” *Brief in Support* at 10. Here, it is undisputed that the administrative process has not yet run its course. Judicial review of a final order issued by the Director in the administrative proceeding is an adequate remedy. Order Dismissing Pet. for Judicial Review at 4–5, *City of Pocatello v. Spackman*, No. CV01-17-23146 (Ada County Dist. Ct. Idaho June 4, 2018).⁵ The Petitioners have an administrative hearing under Idaho Code § 42-1701A(3) scheduled for June 6–10, 2023. The Petitioners then have the right to petition the district court for review under I.R.C.P. 84 and Idaho Code § 67-5270 and the right to appeal to the Idaho Supreme Court after that. In their Brief in Support, the Ground Water Districts allege the Director has “set a rushed hearing on June 6-10, 2023, which does not afford sufficient time for adequate review and scrutiny of the Fifth Methodology Order.” *Brief in Support* at 3. The Ground Water Users argue the Director improperly

⁵ Available at: <http://srba.idaho.gov/Images/2018-06/0080060xx00036.pdf>.

“blocked junior-priority groundwater users from discovering some of the information he considered in developing the Fifth Methodology Order and the April 2023 As-Applied Order.” *Id.* Issues of due process and alleged discovery violations can properly be raised and addressed on judicial review following issuance of a final order.

While the Ground Water Districts will also undoubtedly complain about the expenditure of time and resources if they are forced to go forward with the hearing on June 6, such complaints are not valid grounds for claiming an inadequate remedy. Expense incident to an administrative hearing does not justify immediate review of an interlocutory order. Order Dismissing Pet. for Judicial Review at 5, *City of Pocatello v. Spackman*, No. CV01-17-23146 (Ada County Dist. Ct. Idaho June 4, 2018).

The Ground Water Districts also argue exhaustion of administrative remedies is not required “when the interests of justice so require.” *Brief in Support* at 10. To support their “interest of justice” argument, the Ground Water Districts cite *Regan v. Kootenai Cty.*, 140 Idaho 721, 725 (2004), which cites *Arnze[n] v. State*, 123 Idaho 899, 906 (1993). *Id.* In *Regan*, the Idaho Supreme Court concluded that “[t]he Regans’ failure to exhaust their administrative remedies deprived the district court of subject matter jurisdiction over their claim for declaratory relief.” *Regan*, 140 Idaho at 726, 100 P.3d at 620. Similarly, in *Arnzen* the Idaho Supreme Court concluded that the district court “correctly dismissed [Mr. Arnzen’s] state claims for

failure to exhaust his administrative remedies.” *Arnzen*, 123 Idaho at 907, 854 P.2d at 250.

The Idaho Supreme Court recognized that the interest of justice exception is applicable “when there are no remedies to exhaust.” *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 239–40, 207 P.3d 963, 970–71 (2009). The exception does not apply when a party has an adequate remedy. As described above, the Ground Water Districts have an adequate administrative remedy, namely a hearing under § 42-1701A(3). Moreover, after the hearing the Ground Water Districts can appeal to the district court, and then the Idaho Supreme Court. The Idaho Supreme Court has been clear that even due process allegations first require exhausting administrative remedies. *See White v. Bannock Cnty. Commissioners*, 139 Idaho 396, 400, 80 P.3d 332, 336 (2003). Because the interest of justice exception does not apply when a party has an adequate alternative remedy, the Ground Water Districts Petition must be dismissed.

It is well established that a party must seek judicial review under Idaho Code § 42-1701A and exhaust administrative remedies before filing a petition for judicial review. Yet, the Ground Water Districts continue to ignore this body of caselaw and file premature petitions for judicial review. *See IGWA Order* at 7. “Where an appeal is taken from a non-appealable order, the appeal should be dismissed, even by the court sua sponte, for lack of jurisdiction over the particular appeal.” *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 960, 188 P.3d 900, 902 (2008). Because the caselaw on exhaustion is well established, this Court should not delay and

should immediately enter an order dismissing the Ground Water Districts' prematurely filed Petition.

IV. The Ground Water Districts' motions must be denied and the hearing set for June 1, 2023 vacated.

In addition to their Petition for Judicial Review, the Ground Water Districts have also filed the following motions: Motion for Stay, Motion for Injunctive Relief, Motion to Compel, Motion for Expedited Decision and Motion for Order to Show Cause. The Ground Water Districts have noticed the motions for hearing on June 1, 2023, at 1:30 P.M. Each of these motions is predicated on the Court having jurisdiction to hear the *Ground Water Districts' Petition for Judicial Review*. Because the petition for judicial review is improperly before the Court, the Court should deny the motions and vacate the hearing currently set for June 1, 2023, at 1:30 P.M.

CONCLUSION

Because the Court lacks jurisdiction to hear the case, the Department requests that the Court dismiss the *Ground Water Districts' Petition for Judicial Review*. Given the Court's lack of jurisdiction, the Department also asks the Court to vacate the hearing on June 1, 2023, and dismiss the Ground Water Districts' Motion for Stay, Motion for Injunctive Relief, Motion to Compel, and Motion for Order to Show Cause.

DATED this 30th day of May 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

A handwritten signature in blue ink, appearing to read "G. Baxter", is written over a horizontal line.

GARRICK L. BAXTER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of May 2023, I caused to be served a true and correct copy of the foregoing *Department's Brief in Support of Motion to Dismiss Petition for Judicial Review and Motion to Vacate*, via iCourt E-File and Serve, upon the following:

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