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RECEIVED

Aug 16, 2023

DEPARTMENT OF  
WATER RESOURCES

Wildman, Eric J.

*Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)*

**DISTRICT COURT OF THE STATE OF IDAHO  
FOURTH JUDICIAL DISTRICT  
ADA COUNTY**

IDAHO GROUND WATER  
APPROPRIATORS, INC.,

Petitioner,

vs.

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

Respondents.

CV01-23-13173

Case No. \_\_\_\_\_

**IGWA's Petition  
for Judicial Review**

Fee Category L.3: \$221.00

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

Idaho Ground Water Appropriators, Inc. (“Petitioner”), acting for and on behalf of North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, Aberdeen-American Falls Area Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry’s Fork Ground Water District, by and through counsel, Racine Olson, PLLP, submits this petition for judicial review pursuant to Idaho Code §§ 67-5270 through 67-5279 and Rule 84 of the Idaho Rules of Civil Procedure.

1. This petition seeks judicial review of agency action taken by the Idaho Department of Water Resources (“IDWR” or “Department”).

2. This petition is taken to the District Court of the State of Idaho, Fourth Judicial District, Ada County.

3. This petition requests judicial review of the following orders issued by the Director of the Department in IDWR Docket No. CM-DC-2010-001:

3.1 *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* issued April 21, 2023 (“*Fifth Methodology Order*”).

3.2 *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* issued May 2, 2023 (“*April As-Applied Order*”).

3.3 *Scheduling Order and Order Authorizing Remote Appearance at Hearing* issued May 2, 2023 (“*Scheduling Order*”).

3.4 *Order Denying the Cities’ Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* issued May 5, 2023 (“*Order Limiting Discovery*”).

3.5 *Notice of Materials Department Witnesses May Rely Upon at Hearing and Intent to Take Official Notice* issued May 5, 2023 (“*Order Limiting Evidence*”).

3.6 *Post-Hearing Order Regarding Fifth Amended Methodology Order* issued July 19, 2023 (“*Post-Hearing Order*”).

3.7 *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* issued July 19, 2023 (“*Sixth Methodology Order*”).

3.8 *Order Revising April 23 Forecast Supply and Amending Curtailment Order (Methodology Steps 5 & 6)* issued July 19, 2023 (“*July As-Applied Order*”).

The above-referenced orders are referred to collectively herein as the “Orders.”

4. This court is the proper venue under Idaho Code § 67-5272(a) because the Orders were issued from the Department's state office in Ada County, Idaho.

5. Pursuant to an Administrative Order issued by the Idaho Supreme Court on December 9, 2009, this case should be reassigned to the presiding judge of the Snake River Basin Adjudication district court for further proceedings.

6. The Department did not hold a hearing prior to issuing the *Fifth Methodology Order*, the *Scheduling Order*, the *Order Limiting Discovery*, or the *Order Limiting Evidence*. The Department held a hearing prior to issuing the *Post-Hearing Order* and the *Sixth Methodology Order*. The hearing, held June 5-9, 2023, was recorded by M&M Court Reporting Service, P.O. Box 2636, Boise, Idaho 83701.

7. Petitioners submit the following preliminary statement of issues for judicial review:

7.1 Whether the Director violated Petitioners' constitutional right to due process and/or the Idaho Administrative Procedures Act by issuing the *Fifth Methodology Order* without first providing notice and a hearing.

7.2 Whether the Director violated the Idaho Administrative Procedures Act by failing to base the findings of fact in the *Fifth Methodology Order* exclusively on the evidence in the record of the contested case.

7.3 Whether the Director violated Petitioners' constitutional right to due process and/or the Idaho Administrative Procedures Act by scheduling an after-the-fact hearing on the *Fifth Methodology Order* that did not provide adequate time for Petitioners to be prepared to address the issues, and by denying the motion to continue the hearing to provide adequate time to prepare.

7.4 Whether the Director violated constitutional or statutory provisions, acted upon unlawful procedure, and/or abused his discretion by issuing the *Order Limiting Discovery* which blocked Petitioners from discovering information relevant to the issues in the case, including information the Director considered in developing the *Fifth Methodology Order*.

7.5 Whether the Director violated constitutional or statutory provisions, acted upon unlawful procedure, and/or abused his discretion by issuing the *Order Limiting Evidence* which blocked Petitioners from calling witnesses at the hearing who possess information relevant to issues in the case.

7.6 Whether the Director violated constitutional or statutory provisions, acted upon unlawful procedure, and/or abused his discretion by taking official notice of facts he relied upon in developing the *Fifth Methodology Order* when such notice was


issued after the issuance of the *Fifth Methodology Order* in violation of Department Rule of Procedure 602.

- 7.7 Whether the *Fifth Methodology Order* was otherwise made upon unlawful procedure for failure to comply with the contested case procedures of the Idaho Administrative Procedures Act, Chapter 52, Title 67, Idaho Code, due process of law, the rules of procedure of the Department, or other law.
- 7.8 Whether the *Fifth Methodology Order* and the *Sixth Methodology Order* violate rules 10.07, 10.08, 20.03, 20.04, 40.03, and/or 42.01 of the Rules for Conjunctive Management of Ground Water Resources by failing to apply the futile call doctrine or principles of full economic development of underground water resources and reasonable use of water.
- 7.9 Whether the Director violated constitutional or statutory provisions and/or abused his discretion by failing to use the best science available to determine the number of acres actually irrigated by SWC members when calculating material injury in the *April As-Applied Order* and the *July As-Applied Order*.
- 7.10 Whether the Director violated constitutional or statutory provisions and/or abused his discretion by failing to use the best science available to account for supplemental groundwater use when calculating material injury in the *April As-Applied Order* and the *July As-Applied Order*.
- 7.11 Whether the Director violated constitutional or statutory provisions, acted upon unlawful procedure, and/or abused his discretion by refusing to allow Petitioner adequate time to analyze the number of acres actually irrigated by SWC members, and then refusing to use the best available evidence of irrigated acres by ruling that Petitioner “did not establish an alternative number of acres irrigated by clear and convincing evidence.”
- 7.12 Whether the Director violated constitutional or statutory provisions, acted upon unlawful procedure, and/or abused his discretion by refusing to allow Petitioner adequate time to analyze supplemental groundwater use by SWC members, and then refusing to use the best available evidence of supplemental groundwater use by ruling that Petitioner did not meet its burden of proof.
- 7.13 Whether the Director violated constitutional or statutory provisions and/or abused his discretion by selecting a new baseline year that extremely over-predicts material injury to the SWC.
- 7.14 Whether the Director violated constitutional or statutory provisions and/or abused his discretion by failing to meaningfully evaluate whether SWC members are using water efficiently.

- 7.15 Whether the Director violated constitutional or statutory provisions and/or abused his discretion by failing to meaningfully evaluate whether the water needs of SWC members could be met with their existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices.
  - 7.16 Whether the *Fifth Methodology Order*, the *Post-Hearing Order*, and the *Sixth Methodology Order* are supported by substantial evidence on the record as a whole.
  - 7.17 Whether the Orders otherwise violate constitutional or statutory provisions, were made upon unlawful procedure, or contain finding of fact or conclusions of law that are arbitrary, capricious, or an abuse of discretion.
  - 7.18 Whether the Director is liable for damages and/or attorney fees under 42 U.S.C. § 1983 for deprivation of the due process rights of Petitioner.
  - 7.19 Whether the Director is liable for attorney fees under Idaho Code § 12-117(1) for committing the errors set forth above without a reasonable basis in fact or law.
  - 7.20 Pursuant to I.R.C.P. 84(c)(5), Petitioner reserves the right to assert additional issues for judicial review, which will be set forth in briefs filed in this action.
8. Petitioner has obtained a transcript of the hearing held June 5-9, 2023, from M&M Court Reporting Service.
  9. The undersigned attorney certifies as follows:
    - 9.1 Service of this Petition has been made on the Department.
    - 9.2 Petitioner has paid M&M Court Reporting Service the fee for the transcript of the hearing held June 5-9, 2023.
    - 9.3 Petitioner has requested from the Department the estimated fee to prepare the agency record. Petitioner will promptly pay the estimated fee.

DATED this 16<sup>th</sup> day of August, 2023.

RACINE OLSON, PLLP

By:   
\_\_\_\_\_  
Thomas J. Budge  
*Attorneys for IGWA*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of August, 2023, I served the foregoing document on the persons below via email or as otherwise indicated:



Thomas J. Budge

Clerk of the Court JEROME COUNTY DISTRICT COURT 233 West Main Street Jerome, ID 83338	iCourt
Director Gary Spackman Garrick Baxter Sarah Tschohl IDAHO DEPT. OF WATER RESOURCES 322 E Front St. Boise, ID 83720-0098	<a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a> <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a>
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