

Exhibit P

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF BASIN 37
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**ORDER DENYING MOTION TO
APPOINT INDEPENDENT HEARING
OFFICER**

BACKGROUND

On May 4, 2021, the Director of the Idaho Department of Water Resources (“Department”) issued a *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* (“Notice”). The Director commenced the administrative proceeding in response to predicted drought in Basin 37 for the 2021 irrigation season and in response to ground water modeling showing that curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for certain holders of senior surface water rights. *Notice* at 1. The purpose of the hearing is for the Director to decide whether “the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season.” *Id.* at 1. The Director, acting as presiding officer, set a prehearing conference for May 24, 2021, and set the hearing for June 7-11, 2021. *Id.* at 1-2.

On May 13, 2021, South Valley Ground Water District (“South Valley”) filed *South Valley Ground Water District’s Motion to Appoint Independent Hearing Officer* (“Motion”). In its Motion, South Valley asks the Director to appoint an independent hearing officer pursuant to Idaho Code § 42-1701A(2) and IDAPA 37.01.01.410. *Motion* at 2. South Valley argues the Director should appoint an independent hearing officer because of “the Director’s role in various aspects of prior negotiations and meetings of the Big Wood River Ground Water Management Area Advisory Committee, as well as the overarching issues of the Director’s authority and scope to initiate these proceedings.” *Id.* at 4.

On May 19, 2021, Attorney James Speck filed a *Joinder In and Support of Motions* (“Speck Joinder”) on behalf of numerous clients. The Speck Joinder states that his clients “join in and fully support” South Valley’s Motion. *Speck Joinder* at 1. On the same day, Galena Ground Water District (“Galena GWD”) filed *Galena Ground Water District’s Joinder In and Support of South Valley Ground Water District’s Motions* (“Galena GWD Joinder”) stating Galena GWD “joins in and fully supports” South Valley’s Motion. *Galena GWD Joinder* at 1. On May 20, 2021, Dean Rogers, III and Dean R. Rogers, Inc., Sun Valley Water and Sewer District, and the City of Pocatello also joined in the Motion filed by South Valley.

APPLICABLE LEGAL STANDARD

Idaho Code § 42-1701A(2) states in relevant part: “The director, *in his discretion*, may direct that a hearing be conducted by a hearing officer appointed by the director.” (emphasis added).

Rule 410 of the *Rules of Procedure of the Idaho Department of Water Resources* states:

A hearing officer is a person other than the agency head appointed to hear contested cases on behalf of the agency. Unless otherwise provided by statute or rule, hearing officers may be employees of the agency or independent contractors. Hearing officers may be (but need not be) attorneys. Hearing officers who are not attorneys should ordinarily be persons with technical expertise or experience in issues before the agency. The appointment of a hearing officer is a public record available for inspection, examination and copying.

IDAPA 37.01.01.410.

ANALYSIS

South Valley asks the Director to exercise his discretion pursuant to Idaho Code § 42-1701A(2) to appoint an independent hearing officer. The Director denies South Valley’s request for a number of reasons.

First, time is of the essence in this administrative proceeding. As explained in the Notice, a drought is predicted for the 2021 irrigation season and the water supply in Silver Creek and its tributaries may be inadequate to meet the needs of surface water users. The urgency for water administration requires that issuance of a decision not be delayed. The Director can expeditiously hear the contested case and issue a final order, avoiding delays in identifying and appointing a hearing officer and shortening the time periods for issuance of recommended or preliminary orders, motions for reconsideration, and ultimate issuance of a final order by the Director. Appointing someone else to hear the matter would unreasonably delay the proceeding.

Second, the Director is statutorily mandated to distribute water in Idaho. “The director’s duty pursuant to I.C. § 42-602 is clear and executive. Although the details of the performance of the duty are left to the director’s discretion, the director has the duty to distribute water.” *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994); *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973); *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977). This is the first time the Director has sought to invoke Idaho Code § 42-237a.g. for water right administration. The Director takes this duty seriously and believes that he should hear this matter especially given the important issues to be addressed in this proceeding.

South Valley suggests that because resolution of the surface and ground water disputes were a key topic of discussion at the Big Wood River Ground Water Management Area (“BWRGWMA”) meetings and because the Director made statements about commencing this administrative proceeding and the possibility of curtailment, the Director should appoint

someone else to hear the matter. *Motion* at 3. The Director's participation in the BWRGWMA advisory committee meetings is not improper and does not justify appointing someone else to hear the matter. The Director's participation in discussions involving the BWRGWMA is only natural given he is statutorily charged with creating and overseeing ground water management areas and that he is charged with distributing water in the basin. The Director is required to (and is committed to) being an impartial and disinterested tribunal in this contested case. *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. 170*, 148 Idaho 200, 208, 220 P.3d 318, 326 (2009). An impartial and disinterested tribunal is one which "assures equal application of the law." *Republican Party of Minn. v. White*, 536 U.S. 765, 775-776 (2002). An impartial and disinterested tribunal is one that "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *Id.* at 776. The Director is committed to applying the law evenly to all parties to this proceeding.

Finally, South Valley suggests that someone other than the Director should hear the matter because South Valley is challenging the Director's authority to initiate this proceeding. *Motion* at 3. South Valley argues that "given these foundational disagreements as to the authority of the Director and the procedure chosen, adjudication of these issues should be left to a party without interest in their resolution; i.e. the Director should not be put in a position where he is asked to determine the scope of his own authority to act." *Id.* It is important that quasi-judicial administrative bodies be provided the opportunity to mitigate or cure alleged errors. *See Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 872, 154 P.3d 433, 443 (2007). In a separate motion filed by South Valley with the Department, South Valley alleges that the Director lacks the authority to commence the action. *South Valley Ground Water District's Motion to Dismiss* at 10-15. The filing of the motion to dismiss is the proper way to raise the issue. There is nothing wrong or improper with the Director being in a position where he has to evaluate the scope of his own authority.

ORDER

Based on the forgoing discussion, IT IS HEREBY ORDERED that *South Valley Ground Water District's Motion to Appoint Independent Hearing Officer* is DENIED.

DATED this 21st day of May, 2021.


Gary Spackman
Director

AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May, 2021, the above and foregoing was served on the following by the method(s) indicated below:

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Exhibit Q

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF BASIN 37
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**ORDER AUTHORIZING
DISCOVERY**

On May 4, 2021, the Director of the Idaho Department of Water Resources (“Department”) issued a *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* (“Notice”). The Director commenced the administrative proceeding in response to predicted drought in Basin 37 for the 2021 irrigation season and in response to ground water modeling showing that curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for certain holders of senior surface water rights. *Notice* at 1. The purpose of the hearing was for the Director to decide whether “the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season.” *Id.* at 1. The Director set a pre-hearing conference for May 24, 2021, and set the hearing for June 7-11, 2021. *Id.* at 1-2.

On May 13, 2021, South Valley Ground Water District (“South Valley”) filed *South Valley Ground Water District’s Motion for Order Authorizing Discovery* (“Motion”) asking the Director to authorize discovery in this matter pursuant to IDAPA 37.01.01.260, IDAPA 37.01.01.520, and IDAPA 37.01.01.521. South Valley requests authorization to “conduct discovery in all forms listed in rule 520.01a-d and seeks leave to conduct discovery against all parties or other knowledgeable persons or entities.” *Motion* at 1. South Valley states “[e]valuation of the factual issues that the Director has addressed in his *Notice* will be complex and extensive,” therefore discovery is essential. *Id.* at 2.

Rule 521 of the Department’s Rules of Procedure require an order authorizing discovery prior to any party conducting discovery. IDAPA 37.01.01.521. Rule 520.02 specifies the scope of discovery is governed by the Idaho Rules of Civil Procedure, unless otherwise provided by an order. The Director agrees that discovery is appropriate in this matter. Discovery is only authorized for depositions, production requests (not interrogatories), and subpoenas, as discussed in Rule 520.01a, 520.01b and 520.01d. Deadlines will be discussed at the pre-hearing conference.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED South Valley’s *Motion* is GRANTED.

IT IS FURTHER ORDERED that discovery is limited to depositions, production requests, and subpoenas.

DATED this 21st day of May, 2021.



GARY SPACKMAN
Director

AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May, 2021, the above and foregoing was served on the following by the method(s) indicated below:

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<p>David & Nicole Hults 1572 E. 1700 S. Gooding, ID 83330</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
<p>Bill & Karen Arkoosh 2005 US Hwy 26 Gooding, ID 83330</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
<p>Charles E Newell P.O. Box 584 Shoshone, ID 83352</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
<p>Nick & Jennifer Westendorf 439 N. 700 W. Shoshone, ID 83352</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
<p>Southern Comfort Homeowner's Association P.O. Box 2739 Ketchum, ID 83340</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
<p>Joe & Melissa Matheney P.O. Box 54 Richfield, ID 83349</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
<p>John & Carrie Arkoosh 2368 E. 1775 S. Gooding, ID 83330</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email

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<p>Sarah A. Klahn Somach Simmons & Dunn 2033 11th St., Suite 5 Boulder, CO 80302 sklahn@somachlaw.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Randall C. Budge Thomas J. Budge Racine Olson, PLLP 201 E. Center St. P.O. Box 1391 Pocatello, Idaho 83204 randy@racineolson.com tj@racineolson.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

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[name] *Rebecca Wills*