LAWRENCE G. WASDEN
ATTORNEY GENERAL

GARRICK L. BAXTER
Acting Chief of Natural Resources Division

GARRICK L. BAXTER, ISB No. 6301
MARK CECCHINI-BEAVER, ISB No. 9297
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
mark.cecchini-beaver@idwr.idaho.gov

Attorneys for Respondents

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

IDAHO GROUND WATER APPROPRIATORS, INC., Petitioner, v. THE IDAHO DEPARTMENT OF WATER RESOURCES, and GARY SPACKMAN in his capacity as the Director of the Idaho Department of Water Resources, Respondents.	**Case No. CV27-22-00945** **RESPONDENTS' MOTION TO DISMISS**
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	
IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN	

Respondents, the Idaho Department of Water Resources and its Director, Gary Spackman (collectively, "Department"), request that this Court dismiss IGWA's Petition for Judicial Review ("Petition"). This is a motion under Idaho Rule of Civil Procedure 84(o) and other applicable law discussed below. The Court should dismiss the Petition for lack of subject matter jurisdiction because IGWA has failed to exhaust its administrative remedies under Idaho Code § 42-1701A(3).

BACKGROUND

IGWA's Petition challenges two orders the Director issued in an ongoing contested case under Department Docket No. CM-MP-2016-001.[1] *Petition* ¶ 1. That contested case concerns IGWA's mitigation plan for the long-running and ongoing Surface Water Coalition ("SWC") delivery call (Department Docket No. CM-DC-2010-001).

On May 2, 2016, the Director issued an order approving, with conditions, a mitigation plan stipulated by the SWC and IGWA (collectively, "the parties"). On May 9, 2017, the Director issued an order approving an amendment to the stipulated mitigation plan subject to additional conditions. Today, IGWA's approved mitigation plan consists of a series of settlement agreements and addenda between the parties, subject to the conditions in the Director's 2016 and 2017 orders approving the mitigation plan.

In the spring of 2022, the SWC alleged that IGWA did not comply with the approved mitigation plan during the 2021 irrigation season. IGWA took the position that it had complied. The parties then spent several months attempting to resolve their dispute without the Director's intervention. On July 21, 2022, the SWC filed a notice in the above-

[1] The docket for CM-MP-2016-001, as well as copies of the filings and orders referenced herein are available at: https://idwr.idaho.gov/legal-actions/mitigation-plan-actions/SWC/IGWA/.

referenced contested case, explaining the parties could not resolve their dispute and again alleging that IGWA breached the approved mitigation plan in 2021. IGWA filed a brief contesting the SWC's allegations on August 3. The SWC filed a reply on August 4. The parties presented their arguments to the Director during a status conference on August 5. IGWA filed a supplemental response to the SWC's arguments on August 12.

The Director issued a notice on August 18, informing the parties that he intended to take official notice of IGWA's report documenting its 2021 performance under the approved mitigation plan. IGWA objected to the Director taking official notice, presented additional arguments, and requested a hearing in a filing dated August 23.

On September 7, 2022, the Department received a settlement agreement signed by SWC and IGWA ("Remedy Agreement").[2] The Remedy Agreement states that IGWA and the SWC disagree on how to interpret two aspects of IGWA's approved mitigation plan: "(a) the amount of groundwater conservation for which IGWA is responsible under the [mitigation plan], and (b) whether averaging may be used to measure compliance with IGWA's conservation obligation." *Remedy Agreement* ¶ D. In addition, the Remedy Agreement provides a "2021 Remedy" to "resolve the parties' dispute over IGWA's compliance with the Settlement Agreement and Mitigation Plan in 2021 . . . ." *Id.* § 1. The Remedy Agreement also states that the "Director shall incorporate the terms of [the 2021 Remedy] as the remedy selected for the alleged shortfall in lieu of curtailment, and shall issue a final order regarding the interpretive issues raised by the SWC Notice." *Id.* § 3.

[2] A copy of the Remedy Agreement is available at: https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-MP-2016-001/CM-MP-2016-001-20220907-Settlement-Agreement.pdf.

Thus, IGWA expressly agreed to the Director issuing an order regarding the "interpretive issues" underlying the parties' dispute over IGWA's 2021 compliance.

On September 8, the Director issued a Final Order Regarding Compliance with Approved Mitigation Plan ("Compliance Order"). The Director found it appropriate to take official notice of IGWA's 2021 performance report. Based on the information in the performance report and the terms of the approved mitigation plan, the Director concluded that certain IGWA members breached the approved mitigation plan in 2021. Accordingly, the Compliance Order directs IGWA to implement the parties' agreed-upon 2021 Remedy in lieu of curtailment. *See id*.

On September 22, IGWA filed a Petition for Reconsideration and Request for Hearing. On October 13, the Director issued an Order Granting Request for Hearing; Notice of Prehearing Conference ("Hearing Order").[3] The Hearing Order granted IGWA's request for hearing "in accordance with Idaho Code § 42-1701A(3)" and set a prehearing conference for November 10, 2022. *Hearing Order* at 2. In addition, the Hearing Order states that IGWA's "request for reconsideration is moot" because the Director "is granting the request for hearing." *Id*. However, the Hearing Order also states that "the issues raised in the request for reconsideration can be raised at hearing or within briefing." *Id*. Rather than continuing the administrative process it requested and was granted, IGWA filed its Petition in this Court 11 days after issuance of the Hearing Order.

[3] Although the Hearing Order determined IGWA's issues for reconsideration were moot pending further administrative proceedings, IGWA's Petition characterizes this order as the "Reconsideration Order." *Petition* ¶ 1. A copy of the Hearing Order is available at: https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-MP-2016-001/CM-MP-2016-001-20221013-Order-Granting-Request-for-Hearing-Notice-of-Prehearing-Conference.pdf.

ARGUMENT

The Court lacks subject matter jurisdiction over IGWA's Petition because IGWA has not exhausted its administrative remedies, as required by Idaho Code § 42-1701A(3) and the doctrine of exhaustion. Therefore, IGWA's Petition should be dismissed.

A. An administrative remedy is available to IGWA under Idaho Code § 42-1701A(3).

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 acts without first conducting 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). Judicial review is authorized only after the Director issues a post-hearing final order. *Id*.

In this case, there is no statutory right to a pre-decision hearing regarding compliance with an approved mitigation plan. This means the Director was not required to

hold a hearing before issuing the Compliance Order. The Compliance Order is an "order" within the meaning of § 42-1701A(3). It is also the order on "interpretive issues" IGWA agreed the Director "shall" issue in the Remedy Agreement. *Remedy Agreement* § 3. And, because IGWA was not previously afforded a hearing on the matter, it was entitled to request a hearing in the manner set out in § 42-1701A(3).

"This 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) ("*Sun Valley Order*");[4] *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) ("*McCain Order*").[5] Indeed, IGWA apparently understood it was a mandatory step because IGWA timely requested—and the Director's Hearing Order granted—a hearing on the Compliance Order under § 42-1701A(3). Yet, in its rush to court, IGWA has overlooked § 42-1701A(3)'s final sentence, which authorizes judicial review of "any final order of the director issued *following the hearing* . . . ." (emphasis added). Under the plain language of § 42-1701A(3), IGWA is not entitled to judicial review until the Director issues a written decision after the hearing IGWA requested.

B. IGWA failed to exhaust its administrative remedies because the hearing IGWA requested has not been held, nor has a post-hearing order issued.

"The doctrine of 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). "Until the full gamut of administrative proceedings has been conducted and all available

[4] Available at: http://www.srba.idaho.gov/Images/2017-02/0080053xx00046.pdf.
[5] Available at: http://www.srba.idaho.gov/Images/2017-04/0080051xx00013.pdf.

administrative remedies been exhausted, judicial review should not be considered." *Id*; *see also* I.C. § 67-5271(1). Further, this Court has recognized the "important policy considerations" underlying the doctrine. *Sun Valley Order* at 5. These considerations include protecting agency autonomy, developing the administrative record, and deferring to the administrative process established by the Legislature. *Id*. (citing *Park v. Bradbury*, 143 Idaho 576, 578–79, 149 P.3d 851, 853–54 (2006)).

IGWA's premature petition for judicial review raises each of these policy concerns. As the official who approved IGWA's mitigation plan, the Director has the "specialized knowledge and expertise necessary" to assess compliance with that plan. *Sun Valley Order* at 6. Sensitive policy questions surround IGWA's compliance with its mitigation obligations in this long-running delivery call, and the Director should be allowed to resolve those questions according to the process the Legislature established in § 42-1701A(3). Indeed, that process will provide the hearing IGWA claims is necessary to protect its due process rights. *Petition* ¶ 5.2. Even assuming IGWA's due process claim has merit (a point the Department disputes), the hearing IGWA requested and was granted will "allow the agency to develop the record and mitigate or cure" IGWA's due process concern "without judicial intervention." *Sun Valley Order* at 5. Therefore, the doctrine of exhaustion further supports dismissal of the Petition.

C. The posture of this case is indistinguishable from the *Sun Valley* and *McCain* cases, in which this Court dismissed premature petitions for judicial review.

In both the *Sun Valley Order* and the *McCain Order*, this Court held it lacked jurisdiction because the petitioners had not exhausted the administrative hearing remedy in § 42-1701A(3). While both cases involved challenges to the order designating the Eastern

Snake Plain Aquifer ground water management area, that distinction makes no difference here. Like this case, no statute required the Director to hold a hearing before issuing the challenged designation order, a pre-decision hearing was not held, and the administrative remedy available to the petitioners under § 42-1701A(3) had not been exhausted. *Sun Valley Order* at 2–4; *McCain Order* at 2–3. That administrative remedy is as mandatory here as in those cases. And the similarities do not end there.

The policy considerations underlying the doctrine of exhaustion are equally present. In fact, the Sun Valley Company—just like IGWA here—had requested a hearing under § 42-1701A(3), and then filed a premature petition for judicial review before the hearing was held. *Sun Valley Order* at 4. As the Court recognized, a case in such a posture does not present a fully developed administrative record. *Id*. at 5; *see also Petition* ¶ 5.4 (questioning whether the Compliance Order "is supported by substantial evidence on the record as a whole"). As in *Sun Valley*, "the sense of comity the judiciary has for the quasi-judicial functions of the Director" requires the administrative process to resolve before judicial review commences. *Sun Valley Order* at 6. IGWA has an adequate administrative remedy available, that remedy is not yet exhausted, and thus the Petition must be dismissed for lack of jurisdiction. *See id.*

CONCLUSION

For the reasons above, the Department respectfully requests that the Court issue an order dismissing IGWA's premature petition for judicial review.

//signature on following page//

DATED this 9th day of November 2022.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

GARRICK L. BAXTER
Acting Chief of Natural Resources Division

MARK CECCHINI-BEAVER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of November 2022, I caused to be served a true and correct copy of the foregoing *Respondents' Motion to Dismiss* via iCourt E-File and Serve, upon the following:

Thomas J. Budge Elisheva M. Patterson **RACINE OLSON, PLLP** P.O. Box 1391 Pocatello, ID 83204 tj@racineolson.com elisheva@racineolson.com *Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)*	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☒ iCourt E-File and Serve
John K. Simpson Travis L. Thompson Michael A. Short **BARKER ROSHOLT & SIMPSON LLP** P.O. Box 63 Twin Falls, ID 83303 jks@idahowaters.com tlt@idahowaters.com mas@idahowaters.com W. Kent Fletcher **FLETCHER LAW OFFICE** P.O. Box 248 Burley, ID 83318 wkf@pmt.org *Attorneys for Surface Water Coalition*	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☒ iCourt E-File and Serve ☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☒ iCourt E-File and Serve
Candice McHugh Chris M. Bromley **MCHUGH BROMLEY, PLLC** 380 S. 4th St., Ste. 103 Boise, ID 83702 cmchugh@mchughbromley.com cbromley@mchughbromley.com *Attorneys for Coalition of Cities*	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☒ iCourt E-File and Serve

Sarah A. Klahn **SOMACH SIMMONS & DUNN** 1155 Canyon Blvd., Suite 110 Boulder, CO 80302 sklahn@somachlaw.com *Attorney for City of Pocatello*	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☒ iCourt E-File and Serve

MARK CECCHINI-BEAVER
Deputy Attorney General
Idaho Department of Water Resources