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

CITY OF IDAHO FALLS, CITY OF POCATELLO, CITY OF BLISS, CITY OF BURLEY, CITY OF CAREY, CITY OF DECLO, CITY OF DIETRICH, CITY OF GOODING, CITY OF HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF SHOSHONE, and CITY OF WENDELL,

Petitioners,

vs.

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

Respondents,

and

IDAHO GROUND WATER APPROPRIATORS INC., A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT,

Case No. CV01-23-13238

ORDER GRANTING MOTION TO AUGMENT RECORD

ORDER AUGMENTING RECORD

and BINGHAM GROUNDWATER DISTRICT,

Intervenors.

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 RESERVOIRS DISTRICT NO. 2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY.

On August 16, 2023, the Petitioners filed a *Petition* seeking judicial review of the Director's *Post-Hearing Order Regarding Fifth Amended Methodology Order*. The administrative transcript and record were lodged with the Court on September 28, 2023. On October 19, 2023, the Petitioners filed a *Motion to Augment the Record*, followed by an *Amended Motion to Augment the Record* on October 20, 2023. The *Amended Motion* requests that the Court augment the agency record to include the following three documents pursuant to Idaho Rule of Civil Procedure 84(l):

1. Motion for Clarification and Reconsideration of Denial of Request for Hearing and to Engage in Discovery, filed in IDWR Docket No. CM-DC-2010-001 on September 5, 2023,

2. Surface Water Coalition's Response to Cities' Motion for Clarification and Reconsideration, filed in IDWR Docket No. CM-DC-2010-001 on September 19, 2023, and

3. Order Denying Cities' Motion for Clarification and Reconsideration, filed in IDWR Docket No. CM-DC-2010-001 on September 25, 2023.

A hearing on the *Motion* was held before the Court on November 9, 2023. For reasons set forth on the record, the Court in an exercise of discretion determined to grant the *Amended Motion.*

THEREFORE, BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The Petitioners' *Amended Motion to Augment the Record* is hereby granted.

2. The agency record is hereby augmented to include the three documents identified above as bates stamped and attached hereto.

IT IS SO ORDERED.

Dated: November 15, 2023

ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

Sarah Klahn Maximilian Bricker sklahn@somachlaw.com mbricker@somachlaw.com	via Email
Candice McHugh Chris Bromley cmchugh@mchughbromley.com cbromley@mchughbromley.com	via Email
Robert Harris rharris@Holdenlegal.cm efiling@holdenlegal.com	via Email
Garrick Baxter Kayleen Richter garrick.baxter@idwr.idaho.gov kayleen.richter@idwr.idaho.gov	via Email
Thomas Budge Elisheva Patterson tj@racineolson.com elisheva@racineolson.com	via Email
John Simpson Travis Thompson jsimpson@martenlaw.com tthompson@martenlaw.com	via Email
W. Kent Fletcher wkf@pmt.org	via Email
Skyler Johns Nathan Olsen Steven Taggart sjohns@olsentaggert.com nolsen@olsentaggert.com staggart@olsentaggert.com	via Email
Dylan Anderson dylan@dylanandersonlaw.com	via Email

Date: 11/15/2023

Trent Tripple
Clerk of the Court

By Erin Rowell
Deputy Clerk

DISTRICT COURT 4TH JUDICIAL DISTRICT
OF THE STATE
- OF -
IDAHO
IN AND FOR ADA COUNTY

TABLE OF CONTENTS

INDEX

Candice M. McHugh, ISB # 5908
Chris M. Bromley, ISB # 6530
MCHUGH BROMLEY, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
(208) 287-0991
cbromley@mchughbromley.com
cmchugh@mchughbromley.com
Attorneys for the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell

Sarah A. Klahn, ISB # 7928
Maximillian Bricker ISB #12283
SOMACH SIMMONS & DUNN
2033 11th St., Ste. 5
Boulder, CO 80302
(303) 449-2834
sklahn@somachlaw.com
Attorneys for City of Pocatello

Robert L. Harris, ISB # 7018
HOLDEN KIDWELL HAHN & CRAPO
100 Riverwalk Dr., Ste. 200
PO Box 50130
Idaho Falls, ID 83405
(208) 523-0620
rharris@holdenlegal.com
Attorneys for City of Idaho Falls

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	Docket No. CM-DC-2010-001 **MOTION FOR CLARIFICATION AND RECONSIDERATION OF DENIAL OF REQUEST FOR HEARING AND TO ENGAGE IN DISCOVERY**

COME NOW, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell ("Coalition of Cities"), by and through their attorneys of record, Candice M. McHugh and Chris M. Bromley, the City of Idaho Falls, by and through its attorney of record, Robert L. Harris, and the City of Pocatello, by and through its attorneys of record, Sarah A. Klahn and Maximilian C. Bricker

to Idaho Code § 42-1701A(3)." However, no hearing has actually been held on the *Sixth Methodology Order*. Thus, the Parties request clarification of the nature and status of the *Sixth Methodology Order*—is it, in fact, merely an "amended" *Fifth Methodology Order* that is ripe for immediate appeal?

2. **Regardless of the answer to the clarification question above, the Parties seek reconsideration and clarification of the denial of the request to engage in discovery.**

The Director has stated on numerous occasions that the SWC Delivery Call is a continuing contested case, requiring the Department to periodically update the Methodology Order, which is a "living document." Tr. Hearing Vol. I, 18:21. The Director has also acknowledged on numerous occasions that the Department would consider data or analyses brought forward by the Cities in updating or applying the Methodology Order—even the *Order Denying Hearing* asserted that the Director would welcome "new information [developed by the Cities that] the Director may consider in the future." *Id.* at 2-3 n.1.[1] The Parties have been down this road before, as their April 28, 2023 *Motion for Continuance*, which requested adequate time to conduct investigations prior to a hearing on the *Fifth Methodology Order*, was denied on the ground that the Director had sufficiently notified the junior groundwater users that changes to the *Fourth Methodology Order* were impending (i.e., they had had plenty of "opportunities" to develop data and analyses). *Order Denying the Cities' Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* at 2. To be adequately prepared for the hearing, however, the Cities needed authorization to access SWC's lands, under IDAPA

[1] For example, at the *Fifth Methodology Order* hearing, the Director said at one point: "there have been opportunities for people to gather data; there have been opportunities for folks to take on responsibility to prepare [analyses]." Tr. Hearing Vol. IV, 205:12-14.

37.01.01.520.01.e and I.R.C.P. Rule 34, to develop data associated with the nature and extent of irrigation on SWC lands; the Cities also needed adequate time to analyze the results of these inspections and investigations. The Cities did not have such authorization prior to April 21, 2023, so any "presentations" that the "Department conducted" in fall 2022 fell far short of what was reasonably needed to prepare for the hearing on the *Fifth Methodology Order*. *Id.*

The instant request to engage in discovery reflects the Cities' efforts to take seriously the Director's invitation to present "new information" to the Department update the Methodology Order with the best available science, and to be prepared to challenge the Department's application of the *Sixth Methodology Order* in 2024 on the basis of erroneous or outdated inputs. Accordingly, the Cities request that the Director reconsider his denial of the Cities' request to conduct discovery.

However, if this is indeed a continuing contested case, perhaps no new order authorizing such discovery is necessary. In that case, the Cities seek clarification as to whether it is entitled to proceed with serving requests on SWC members notwithstanding the *Order Denying Hearing* and whether the SWC members are obligated to comply.

Submitted this 6th day of September, 2023.

/s/ Sarah Klahn

Sarah A. Klahn
Maximilian C. Bricker
SOMACH SIMMONS & DUNN
Attorneys for City of Pocatello

/s/ Candice M. McHugh

Candice M. McHugh
Chris M. Bromley
MCHUGH BROMLEY
Attorneys for Coalition of Cities

/s/ Robert Harris

Robert L. Harris
HOLDEN KIDWELL HAHN & CRAPO
Attorneys for City of Idaho Falls

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September, 2023, the above and foregoing, was filed and served via electronic service as set forth below:

Idaho Dept. of Water Res.

file@idwr.idaho.gov
garrick.baxter@idwr.idaho.gov

Travis L. Thompson
MARTEN LAW LLP P.O. Box 63
Twin Falls, ID 83303-0063
tthompson@martenlaw.com
jnielsen@martenlaw.com

W. Kent Fletcher
FLETCHER LAW OFFICE
P.O. Box 248 Burley, ID 83318
wkf@pmt.org

Thomas J. Budge
Elisheva M. Patterson
RACINE OLSON
P.O. Box 1391 Pocatello, ID 83204-1391
tj@racineolson.com
elisheva@racineolson.com

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC
P.O. Box 50130 Idaho Falls, ID 83405
rharris@holdenlegal.com

Skyler C. Johns
Nathan M. Olsen
Steven L. Taggart
OLSEN TAGGART PLLC
P.O. Box 3005
Idaho Falls, ID 83403
sjohns@olsentaggart.com
nolsen@olsentaggart.com
staggart@olsentaggart.com

Robert E. Williams
WILLIAMS, MESERVY, & LOTHSPEICH, LLP
P.O. Box 168 Jerome, ID 83338
rewilliams@wmlattys.com

John K. Simpson
MARTEN LAW LLP
P.O. Box 2139 Boise, ID 83701-2139
jsimpson@martenlaw.com

David W. Gehlert
Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice
999 18th St., South Terrace, Suite 370 Denver, CO 80202
david.gehlert@usdoj.gov

Matt Howard
US Bureau of Reclamation
1150 N Curtis Road Boise, ID 83706-1234
mhoward@usbr.gov

Sarah A Klahn
Maximilian C Bricker
Somach Simmons & Dunn
1155 Canyon Blvd, Ste. 110 Boulder, CO 80302
sklahn@somachlaw.com
mbricker@somachlaw.com
dthompson@somachlaw.com

Rich Diehl
City of Pocatello
P.O. Box 4169 Pocatello, ID 83205
rdiehl@pocatello.us

Dylan Anderson
Dylan Anderson Law PLLC
P.O. Box 35
Rexburg, Idaho 83440
dylan@dylanandersonlaw.com

/s/ Candice McHugh

Candice M. McHugh

RECEIVED
Sep 19. 2023
DEPARTMENT OF
WATER RESOURCES

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
MARTEN LAW LLP
163 Second Ave. West
P.O. Box 63
Twin Falls, Idaho 83303-0063
Telephone: (208) 733-0700
Email: jsimpson@martenlaw.com
tthompson@martenlaw.com

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Email: wkf@pmt.org

Attorneys for American Falls Reservoir District #2 and Minidoka Irrigation District

BEFORE THE DEPARTMENT OF WATER RESOUCES

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	Docket No. CM-DC-2010-001 **SURFACE WATER COALITION'S RESPONSE TO CITIES' MOTION FOR CLARIFICATION AND RECONSIDERATION**

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 hereby respond to the *Motion for Clarification and Reconsideration of Denial of*

Request for Hearing and to Engage in Discovery ("Motion") filed on September 5, 2023.[1] The Coalition requests the Director to deny the Cities' Motion for the reasons set forth below.

BACKGROUND

The Sixth Methodology Order was issued as a "final" administrative order subject to reconsideration and/or appeal to district court. *See* I.C. §§ 67-5246; 67-5270 to 5272; *see also*, Explanatory Information to Accompany a Final Order (attached to the Director's Sixth Methodology Order). The Cities filed a notice of appeal and petition for judicial review concerning the Director's related *Post-Hearing Order*, another order issued as part of the matter resulting in the Sixth Methodology Order. *See City of Idaho Falls et al. v. IDWR*, Fourth Jud. Dist., Ada County Dist. Ct., Case No. CV01-23-13238 (appeal filed August 16, 2023). IGWA filed a notice of appeal and petition for judicial review of various orders as well, including specifically the Sixth Methodology Order. *See IGWA v. IDWR*, Fourth Jud. Dist., Ada County Dist. Ct., Case No. CV01-23-13173 (appeal filed August 16, 2023). The Coalition of Cities and the City of Pocatello filed notices of appearance in that case. The two appeals are pending in district court and it is anticipated the cases will be consolidated.

ARGUMENT

I. The Director Properly Denied the Cities' Request for Hearing.

The Cities request clarification of the Director's Sixth Methodology Order claiming "no hearing has actually been held on the *Sixth Methodology Order*." Motion at 2-3. Yet, the Cities' feigned ignorance about the order is merely form over substance. The Cities fully participated in the contested case and administrative hearing that resulted in the issuance of the Sixth Methodology Order. They cannot dispute this fact. There is no basis to hold a second hearing

[1] The motion was filed the Coalition of Cities (cities of Bliss et al.), the City of Idaho Falls, and the City of Pocatello.

on the Sixth Methodology Order that fully addressed all of the information either presented at or before the administrative hearing. As such, the Director properly denied the requested hearing. *See Order Denying Request for Hearing and Motion Authorizing Discovery* at 2-3.

Moreover, the Cities have appealed the Director's *Post-Hearing Order* that addresses the issues raised on the Fifth Methodology Order, including the updated data the Director included in the Sixth Methodology Order. Although the Cities had a right to appeal the Sixth Methodology Order they failed to do so. Regardless, all of the Cities except Idaho Falls have appeared in IGWA's appeal of the Sixth Methodology Order.[2] Consequently, there is nothing to clarify and the petitions for judicial appeal will proceed pursuant to Idaho's civil rules.

II. The Director Properly Denied the Cities' Request for Discovery.

The Cities have also requested the Director to reconsider the denial of their motion to authorize discovery. *See* Motion at 2-3. Since the request for hearing was denied, the request to authorize discovery was properly denied as well. The Cities misconstrue this matter as a "continuing contested case" with no end. Motion at 2. Although the Director's methodology regarding the SWC delivery call may be updated at some point in time, that does not mean the prior contested cases resulting in "final orders" that have been appealed or are currently on appeal to the District Court are continuing *ad infinitum* as the Cities suggest. To find otherwise would keep the parties in a perpetual state of discovery, motion practice, and litigation, without any culminating hearing or end.[3] Such a scenario has no basis in statute or rule and would be unduly burdensome and mire the parties in endless litigation expense.

---

[2] Whether the City of Idaho Falls will file a notice of appearance is unknown. If the cases are ultimately consolidated it may not matter as all parties will be participating.

[3] It is curious why the Cities seem determined to re-litigate prior contested cases and outcomes in the face of their approved mitigation plan for the SWC delivery call and safe harbor from curtailment pursuant to the CM Rules. The request for discovery is unwarranted and would be overly burdensome in the context of what has already

Finally, the Cities' argument that they could not "adequately prepare" for the prior hearing is also erroneous and does not support their present reconsideration request. These arguments have been previously addressed by both the Director and the District Court. The Cities' continued efforts to "redo" prior contested cases is unwarranted and was properly denied by the Director. Since the final agency orders are presently on appeal to the district court, the agency should refrain from restarting contested cases as requested by the Cities.

CONCLUSION

The Cities have pointed to no new authority or information that would warrant reconsideration of the Director's August 23, 2023 order. The Coalition respectfully requests the Director to deny the Cities' Motion accordingly.

DATED this 19th day of September, 2023.

MARTEN LAW LLP

Travis L. Thompson

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company

FLETCHER LAW OFFICE

for W. Kent Fletcher

Attorneys for American Falls Reservoir District #2 and Minidoka Irrigation District

preceded in this matter. The Department is right to deny such tactics that would result in wasted time and resources for the various canal companies and irrigation districts.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

Director Mat Weaver Garrick Baxter Sarah Tschohl State of Idaho Dept. of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail mat.weaver@idwr.idaho.gov garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov file@idwr.idaho.gov	Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only mhoward@usbr.gov	Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only tony.olenichak@idwr.idaho.gov
T.J. Budge Elisheva Patterson Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only tj@racineolson.com elisheva@racineolson.com	Sarah A. Klahn Max C. Bricker Diane Thompson Somach Simmons & Dunn 2033 11th St., Ste. 5 Boulder, CO 80302 *** service by electronic mail only sklahn@somachlaw.com mbricker@somachlaw.com dthompson@somachlaw.com	David Gehlert ENRD – DOJ 999 18th St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only david.gehlert@usdoj.gov
Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only rdiehl@pocatello.us.	William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only wparsons@pmt.org	Corey Skinner IDWR – Southern Region 650 Addison Ave W, Ste. 500 Twin Falls, ID 83301-5858 *** service by electronic mail only corey.skinner@idwr.idaho.gov
W. Kent Fletcher Fletcher Law Offices P.O. Box 248 Burley, ID 83318 *** service by electronic mail only wkf@pmt.org	Kathleen Carr U.S. Dept. Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway, Ste. 400 Boise, ID 83706 *** service by electronic mail only kathleenmarion.carr@sol.doi.gov	Candice McHugh Chris M. Bromley McHugh Bromley, PLLC 380 South 4th Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only cbromley@mchughbromley.com cmchugh@mchughbromley.com

Robert E. Williams Williams, Meservy & Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only rewilliams@wmlattys.com	Robert L. Harris Holden, Kidwell, Hahn & Crapo, PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only rharris@holdenlegal.com	Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only rfife@idahofallsidaho.gov
Skyler Johns Steven Taggart Nathan Olsen Olsen Taggart PLLC P.O. Box 3005 Idaho Falls, ID 83403 *** service by electronic mail only sjohns@olsentaggart.com staggart@olsentaggart.com nolsen@olsentaggart.com	Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, ID 83440 *** service by electronic mail only dylan@dylanandersonlaw.com	

Jessica Nielsen
Assistant for Travis L. Thompson

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	Docket No. CM-DC-2010-001 **ORDER DENYING CITIES' MOTION FOR CLARIFICATION AND RECONSIDERATION**

BACKGROUND

On June 6–9, 2023 a hearing was held on the Department's April 21, 2023 *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Fifth Methodology Order*"). On July 19, 2023, Gary Spackman, the then-Director of the Idaho Department of Water Resources ("Department"), issued his *Post-Hearing Order Regarding Fifth Amended Methodology Order* ("*Post-Hearing Order*") and *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Sixth Methodology Order*"). The *Sixth Methodology Order* corrects data in the Department's *Fifth Methodology Order* found to be in error during the hearing held in this matter. The *Sixth Methodology Order*, like the *Fifth Methodology Order*, comprises nine steps to determine material injury to members of the Surface Water Coalition ("SWC").

On August 3, 2023, the Department received the *City of Pocatello's, City of Idaho Falls', and Coalition of Cities' Request for Hearing and Order Authorizing Discovery* ("*Request for Hearing and Discovery*"). The *Request for Hearing and Discovery* asks the Director to hold a status conference to schedule a four-day hearing, pursuant to Idaho Code § 42-1701(A)(3), on the *Sixth Methodology Order*. *Request for Hearing and Discovery* at 2. The request also asks the Director for an order authorizing discovery, pursuant to IDAPA 37.01.01.521. *Id.* at 2–3. Four issues for hearing are identified in the *Request for Hearing and Discovery*:

> a) Whether the members of the Surface Water Coalition ("SWC") operate reasonably and without waste;
>
> b) Whether the irrigated acreage numbers for the SWC members in the Sixth Methodology Order are accurate;
>
> c) Whether the number of acres irrigated with supplemental groundwater rights within the service areas of the SWC members can be accurately determined; [and]

d) Whether the number of acres irrigated with enlargement rights within the service areas of the SWC members can be accurately determined[.]

Id. at 2.

On August 22, 2023, the Department received the *Surface Water Coalition's Response to Cities' Request for Hearing and Order Authorizing Discovery* ("*SWC's Response*"). The *SWC's Response* requests the Director "deny or limit the Cities' request for hearing and an order authorizing discovery . . . ." *SWC's Response* at 7.

On August 25, 2023, Director Spackman issued an *Order Denying Request for Hearing and Motion Authorizing Discovery* ("*Order Denying Request for Hearing*"). After quoting Idaho Code § 42-1701(3), the Director concluded that "[t]he parties have previously been afforded an opportunity for hearing on the issues identified related to the Sixth Methodology Order and are not entitled to a hearing pursuant to Idaho Code § 42-1701A(3)." *Order Denying Request for Hearing* at 2.

On September 5, 2023, the City of Pocatello, the City of Idaho Falls, and Coalition of Cities (collectively "Cities") filed a *Motion for Clarification and Reconsideration of Denial of Request for Hearing and to Engage in Discovery* ("*Motion for Clarification and Reconsideration*"). The Cities "seek clarification on the nature of the Sixth Methodology Order." *Motion for Clarification and Reconsideration* at 2. The Cities "request clarification on the nature and status of the Sixth Methodology Order – is it, in fact, merely an 'amended' Fifth Methodology Order that is ripe for immediate appeal?" *Id.* at 3. The Cities also ask that the Director also "reconsider his denial of the Cities' request to conduct discovery." *Id.* at 4.

On September 19, 2023, the SWC submitted *Surface Water Coalition's Response to Cities' Motion for Clarification and Reconsideration* ("*SWC's Response to Motion for Clarification*"). The SWC argues the Director correctly denied the Cities' request for hearing and request for discovery and urges the Director to deny the latest request. *SWC's Response to Motion for Clarification* at 2–4.

ANALYSIS AND CONCLUSIONS OF LAW

A. Motion for Clarification and Reconsideration.

Idaho Code § 42-1701A(3) states in relevant part:

> 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 . . . 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 Director denies the *Cities' Motion for Clarification and Reconsideration* because there is nothing unclear about the *Order Denying Request for Hearing*. As was stated in the *Order Denying Request for Hearing*, "[t]he parties have previously been afforded an opportunity for hearing on the issues identified related to the Sixth Methodology Order and are not entitled to a hearing pursuant to Idaho Code § 42-1701A(3)." *Order Denying Request for Hearing* at 2. The *Sixth Methodology Order* is an order issued after a hearing in response to the issues raised by the parties at hearing. The Cities ask whether "the *Sixth Methodology Order* – is it, in fact, merely an 'amended' Fifth Methodology Order." *Motion for Clarification and Reconsideration* at 3. The title of the order does not matter. What matters is that the Cities have previously been afforded an opportunity for a hearing on the issues. Because the parties were recently afforded a hearing on the issues, the parties are not entitled to another hearing at this time. I.C. § 42-1701A(3).

B. Motion to Authorize Discovery.

Because the request for an order authorizing discovery was made as part of an improper request for hearing, the Director will not consider the request for discovery.

ORDER

IT IS HEREBY ORDERED that the *Motion for Clarification and Reconsideration of Denial of Request for Hearing and to Engage in Discovery* is DENIED.

DATED this 25th day of September 2023.

MATHEW WEAVER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of September 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson MARTEN LAW LLP P.O. Box 2139 Boise, ID 83701-2139 jsimpson@martenlaw.com	☒ U.S. Mail, postage prepaid ☒ Email
Travis L. Thompson MARTEN LAW LLP P.O. Box 63 Twin Falls, ID 83303-0063 tthompson@martenlaw.com jnielsen@martenlaw.com	☒ U.S. Mail, postage prepaid ☒ Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org	☒ U.S. Mail, postage prepaid ☒ Email
Thomas J. Budge Elisheva M. Patterson RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 tj@racineolson.com elisheva@racineolson.com	☒ U.S. Mail, postage prepaid ☒ Email
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202 david.gehlert@usdoj.gov	☒ U.S. Mail, postage prepaid ☒ Email
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@usbr.gov	☒ U.S. Mail, postage prepaid ☒ Email
Sarah A Klahn Maximilian C. Bricker Somach Simmons & Dunn 1155 Canyon Blvd, Ste. 110 Boulder, CO 80302 sklahn@somachlaw.com mbricker@somachlaw.com dthompson@somachlaw.com	☒ U.S. Mail, postage prepaid ☒ Email

Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83205 rdiehl@pocatello.us	☒ U.S. Mail, postage prepaid ☒ Email
Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83702 cmchugh@mchughbromley.com cbromley@mchughbromley.com	☒ U.S. Mail, postage prepaid ☒ Email
Robert E. Williams WILLIAMS, MESERVY, & LOTHSPEICH, LLP P.O. Box 168 Jerome, ID 83338 rewilliams@wmlattys.com	☒ U.S. Mail, postage prepaid ☒ Email
Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com	☒ U.S. Mail, postage prepaid ☒ Email
Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 rfife@idahofallsidaho.gov	☒ U.S. Mail, postage prepaid ☒ Email
Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC P.O. Box 3005 Idaho Falls, ID 83403 sjohns@olsentaggart.com nolsen@olsentaggart.com staggart@olsentaggart.com	☒ U.S. Mail, postage prepaid ☒ Email
Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, Idaho 83440 dylan@dylanandersonlaw.com	☒ U.S. Mail, postage prepaid ☒ Email
COURTESY COPY TO: Tony Olenichak IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 Tony.Olenichak@idwr.idaho.gov	☒ Email

COURTESY COPY TO: Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 corey.skinner@idwr.idaho.gov	☒ Email
COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 wparsons@pmt.org	☒ Email

Sarah Tschohl
Paralegal

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is an **Order Denying Petition for Reconsideration** of the "final order" or "amended final order" issued previously in this proceeding by the Idaho Department of Water Resources ("department") pursuant to section 67-5246, Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person 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. The 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. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.