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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

McCain Foods USA, Inc. Petitioners vs. GARY SPACKMAN in his official capacity as Director of the Idaho Department of Water Resources; and the IDAHO DEPARTMENT OF WATER RESOURCES, Respondents.	Case No.: CV01-16-21480 **MOTION FOR RECONSIDERATION OR ALTERNATIVELY RELIEF FROM JUDGMENT**

Petitioner, McCain Foods USA, Inc. ("McCain"), by and through its respective attorney of record, Candice M. McHugh, of the firm McHugh Bromley, PLLC, pursuant to Idaho Rules of Civil Procedure 11.2(b) and alternatively 60(b)(1)(2)(5) and (6) hereby requests that the Court reconsider its April 10, 2017 *Order Sua Sponte Dismissing Petition for Judicial Review* and the underlying attached February 16, 2017, *Orders on Motion to Determine Jurisdiction* as incorporated therein.

PROCEDURAL BACKGROUND

On November 17, 2016, McCain filed a *Notice of Appeal and Petition for Judicial Review of Agency Action* alleging that the Director's November 2, 2016 *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area,* ("*GWMA Order*") was invalid and did not comply with the requirements of Idaho's Ground Water Act among other assertions.

On April 10, 2017, the Court issued an *Order Sua Sponte Dismissing Petition for Judicial Review* ("*Dismissal Order*") stating that "[f]or the same reasons the Court did not have jurisdiction over the petitions in the Ada County Cases[1] and pursuant to the same grounds, the Court holds it lacks jurisdiction over the Petition filed by McCain Foods in this matter." *Dismissal Order* at 3.

McCain timely filed a petition for judicial review on November 17, 2016, of the *GWMA Order*. Another aggrieved person, Sun Valley Company, filed a request for hearing of the same GWMA Order and a petition for reconsideration of the order the day before on November 16, 2016. The City of Pocatello and fourteen other cities ("Coalition of Cities") on the Eastern Snake Plain also each filed requests for reconsideration of the GWMA Order on November 16, 2016. Because there was a request for hearing and pending petitions for reconsideration filed, McCain stipulated with IDWR to suspend its petition for judicial review until after the hearing and a final order after hearing was issued. The petitions for reconsideration were denied by operation of law on December 7, 2016. Idaho Code § 67-5246; *A&B Irrig. Dist. v. Idaho Dept. of Water Resources.*, 154 Idaho 652, 301 P.3d 1270 (2012).

On December 1, 2016, the Director issued an *Order Granting Request for Hearing; Notice of Pre-Hearing Conference* and created a contested case. On December 20, 2016, the Coalition of Cities filed a petition for clarification. On December 30, 2016, the Director denied the petition for clarification concluding that the GWMA Order was not ripe for judicial review "until the Director issues a final order following the hearing requested by SVC." *In the Matter of Designating the Eastern Snake Plain Aquifer Ground Water Management Area*, Docket No. AA-GWMA-2016-001, *Response to Petition for Clarification* at 2-3 (IDWR Dec. 30, 2016)

[1] The Ada County Case Nos. are CV-01-23185 and CV-01-17-67 filed by the Sun Valley Company and the City of Pocatello respectively.

("because the Director granted SVC's request for hearing the ESPA GWMA Order .... the Coalition of Cities is not entitled to judicial review ....")

On January 13, 2017, Sun Valley filed a *Motion to Determine Jurisdiction* and City of Pocatello supported a response in support of that motion. On February 16, 2017 the Court issued two nearly identical *Orders on Motion to Determine Jurisdiction and Order Dismissing Petition for Judicial Review* ("*Jurisdictional Orders*") finding it lacked jurisdiction and dismissing Sun Valley and Pocatello's petitions for judicial review.

BASIS FOR THE MOTION FOR RECONSIDERATION OR ALTERNATIVELY RELIEF FROM JUDGMENT

McCain is asking that the Court reconsider its *Dismissal Order* because 1) the facts and basis upon which the Court issued the *Jurisdictional Orders* in the Ada County Cases have changed since the *Jurisdictional Orders* were issued; 2) the Court's reading of Idaho Code § 42-1701A(3) is too narrow; and, 3) the Court did not address Idaho Code § 42-1701A(4).[2]

There is no dispute that the Director issued the *GWMA Order* without a hearing, after public meetings. There is also no dispute that the Director intentionally issued the *GWMA Order* as a "Final Order" with the accompanying "Explanatory Information" which directed that the parties could seek an appeal, although this Court found that was a mistake. Finally, there is no dispute that when the Court considered and render its *Jurisdictional Orders*, a hearing was pending before the agency.

[2] McCain is filing this petition for reconsideration in order to preserve its right to do so within the time limits set in IRCP 11.2(b). McCain acknowledges, however, that the issue of whether a contested case is still pending and whether or not a hearing will still be held before IDWR since Sun Valley withdrew its request for hearing is being briefed by the parties with briefs addressing the issue due May 4, 2017 with replies due May 18, 2017. *In the Matter of Designating the Eastern Snake Plain Aquifer Ground Water Management Area*, Ordering Establishing Briefing Deadlines, Docket No. AA-GWMA-2016-001 (IDWR, April 24, 2017).

A. Idaho Code § 42-1701A Does not Mandate a Hearing as an Aggrieved Parties' Only Option

The Court rightly understood when considering the *Motion to Determine Jurisdiction*, that Sun Valley and Pocatello were also going to be provided due process before IDWR through an administrative hearing as IDWR clearly stated that it was prepared to "move forward with the hearing." *City of Pocatello v. Spackman*, CV 01-17-67, *IDWR's Response to Motion to Determine Jurisdiction* at 7-8 (4th Jud. Dist. Feb. 3, 2017). Hence, the Court did not decide the jurisdictional question with the understanding that no hearing request had been filed by any party.[3] Furthermore, when the Court made its decisions in the *Jurisdictional Orders*, based on questions to counsel it assumed there was no administrative record developed. However, that is factually incorrect as the agency did develop a record upon which it based its *GWMA Order* and the references to that record are contained in the *GWMA Order*.

When analyzing the jurisdictional motion, the Court found that Idaho Code § 42-1701A(3) controlled and that Sun Valley was required (and indeed did) file a request for hearing. The Court found that requesting a hearing is a "mandatory" "procedural step." *Jurisdictional Orders* at 4. However, throughout the Court's decision is the underlying fact that the parties are protected because a hearing will be held. The Court's conclusion that requesting a hearing is the only remedy, misreads Idaho Code § 42-1701A(3) and disregards Idaho Code § 42-1701A(4). Idaho Code § 42-1701A(3) says any "person aggrieved" "shall be entitled to a hearing before the

[3] See fn 2. Infra. As part of the briefing before IDWR the Coalition of Cities have joined in Pocatello's argument that a contested case does exist and a hearing should go forward even in light of the fact that Sun Valley's hearing request has been withdrawn; the City of Pocatello and the Coalition of Cities have requested a hearing as part of that briefing. Other parties have responded arguing that the order is now final and any hearing request would now be untimely as more than 15 days has past since the order was issued. *In the Matter of Designating the Eastern Snake Plain Aquifer Ground Water Management Area*, Surface Water Coalition's Response..., Docket No. AA-GWMA-2016-001 (IDWR, April 18, 2017) (15-day deadline is mandatory and cannot be extended).

director." Idaho Code § 42-1701A(3) does not say a hearing is the only available remedy -- it simply states that if that person wants a hearing, they must inform IDWR of their intention to be heard. The next sentence in Idaho Code § 42-1701A(3) does not contradict that statement nor does it make a hearing request mandatory. Rather, the word "shall" in the next sentence directs when and where the aggrieved person shall file the request for hearing. "The person shall file with the director, within fifteen (15) days .... Stating the grounds for contesting the action by the director and requesting a hearing." This is entirely consistent with how the word "shall" is commonly used; while the word "shall" is "generally imperative or mandatory" it "may be construed as merely permissive or directory ... to carry out legislative intent and in cases where no right or benefit to anyone depending on its being taken in the imperative sense and where not public or private right is impaired by its interpretation in the other sense." BLACK'S LAW DICTIONARY, Sixth ed. at 1375 (emphasis added). In this case, the word "shall file" is best interpreted as directing a person who is "entitled" to a hearing where and when to filed it, not imposing a mandatory duty to request a hearing or making a hearing the only available remedy, especially in this case where the right to have the *GWMA Order* reviewed by a District Court would be significantly impaired if the time for requesting a hearing has passed.[4]

The Court in its *Jurisdictional Orders* forces parties to submit to a lengthy and costly administrative hearing as their only remedy when the Department chooses to issue an order without a prior hearing. This conclusion actually allows the Director to issue orders that may escape judicial review, which flies in the face of the legislatures' intention to have judicial check of agency decisions and the protections afforded parties under the Idaho Administrative Procedures Act. Essentially the Court created a final order that is not appealable severely

[4] See fn 2 and 3. McCain however does not take the position that a timely request for hearing has passed, only that parties to the underlying administrative action are making that argument.

prejudicing an aggrieved parties' rights. In other words, parties are compelled to go through an unnecessary administrative hearing before they can challenge whether the Director's order was validly issued in the first place.

B. The Court's Interpretation is Inconsistent with Idaho Code § 42-1701A(4)

In its *Jurisdictional Orders*, the Court did not address the question regarding what happens when a party appeals an order, after it becomes final, directly to the District Court as provided for under Idaho Code § 42-1701A(4). The plain language of Idaho Code § 42-1701A(4) states simply that "any person who is aggrieved by a final decision or order of the director is entitled to judicial review." It does not state that such a person is entitled to judicial review, only after having first gone through a hearing. We know from case law that an aggrieved person is not required to go through a hearing as demonstrated in *Idaho Power Company v. Idaho Dep't of Water Resources*, 151 Idaho 266, 255 P. 3d 1152 (2011). In *Idaho Power*, the applicant appealed a condition placed in its license by IDWR without first having a hearing.[5] To the extent a party does not wish to contest the facts that the agency developed, but is willing to accept the agency's facts and record; yet, believes the agency's order is invalid, judicial review is the proper action. This is precisely what Idaho Code § 42-1701A(4) provides – [a]ny person who is aggrieved by a final decision or order of the director is entitled to judicial review. Idaho Code § 42-1701A(4) goes on to state that judicial review shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code." It does not say that any person who is aggrieved *and* who has also been through an administrative hearing is entitled to judicial review.

[5] The applicant did initially file a protest and request a hearing but then withdrew its protest and request for hearing and then appealed IDWR's final order under Idaho Code § 42-1701A(4).

C. Alternatively, McCain is Entitled to Relief from Judgment as Contained in the Jurisdictional Orders and Dismissal Order and Should be Allowed to Continue With its Appeal.[6]

Alternatively, McCain files this motion under IRCP 60(b)(1)(2)(5) and (6) for relief from the *Jurisdictional Orders*. This request is timely made as the *Jurisdictional Orders* were only issued a little over two months ago on February 16, 2017. At the time that the Court considered the petitions leading to the *Jurisdictional Orders*, there was a pending hearing request, thus, asking the Court to rule under Idaho Code § 42-1701A(4) was not necessary and would have amounted to asking for an advisory opinion on facts that were not present (i.e. what happens when no hearing pending or requested). Thus, relief under IRCP 60(b)(1) inadvertence or excusable neglect seems appropriate. Further, because Sun Valley's withdrawal could not have been known or anticipated and was not done until March 20, 2017, after the deadline to file for a petition for reconsideration on the *Jurisdictional Orders*, the fact that no hearing request was pending could also be considered "newly discovered evidence" under IRCP 60(b)(2) making relief available to McCain under that provision.

Finally, McCain's appeal was stayed until after the administrative action was concluded and thus, McCain's interest was reasonably thought to be preserved in its appeal and the Court's order on the jurisdictional motions did not, at that time, apply in McCain's appeal nor did the *Jurisdictional Orders* appear to render any injustice or prejudice to McCain as McCain's appeal would be taken up after a hearing, albeit it may have had to be modified if an amended order was issued. Therefore, to now dismiss McCain's appeal by applying the *Jurisdictional Orders* to

[6] As stated above, McCain is required to filed this petition in order to comply with the timeframes for filing reconsideration; if an administrative contested case moves forward, McCain is again agreeable to staying its appeal until IDWR has concluded the hearing.

McCain's pending appeal, which had different facts and deadlines is inequitable thus, allowing relief under IRCP 60(b)(5) or (6) is proper.

CONCLUSION

In this case, McCain did not initially request a hearing[7] and elected to appeal the GWMA Order directly to District Court as provided under Idaho Code § 42-1701A(4) as the order was issued as final and affected McCain's water rights and ability to protect its water use. McCain filed a timely appeal but was willing to allow other parties to the underling action their right to a hearing under Idaho Code § 42-1701A(3). However, the Court's conclusions in its *Jurisdictional Orders*, that a hearing is the only available remedy to all parties when IDWR issues a final order without a hearing misreads Idaho Code §§ 42-1701A(3) and (4). Based on the foregoing the Court should reconsider its *Jurisdictional Orders* and thus revise its *Dismissal Order* of McCain's appeal accordingly.

Oral argument is requested.

Respectfully submitted this 24th day of April, 2017.

MCHUGH BROMLEY, PLLC

By: Candice M. McHugh
Candice M. McHugh
Attorney for McCain Foods USA, Inc

[7] See fn. 2 infra. McCain is an intervenor at the administrative level and will participate in a hearing if a hearing goes forward.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of April, 2017, the foregoing was filed, served, or copied as follows:

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