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**DISTRICT COURT OF THE STATE OF IDAHO  
FIFTH JUDICIAL DISTRICT  
JEROME 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.

Case No. CV27-22-00945

**IGWA'S RESPONSE TO  
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

Idaho Ground Water Appropriators, Inc. (“IGWA”)<sup>1</sup> submits this brief pursuant to I.R.C.P. 84(p) and Idaho Appellate Rule 32(d) in opposition to Respondents’ Motion to Dismiss (“Motion to Dismiss”) filed November 9, 2022. This brief is supported by the Declaration of Thomas J. Budge (“Budge Declaration”) filed herewith.

### **Background**

IGWA generally concurs with the Department’s statement of background information set forth on pages 2-4 of the Motion to Dismiss. However, the Department’s statement omits critical details about the events in July and August 2022 that gave rise to the Final Order Regarding Compliance With Approved Mitigation Plan (“Compliance Order”) issued September 8, 2022, from which IGWA seeks judicial review. As explained below, the Director refused to hold an evidentiary hearing prior to issuing the Compliance Order, in violation of due process and the Idaho Administrative Procedures Act, Chapter 52, Title 67, Idaho Code (“APA”).

The Compliance Order adjudicates IGWA’s obligations under a settlement agreement (“Settlement Agreement”) entered into between IGWA and the Surface Water Coalition<sup>2</sup> (“SWC”) in 2015. The Director determined that (i) IGWA must provide approximately 35,000 acre-feet more mitigation to the SWC than IGWA had previously committed to provide under the Settlement Agreement; (ii) IGWA cannot utilize averaging for purposes of compliance with groundwater conservation obligations under the Settlement Agreement, despite having done so for five years; and (iii) certain IGWA members breached the Settlement Agreement in 2021.

Because the Compliance Order restricts the amount of water IGWA’s members can divert under their water rights, it is subject to the constitutional requirement of due process: “individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state.” *Nettleton v. Higginson*, 98 Idaho 87, 90 (1977). “Due process of law under the federal and state constitutions requires that one be heard before his rights are adjudged.” *Duggan v. Potlatch Forests, Inc.*, 92 Idaho 262, 264 (1968) (quoting *Lovell v. Lovell*, 80 Idaho 251 (1958)). A pre-decision hearing is required “except for extraordinary

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<sup>1</sup> IGWA represents the interests of nine groundwater districts: North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Henry’s Fork Ground Water District.

<sup>2</sup> The SWC represents the interests of seven canal companies and irrigation districts: Twin Falls Canal Company, North Side Canal Company, American Falls Reservoir District #2, A&B Irrigation District, Milner Irrigation District, Burley Irrigation District, Minidoka Irrigation District.

situations when some valid governmental interest is at stake that justifies postponing the hearing until after the event.” *Fuentes v. Shevin*, 407 U.S. 67, 81 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971)). “This principle of equity embedded in our constitutions is applicable in proceedings before administrative bodies.” *Duggan*, 92 Idaho at 264.

To ensure that Idaho agencies afford due process to the citizens they regulate, the Legislature enacted the Idaho Administrative Procedures Act, Chapter 52, Title 67, Idaho Code (“APA”), which prescribes specific procedures that agencies must follow in contested cases. Under the APA, a contested case may be disposed of either formally or informally. Informal disposition may occur “by negotiation, stipulation, agreed settlement, or consent order”—i.e. with the approval of the parties. Idaho Code § 67-5240. Formal disposition, on the other hand, may occur over the objection of one or more parties, but it requires that a hearing be held to ensure “a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary,” and that all parties have “the opportunity to respond and present evidence and argument on all issues involved.” Idaho Code §§ 67-5242(3)(a)-(b). The APA allows state agencies to take action without a hearing only “in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate government action,” in which case the agency must “proceed as quickly as feasible to complete any proceedings that could be required.” Idaho Code § 67-5247.

In keeping with due process, Department rules of procedure require that parties to a contested case who desire that the Department take action must file a “motion,” defined as “a request to the agency to take an action in a contested case” (IDAPA 37.01.01.220), which must fully state the “facts upon which it is based,” the “provision of statute, rule, order, or other controlling law upon which it is based,” and the “relief sought” (IDAPA 37.01.01.300.02).

The catalyst for the Compliance Order was a request for status conference filed by the SWC on July 21, 2022. (Budge Decl., Ex. F.) The request states that a disagreement had arisen between IGWA and the SWC concerning IGWA’s compliance with the Settlement Agreement in 2021, and it asks the Director to set a status conference to address the issue. *Id.* The SWC’s request for a status conference does not qualify as a “motion” under Department rules of procedure because it was not accompanied by affidavits or facts already in the agency record to support the request, and it fails to state the relief sought.

Before the Director could lawfully rule on the issues raised in the SWC's request for status conference, he should have required the SWC to file a motion setting forth the relief sought, followed by a hearing held in compliance with the the APA, unless the Director determined that an emergency necessitated immediate action in which case he must proceed as quickly as possible to hold a hearing after issuing the order. However, none of this happened.

Per the SWC's request, the Director scheduled a status conference on August 5, 2022. (Budge Decl., Ex. G.) IGWA anticipated that the status conference would be used to informally discuss the issues and determine whether a hearing should be scheduled to formally address the merits of the issues. To IGWA's surprise, however, the Director requested oral argument at the status conference and then advised the parties that he would issue a written decision thereafter.

Following the status conference, IGWA filed a written brief on August 12, 2022, arguing that the Director cannot take action at a status conference, and citing Department rules of procedure that require the filing of a motion along with affidavits, briefs, and oral argument. (Budge Decl., Ex. J.) The Director ignored IGWA's argument and instead issued a notice on August 18, 2022, stating that he intended to take official notice of a document that IGWA submitted to the Department several months prior that summarizes IGWA's conservation activities in 2021. (Budge Decl., Ex. K.) IGWA filed a written objection on August 23, 2022, arguing that the constitution, the APA, and Department rules of procedure all require that IGWA be given a hearing and opportunity to present evidence before the Director undertakes to decide the issues. (Budge Decl., Ex. L.) This too was ignored. The Director did not respond to IGWA's filings on August 12 and 23.

In late August, IGWA learned that the Director intended to issue a curtailment order and turn off water to a hundred thousand or more acres of farmland for the last several weeks of the 2022 irrigation season, killing crops and devastating the farming operations of IGWA's members along with the employees, food processors, suppliers, and other business who depend upon them. To avoid this, IGWA entered into a settlement agreement on September 7, 2022 ("Remedy Agreement") to resolve the parties' dispute over IGWA's compliance with the Settlement Agreement in 2021. (Budge Decl., Ex. M.)

Despite the parties' having resolved their dispute over IGWA's 2021 compliance, the Director proceeded to issue the Compliance Order, finding IGWA in breach of the Settlement Agreement. Although IGWA had clearly laid out to the Director in August that due process and

the APA require a hearing before undertaking to adjudicate IGWA's obligations under the Settlement Agreement, the Director refused to hold a hearing and consider all available information, ruling instead that Idaho Code § 42-1701A(3) allows him to make decisions first and hold hearings later. (Budge Decl., Ex. N, p. 17-18.)

The Director's refusal to hold a hearing is critical to this Court's evaluation of the Motion to Dismiss. As explained below, the Motion to Dismiss should be denied if this Court agrees that the Director should have held a hearing before deciding the issues raised in the SWC's request for a status conference

### **ARGUMENT**

IGWA's objective in petitioning for judicial review is to have the Compliance Order set aside and to have the Director instructed to comply with due process and the APA by holding a hearing before adjudicating IGWA's obligations under the Settlement Agreement, in the absence of an emergency. If this occurs, an evidentiary hearing before the Department may prove unnecessary. Granting the Motion to Dismiss would force IGWA through a potentially unnecessary hearing and allow the Director to continue disregarding due process and the APA.

As explained below, this court should deny the Motion to Dismiss because Idaho Code § 42-1701A(3) does not apply where a pre-decision hearing is required under the APA. Even if an after-the-fact hearing were available under Idaho Code § 42-1701A(3), exhaustion is not required because the Director exceeded his statutory authority.

#### **1. Idaho Code § 42-1701A(3) does not apply because a pre-decision hearing is required under the APA.**

The Department's Motion to Dismiss argues that IGWA's petition for judicial review should be dismissed because IGWA has not exhausted its administrative remedies. (Mot. to Dismiss, p. 5.) Specifically, the Department argues that an after-the-fact hearing is available under Idaho Code § 42-1701A(3). (Mot. to Dismiss, p. 5-6.) However, Idaho Code § 42-1701A(3) only applies if a hearing before the director is not "otherwise provided by statute." As explained below, IGWA is entitled to a pre-decision hearing under the APA; therefore, Idaho Code § 42-1701A(3) does not apply. In other words, Idaho Code § 42-1701A(3) is not a cure-all that gives IDWR license to violate a person's due process rights by refusing to hold a hearing before restricting one's water rights in the absence of an emergency.

The Director's duties involve actions in a wide range of contexts, many of which do not involve contested cases under the APA. In such contexts, § 42-1701A(3) entitles aggrieved parties to an after-the-fact hearing to contest the action. By contrast, when the Director takes action in a contested case that is governed by the APA, a hearing is provided by statute under Idaho Code §§ 67-5240 and 67-5242. Section 42-1701A(3) does not apply in contested cases governed by the APA.

Both the SWC Notice and the Compliance Order were filed in existing contested cases that have been conducted under the APA from the beginning. The original Department order issued in 2005 in response to the SWC delivery call states: "A contested case is initiated pursuant to Idaho Code § 67-5240 to consider the relief requested." (Budge Decl., Ex. A, p. 33.) The Director's orders approving the Settlement Agreement and the Amendment to Settlement Agreement were also issued under the APA and include the following statement: "The accompanying order is a 'Final Order' issued by the department pursuant to section 67-5246, Idaho Code." (Budge Decl., Ex. C, p. 8; Budge Decl., Ex. E, p. 9.) The SWC Notice was filed in the contested cases for both the SWC delivery call and the Settlement Agreement (IDWR Docket Nos. CM-DC-2010-011 and CM-MP-2016-001), and the Compliance Order was filed in the contested case governing the Settlement Agreement (IDWR Docket No. CM-MP-2016-001). (Budge Decl., Ex. F, p. 1; Budge Decl., Ex. N, p. 1.)

After many years of the SWC delivery and the Settlement Agreement being governed by the APA, the Director cannot now disregard the APA and rely on § 42-1701A(3) to avoid hearing all evidence before ruling on IGWA's obligations under the Settlement Agreement.

Since IGWA is entitled to a pre-decision hearing by statute under the APA, Idaho Code § 42-1701A(3) does not apply. Thus, there is no additional administrative remedy that IGWA must exhaust before receiving judicial review of the Compliance Order. Therefore, the Motion to Dismiss should be denied.

## **2. Exhaustion is not required where an agency acts outside of its statutory authority.**

While parties generally must exhaust administrative remedies before seeking judicial review, exceptions exist in two instances: "(a) when the interests of justice so require, and (b) when the agency acted outside its authority." *Regan v. Kootenai Cty.*, 140 Idaho 721, 725 (2004 (citing *Arnze v. State*, 123 Idaho 899, 906 (1993))).

As a matter of law, Idaho state agencies have no inherent authority; they only have those powers granted by the legislature. *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 102 Idaho 744, 750 (1981); *Idaho Retired Firefighters Assoc. v. Pub. Emp. Ret. Bd.*, 165 Idaho 193, 196 (2019). They are, in other words, “tribunals of limited jurisdiction.” *In re Idaho Workers Comp. Bd.*, 167 Idaho 13, 20 (2020) (citing *Washington Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho 875, 879 (1979)). When implementing express statutory powers, “administrative agencies have the implied or incidental powers that are reasonably necessary in order to carry out the powers expressly granted.” *Vickers v. Lowe*, 150 Idaho 439, 442 (2011) (citing 2 Am.Jur.2d *Administrative Law* § 57 (2004)). If an agency acts outside of its express and implied powers, such actions are void. *Wernecke v. St. Maries Joint Sch. Dist. No. 401*, 147 Idaho 277, 286 n.10 (2009) (citing 73 C.J.S. *Public Administrative Law & Procedure* § 112).

For an agency to retain authority over a controversy, “an agency must be acting within the scope of authority conferred upon it.” *Am. Falls Reservoir Dist. No. 2 v. Dep’t of Water Res.*, 143 Idaho 862, 872 (2007) (citing *Roeder Holdings*, 136 Idaho at 813). Public policy considerations often cited on connection with the exhaustion doctrine are inapplicable when an agency exceeds its statutory authority because allowing an agency to mitigate or cure errors only compounds the problem when the agency lacked authority in the first place. Therefore, “[a] court must always make an independent determination whether an agency regulation [or act] is ‘within the scope of the authority conferred,’ and that determination includes an inquiry into the extent to which the legislature intended to delegate discretion to the agency.” *Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada Cty.*, 136 Idaho 809, 813 (2001) (abrogated on separate grounds by *Ada Cty. Bd. of Equalization v. Highlands, Inc.*, 141 Idaho 202 (2005), regarding standard of review from tax board appeals) (citing *Yamaha Corp. of America v. State Bd. of Equalization*, 960 P.2d 1031, 1041 (Cal. 1980)).

Adjudication of contract disputes is not among the powers granted to the Department. Such power is vested in the judiciary. The Department’s statutory authority is confined to the distribution of water among water users and matters related thereto. While the Department’s water distribution duties may be affected by third party contracts, and while the Department may need to interpret such contracts for the purpose of performing such duties, that is the extent of its interpretive authority. The Department does not have legal authority to adjudicate disputes over contract interpretation. That authority remains with the judiciary.

The Director acted outside his statutory authority by undertaking to adjudicate IGWA's contractual obligations under the Settlement Agreement when it was unnecessary to do so to perform his water distribution duties. The *Surface Water Coalition's Notice of Steering Committee Impasse / Request for Status Conference* ("SWC Notice") placed before the Director five issues related to IGWA's compliance with the Settlement Agreement in 2021. (Budge Decl., Ex. F., p. 4.) Had the parties not resolved their dispute over IGWA's 2021 compliance, the Director would have had to interpret the Settlement Agreement for the **limited purpose** of performing his water distribution duties. However, the parties did resolve their dispute. Once the Remedy Agreement was signed, there was no longer a need for the Director to evaluate IGWA's 2021 performance in order to perform his water distribution duties. Nor had a petition for declaratory ruling been filed with the Director to determine how he may perform his water administration duties in the future under the Settlement Agreement. Therefore, the Compliance Order constitutes an advisory opinion in excess of the Department's statutory authority.

**3. The Remedy Agreement does not permit the Director to violate due process or the APA.**

The Motion to Dismiss infers that IGWA agreed that the Department had authority to adjudicate IGWA's contractual obligations since section 3 of the Remedy Agreement asks the Director to "issue a final order regarding the interpretive issues raised by the SWC Notice." (Remedy Agreement, Budge Decl., Ex. M, ¶ 3.) While the SWC certainly desired that the Director would find IGWA in breach of the Settlement Agreement, IGWA maintained then, as it does now, that the Director should not adjudicate IGWA's contractual obligations for the reasons stated above. (Budge Decl., Ex. O.) The Remedy Order does not the Director to "decide" or "determine" the issues, at asks only that he issue an order "regarding" the issues, so that he could decline to adjudicate IGWA's contractual obligations for such reasons.

Recognizing that the Director may continue to disregard IGWA's due process arguments, the Remedy Agreement preserves IGWA's ability to challenge such action, stating: "The parties reserve the right to seek judicial review of the decision by the Director relating to such interpretive issues but shall not seek review of the remedy agreed to herein and incorporated into the Director's Order." (Budge Decl., Ex. M, ¶ 5.) The Second Addendum to the Settlement Agreement also preserves IGWA's right for judicial relief, stating: "The parties further reserve



all remedies, including the right to judicial action, to enforce the terms of the Settlement Agreement and this Second Addendum.” (Budge Decl., Ex. D, ¶ 4.)

**4. IGWA requested a hearing under Idaho Code § 42-1701A(3) as a safeguard only.**

As noted by the Department, IGWA did request a hearing pursuant to Idaho Code § 42-1701A(3). However, this was done as a safeguard in case this court rejects IGWA’s argument that a pre-decision hearing is required under the APA. Should that happen, IGWA will proceed with a hearing under Idaho Code § 42-1701A(3). However, in no way should IGWA’s safeguard request be construed as acquiescence to an after-the-fact hearing.

**5. This matter is distinguishable from the Sun Valley and McCain cases because there was no contested case in effect at the time the orders were issued in those cases, and because those cases did not involve the adjudication of contractual rights.**

The Department argues this case is indistinguishable from the Sun Valley and McCain cases where this court allowed the Department to hold an after-the-fact hearing. However, those cases involved challenges to orders issued unilaterally by the Department where no contested case had previously been functioning under the APA. In those cases, a hearing was available under Idaho Code § 42-1701A(3). In this case, § 42-1701A(3) does not apply, as explained above. In addition, the Sun Valley and McCain cases involved urgent water administration matters; they did not involve disputes over contract interpretation where the Director did not have an urgent need to perform water distribution duties.

**CONCLUSION**

For the foregoing reasons, IGWA respectfully requests that this court deny the Department’s Motion to Dismiss.

DATED this 14<sup>th</sup> day of November, 2022.

RACINE OLSON, PLLP

By:   
Thomas J. Budge  
Attorneys for IGWA

## CERTIFICATE OF SERVICE

I hereby certify that on this 14<sup>th</sup> day of November, 2022, I served the foregoing document on the persons below via email or as otherwise indicated:

  
Thomas J. Budge

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