Filed: 12/08/2022 14:52:14
Fifth Judicial District, Jerome County
Michelle Emerson, Clerk of the Court
By: Deputy Clerk - Brandebourg, Traci

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

IDAHO GROUNDWATER 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,

and

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, 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, CITY OF WENDELL, AND CITY OF POCATELLO,

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 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

Case No. CV27-22-00945

ORDER GRANTING MOTION TO DISMISS

I.

BACKGROUND

In 2005, members of the Surface Water Coalition initiated a delivery call before the Idaho Department of Water Resources.[1] The Coalition alleged their senior water rights are being injured due to junior ground water pumping on the Eastern Snake Plain Aquifer ("ESPA"). The Director initiated a contested case in response to the call. He ultimately found that water rights held by members of the Coalition are being materially injured by junior ground water pumping from the ESPA. The Coalition's delivery call is ongoing.

In 2015, certain members of the Coalition and certain members of the Idaho Ground Water Appropriator's Inc. ("IGWA") entered into a settlement agreement in relation to the call, followed by an addendum to that agreement. Also in 2015, the A&B Irrigation District and certain members of IGWA entered into a separate settlement agreement. These agreements will be referred to collectively as the "2015 Agreements."

On March 9, 2016, the Coalition and IGWA submitted a *Stipulated Mitigation Plan and Request for Order* to the Department. The parties jointly moved the Director to adopt the 2015 Agreements as an approved mitigation plan in response to the Coalition's delivery call under CM Rule 43.[2] CM Rule 43 permits the Director to adopt a proposed mitigation plan to address material injury to senior water rights in response to a delivery call in lieu of curtailment of junior rights. IDAPA 37.03.11.043. The 2015 Agreements were attached as exhibits to the *Request for Order*. On May 2, 2016, the Director entered a *Final Order* adopting the 2015 Agreements as an approved mitigation plan in lieu of curtailment, with certain additional conditions.

On December 14, 2016, the Coalition and IGWA entered into an addendum to the 2015 Agreements. Thereafter, they submitted a *Stipulated Amended Mitigation Plan and Request for Order* to the Department. The parties jointly moved the Director to adopt an amendment to the approved mitigation plan reflecting the December 14, 2016, addendum. On May 9, 2017, the Director entered a *Final Order* adopting the requested amendment with respect to the approved mitigation plan, with certain additional conditions. The Court will refer to the Director's 2017

---

[1] The term "Surface Water Coalition" refers collectively to 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.

[2] The term "CM Rule" refers to the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

Final Order as the "Approved Mitigation Plan." The Approved Mitigation Plan requires IGWA to conserve a certain amount of groundwater through reduced diversions and/or managed aquifer recharge, among other things, in lieu of curtailment.

On July 21, 2022, the Coalition filed a *Notice* with the Department alleging that IGWA did not comply with the requirements of the Director's Approved Mitigation Plan in 2021. It requested a status conference on the issue. A status conference was held on August 5, 2022. At the conference, the parties presented argument as to whether IGWA was in violation of the requirements of the Director's Approved Mitigation Plan in 2021. Prior to any action by the Director, the Coalition and IGWA entered into a settlement agreement effective September 7, 2022. In the settlement agreement, the parties agreed to a remedy set forth therein to satisfy IGWA's obligation under the approved Mitigation Plain for 2021 only. They further agreed to jointly submit the settlement agreement to the Director "as the remedy selected for the alleged shortfall in lieu of curtailment."

Notwithstanding the agreement as to remedy, the parties still desired the Director to issue an order clarifying various provisions of the Approved Mitigation Plan. In the settlement agreement dated September 7, 2022, the parties agreed the Director "shall issue a final order regarding the interpretative issues raised by the SWC Notice." *Settlement Agreement*, p.2. In particular, the parties desired the Director's clarification as to (1) the amount of groundwater conservation for which IGWA is responsible under the Approved Mitigation Plan, and (2) whether averaging may be used to measure compliance with IGWA's conversation obligation.

On September 8, 2022, the Director issued a *Final Order Regarding Compliance with Approved Mitigation Plan* ("*Final Order*"). The Director clarified that the Approved Mitigation Plan "obligates IGWA to reduce total ground water diversions, or conduct equivalent private recharge, by 240,000 acre-feet annually." *Final Order*, p.9. He further clarified that IGWA may not use averaging to measure its compliance under the Approved Mitigation Plan. *Id.* at 11. Instead, he directed that "IGWA has an obligation to reduce total ground water diversion by 240,000 acre-feet every year." *Id.* Based on this clarification, the Director found that certain IGWA members failed to comply with the requirements of the Approved Mitigation Plain in 2021. *Id.* at 13. Rather than curtail non-compliant junior water rights, the Director's *Final Order* adopts the remedy agreed upon by the parties as the appropriate remedy for non-compliance in 2021.

On September 22, 2022, IGWA filed a *Petition for Reconsideration* of the Director's *Final Order* with the Department. It alternatively filed a *Request for Hearing* with the Department on that same date. The Director granted IGWA's request for a hearing on the *Final Order* under Idaho Code § 42-1701A(3) on October 13, 2022. As the Director granted IGWA's request for a hearing, he found IGWA's request for reconsideration to be moot. That said, he directed that "[t]he issues raised in the request for reconsideration can be raised at hearing or within briefing." *Order Granting Request for Hearing,* p.2.

On October 24, 2022, IGWA filed the instant *Petition for Judicial Review.* The *Petition* asserts the Director's *Final Order* is contrary to law and requests that it be set aside and remanded for further proceedings. At this time, the Director has not held the hearing requested by IGWA in the underlying administrative proceeding. That hearing is presently scheduled for February 2023.

On November 9, 2022, the Department filed a *Motion to Dismiss* the *Petition for Judicial Review* on the basis the Court lacks subject matter jurisdiction over the *Petition.* IGWA opposes the *Motion.* A hearing on the *Motion* was held before the Court on November 21, 2022. Prior to hearing, those parties identified as Intervenors in the caption were permitted to appear in this proceeding as Intervenors. The Coalition members joined in the Department's argument on the *Motion to Dismiss.* The Coalition of Cities and the City of Pocatello did not take a position on the *Motion to Dismiss.*[3]

II.
ANALYSIS

A. The Court lacks jurisdiction under the doctrine of exhaustion.

The issue is whether the Court has jurisdiction over IGWA's *Petition.* Under Idaho law, the pursuit of statutory remedies is a condition precedent to judicial review. *Park v. Banbury,* 143 Idaho 576, 578, 149 P.3d 851, 853 (2006). The doctrine of exhaustion requires a case "run the full gamut of administrative proceedings before an application for judicial relief may be considered." *Regan v. Kootenai County,* 140 Idaho 721, 724, 100 P.3d 615, 618 (2004). Important policy considerations underlie this requirement. It protects agency autonomy by

[3] The term "Coalition of Cities" refers collectively to the Cities of Bliss, Buhl, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell.

allowing the agency to develop the record and mitigate or cure errors without judicial intervention. *See e.g., Park*, 143 Idaho at 578-579, 149 P.3d at 853-854. It also defers "to the administrative process established by the Legislature." *Id.* Consistent with these principles, "courts infer that statutory administrative remedies implemented by the Legislature are intended to be exclusive." *Id.*

In the underlying administration action, the parties requested that the Director provide clarification with respect to several provisions of the Approved Mitigation Plan. The Approved Mitigation Plan is a *Final Order* of the Director. The Director should be given the first opportunity to clarify the provisions of his *Order*. *See e.g., White v. Bannock County Commissioners*, 139 Idaho 396, 401-402, 80 P.3d 332, 337-338 (2003) (one policy consideration underlying the doctrine of exhaustion is "the sense of comity for the quasi-judicial functions of the administrative body"). Furthermore, it is the Director who is statutorily vested with the duty to distribute water. I.C. § 42-602. The legislature has vested this responsibility in the Director because he has the specialized knowledge and expertise in this area. The Director should be given the opportunity to apply his knowledge and expertise to any issues raised by IGWA regarding the alleged non-compliance with the Approved Mitigation Plan. If there are errors in the *Final Order* as asserted by IGWA, the Director should be given the opportunity to develop the evidentiary record and mitigate or cure those errors without judicial intervention. *Id.* Idaho Code § 42-1701A provides the mechanism through which the Director is given that opportunity in this case.

Idaho Code § 42-1701A governs hearings before the Director. Subsection (1) provides that when the Director is required to hold a hearing prior to taking an action, he must conduct it in accordance with the provisions of the IDAPA. Subsection (2) permits the Director to appoint a hearing officer to conduct such a hearing and make a complete record of the evidence presented. Subsection (3) governs the situation where the Director takes an action without a hearing. That section provides as follows:

> Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any 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. The director shall give such notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section.

I.C. § 42-1701A(3).

There is no specific statutory right to a pre-decision hearing regarding compliance with an approved mitigation plan. To the contrary, the CM Rules generally contemplate "immediate" action by the Director where a junior water user fails to operate in accordance with an approved mitigation plan. *Cf* CM Rule 40.05 (the Director "will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights" when a junior user fails to operate in accordance with an approved mitigation plan). The general tone of the CM Rules in this respect acknowledges the realities of water administration in times of shortage. As the Idaho Supreme Court has stated, "in times of shortage, someone is not going to receive water." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815, 252 P.3d 71, 96 (2011). Therefore, "[w]hen a junior appropriator wrongfully takes water that a senior appropriator is entitled to use, there is often the need for very prompt action." *Id.* The Court has acknowledged that "deprivation of water for the time it would take for a hearing may cause serious economic or other harm to the senior appropriator" and that "very prompt action may be necessary to prevent attempts at self help and possibly even violence."[4] *Id.* For these reasons, the Court has directed that situations may exist where "curtailment of water use can be ordered without prior notice or an opportunity for a hearing." *Id.*

Since no pre-decision hearing is required by statute, IGWA is entitled to request a hearing before the Director to contest the *Final Order*.[5] IGWA has requested such a hearing in

---

[4] The rationales and comments set forth by the Court in *Clear Springs* are heightened when a junior user does not act in accordance with an approved mitigation plan. In such circumstances, the Director has already found material injury to a senior water right based on junior water use. But for the approval of a mitigation plan, the offending junior water user would already be curtailed to remedy the resulting injury to the senior. The junior's continued out-of-priority water use is contingent upon compliance with the approved mitigation plan.

[5] The Court notes that a pre-decision status conference was held in the underlying administrative proceeding. On judicial review, no party argues that IGWA was previously "afforded an opportunity for a hearing on the matter" for purposes of Idaho Code § 42-1701A(3) as a result of the status conference. The Court agrees. The status conference was not evidentiary hearing. It did not result in the development of a factual and evidentiary record. Therefore, there is no evidentiary record developed for the Court to review on judicial review.

this case, and the Director has granted IGWA's request. It is undisputed that the Director has not yet held the requested hearing in the underlying administrative proceeding. Therefore, the Court finds the administrative remedy available to IGWA under Idaho Code § 42-1701A(3) has not been exhausted.

IGWA argues that although no statute specifically requires a pre-determination hearing regarding compliance with an approved mitigation plan, the Idaho Administrative Procedure Act generally requires a hearing in this situation. In making its argument, IGWA relies upon Idaho Code §§ 67-5240 and 67-55424. The Idaho Administrative Procedure Act "controls agency decision-making procedures only in the absence of more specific statutory requirements." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 277 (1994). Indeed, Idaho Code § 67-5240 directs that its provisions apply "except as provided by other provisions of law." This directive is consistent with the basic tenant of statutory construction that "a more general statute should not be interpreted to encompass an area already covered by a special statute." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 743, 947 P.2d 409, 416 (1997). Here, Idaho Code § 42-1701A specifically governs hearings before the Director. As the more specific statute, it is Idaho Code § 42-1701A that governs.

As an exception to the exhaustion requirement, IGWA also asserts the Director exceeded his authority by clarifying the terms of the Approved Mitigation Plan after the parties resolved the dispute via settlement. This Court disagrees.

As an initial matter, IGWA waived this argument when as part of the November 2022 resolution, the parties agreed to have the Director issue an order clarifying disputed provision of the Approved Mitigation Plan.[6] Notwithstanding, although based on a settlement agreement between the parties, the Approved Mitigation Plan - which adopts terms of the settlement agreement with certain additional conditions – is a final order of the Director issued in accordance with the CM Rules. *See e.g.,* IDAPA 37.03.11.043. The final order approves an on-going mitigation plan under the umbrella of an active delivery call. Contrary to IGWA's assertion, this is not a situation involving the Director interpretating an independent contract

[6] In the Settlement Agreement dated September 7, 2022, the parties stipulated that "the Director shall incorporate the terms of section 1 above 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.*" *Budge Declaration in Support of IGWA's Response to IDWR's Motion to Dismiss*, Ex M., p. 2 (Nov. 14, 2022) (emphasis added).

between the parties outside the scope of his authority. The Director clearly has authority to clarify his own final order.[7] Despite the resolution for the 2021 irrigation season, it was not only appropriate but necessary for the Director to take such action due to the on-going nature of the Approved Mitigation Plan. Accordingly, the argument is without merit.

Since IGWA has an adequate administrative remedy available to it which has not been exhausted under Idaho Code § 42-1701A(3), its *Petition* must be dismissed. *See e.g., Regan*, 140 Idaho at 724, 100 P.3d at 618 ("if a claimant fails to exhaust administrative remedies, dismissal of the claim is warranted").

B. Due process does not require a pre-determination hearing in this case.

Notwithstanding the foregoing analysis, IGWA argues that due process required a hearing before the Director issued the *Final Order*. Under Idaho law, a water right is real property, and the owner of a water right must be afforded due process of law before the right can be taken by the State. I.C. § 55-101; *Clear Springs Foods, Inc.*, 150 Idaho at 814, 252 P.3d at 95. However, "due process does not necessarily require a hearing before property is taken." *Clear Springs Foods, Inc.*, 150 Idaho at 814, 252 P.3d at 95. Circumstances that justify postponing notice and an opportunity for a hearing are as follows:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Id. Whether these factors have been met turn on the facts and circumstances of each case. *Id.*

Here, there has been no deprivation of a water right. Although the Director found that members of IGWA failed to comply with the requirements of the Approved Mitigation Plan in

[7] IGWA argues that such contract disputes should be brought and resolved in district court in the same manner as any other contract dispute. This position is untenable for a variety of reasons. First, it is inconsistent with the Director's responsibilities under the CM Rules pertaining to mitigation plans. Second, it would put a district judge in the position of having to clarify a final order of the Director – without providing the Director the opportunity to address his own order. Last, it would undermine the Director's ability to timely respond to the exigencies of the circumstances while awaiting a determination. Ironically, IGWA attests to the urgent need for a determination as it requested an expedited schedule in this matter, citing this very concern. Addressing the matter in yet another forum frustrates any possibility of resolution in a time frame necessary to avoid potential implications relating to disputes over compliance with an approved mitigation plan.

2021, he did not order curtailment of any junior water rights. Rather, he adopted the remedy agreed upon by the parties. That remedy is one to which IGWA has voluntarily agreed. As there has been no deprivation of a water right, the Court need not evaluate those factors set forth in *Clear Springs*. Rather, the Court finds IGWA will be afforded meaningful notice and an opportunity to be heard pursuant to the procedures set forth in Idaho Code § 42-1701A(3).

III.

ORDER

Therefore, based on the foregoing, IT IS ORDERED that the Department's *Motion to Dismiss* is hereby granted.

Dated December 8, 2022

ERIC J. WILDMAN
District Judge

SEAL OF THE DISTRICT COURT, JEROME COUNTY, IDAHO
Fifth Judicial District

CERTIFICATE OF SERVICE

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

Garrick L Baxter Mark Cecchini-Beaver Idaho Department of Water Resources PO Box 83720 Boise, ID 83720-0098 mark.cecchini-beaver@idwr.idaho.gov garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov	[X] By E-mail [ ] By mail [ ] By fax (number) [ ] By overnight deliver / FedEx [ ] By personal delivery
Thomas J Budge Elisheva M Patterson Racine Olson, PLLP 201 E Center St PO Box 1319 Pocatello, ID 83204 tj@racineolson.com elisheva@racineolson.com	[X] By E-mail [ ] By mail [ ] By fax (number) [ ] By overnight deliver / FedEx [ ] By personal delivery
John K Simpson Travis L Thompson Michael A Short Barker Rosholt & Simpson, LLP PO Box 63 Twin Falls, ID 83303-0063 jks@idahowaters.com tlt@idahowaters.com mas@idahowaster.com	[X] By E-mail [ ] By mail [ ] By fax (number) [ ] By overnight deliver / FedEx [ ] By personal delivery
W Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318 wkf@pmt.org	[X] By E-mail [ ] By mail [ ] By fax (number) [ ] By overnight deliver / FedEx [ ] By personal delivery
Sarah A Klahn Somach Simmons & Dunn 2033 11th Street, Ste 5 Boulder, CO 80302 sklahn@somachlaw.com dthompson@somachlaw.com	[X] By E-mail [ ] By mail [ ] By fax (number) [ ] By overnight deliver / FedEx [ ] By personal delivery

Candice McHugh Chris Bromley McHugh Bromley, PLLC 380 South 4th Street, Ste 103 Boise, ID 83702 cmchugh@mchughbromley.com cbromley@mchughbromley.com	[X] By E-mail [ ] By mail [ ] By fax (number) [ ] By overnight deliver / FedEx [ ] By personal delivery

DATED: 12/8/2022

Clerk of the Court

By Traci Brandebourg
Deputy Clerk