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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

IDAHO GROUND WATER APPROPRIATORS, INC. ET AL., Petitioners, vs. IDAHO DEPARTMENT OF WATER RESOURCES, and GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources. Respondents.	**Case No. CV01-23-8187** **SURFACE WATER COALITION'S RESPONSE IN OPPOSITION TO GROUND WATER DISTRICTS' MOTIONS / MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**
IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT NO. 2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	

COME NOW, Intervenor-Respondents 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 (hereinafter collectively "Surface Water Coalition" or "Coalition), by and through undersigned counsel of record, and hereby respond to the *Motion for Stay*, *Motion for Injunctive Relief*, and *Motion for Order to Show Cause* filed in this matter by the Idaho Ground Water Appropriators, Inc. et al. ("Ground Water Districts" or "Districts") on May 19, 2023. This memorandum further supports the Coalition's motion to dismiss filed concurrently herewith. *See Surface Water Coalition's Motion to Dismiss*.

For the reasons set forth below, the Court should deny the Districts' motions and dismiss their petition for judicial review.

INTRODUCTION

Water right administration is all dependent upon timing, particularly during an irrigation season. This Court has noted that "[t]he legislature has vested this responsibility in the Director because he has the specialized knowledge and expertise in this area." *See* Ex. A to *Thompson Dec.*, *Order Granting Motion to Dismiss* (Dec. 8, 2022). Whereas the Director has forecast an initial injury for the 2023 irrigation season, junior ground water rights must either mitigate or face curtailment for that injury to comply with Idaho's prior appropriation doctrine. Delaying the administrative process in this matter, by either a few weeks or several months as requested by the Districts, could essentially preclude distribution of water as required by Idaho law. Moreover, since the Director has stated that no curtailment orders will be issued until after the administrative hearing in this matter is held, time is of the essence. For the reasons set forth below the Coalition respectfully requests the Court to deny the Districts' motions and dismiss their petition for judicial review as a matter of law.

FACTUAL BACKGROUND

As this Court is aware, the Surface Water Coalition's delivery call case was initiated in 2005. After experiencing years of depleted reach gains and reduced water supplies the Coalition exercised their lawful rights under the Department's Conjunctive Management Rules (37.03.11 et seq.) ("CM Rules") and requested conjunctive administration of hydraulically connected junior ground water rights. The delivery call and associated mitigation plan cases spanned various administrative hearings, judicial review cases in district court, and two Idaho Supreme Court decisions. *See AFRD#2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007); *A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 315 P.3d 828 (2013).

Notable for this case, IDWR issued its first *Final Order Regarding Methodology for Determining Material Injury to Reasonable In Season Demand and Reasonable Carryover* ("*First Order*") on April 7, 2010. That order, issued in response to the district court's remand,[1] set forth a 10-step process for annual conjunctive administration of the Coalition's delivery call. Following issuance of that order, the Director held another administrative hearing in response to petitions requesting the same on May 24-26, 2010.[2] Shortly after that hearing, the Director issued the *Second Amended Final Order Determining Material Injury to Reasonable In Season Demand and Reasonable Carryover* ("*Second Order*") on June 23, 2010.

[1] *See generally Order on Petition for Judicial Review* (Gooding County Dist. Ct., Fifth Jud. Dist, Case No. CV-2008-551, July 24, 2009).

[2] Documents and hearing audio found at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/. Similar to the timing of the facts in the current case, the Director held an administrative hearing on various petitions approximately six weeks from issuance of the *Fourth Order*. The Director used a similar timeframe in a conjunctive administration proceeding concerning water rights in Basin 37, where a notice of hearing was issued in early May and the hearing was held six weeks later in early June. *See Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* (Docket No. AA-WRA-2021-001, May 4, 2021); available at: https://idwr.idaho.gov/legal-actions/administrative-actions/basin-37/.

Thereafter, twelve separate judicial review cases regarding the *Second Order* and various implementation orders were filed with district courts in Gooding, Lincoln, and Twin Falls Counties resulting in a consolidated case captioned *IGWA et al. v. Spackman* (Gooding County Dist. Ct., Fifth Jud. Dist., Consolidated Case No. CV-2010-382).[3] The Court issued a *Memorandum Decision and Order* (Sept. 26, 2014) that comprehensively addressed the Director's methodology. *See* Ex. B to *Thompson Dec.* The fundamental concepts of the methodology and the Districts' defenses thereto have been fully adjudicated. Further, the Court denied claims that the Director violated due process rights with the hearing that he held in the spring of 2010. *See id; Memorandum Decision* at 47. No party, including any of the Districts, appealed the Court's decision and final judgment.

Complying with the Court's ordered remand, the Director issued the *Third Amended Final Order Determining Material Injury to Reasonable In Season Demand and Reasonable Carryover* ("*Third Order*") on April 16, 2015. This order superseded the prior methodology orders and set out essentially the same nine-step process that is implemented by IDWR today. *See Third Order* at 32-36.[4] Both IGWA and the City of Pocatello requested hearings on this order. At about that same time the Coalition and IGWA reached general settlement terms concerning mitigation that season and filed a joint motion with IDWR requesting withdrawal of the *Third Order* and the April As Applied Order. *See generally, SWC and IGWA Stipulation and Joint Motion* (May 8, 2015).[5] The City of Pocatello did not oppose that motion.

[3] Documents filed in that case available at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/swc/archived-matters/.

[4] Available at: https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2010-001/CM-DC-2010-001-20150417-Third-Amended-Final-Order-Regarding-Methodology.pdf

[5] Available at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/

After execution and approval of a stipulated mitigation plan, the Coalition and IGWA further stipulated to have IDWR reinstate the *Third Order* on March 9, 2016 and requested IDWR to administer ground water rights accordingly. The City of Pocatello requested a hearing on that order but also asked the Director to stay further action on its request. *See City of Pocatello's Response* (March 18, 2016).[6] Despite having an opportunity for an administrative hearing on its issues with the Director's methodology for several years, the City chose to continue that indefinite stay.

Approximately one month later the Director issued the *Fourth Amended Final Order Determining Material Injury to Reasonable In Season Demand and Reasonable Carryover* ("*Fourth Order*") on April 19, 2016.[7] The City of Pocatello again requested a hearing on the order and a stay on its request (May 4, 2016).[8] At that time the Surface Water Coalition and several cities, including Pocatello, had entered into an interim one-year mitigation plan providing safe harbor for all the cities' junior priority ground water rights.[9] After that plan was extended for another year, the Cities' filed a comprehensive 35-year mitigation plan that was supported by IGWA and the Surface Water Coalition on February 25, 2019.[10] The Director approved the Cities' stipulated 35-year mitigation plan by final order on April 9, 2019.[11] All affected cities,

[6] Available at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/

[7] Available at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/

[8] Similar to its *Third Order* request, the City of Pocatello never asked the Director to lift the stay on its requested hearing on the *Fourth Order* which had been pending for several years.

[9] *See Joint Motion* (March 15, 2016) in Docket No. CM-MP-2016-002, available at: https://idwr.idaho.gov/legal-actions/mitigation-plan-actions/SWC/Cities/

[10] *See Coalition of Cities, City of Idaho Falls, and City of Pocatello Joint Mitigation Plan* (Feb. 25, 2019) in Docket No. CM-MP-2019-001; available at: https://idwr.idaho.gov/legal-actions/mitigation-plan-actions/SWC/Cities/

[11] *See* Ex. T to *Thompson Dec.*

including all those participating in this case before the Court are in compliance with that mitigation plan and have safe harbor from any notice of curtailment this year.

Similar to the group of cities, IGWA and its nine member ground water districts entered into a comprehensive agreement and stipulated mitigation plan with the Coalition in the summer of 2015 and spring of 2016.[12] The Districts implemented and complied with their approved mitigation plan from 2016-2020. However, in 2021 certain ground water districts did not comply with their annual conservation obligations.[13] *See Final Order Regarding Compliance with Approved Mitigation Plan* (Sept. 8, 2022).[14] IGWA challenged that decision and the parties held an administrative hearing on the matter on February 8, 2023. Following issuance of the Director's *Amended Final Order Regarding Compliance with Approved Mitigation Plan* IGWA filed a petition for judicial review that is currently pending before this Court. *See generally*, *IGWA v. IDWR* (Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV01-23-7893).

Apart from the mitigation plan actions, in the fall of 2022 IDWR convened a technical working group comprised of staff and consultants for the parties to evaluate potential updates to the methodology. IDWR staff Matt Anders sent the first notice to the parties in early September. *See* Ex. C to *Thompson Dec.* On October 25, 2022, Mr. Anders provided the following explanation on the working group meetings:

> IDWR is planning to give presentations to the TWG on the following topics. There will be time for discussion after each presentation. We will also provide time for discussion of a topic at subsequent TWG meetings. For some of these topics, IDWR will propose a change to the Methodology. For others, IDWR will simply present the results of our internal analysis but not recommend changing the Methodology.

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[12]The stipulated mitigation plan, addendums, and orders approving the same available at: https://idwr.idaho.gov/legal-actions/mitigation-plan-actions/SWC/IGWA/

[13] IGWA and the Coalition reached a settlement regarding the dispute over the Districts' 2021 mitigation actions on September 7, 2022. Available at: https://idwr.idaho.gov/legal-actions/mitigation-plan-actions/SWC/IGWA/

[14] Available at: https://idwr.idaho.gov/legal-actions/mitigation-plan-actions/SWC/IGWA/

- Base Line Year
- Forecasting Natural Flow Supply
- Near-Real-Time METRIC for ET
- Project Efficiency
- ESPAM 2.2: Steady State vs. Transient

IDWR's goal for this TWG is to get verbal feedback at meetings, followed up by written feedback, on the technical merits of the topics presented. The TWG will not attempt to reach a consensus on which Methodology updates to pursue further. Written comments should focus on these general questions:

- Does the technique presented provide a better technical basis than the current technique for the analysis in question?
- Is there an alternative to the technique presented that would provide a better technical basis for the analysis in question?

See Ex. D to *Thompson Dec.*

The working group participants included IDWR staff, as well as the parties' consultants and counsel, and other non-active participants. *See* Ex. E to *Thompson Dec.* The working group held meetings at IDWR (with remote participation) on November 16, 17, 28 and December 1, 9, and 14, 2022. *See* Ex. F to *Thompson Dec.* At each of these meetings Department staff received comments and feedback from the participants.

Notably, on October 25th IDWR notified the parties that updates to the methodology could include the "baseline year" as well as the "ESPAM 2.2: Steady State v. Transient." Ex. D to *Thompson Dec.* Matt Anders presented information and data related to the "baseline year" at the November 16, 2022 meeting. *See* Ex. G to *Thompson Dec.* Jennifer Sukow's presentation on the results of using a transient analysis for determining a projected curtailment date was sent to the parties on November 19, 2022, and presented in a meeting on November 28, 2022. *See* Ex.

H to *Thompson Dec.* In other words, the parties were put on notice over six months ago that these updates could be made to the methodology.[15]

Ultimately, following the series of meetings and presentations, IDWR staff submitted a preliminary recommendation to the Director on December 23, 2022. *See* Ex. I to *Thompson Dec.* Consultants for the Coalition, the Districts, and the various Cities then submitted their own comments on or before January 16, 2023.[16] *See* Exs. J, K, and L to *Thompson Dec.*

On April 21, 2023 the Director issued the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Fifth Order*") and the *Final Order Regarding April 2023 Forecast Supply* ("*April Order*") implementing steps 1-3 for the 2023 irrigation season. *See* Exs. A-1; A-2 to *Budge Dec.* The Director issued a notice that same day setting an administrative hearing to be held over six weeks later on June 6-10, 2023. *See* Ex. A-3 to *Budge Dec.* Contrary to the Districts' characterization, the Director's *Fifth Order* does not make "radical changes" to the methodology for conjunctive administration and was not issued in a vacuum. Notably, the methodology continues essentially the same nine steps from the *Fourth Order* issued over seven years ago. The basic framework and steps were previously litigated on judicial review before this Court. *See* Ex. B. to *Thompson Dec.*[17] The *Fifth Order* incorporates known additional data from 2015-2021 with the following updates to address the various methodology steps:

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[15] Any allegations of insufficient time to analyze this change to the methodology is unfounded as the Director's *Fifth Order* was not the first time parties were presented with the transient modeling analysis. *See generally Districts' Brief* at 21.

[16] Consultants with Spronk Water Engineers, Inc. participated in the Technical Working Group on behalf of the City of Pocatello, the City of Idaho Falls, and the Coalition of Cities (Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell).

[17] Documents filed in that case available at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/swc/archived-matters/.

1. Baseline Year

The methodology's baseline year "is a year or average of years when irrigation demand represents conditions that predict need in the current year of irrigation at the start of the irrigation season." *Fifth Order* at 3, ¶ 7; Ex. A-1 to *Budge Dec*. A baseline year "should represent a year(s) of above average diversions . . . and should also represent a year(s) of above average temperatures and reference ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors . . .[and] actual supply should be analyzed to assure that the BLY is not a year of limited supply." *Id.* at 3-4, ¶ 9. The criteria for selecting a baseline year has not changed since the Director issued the *Second*, *Third*, and *Fourth Orders*.[18] However, what has changed is the number of years the Director has available to analyze against that criteria. *See Fifth Order* at 11 ("the years 2000-2021 were considered for the BLY selection"). As a result of the updated data, the Director found that "BLY 06/08/12 no longer satisfies the presumption criteria that total diversions in the BLY should exceed the average annual diversions." *Id.* Consequently, the Director concluded that "total diversions for 2018 adequately protect senior water rights when predicting the demand shortfall at the start of the irrigation season and selects 2018 as the BLY." *Id.* at 12, ¶p 27.

Notably, IDWR staff recommended changing the baseline year to 2018 in its December 23, 2022 staff memorandum. *See* Ex. I to *Thompson Dec.* Whereas the data from 2018 was presented to the parties back in mid-November 2022, the Districts have been on notice of this information for several months. *See* Ex. G to *Thompson Dec.*

[18] The Director has updated the baseline year before. In 2016, the Director updated the baseline year from the 06/08 average used in the *Second Order* to a new average of 06/08/12 because at that time "the 06/08 diversions are no longer above average." *See Fourth Order* at 11; available at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/.

2. Reasonable Carryover

The methodology for determining reasonable carryover did not change from the *Third* or *Fourth Orders* either. *See Fifth Order* at 21-29; Ex. A-1 to *Budge Dec*. What changed was the Director's use of projected demand in his calculation with a projected demand (2018 BLY) instead of (06/08/12 BLY). *See id.* at 23, ¶ 68. The Director did make adjustments to certain Coalition entities' "maximum projected carryover need" as well. *See id.* at 27-29. The Coalition filed a petition requesting hearing on this issue that is set for June 6-10, 2023. *See* Ex. M to *Thompson Dec.* Although the reasonable carryover quantities changed in response to a change in the baseline year, the Director's evaluation of injury to carryover storage and the basic mechanics of Step 9 did not change.

3. Determination of Curtailment Date

The Director identified how the ESPAM groundwater model has been and can be run to identify a curtailment date for junior groundwater rights causing material injury. *See Fifth Order* at 29-30; Ex. A-1 to *Budge Dec*. If a ground water right is not covered by an approved and effectively operating mitigation plan, then curtailment is the Director's only remedy to prevent material injury to the senior right.

A steady-state analysis analyzes the impact of curtailment on the aquifer and connected river reaches long-term (i.e. 50 years), whereas a transient analysis predicts the timing of changes that would occur during the irrigation season. *See id.* at 30. The Director acknowledged that only "9% to 15% of the steady state response is predicted to accrue to the near Blackfoot to Minidoka reach between May 1 and September 30 of the same year." *See id.* In other words, if curtailment is based upon a steady-state analysis, it severely under-mitigates a predicted injury to the Coalition's senior water rights. Consequently, the Director adopted a transient analysis as

being "necessary to simulate the short-term curtailments prescribed in the methodology."[19] *Id.* at 31. The potential use of a transient simulation was disclosed to the parties and available for evaluation as early as November 28, 2022 where Jennifer Sukow presented a comparison between the two analyses. *See* Ex. H to *Thompson Dec.* In other words, the parties have had over five months to analyze the Director's use of ESPAM in this manner.

With these updates, several parties, including the Districts and the Coalition, all filed petitions requesting a hearing pursuant to section 42-1701A(3).[20] The Districts and the Cities repeatedly requested the Director to stay or continue the scheduled hearing. *See* Ex. A-6 to *Budge Dec.*; Ex. N to *Thompson Dec.* The Coalition opposed these requests noting the fact that not all ground water rights were covered by an approved mitigation plan, potential worsening water supply conditions, and the need for timely water right administration during the irrigation season. *See* Ex. A-16 to *Budge Dec.*; Ex. O to *Thompson Dec.* The Director considered and addressed the requests for delay and accommodated remote participation for certain individuals unable to travel to Boise, Idaho in person. *See* Ex. P to *Thompson Dec*.

Given the need for timely water right administration the Director denied the repeated requests to delay the administrative hearing. *See* Exs. P; Q to *Thompson Dec.* Notably, the Director recognized the following:

> The Director has a responsibility to timely respond to injury incurred by senior water users and there should be no unnecessary delays in that process. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res*., 143 Idaho 862, 874, 154 P.3d 433, 445 (2007). "Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call." Id. The Department also agrees with the SWC that "[i]n practice, an untimely decision effectively becomes

[19] Such a finding is consistent with the Director's approval of mitigation plans where he allows the delivery of storage equal to the amount of an injury finding.

[20] Petitions requesting hearing were filed by the Coalition of Cities, the City of Pocatello, Amalgamated Sugar Co., McCain Foods USA, Inc., IGWA (on behalf of seven ground water districts), Bingham Ground District, Bonneville-Jefferson Ground Water District, the City of Idaho Falls, and the Surface Water Coalition. Available at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/

> the decision; i.e. no decision is the decision." *Objection* at 3 (citing *Order on Plaintiffs' Motion for Summary Judgment* at 97 (AFRD#2 et al. v. IDWR, No. CV-2006-600 (Gooding County Dist. Ct. Idaho June 2, 2006)).

Ex. P to *Thompson Dec.*

The Director set a deadline to disclose witness and exhibit lists and any expert reports by May 30, 2023.[21] *See* Ex. A-5 to *Budge Dec.* The administrative hearing is set for June 6-10, 2023.[22]

ARGUMENT

I. The Court Should Dismiss the Districts' Petition for Judicial Review.

The Districts have filed a petition for judicial review and have requested a stay of the scheduled administrative hearing pursuant to Civil Rule 84 which provides that "the agency may grant, or a reviewing court may order, a stay upon appropriate terms." I.R.C.P. 84(m). However, in combination with their petition the Districts have filed separate motions under other civil rules not covered in an administrative appeal. *See generally*, *Motion to Compel*, *Motion for Injunctive Relief*, *Motion for Order to Show Cause*. The Districts are precluded from combining their causes of action and requests for relief in this fashion.[23] *See Euclid Ave. Trust v. City of Boise*, 146 Idaho 306, 309, 193 P.3d 853, 856 (2008); *S Bar Ranch v. Elmore County*, 170 Idaho 282

[21] The parties agreed to close discovery that day as well. To date the Cities and Districts have taken the depositions of Jennifer Sukow, Matt Anders, and Jay Barlogi (Twin Falls Canal Company). Counsel with the Cities indicated they did not want to take the deposition of any other Coalition representatives as of May 22, 2023. *See* Ex. R to *Thompson Dec.*

[22] The Director set the hearing date by notice on April 21st and granted the various requests for hearing that followed. *See* Ex. S to *Thompson Dec.*

[23] Related to this issue is the separate case filed by the City of Pocatello and others seeking declaratory relief and writs of prohibition and mandamus. *See City of Pocatello et al. v. IDWR* (Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV01-23-8258, May 19, 2023). That case concerns the same administrative proceeding subject to the Districts' petition for judicial review. Notably, the Bingham and Bonneville-Jefferson Ground Water Districts are petitioners in both proceedings. Whereas the Supreme Court has prohibited parties from combining a petition for judicial review with a civil action in the same case, this Court should not allow those parties to circumvent that principle even though they are filing multiple petitions and complaints regarding the same underlying matter.

(2022) ("[S Bar] unable to obtain relief under the Open Meeting Law's civil suit provision because a petition for judicial review is not a civil action and may not be joined with one"). For this reason the Court can dismiss the Districts' petition for review and requested stay under Rule 84(m). Should the Court consider the requested stay, it can still deny it as explained below.

The Director, in an exercise of discretion, has declined the Districts' repeated requests to delay the scheduled hearing, but has accommodated requests for certain witnesses to participate remotely. *See* Ex. P; *Order Denying Motion for Reconsideration* at 7 (authorizing the Districts' consultants to participate remotely). The Court should similarly decline the requested stay as the administrative process concerning this matter is not yet complete and the Director should be given the first opportunity to address any clarification or changes to his orders.

In a nutshell the Districts have filed a premature petition for judicial review of an agency action contrary to well-established administrative law. *See Laughy v. Idaho Dept. of Transp.*, 149 Idaho 867, 876, 243 P.3d 1055, 1064 (2010) ("Absent a final order, any petition for judicial review is premature").

Although the Districts have filed requests and the Director has scheduled an administrative hearing to consider additional evidence and testimony on the *Fifth Order* as allowed by Idaho law, the Districts have nonetheless sought judicial review before exhausting their administrative remedies. This situation is no different than their failed effort to seek judicial review of the Director's *Final Order Regarding Compliance with Approved Mitigation Plan* that was dismissed by this Court last year. *See Order Granting Motions to Dismiss* (*IGWA v. IDWR*, Jerome County Dist. Ct., Fifth Jud. Dist., Case No. CV27-22-945, Dec. 8, 2022); Ex. A to *Thompson Dec.* In that case the Court rightly noted the following:

> 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*. . . . 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.

Order at 5; Ex. A to *Thompson Dec.*

Whereas IGWA's petition was dismissed for failing to exhaust its adequate administrative remedy in that case, the same reasons justify dismissal here where the Districts have requested and have been provided an opportunity for a hearing to address their concerns with the *Fifth Order* and *April Order*. *See* I.C. § 67-5271(1). Stated another way, it is well settled that the administrative remedy provided by section 42-1701A(3) must be exhausted before this Court can consider any petition for judicial review. *See Park v. Banbury*, 143 Idaho 576, 578, 149 P.3d 851, 853 (2006) ("Pursuit of statutory administrative remedies is a condition precedent to judicial review"); *see also*, *Hartman v. Canyon County*, 170 Idaho 666, 516 P.3d 90, 94 (2022) ("If an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before the courts will act").

Further, the Districts have failed to show that any exceptions to the exhaustion rule apply that would warrant consideration of their petition. The Districts claim that exhaustion is not required "when the interests of justice so require," yet they have failed to show how such interests require enjoining an administrative hearing required by Idaho law. *See* I.C. § 42-1701A(3). Whereas the Districts have requested a hearing and the Director has set one, there is

no equitable reason to halt the administrative process and delay water right administration to senior rights. *See e.g.* IDAHO CONST. Art. XV, § 3; I.C. §§ 42-602, 607; *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 800, 252 P.3d 71, 81 (2011) ("Conjecture that a junior appropriator's use of water will not adversely impact a senior appropriator's water right does not change the doctrine of prior appropriation"); *AFRD#2 v. IDWR*, 143 Idaho 862, 874, 154 P.3d 433, 445 (2007) ("Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call").

Moreover, the Districts have failed to recognize that any delay in this process, and ultimately conjunctive administration and continuing injury to senior water rights violates Idaho law and "the interests of justice." Indeed, where the Director has stated he will not issue any curtailment orders until after the hearing is held, enjoining the hearing would effectively enjoin or delay water right administration to the detriment of the Coalition's senior rights during the 2023 irrigation season. *See* Ex. P to *Thompson Dec*; *Order Denying Motion for Reconsideration* at 6 ("The Director will not be issuing a curtailment order until after a hearing in this matter so that junior ground water users have the opportunity for a hearing before being curtailed").

Accordingly, before the Court can even consider a request for a stay under Rule 84(m) it should examine whether jurisdiction is even proper. *See State v. Urrabazo*, 150 Idaho 158, 162-63, 244 P.3d 1244, 1248-49 (2010), overruled on other grounds, *Verska v. St. Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 265 P.3d 502 (2011); *see also*, *Int. of Dudley*, 167 Idaho 56, 57, 467 P.3d 420, 421 (2020). In *Urrabazo*, the Supreme Court explained that subject matter jurisdiction "is so fundamental to the propriety of a court's actions, that subject matter jurisdiction can never be waived or consented to, and a court has a *sua sponte* duty to ensure that it has subject matter jurisdiction over a case." *Id.; see also* I.R.C.P. 12(g)(3) (If the court determines at any time that

it lacks subject-matter jurisdiction, the court must dismiss the action).

Since the Districts have not exhausted their administrative remedies as required by Idaho law, and they cannot meet the grounds for any exception to this rule, the Court should dismiss their petition accordingly.

II. The Court Should Deny the Districts' Motion for Preliminary Injunction.

In the alternative the Districts have moved for injunctive relief under Idaho Civil Rules 62 and 65. *See Districts' Motion for Injunctive Relief* at 2. The Districts' motion does not meet the criteria for a preliminary injunction therefore it should be denied.

First, a party seeking a preliminary injunction bears "the burden of proving the right thereto ...." *Harris v. Cassia Cty.,* 106 Idaho 513, 518, 681 P.2d 988, 993 (1984) (citing *Lawrence Warehouse Co. v. Rudio Lumber Co.,* 89 Idaho 389, 405 P.2d 634 (1965)); *see also*, *Gordon v. U.S. Bank Nat'l Ass'n*, 166 Idaho 105, 115, 455 P.3d 374, 384 (2019). "Whether to grant or deny a preliminary injunction is a matter for the discretion of the trial court." *Brady v. City of Homedale,* 130 Idaho 569, 572, 944 P.2d 704, 707 (1997) (citing *Harris*, 106 Idaho at 517, 681 P.2d at 992). A district court should only grant a preliminary injunction "in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Id.* (quoting *Harris,* 106 Idaho at 518, 681 P.2d at 993).

Rule 65(e) enumerates the grounds upon which a district court may grant a preliminary injunction. I.R.C.P. 65(e). The Districts' motion contains no reasons to grant the requested injunction but instead just lists the requested actions the Districts want the Court to take. *See Districts' Motion for Injunctive Relief* at 2. In their memorandum the Districts allege the Director issued the *Fifth Order* in violation of the Idaho APA and due process. *See Districts' Brief* at 11-15. However, the Districts do not tie these arguments to the standard set forth in Rule

65. In other words, the Districts do not show how the Director's issuance of the *Fifth Order* and provision of an administrative hearing on that decision violates the APA or their right to due process. Where section 42-1701A(3) provides a statutory right for a hearing on the Director's orders, which the Districts' and other parties have exercised, they have failed to show how that process is inadequate. *See* Ex. S to *Thompson Dec.*

The Districts' due process argument fails as the Director has set an administrative hearing to address any concerns or clarifications of his orders. Determining whether an individual's Fourteenth Amendment due process rights have been violated requires a two-step analysis under Idaho law: 1) determining whether the individual is threatened with deprivation of a liberty or property interest; and 2) determining what process is due. *See Newton v. MJK/BJK, LLC*, 167 Idaho 236, 244 (2020). In this case the Districts have a stipulated mitigation plan that was approved by the Director. Presuming the Districts operate in conformance with their plan there is no "threatened deprivation" of a property interest in having the administrative hearing set by the Director. Next, the concept of what process is due is flexible, "calling for such procedural protections as are warranted by the particular situation." *City of Boise v. Industrial Com'n*, 129 Idaho 906, 910 (1997).

Here, the basic framework of the methodology has been available for over a decade since the issuance of the *First Order* in April 2010. The various parties, counsel, and consultants are all familiar with the various steps involved, including the calculations and background data. Further, the methodology was amended three other times before the *Fifth Order* was issued this spring and the parties had the opportunity to request a hearing on each of those orders. While some parties did request hearings, they then voluntarily chose to have IDWR stay any action on those requests. Finally, IDWR supplied the parties with information regarding potential changes

and updates to the methodology several months ago. *See* Exs. D, G, H. The Director set an administrative hearing over six weeks out from the issuance of the *Fifth Order*. The unique circumstances of this case plainly show that the Director has provided the necessary due process that is warranted by the particular situation.

Moreover, the Districts have failed to demonstrate any threatened "irreparable harm" required under Rule 65(e)(3). The Districts can only allege "uncertainty as to whether IGWA's mitigation plans will be effective in 2023." *See Districts' Brief* at 18. Claiming "uncertainty" does not meet a standard of irreparable harm under Idaho's injunctive relief rule. While the Districts have an approved mitigation plan that was stipulated to by the Coalition in 2016, compliance with that plan is not the issue before this Court. In other words, whether the Districts will comply with their mitigation plans in 2023 and the Director's requirements is not known or decided at this point. Regardless, groundwater users cannot use potential non-compliance with their own mitigation plan as a reason for a Court to enjoin conjunctive administration of their junior priority rights. Moreover, none of the Cities participating in this case can show irreparable harm as they are all covered by an approved stipulated 35-year mitigation plan. *See* Ex. T to *Thompson Dec.*

In contrast, if the hearing is delayed or stayed indefinitely, the Coalition's senior water rights stand to be irreparably harmed from continued out-of-priority groundwater pumping.[24] IGWA's representative districts do not represent and have no authority to mitigate for any junior groundwater right holders who are not members of a groundwater district. *See* I.C. § 42-

[24] The Districts erroneously seek to have this Court move the scheduled hearing from June to October 16-20, 2023, or after the irrigation season is complete. *See Districts' Motion for Order to Show Cause* at 2. The Director scheduled a consolidated hearing in the Snake River and Big Wood River Basin Moratorium cases for that same time on March 31, 2023. That case involves additional parties and counsel not involved in this matter that the Districts do not represent. Consequently, they have no basis to unilaterally change schedules in other proceedings without those parties' involvement or stipulation.

5224(6). This is confirmed in IGWA's *Notice of Ground Water District Mitigation* ("*Notice*") wherein the districts represent they are only proposing to mitigate for their members. *See* Ex. H to *Budge Dec.*; *Notice* at 2-3 ("These districts' proportionate shares of the 63,645 acre-feet demand shortfall predicted in the April 2023 As-Applied Order are as follows . . ."). Stated another way, the *Notice* does not indicate that the districts will mitigate for the entire predicted demand shortfall of 75,200 acre-feet.

Whereas the Director has indicated he does not plan to issue a curtailment order until after the hearing in this matter, each day that passes is critical for purposes of timely water right administration during the 2023 irrigation season. Thus, any delay in the schedule would inevitably delay administration of any affected junior ground water rights not covered through an approved mitigation plan. Every day that passes furthers the potential that unmitigated pumping will continue to injure senior surface water rights without adequate mitigation as the irrigation season has already commenced throughout the various administrative basins across Eastern Snake Plain Aquifer ("ESPA").

Further exacerbating potential injury this year is the sentinel well index measurement for April 2023. The groundwater level data information depicts aquifer levels dropping back to near 2015 levels. *See* Ex. U to *Thompson Dec*. The declining groundwater levels are likely reducing hydraulically connected reach gains in the Near Blackfoot to Minidoka reach of the Snake River this year, further reducing available water to the Coalition members. Contrary to the Districts' theory, just looking at the current snowpack does not tell the whole story on injury to the Coalition, the health and status of the ESPA, or trends in reach gains in the Snake River. *See e.g., Districts' Brief* at 19-20.

Finally, the Director has made it clear that he will not issue any curtailment orders until after the June hearing. *See* Ex. P to *Thompson Dec*. Accordingly, there is no reason to enjoin the administrative process the Director is providing to the Districts, particularly where the Districts cannot show any immediate irreparable harm. *See id; Order Denying Motion for Reconsideration* at 6 ("The Director will not be issuing a curtailment order until after a hearing in this matter so that junior ground water users have the opportunity for a hearing before being curtailed"); *see also* Ex. V to *Thompson Dec.*; *Order Denying Application for Temporary Restraining Order* at 3 ("In this case, the Court does not find that immediate and irreparable injury, loss, or damages will result to Petitioners. . . . Nor has the Director issued any order of curtailment that would affect the water rights held by the Petitioners or their members").

The Coalition submits the Court should deny the Districts' request for preliminary injunction accordingly.

III. The Court Should Deny the Districts' Motion for Order to Show Cause.

The Districts have filed an application for an order to show cause under Rule 72. The Districts have not submitted a "verified complaint" but have instead filed a *Declaration of Thomas J. Budge* in support of their motion. The declaration of counsel includes a number of filings from the administrative case, describes his effort to retain additional engineering firms, describes claims related to depositions of IDWR staff, and attaches copies of a district court decision and the Districts' *Notice of Mitigation*. *See generally, Budge Dec.* Critically, the declaration does not make a "prima facie showing for an order commanding" the Director "to do or refrain from doing specific acts." *See* I.R.C.P. 72. Nothing in the declaration demonstrates that the Director is not acting in compliance with his statutory duties.

Moreover, the Court has not issued a show cause order to either IDWR or the Director yet. Rather, the Districts have noticed up a hearing on their "motion" requesting the same. *See Amended Notice of Hearing* (May 25, 2023). To that end the Coalition understands the hearing on June 1st as an argument on the Districts' motion to set a show cause hearing at some later date, not a show cause hearing itself. Unless the Districts file a verified complaint or affidavit to make a prima facie showing, the Court should deny the Districts' motion accordingly.

CONCLUSION

The Districts have filed a premature petition for judicial review. Where the Director has scheduled an administrative hearing for June 6-10, 2023, and the Districts have requested a hearing pursuant to section 42-1701A(3), Idaho law requires exhaustion of that administrative remedy. Time is of the essence in water right administration, and any delay or stay of this proceeding would effectively interfere with conjunctive administration this season thereby potentially causing additional harm to the Coalition's senior water rights. As such, the Coalition respectfully requests the Court to deny the Districts' motions and dismiss their petition for judicial review.

DATED this 30th day of May, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2023, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

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