RAÚL R. LABRADOR
ATTORNEY GENERAL

SCOTT L. CAMPBELL
Chief of Energy and Natural Resources Division

GARRICK L. BAXTER, ISB No. 6301
Deputy Attorney General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov

Attorneys for Respondents

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., BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, and BINGHAM GROUND WATER DISTRICT,

Petitioners,

vs.

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

Respondents.

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

Case No. CV01-23-08187

RESPONSE TO GROUND WATER DISTRICTS' MOTION FOR STAY, MOTION FOR INJUNCTIVE RELIEF, MOTION TO COMPEL, MOTION FOR EXPEDITED DECISION, AND APPLICATION FOR ORDER TO SHOW CAUSE

Respondents, the Idaho Department of Water Resources and its Director, Gary Spackman (collectively, "Department"), file this *Response to Ground Water Districts' Motion for Stay*, *Motion for Injunctive Relief*, *Motion to Compel*, *Motion for Expedited Decision, and Application for Order to Show Cause* ("Response"). As argued in the Department's *Motion to Dismiss Petition for Judicial Review and Motion to Vacate Hearing* and brief in support of the motions filed on May 30, 2023, the Court should dismiss the petition for judicial review and the accompanying motions for lack of jurisdiction. However, as explained in this Response, the Court should also deny the Ground Water Districts' motions because the Ground Water Districts are not entitled to such extraordinary relief.

BACKGROUND

On April 21, 2023, the Director issued his *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*. *See* Budge Decl. Ex. A-1, at 10–56 [hereinafter "Methodology Order"].[1] The Methodology Order updates the process used to determine material injury to members of the Surface Water Coalition ("SWC").

The Director's reason for updating the methodology order is straight forward. The Director is obligated to update the methodology order if new data and information show that a change is warranted:

> Recognizing his ongoing duty to administer the State's water resources, the Director should use available data, and consider new analytical

[1] Moving forward, citations to the Methodology Order in this Response will include Methodology Order page number references and not the PDF page numbers associated with the declaration of T.J. Budge.

> methods or modeling concepts, to evaluate the methodology. As more data is gathered and analyzed, the Director will review and refine the process of predicting and evaluating material injury. The methodology will be adjusted if the data supports a change.

Methodology Order, at 1 (quoting *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Fourth Methodology Order")).

As a first step, to ensure that the Methodology Order is using the most recent available data, the Director updated the datasets used in the methodology. Most of the datasets now extend through the year 2021. *See Methodology Order*, at 4 n.3, 5 n.4, 5 n.5, 6 n.7, 7 n.8, 8 n.9, 9 n.10, 14 n.12. Using the updated data, the Director then reviewed various elements of the methodology, including the Base-Line Year ("BLY") calculation. Based on that review, the Director concluded a change to the methodology order was necessary. The Director found that the BLY calculation in the Fourth Methodology Order was no longer sufficiently protective of senior water rights:

> With the addition of new data from 2014 to 2021, the total diversions by the SWC for the previous BLY 06/08/12 are 100% of the average SWC diversions for the years 2000-2021. As a result of adding the new data, BLY 06/08/12 no longer satisfies the presumption criteria that total diversions in the BLY should exceed the average annual diversions. Mem. Decision & Order on Pets. for Jud. Rev., at 34, *IGWA v. Idaho Dep't of Water Res.*, No. CV-2010-382 (Gooding Cnty. Dist. Ct. Idaho Sept. 26, 2014).

Methodology Order ¶ 26, at 11.

Furthermore, the Director concluded that continuing to run the Eastern Snake Plain Aquifer ("ESPA") model in steady-state mode was contrary to Idaho

law and previous decisions of this Court. *Methodology Order* ¶ 23, at 10. Other changes were made in the Methodology Order (for example, the Reasonable Carryover analysis was updated because of the change in the BLY) but these two changes are the primary changes.

On the same day he issued the Methodology Order, the Director also issued his *Final Order Regarding April 2023 Forecast Supply* ("As-Applied Order"). *See* Budge Decl. Ex. A-2, at 58–71. The As-Applied Order applies the new Methodology Order for the 2023 irrigation season and predicts a shortfall for Twin Falls Canal Company, which will result in mitigation requirements or curtailment for ground water rights with priority dates junior to December 30, 1953.

To help prevent delay in administration, in case one or more parties requested a hearing pursuant to Idaho Code § 42-1701A(3), the Director also preemptively issued a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* ("Notice of Hearing"). *See* Budge Decl. Ex. A-3, at 73–78. The Notice of Hearing scheduled a prehearing conference for April 28, 2023, and an in-person evidentiary hearing on the Methodology Order and As-Applied Order for June 6–10, 2023.

On May 19, 2023, the Idaho Ground Water Appropriators, Inc. ("IGWA"), Bonneville-Jefferson Ground Water District and Bingham Ground Water District (collectively the "Ground Water Districts") filed the *Ground Water Districts' Petition for Judicial Review* ("Petition"). Within the petition for judicial review case, numerous motions were concurrently filed—*Ground Water Districts' Motion for*

Stay, Ground Water Districts' Motion for Injunctive Relief, *Ground Water Districts' Motion for Expedited Decision*, *Ground Water Districts' Motion to Compel*; and *Ground Water Districts' Motion for Order to Show Cause*. The purpose of each of these motions is to persuade the Court to step in and stop the administrative hearing set for June 6–10, 2023.

On May 25, 2023, the Ground Water Districts filed an *Amended Notice of Hearing* for their various motions to be heard on June 1, 2023, at 1:30 P.M.

ARGUMENT

The way a litigant avoids the obligation to exhaust administrative remedies is to argue that one of the exceptions to the doctrine of exhaustion applies. For the reasons discussed in the Departments' *Brief in Support of Motion to Dismiss Petition for Judicial Review and Motion to Vacate Hearing*, those exceptions do not apply here. However, in an attempt to confuse the issue and divert the Court's attention from their failure to exhaust administrative remedies, the Ground Water Districts filed four different requests for extraordinary relief.[2] In support of their requests, the Ground Water Districts filed a single brief. *See Ground Water District's Brief in Support of Motion for Stay, Motion for Injunctive Relief, Motion to Compel, Motion for Expedited Decision, and Application for Order to Show Cause* [hereinafter "Brief in Support"]. In the Brief in Support, the Ground Water Districts make various allegations related to due process and discovery. Even if the

[2] The Ground Water Districts filed the following: (1) Motion for Stay, (2) Motion for Injunctive Relief, (3) Motion to Compel, and (4) Motion for Order to Show Cause.

Court concludes it has jurisdiction to hear them, the Court should deny each of the motions because the Ground Water Users have failed to meet the high legal standards for granting such extraordinary relief.

I. The Court Should Deny the Ground Water Districts' Motion for Stay

Whether to grant a stay during the pendency of an appeal is a discretionary decision. *Tricore Invs., LLC v. Est. of Warren through Warren*, 168 Idaho 596, 610, 485 P.3d 92, 106 (2021); *see also* I.R.C.P. 84(m). Idaho Code § 67-5274 states: "The filing of the petition for review does not itself stay the effectiveness or enforcement of the agency action… [T]he reviewing court may order[] a stay upon appropriate terms." I.R.C.P. 84(m) similarly provides in pertinent part that:

> [T]he filing of a petition for judicial review with the district court does not automatically stay the proceedings and enforcement of the action of an agency that is subject to the petition. Unless prohibited by statute … the reviewing court may order, a stay upon appropriate terms.

IDAPA and I.R.C.P. 84(m) do not state what qualifies as "appropriate terms" for a stay. There are no Idaho cases that explain what constitutes "appropriate terms" under I.R.C.P. 84(m) or Idaho Code § 67-5274. Whether to grant a request for stay is an exercise of judicial discretion and the propriety of its issue is dependent upon the circumstances of the particular case. 2 Am. Jur. 2d Administrative Law § 526.

Here, the Court should reject the motion for stay because the Ground Water Districts have failed to exhaust their administrative remedies and have an adequate remedy to address their due process and discovery concerns. Idaho Code § 42-1701A governs hearings before the Director. The plain language of § 42-1701A

makes clear that the Director is authorized to issue an order prior to holding a hearing. If a person is aggrieved by an order issued without hearing, they can request a hearing on the matter. Idaho Code § 42-1701A(3) ("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."). As this Court has previously recognized, Idaho Code § 42-1701A controls Department decision making procedures. Order Granting Mot. to Dismiss at 7, *Idaho Ground Water Appropriators, Inc. v. Idaho Department of Water Resources*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho Dec. 8, 2022). Because the more specific Idaho Code § 42-1701A controls, the Director is not required under the Idaho Administrative Procedures Act to hold a hearing before issuing an order. Moreover, the Ground Water Districts have an adequate remedy at law to address their concerns regarding due process and discovery—they can appeal the decision. Judicial review of a final order issued by the Director in the administrative proceeding is an adequate remedy. Order Dismissing Pet. for Judicial Review at 4–5, *City of Pocatello v. Spackman*, No. CV01-17-23146 (Ada County Dist. Ct. Idaho June 4, 2018). Because the circumstances of this particular case do not warrant a stay, the Court should deny the Ground Water Districts' motion for stay.

II. The Court Should Deny the Ground Water Districts' Motion for Injunctive Relief

Whether to grant an injunction is a discretionary determination for the trial court. *Gem State Roofing, Inc. v. United Components, Inc.*, 168 Idaho 820, 828, 488

P.3d 488, 496 (2021). The party seeking an injunction bears the burden of proving they are entitled to injunctive relief. *Harris v. Cassia Cnty.*, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984).

The Ground Water Districts seek a preliminary injunction under I.R.C.P. 62 and I.R.C.P. 65. *Brief in Support*, at 9–10. I.R.C.P. 62 specifically involves stays to enforce a judgment. Because the Department has not issued a judgment, nor are the Ground Water Districts subject to the enforcement of a judgement in this case, I.R.C.P. 62 is inapplicable.

The Idaho Supreme Court, however, recently reaffirmed the so-called conjunctive standard for issuing a preliminary injunction under I.R.C.P. 65, which requires the petitioner to show two things: first, without an injunction they will suffer irreparable injury; and second, they are likely to succeed on the merits or that the right is clearly established. *Planned Parenthood Great Nw. v. State,* No. 49615, 2022 WL 3335696, at *5 (Idaho Aug. 12, 2022). *See also Inc. v. United Components, Inc.*, 168 Idaho 820, 834, 488 P.3d 488, 502 (2021) (District courts should grant preliminary injunctions "only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal."). An irreparable injury is an injury that is impossible to remedy or repair. *McCann v. McCann*, 152 Idaho 809, 820, 275 P.3d 824, 835 (2012) (citing Webster's Third New International Dictionary, Unabridged Edition 1196 (1971)).

The Ground Water Districts assert, in conclusory fashion, that "implementation of an erroneous *Fifth Methodology Order*" will cause it "irreparable

harm." *Brief in Support*, at 18. The Ground Water Districts' conclusory assertion is inadequate to meet its burden, especially for a preliminary injunction which as noted are only properly issued in "extreme cases." The Ground Water Districts provide no evidence of irreparable injury, that is, an injury that it is *impossible* to remedy.

Nor have the Ground Water Districts shown they have a clearly established right. The crux of the Ground Water Districts' complaint is that the Director denied their motions to continue and limited discovery—both of which are purely discretionary decisions. By definition, scheduling and discovery matters in administrative cases are not clearly established rights. Were it otherwise, the Director would not have discretion to alter them. The burden is on the moving party to show they are entitled to the extraordinary relief that is a preliminary injunction—the Ground Water Districts have failed to meet this high burden.

III. The Court Should Deny the Ground Water Districts' Motion to Compel.

The Ground Water Districts seek an order compelling discovery in this matter. The motion must be rejected because I.R.C.P. 37 cannot be used to overturn an order issued by the Director limiting discovery, including the scope of the depositions.

During the April 28, 2023 prehearing conference, the Director's stated he would make technical staff available to discuss the technical aspects of the Methodology Order. In response, IGWA's counsel T.J. Budge stated that he was "interested more in the policy related decisions… outside of the technical input...."

Prehr'g 37:55–38:17. Mr. Budge then stated that, "I am assuming the Director was not involved in writing [the Methodology Order] … [but he] could be mistaken about that." *Id*. 38:30–38:37. Mr. Budge then stated, "[w]e need to understand who participated [in writing the Methodology Order] because we need to understand what their thinking was about some of those decisions." *Id*. 38:38–38:45. The Director responded:

> Well for me to extend the opportunity for discovery to those people within a circle writing the document itself, TJ, I wrote the document. I signed it. And I don't work in a vacuum. I have staff that assists me. And I'm not making myself and other staff and those discussions available unless you can articulate a reason why I should. So this is an evidentiary hearing, and the evidence should relate to the facts and the data and the process by which—and when I say process I mean the technical analysis that led to the [Methodology Order].

Id. 38:53–39:46. The Director later stated that: "I think I'll limit the disclosure to the people we've identified. If there are issues that you can identify that are outside of those that Matt Anders or Jennifer Sukow could discuss then we will consider enlarging the list." *Id*. 41:25–41:41.

On May 5, 2023, the Director issued an *Order Denying the Cities' Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions*, reiterating that Matthew Anders and Jennifer Sukow are the witnesses that will testify on behalf of the Department at the hearing to explain the facts and information the Department considered in updating the Methodology Order and As-Applied Order. *See* Budge Decl. Ex. A-8, at 112–118

[hereinafter "Order Limiting Evidence].[3] The Director also limited the scope of deposition questions to Department employees, stating:

> As indicated at the prehearing, the deposition process is not an opportunity for parties to question Department employees about the Director's deliberative process related to legal and policy considerations. The Methodology Order clearly explains the Director's views regarding the legal and policy considerations on the issues like why the Director is updating the methodology order and steady-state vs. transient-state modeling. Rule 521 of the Department's Rules of Procedure states: "The presiding officer may limit the type and scope of discovery." IDAPA 37.01.01.521. Accordingly, the Director will limit the scope of the depositions to preclude questions regarding the Director's deliberative process on legal and policy considerations."

Order Limiting Evidence, at 4. Thus, the Director's decision to limit the scope of the depositions was expressly authorized by Department Rule of Procedure 521. IDAPA 37.01.01.521. ("The presiding officer may limit the type and scope of discovery.")

Idaho Rule of Civil Procedure 37 authorizes a party to file a motion for an order compelling disclosure and discovery in specific circumstances. I.R.C.P. 37(a)(3)(A) states:

> To compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:
>
> (i) a deponent fails to answer a question asked under Rule 30 or 31;
>
> (ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

[3] Moving forward, citations to the Order Limiting Evidence in this Response will include Order Limiting Evidence page number references and not the PDF page numbers associated with the declaration of T.J. Budge.

> (iii) a party fails to answer an interrogatory submitted under Rule 33; or
>
> (iv) a party fails to respond that inspection will be permitted, or fails to permit inspection, as requested under Rule 34.

The Ground Water Districts impliedly suggest that the Department has violated I.R.C.P. 37(a)(3)(A)(i) by failing to answer questions asked under Rule 30.[4] However, per I.R.C.P. 30(d)(1), "A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, …."

Here, as the Ground Water District' own briefing makes clear, the Department employees were instructed not to answer certain questions because of the Director's order limiting the scope of depositions. Since an order limiting the scope of depositions is an appropriate ground for instructing an employee not to answers deposition questions, the Department has not violated Rule 30. The Ground Water Districts' attempt to seek an order compelling discovery is just a veiled attempt to attack the Director's order limiting the scope of the depositions. The Ground Water Districts know that they cannot attack such an order at this time because it is an interlocutory order but try to get around the prohibition of appealing an interlocutory order by framing their argument as a challenge under I.R.C.P. 37.

Moreover, even if the Groundwater Districts argument had merit, their motion to compel should have been filed with the Department—not the District

[4] I.R.C.P. 31 addresses depositions by written questions and is not an issue here.

Court—as the matter is currently before the Department not the District Court. I.R.C.P. 37(a)(2) ("A motion for an order to a party must be made in the court where the action is pending."). As a simple analogy, deposition disputes in a district court case are brought before the district court—not the Idaho Supreme Court. The same is true here.

In sum, the Ground Water Districts' motion must be dismissed because the Rule 37 cannot be used to overturn an order issued by the Director limiting discovery.

IV. The Court Should Deny the Ground Water Districts' Motion for Order to Show Cause.

In their Motion for Order to Show Cause, the Ground Water Districts seek an order to show cause pursuant to I.R.C.P. 72 compelling the Director to appear and show cause why the Court should not:

1) Stay implementation the *Fifth Methodology Order* until after it is properly adjudicated, and, in until then, administer water rights under the *Fourth Methodology Order*;
2) Continue the after-the-fact hearing currently scheduled for June 6-10, 2023, to October 16-20, 2023, to give the Ground Water Districts adequate time to prepare for the hearing;
3) Disclose all documents and other information he considered in developing the *Fifth Methodology Order*;
4) Allow the Ground Water Districts to depose and, if needed, call as witnesses any Department staff member who contributed to development of the Fifth Methodology Order or the April 2023 As-Applied Order;
5) Instruct counsel for the Director to refrain from instructing Department deponents or witnesses to not answer questions at depositions or the hearing on the basis that the information pertains to the Director's deliberative process;

6) Vacate the Director's *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* ("*Order Limiting Discovery*"), and *Order Denying the Cities' Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* ("*Order Limiting Evidence*") issued May 5, 2023 .

Ground Water Dists.' Mot. for Order to Show Cause at 2.

I.R.C.P. 72(a) states in pertinent part:

> An application for an order to show cause must… state[] the facts and grounds on which the application is based. *If the court finds that an application makes a prima facie showing* for an order commanding a person to do or refrain from doing specific acts… *the court must enter an order to show cause* to the opposing party to comply with the request or show cause before the court at a time and place certain why the order should not be entered.

(Emphasis added.) Whether to continue the June 6–10 hearing is a discretionary decision by the Director. IDAPA 37.01.01.560 ("The presiding office *may* continue proceedings…."). Discovery rulings that limit the scope of discovery are likewise discretionary. IDAPA 37.01.01.521 ("The presiding officer *may* limit the type and scope of discovery.") By definition, show cause orders are only proper for non-discretionary acts, remembering that an application must make a prima facie showing for a court order *commanding* the person to do or refrain from doing specific acts. One cannot be commanded to do, or refrain from doing, a *discretionary* act. *State v. Dist. Ct. of Fourth Jud. Dist., 143 Idaho 695, 698, 152 P.3d 566, 569 (2007).* Accordingly, the Ground Water Districts' motion for order to show cause must be denied.

CONCLUSION

For the reasons described above, the Court should deny the Ground Water Districts' motions.

DATED this 31st day of May 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

GARRICK L. BAXTER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of May 2023, I caused to be served a true and correct copy of the foregoing *Response to Ground Water Districts' Motion for Stay, Motion for Injunctive Relief, Motion to Compel, Motion for Expedited Decision, and Application for Order to Show Cause*, via iCourt E-File and Serve, upon the following:

Thomas J. Budge
Elisheva M. Patterson
RACINE OLSON, PLLP
tj@racineolson.com
elisheva@racineolson.com

Dylan Anderson
DYLAN ANDERSON LAW
dylan@dylanandersonlaw.com

Skyler C. Johns
Nathan M. Olsen
Steven L. Taggart
OLSEN TAGGART PLLC
icourt@olsentaggart.com

John K. Simpson
Travis L. Thompson
MARTEN LAW LLP
jsimpson@martenlaw.com
tthompson@martenlaw.com

W. Kent Fletcher
FLETCHER LAW OFFICE
wkf@pmt.org

Candice M. McHugh
Chris M. Bromley
MCHUGH BROMLEY, PLLC
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

GARRICK L. BAXTER
Deputy Attorney General