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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**

CITY OF POCATELLO, CITY OF IDAHO  
FALLS, 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, BINGHAM GROUND WATER  
DISTRICT, BONNEVILLE-JEFFERSON  
GROUND WATER DISTRICT, and MCCAIN  
FOODS USA, INC.,

Petitioners,

vs.

**Case No. CV01-23-8258**

IDWR Docket No. CM-DC-2010-001

**PETITIONERS' RESPONSE TO  
IDWR'S MOTION AND  
SUPPORTING POINTS TO  
VACATE THE SHOW CAUSE  
HEARING**

IDAHO WATER RESOURCES BOARD,  
IDAHO DEPARTMENT OF WATER  
RESOURCES, GARY SPACKMAN, in his  
capacity as Director of the Idaho Department  
of Water Resources, and TONY  
OLENICHAK, in his capacity as Water  
District 01 Watermaster.

Defendants.

IN THE MATTER OF DISTRIBUTION  
OF WATER TO VARIOUS WATER RIGHTS  
HELD BY OR 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

COMES NOW the City of Pocatello, City of Idaho Falls, and Coalition of Cities, Bingham Ground Water District, Bonneville-Jefferson Ground Water District and McCain Foods (“Petitioners”) to respond to the Idaho Department of Water Resources’ (“IDWR” or “Respondents”) *Motion and Supporting Points to Vacate Show Cause Hearing* (“*Motion to Vacate*”). As grounds therefor:

**I. The Court’s Discretion Extends to Scheduling and Holding This Hearing**

Respondents complain that the Petitioners reached out to the Court to schedule a show cause hearing. *Motion to Vacate* at 3-5. While actions for writ of prohibition or mandamus typically involve a court first issuing an alternative writ, or an order to show cause, we have found no caselaw to support the proposition that a party is prohibited from coordinating with the court to find a time when a prospective show cause hearing could be held. In fact, if the Court believes IDWR’s concerns have merit, the Court can enter an Order to Show Cause

(i.e., issue an alternative writ) as requested in the Complaint, then consider and grant Petitioners' *Motion to Shorten Time for Hearing*, and proceed with a show cause hearing. See, *Associated Press v. Second Jud. Dist. (In re Petition for Writ of Mandamus or Writ of Prohibition)*, No. 50482, 2023 Ida. LEXIS 47, at \*18 (Apr. 24, 2023) (the decision to issue a writ "[r]est[s] largely in the sound discretion of the court") (internal citations omitted).

The relief the Petitioners seek is significant. Initially, Petitioners seek a writ of prohibition to restrain IDWR from holding the scheduled hearing in Case No. CM-DC-2010-001, currently scheduled for June 6-10, and to curb IDWR's interference with discovery. Second, Petitioners seek a writ of mandamus to compel IDWR to reset the hearing in approximately six months to facilitate adequate discovery consonant with principles of due process. As the Petitioners' *Complaint for Declaratory Relief, Petition for Writ of Prohibition and Petition for Writ of Mandamus* ("*Complaint*") demonstrates, the truncated hearing schedule set by IDWR, along with the agency's unlawful interference in the discovery process, has turned the hearing into a sham proceeding.

**II. Granting Petitioner's Motion to Shorten Time for Hearing and Holding the Show Cause Hearing on Thursday, June 1, 2023, is not Prohibited by Rule 74.**

Although IDWR was not served until Monday, May 22, 2023, the Respondents were provided actual notice of the *Complaint* and other initial pleadings filed in this matter on May 19, 2023. See, *Declaration of Sarah Klahn in Support of Petitioners' Response to IDWR's Motion to Vacate Show Cause Hearing* ("*Declaration of Sarah Klahn*"), ¶ 3. Petitioners sought to shorten the time for hearing in this matter because the gravamen of Petitioners' request for a writ of prohibition is: 1) IDWR's denial of Petitioners' request to continue the hearing in Case No. CM-DC-2010-0001—which begins on June 6, 2023; and 2) the discovery

limitations included in the Director’s May 5, 2023 *Order Denying the Cities’ Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* (“*Order Limiting Discovery*”). Further, while Petitioners considered asking this Court if it was available for a prospective show cause hearing on June 5, 2023 (14 days after the Respondents were *served*, and 17 days after they received actual notice of the *Complaint*), at the time this hearing was set (on May 23, 2023), the Supreme Court was scheduled to hear arguments in the Basin 37 appeal, *South Valley Ground Water District v. Idaho Dept. of Water Res.*, Supreme Court Docket No. 49632-2022, and many of the lawyers involved in the captioned matter were also involved in those arguments.<sup>1</sup> Because of the timing of the IDWR hearing, a mere 46 days between issuance of the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Fifth Methodology Order*”) and commencement of the first day of hearing, shortening the time for *this* hearing is in the best interests of justice.

Further, the 14-day time frame in Rule 74 does not appear to be jurisdictional and IDWR does not argue that it is. A review of available Idaho caselaw reveals only cases suggesting that courts retain the discretion to shorten the time for a hearing under I.R.C.P. 74(b)(1)(B). *See, e.g., Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 953 (1985) (“The Court entered an alternative writ of mandate commanding Mayor Campbell to either execute the power sales contract and ground lease with UP & L or show cause by answering the petition why he should not be permanently commanded to comply with the proposed writ. *The Mayor filed an answer and both parties requested that the hearing on the writ of mandate*

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<sup>1</sup> Ironically, given IDWR’s scheduling in the captioned matter which has proceeded over the objection of and without regard for the unavailability of ground water users’ counsel and experts, IDWR asked to vacate the Supreme Court arguments on June 5, 2023 because one of IDWR’s lawyer has COVID and is now unavailable for oral argument.

*be expedited because the City's FERC license requires that construction of the Project commence prior to November 30th, 1985.*") (emphasis added). Taken to its logical end, under the Director's view of the Idaho Rules of Civil Procedure, a district court could *never* shorten the time period for a hearing designated by a rule with mandatory "must" language. This is simply not the law in Idaho, as motions to shorten time for hearing are commonplace in general litigation under the Idaho Rules of Civil Procedure notwithstanding Rule 7(a)(3)(A), which, just like Rule 74(b)(1)(B), contains the word "must" in the context of respondents receiving 14 days' notice before hearing. *See, e.g., IGWA v. IDWR*, Case No. CV-2015-237 (*IGWA's Motion to Shorten Time to Hear IGWA's Motion to Stay Curtailment Order*, filed Jan. 20, 2015); *id.*, (*Notice of Hearing*, filed Jan. 21, 2015) (Snake River Basin Adjudication District Court set a hearing on the Motion to Stay Curtailment Order just two days following IGWA's filing of the motion). "It is within the magistrate's discretion whether to hear a motion upon shortened time when the magistrate determines good cause exists." *Brinkmeyer v. Brinkmeyer*, 135 Idaho 596, 601 (2001) (holding that the magistrate did not abuse discretion for granting a motion to shorten time on a motion for divorce); *Gordon v. United States Bank Nat'l Ass'n*, 166 Idaho 105, 113 (2019) (involving a dispute over schedule for a I.R.C.P. 12(b)(6) Motion converted to a motion for summary judgment: "*The court may shorten this time period for good cause. Deciding whether to shorten time under Rule 56([b]) is subject to the court's discretion.*" (quoting *Doe v. Idaho Dep't of Health & Welfare*, 150 Idaho 491, 495 (2011) (*italics added*) (*citations omitted*)). Accordingly, the IDWR's position is unavailing and there is no basis to vacate the hearing on June 1, 2023.

### III. Writs of Mandate and Prohibition are Proper Remedies Here Because IDWR's Actions are Not Purely Discretionary and are Clearly Erroneous.

Respondents argue that “[b]ecause Petitioners are seeking extraordinary writs related to discretionary functions, the Petitioners’ application fails to make a prima facie showing of entitlement to a show cause hearing . . . [so] the Court can and should deny Petitioners’ request for a writ of mandate and a writ of prohibition and vacate the June 1 show cause hearing.” *Motion* at 10. Some definitions are instructive – a “writ of mandate” is “an order issued by the court to any inferior court, corporation, board or person that: (A) compels the performance of an act which a party has a duty to perform as a result of an office, trust or station . . . .” I.R.C.P. Rule 74(a)(1). A “writ of prohibition” is as “an order that arrests the proceedings of any court, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of the court, corporation, board or person.” *Id.*, Rule 74(a)(2).

Based on these definitions, it makes sense that a court would only enter a writ against a state officer mandating the performance of an act that it must perform (i.e., a ministerial act) but not an act that it may perform (i.e., a discretionary act). Similarly, it follows that a court would only enter a writ against a state officer prohibiting the performance of an act that it believes it may perform (but it actually may *not* perform because it lacks authority), but not an act it must perform. Compare *Coeur d'Alene Tribe v. Denney (In re Verified Petition for Writ of Mandamus)*, 161 Idaho 508, 523 (2015) (“mandamus is the proper remedy for one seeking to require a public officer to carry out a clearly mandated, non-discretionary ministerial act”) with *Stein v. Morrison*, 9 Idaho 426, 457 (1904) (“the writ of prohibition . . . will not issue to restrain purely ministerial acts”).

Here, Petitioners have sought a writ prohibiting IDWR from holding the scheduled hearing and from asserting the deliberative process privilege (*see Complaint*, Prayer for Relief

¶¶ C and D), because the schedule is devoid of due process, and because IDWR lacks authority to so limit discovery. Petitioners also seek a writ mandating that IDWR witnesses answer previously foreclosed questions in discovery (*see id.*, Prayer for Relief ¶ E), because IDWR must follow rules of discovery, and that IDWR reset the hearing later in the year (*id.*). Regardless of whether an act is discretionary or not, if there is an error as a matter of law, a writ is appropriate if no available legal remedy is adequate. *Hepworth Holzer, LLP v. Fourth Jud. Dist. of State (In re Writ of Mandamus)*, 169 Idaho 387, 395 (2021) (“[T]his Court has traditionally held that writs of mandate and prohibition will not issue to compel the performance of a purely discretionary function. . . . *That said, if a [state official] errs as a matter of law, this Court may issue a writ*”) (emphasis added, internal citations omitted).

In sum, Petitioners seek writs prohibiting IDWR from asserting the deliberative process privilege, which, as previously briefed, is not recognized under Idaho law. *See Idaho Press Club, Inc. v. Ada County*, Case No. CV01-19-16277 (Decision and Order, filed Dec. 13, 2019) at 30 (“There is no ‘Deliberative Process’ privilege in Idaho law”). In its *Motion to Vacate*, counsel for IDWR fails to even address that the Director has barred discovery based on a privilege that does not exist in this State, rendering IDWR’s response waived. *State v. Zichko*, 129 Idaho 259, 263 (1996) (“When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered.”). To the extent IDWR argues alternatively that its procedural rules at IDAPA 37.01.01.521 (“[t]he presiding officer may limit the type and scope of discovery”) provide a basis for the limitations contained in the *Order Limiting Discovery*, this expansive view of agency discretion to limit discovery has no limiting principle: under such a view, there is nothing to stop the Director from limiting discovery in an even more draconian fashion than what Petitioners have experienced in CM-

DC-2010-0001. As “a creature of statute, limited to the power and authority granted to it by the Legislature,” IDWR is *per se* foreclosed from exercising discretion in excess of the scope of Idaho law to limit discovery. *Simpson v. Louisiana-Pacific Corp.*, 134 Idaho 209, 212 (2000).

Because the shortened discovery deadline set by the Director has now passed, and IDWR has successfully prevented Petitioners from conducting adequate discovery, Petitioners also seek a writ prohibiting IDWR from holding its hearing set for June 6-10, 2023. These requested writs are the proper remedy for IDWR’s substantial, clear-cut, legal errors plainly in contravention of Idaho law because there is a high probability that IDWR’s decision will be completely reversed if the error is not corrected in advance.

**IV. Writs of Mandate and Prohibition are Proper Remedies Here Because Petitioners Lack an Adequate Alternative Remedy.**

Respondents argue that the Court should reject the requests for writs because “petitioners have alternative remedies,” specifically that the ability to participate in the hearing on June 6-10, 2023, and the ability to seek judicial review of the decision thereafter, is sufficient. *Motion* at 10-11. This argument epitomizes the flaws in Respondent’s position: how are Petitioners supposed to properly challenge IDWR’s *Fifth Methodology Order* on judicial review when IDWR set a schedule that prevented Petitioners from conducting adequate discovery and when IDWR has precluded Petitioners from asking questions or deposing relevant witnesses about IDWR’s preparation of the *Fifth Methodology Order*? Because of the truncated time frame for discovery, along with the Director’s limitations on the scope of discovery, much remains to be investigated. Among the issues that Petitioners have identified that bear further inquiry, but that would require additional time and the Court’s intervention to investigate, are:



- Actual Twin Falls Canal Company (“TFCC”) acres:
  - Matt Anders, one of two IDWR technical leads on the *Fifth Methodology Order*, testified that the *Fifth Methodology Order* relies on TFCC acreage of 194,000 acres are based on 2013 “shapefiles” and likely are not current or accurate and that likely include hardened acres that cannot be irrigated. Exhibit 3 to *Declaration of Sarah Klahn*, (Transcript of the Deposition of Matthew Anders, P.E., Volume II, 235:7-236:14);
  - Mr. Anders testified that while IDWR has staff who could develop accurate and current irrigated acreage for TFCC, the agency has not dedicated resources to this effort. Exhibit 3 to *Declaration of Sarah Klahn*, (Transcript of the Deposition of Matthew Anders, P.E., Volume II, 236:15-238:12);
  - Mr. Anders further testified he had no recollection of the basis for IDWR’s decision in 2016 to *increase* the TFCC acreage values used in the *Fourth Methodology Order* from 183,000 acres to 194,000 acres, the value still in use in the *Fifth Methodology Order*. Exhibit 2 to *Declaration of Sarah Klahn*, (Transcript of Deposition of Matthew Anders, P.E., Volume I, 98:12-22).

Among the issues that IDWR has precluded discovery based on “deliberative process” or being “outside the scope of the *Order Limiting Discovery*”:

- The Department’s thinking about the legal framework for updating the Methodology Order, as well as the genesis for specific changes to the *Fifth*

*Methodology Order*, such as the move to transient modeling to determine curtailment dates:

- Mr. Anders was asked about documents associated with emails from Deputy Director Mat Weaver to Lt. Governor Scott Bedke and others involved on the side of the Surface Water Coalition (“SWC”) in the SWC-IGWA negotiations during 2022 in which Mr. Weaver suggested that Mr. Bedke keep the possibility of imposing transient modeling on the ground water users “in his backpocket.” Exhibit 3 to *Declaration of Sarah Klahn*, (Transcript of Deposition of Matthew Anders, P.E., Volume II, 249:16-252:20). Mr. Anders was unfamiliar with the contents of the letter and agreed that Mat Weaver would be the best person to explain. Conveniently, IDWR has prohibited the Petitioners and IGWA from deposing Mr. Weaver.


These are but two categories of issues that the Petitioners would further investigate if the hearing was reset for later in the year. As it is, holding the hearing June 6-10, 2023 will not give Petitioners a meaningful opportunity to be heard, or to have their day in court – it would be a hearing that is very likely to result in the rubber stamping of the *Fifth Methodology Order*. Further, on judicial review, Petitioners would have to appeal a decision based on a record that they had an insufficient time to develop. This is a great way for IDWR to insulate the flaws of its *Fifth Methodology Order* from judicial scrutiny but a terrible way for junior ground water users to protect their water rights from inappropriate administration.

“A writ of prohibition or mandamus can undoubtedly be an appropriate legal avenue where the petition ‘alleges sufficient facts concerning a possible constitutional violation of an

urgent nature.” *Associated Press v. Second Jud. Dist. (In re Petition for Writ of Mandamus or Writ of Prohibition)*, No. 50482, 2023 Ida. LEXIS 47, at \*16-17 (internal citations omitted). Here, not only will the *Fifth Methodology Order* cause undue injury to Petitioners for the indefinite future, IDWR’s handling of Petitioners’ challenge thereto has deprived Petitioners of their rights to due process. Because the Court must act swiftly to prevent such a grave constitutional violation, and there is no future remedy that can adequately cure the damage that would be done, the requested writs are the proper remedy here.

Respectfully submitted this 31st day of May, 2023.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of May, 2023, I caused to be filed a true and correct copy of the foregoing document via iCourt E-File and Serve, and upon such filing, the following parties were served via electronic mail:

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