

LAWRENCE G. WASDEN
Attorney General

DARRELL G. EARLY
Chief, Natural Resources Division

GARRICK BAXTER #6301
MICHAEL ORR # 6720
MEGHAN CARTER #8863
Deputy Attorneys 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
michael.orr@ag.idaho.gov
meghan.carter@idwr.idaho.gov

Attorneys for Respondents

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

SOUTH VALLEY GROUND WATER
DISTRICT and GALENA GROUND
WATER DISTRICT,

Petitioners,

vs.

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

Respondents.

Case No. CV07-21-00243

**IDWR'S RESPONSE AND
MEMORANDUM IN OPPOSITION TO
SECOND APPLICATION FOR
TEMPORARY RESTRAINING ORDER**

Respondents, the IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources (respectively, the "Department" and the "Director"; collectively, the "Respondents"), by and

through the Office of the Attorney General, hereby submit *IDWR's Response and Memorandum in Opposition to Second Application for Temporary Restraining Order and Second Motion for Preliminary Injunction*. This response is supported by the *Second Declaration of Michael C. Orr* (“*Second Orr Dec.*”), filed simultaneously.

The Petitioners filed a number of documents with this Court on Wednesday, June 30, 2021,¹ including: a motion to amend the petition for judicial review on file in this matter (“*Petition*”) counts and claims that this Court previously dismissed²; the *Petitioners' Second Application for Temporary Restraining Order* (“*Application*”); and the *Petitioners' Second Motion for Preliminary Injunction* (“*Motion*”). The *Application* and the *Motion* both explicitly rely upon the amended *Petition* proposed by the Petitioners. This Court should deny the *Application* and the *Motion* for two reasons. First, the Petitioners have failed to meet their burden under I.R.C.P. 65 for a temporary restraining order or a preliminary injunction with respect to the *Petition's* claim for judicial review under the Idaho Administrative Procedure Act (“IDAPA”). Second, the additional claims and counts for relief the Petitioners' seek to amend into the *Petition* are barred by Idaho Supreme Court precedent because they seek judicial review of the Director's orders and actions outside of IDAPA's procedures, standards, and requirements, and therefore cannot support the Petitioners' requests for a temporary restraining order or a preliminary injunction.

¹ It appears the Petitioners attempted to make their filings on June 29, but they were rejected by the court clerk.

² *Order Granting Joint Motion to Stay Count I and Dismiss Remaining Counts Without Prejudice* (June 10, 2021).

BACKGROUND

On May 4, 2021, the Director commenced an administrative proceeding in IDWR Administrative Basin 37 pursuant to Idaho Code § 42-237a.g. by issuing a *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* (“*Notice*”). Ex. C, *Second Orr Dec.* at 1. The Director commenced the administrative proceeding in response to predictions of drought and severe water shortfalls in Basin 37 for the 2021 irrigation season, and ground water modeling showing that curtailment of certain ground water rights during the 2021 irrigation season would result in significantly increased surface water flows during the 2021 irrigation season for holders of senior surface water rights on Silver Creek³ and its tributaries. *Id.*; see also Ex. D, *Second Orr Dec.* (Sean Vincent’s Staff Memorandum) at 3; Ex. P, Declaration of Michael A. Short (*Short Dec.*) (Jennifer Sukow’s Staff Memorandum) at 25. The Director initiated the administrative proceeding “pursuant to Idaho Code § 42-237a.g. and IDAPA 37.01.01.01.104” to determine whether “the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season.” Ex. A, *Second Orr Dec.* (“*Notice*”) at 1.

A number of interested persons and entities filed notices of intent to participate in the administrative proceeding. A pre-hearing conference was held on May 24, 2021. Various pre-hearing motions were filed before and after the pre-hearing conference, and the parties engaged in discovery and depositions prior to the hearing. The hearing was held over six days, June 7-12, 2021, and the parties filed post-hearing briefs approximately a week later. The Petitioners filed a

³ Silver Creek is a tributary of the Little Wood River.

proposed mitigation plan, “contingent on a determination that a curtailment order is necessary to prevent material injury,” on June 23, 2021. Ex. T, *Short Dec.* at 2-3.

The Director issued a *Final Order* on June 28, 2021. Ex. S, *Short Dec.* The *Final Order* determined that junior ground water rights in the Bellevue Triangle are adversely affecting senior surface water rights on Silver Creek and the Little Wood River, and ordered that the ground water rights were to be curtailed on July 1, for the remainder of the 2021 irrigation season. *Id.* at 26-27, 38. The Petitioners filed a petition to stay implementation of the *Final Order* on the same day, pending a decision on the previously-submitted mitigation plan. Ex. V, *Short Dec.* On June 29, 2021, the Director issued final orders denying the proposed mitigation plan and the petition for stay. Exs. E-F, *Second Orr Dec.* On the following day, the Petitioners filed with this Court the *Application*, the *Motion*, and a number of other supporting or related documents.

STANDARD

Idaho Rules of Civil Procedure (“I.R.C.P”) 65 governs injunctions and restraining orders. Specifically, I.R.C.P 65(b) governs temporary restraining orders. A temporary restraining order issues only after a showing to the court that “immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon.” *Wood v. Wood*, 96 Idaho 100, 101, 524 P.2d 1072, 1073 (1974). The function of a temporary restraining order is “to preserve the status quo during the interim and until a hearing can be held after notice to the adverse party on the application for a preliminary injunction.” *Id.*

I.R.C.P 65(e) provides the criteria for granting a preliminary injunction. A court may grant a preliminary injunction in the following cases:

- (1) when it appears by the complaint that the plaintiff is entitled to the relief demanded, and that relief, or any part of it, consists of restraining the commission or continuance of the acts complained of, either for a limited period or perpetually;

(2) when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff;

(3) when it appears during the litigation that the defendant is doing, threatening, procuring or allowing to be done, or is about to do, some act in violation of the plaintiff's rights, respecting the subject of the action, and the action may make the requested judgment ineffectual;

.....

I.R.C.P. 65(e).

A party seeking a preliminary injunction bears “the burden of proving the right thereto” *Gordon v. U.S. Bank Nat'l Ass'n*, 166 Idaho 105, 455 P.3d 374, 384 (2019). It is incumbent on the party seeking a preliminary injunction to show that “it likely would prevail” at trial. *Farm Service, Inc. v. U.S. Steel Corp.*, 90 Idaho 570, 414 P.2d 898 (1966). A district court should grant a preliminary injunction “only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal.” *Id.* 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).

ARGUMENT

The Petitioners seek a temporary restraining order pursuant to I.R.C.P. 65(b) “restraining the Director from curtailing Petitioners’ members water rights pending a hearing on the *Petitioners’ Second Motion for Preliminary Injunction* . . . to prevent immediate and irreparable harm to Petitioner and its member [sic] and maintain the status quo during the pendency of this action.” *Application* at 2. The *Application* states it “is supported by” the amended *Petition*, i.e., the *Application* assumes that the Petitioners’ motion to amend the *Petition* has been granted. The Petitioners’ motion to amend the *Petition* has not yet been granted, however, and Respondents intend to file a response opposing the motion to amend the *Petition*. Unless and until the motion to amend the *Petition* is granted, the only claim for relief on file in this case, and the only claim

for relief upon which the *Application* may rely, is the *Petition*'s request for judicial review pursuant to IDAPA.

This Court should deny the Petitioners' request for a temporary restraining order with respect to the *Petition*'s request for IDAPA judicial review because the Petitioners cannot satisfy the test for a temporary restraining order. This Court should deny the Petitioners' request for a temporary restraining order with respect to the additional claims and counts for relief the Petitioners' seek to amend into the *Petition* because they seek judicial review of the Director's orders and actions outside of IDAPA's procedures, standards, and requirements, and therefore cannot support the Petitioners' requests for a temporary restraining order or a preliminary injunction.

1. The Petitioners Are Not Entitled to a Temporary Restraining Order for Purposes of IDAPA Judicial Review.

A temporary restraining order is an extraordinary remedy and can only be issued after a showing by the proponent that "immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon." *Wood v. Wood*, 96 Idaho 100, 101, 524 P.2d 1072, 1073 (1974). The "immediate and irreparable harm" that the Petitioners allege is the curtailment of junior ground water rights in the Bellevue Triangle. *Application* at 2. The Petitioners argue that the hearing was "unlawful" and denied them "the opportunity to be heard at a 'meaningful time and in a meaningful manner.'" *Memorandum in Support of Amended Petition for Judicial Relief, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition* at 61 (June 30, 2021) ("*Memorandum*"). They argue that "denying irrigation water to planted crops poses an immediate and irreparable injury" to their members and is estimated to cause damages of over \$12 million dollars. *Id.*

a. The Petitioners Were Not Denied Due Process.

The Petitioners were not denied due process. “Due process is not a concept to be rigidly applied, but is a flexible concept calling for such procedural protections as are warranted by the particular situation.” *Neighbors for Pres. of Big & Little Creek Cmty. v. Bd. of Cty. Comm’rs of Payette Cty.*, 159 Idaho 182, 190, 358 P.3d 67, 75 (2015) (citation omitted). Procedural due process requirements are met when notice and an opportunity to be heard are provided, and “the opportunity to be heard must occur at a meaningful time and in a meaningful manner.” *Id.* The procedure required “is merely that to ensure that a person is not arbitrarily deprived of his or her rights.” *Telford v. Nye*, 154 Idaho 606, 611, 301 P.3d 264, 269 (2013).

The Petitioners do not deny that the contested case was initiated by the *Notice* and that the hearing took place on June 7-12, 2021. Thus, the required “notice and an opportunity to be heard” were provided. *Neighbors*, 159 Idaho at 190, 358 P.3d at 75. What the Petitioners argue, rather, is that: (1) the contested case schedule did not provide Petitioners enough time to prepare their case; (2) only the Rules for the Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.011.000—.051 (“CM Rules”), satisfy due process requirements in a case involving administration of junior ground water rights and senior surface water rights; and (3) the Petitioners were denied essential information. *Memorandum* at 28-41. These assertions lack merit.

The Petitioners clearly had sufficient time to prepare their case. They participated in the prehearing conference, filed several prehearing motions, called a number of witnesses, submitted numerous exhibits, extensively cross-examined witnesses called by other parties and Department staff, and filed a 48-page post-hearing brief. *See, e.g.*, Exs. A-O, Y, AA, *Short Dec.* The Petitioners nonetheless argue the schedule was too short because “every other conjunctive

administration contested case before IDWR has taken months or years, not weeks.”

Memorandum at 34. This analogy is inapposite because the referenced cases were responses to delivery calls filed under the CM Rules, not under Idaho Code § 42-237.a.g. Further, the cases addressed delivery calls upon the Eastern Snake Plain Aquifer (“ESPA”), and involved a far larger geographic area and many more ground water diversions than this contested case.⁴ The vast majority of the ESPA diversions were much farther away from the Snake River than ground water diversions in the Bellevue Triangle are from Silver Creek and its tributaries. The impacts of the ESPA diversions on surface flows of the Snake River are far more diffuse, delayed, and attenuated than the impacts of ground water diversions in the Bellevue Triangle on the surface flows of Silver Creek and its tributaries. Resolving the ESPA cases often required long-term, multiple-season curtailments and/or mitigation plans to address the cumulative impacts of many years of pumping.

This contested case, in contrast, involved a smaller number of ground water rights pumping from a more limited area that is immediately adjacent to Silver Creek and its tributaries. The record established that these ground water uses have immediate, largely un-attenuated impacts on the surface flows in Silver Creek and its tributaries. Further, this case only addresses potential shortages during the 2021 irrigation season, which likely will be a time of drought. Ex. S, *Short Dec. (Final Order)* at 19, 38. The fact the ESPA cases took longer to resolve does not mean that the Petitioners were denied a meaningful opportunity to be heard in this case.

⁴ See, e.g., *AFRD2 v. IDWR*, 143 Idaho 862 (2007); *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 284 P.3d 225 (2012); *In the Matter of Distribution to Various Water Rights held by and for the Benefit of A&B Irr. Dist.*, 155 Idaho 640, 315 P.3d 828 (2012); *IGWA v. IDWR*, 160 Idaho 119, 369 P.3d 897 (2016); *Rangen, Inc. v. IDWR*, 160 Idaho 251, 371 P.3d 305 (2016); *North Snake Ground Water Dist. v. IDWRT*, 160 Idaho 518, 376 P.3d 722 (2016).

The Petitioners' argument that only the CM Rules would have satisfied due process requirements in this case lack merit for similar reasons. The ESPA cases involved delivery calls filed under the CM Rules, but this contested case did not. The contested case was initiated by the Director, *sua sponte*, pursuant to his express "discretionary power" to do so under Idaho Code § 42-237a.g. Ex. C, *Second Orr Dec. (Notice)* at 1; Ex. S, *Short Dec. (Final Order)* at 1. This statute gives the Director "broad powers" to prohibit or limit ground water withdrawals that adversely affect the use of senior surface water rights. *Stevenson v. Steele*, 93 Idaho 4, 11-12, 453 P.2d 819, 826-27 (1969). Section 42-237a.g. authorizes the Director "[t]o "supervise and control the exercise and administration of all rights to the use of ground water." Idaho Code § 42-237a.g. Further, "in the exercise of this discretionary power," the statute states, the Director "may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well" during any period the Director determines "that water to fill any water right in said well is not there available." *Id.* "Water in a well shall not be deemed available to fill a water right therein," in turn, "if withdrawal of the amount called for by such right" would affect, contrary to the policy of the Ground Water Act, "the present or future use of any prior surface or ground water right" *Id.* (underlining added).

Nothing in Idaho Code § 42-237a.g. requires the filing of a delivery call or request for administration of ground water rights prior to the Director initiating an administrative proceeding. Idaho Code § 42-237a.g. expressly authorized the Director to initiate this proceeding even in the absence of a delivery call or a request for administration. Further, Idaho Code § 42-237a.g. expressly commits the determination of whether to initiate this proceeding to the Director's discretion.

The CM Rules, in contrast, apply only when a delivery call has been filed. The CM Rules “prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right” IDAPA 37.03.11.001 (underlining added). This Court has affirmed that the CM Rules are limited to cases respond to a “delivery call” as that term is defined and treated in the CM Rules. *Memorandum Decision and Order, Basin 33 Water Users, et al., v. IDWR*, Ada County Case No. CV01-20-8069, at 8-9 (Nov. 6, 2020) (“the CM Rules are limited in scope to prescribing the basis and procedure for responding to delivery calls No such delivery call has been made in this case.”).⁵

Moreover, and contrary to the Petitioners’ arguments, no decision of this Court or the Idaho Supreme Court has held that due process requires the Director to use the CM Rules to resolve any and all questions of administration involving senior surface water rights and junior ground water rights. The Petitioners’ assertion that “the issue of what process is required has previously been decided” by this Court, *Memorandum* at 36-38, mischaracterizes this Court’s *Memorandum Decision and Order* issued on April 22, 2016, in the judicial review proceeding under Ada County Case No. CV-WA-2015-14500.⁶ While that decision addressed a delivery call under the CM Rules, it did not hold that due process requires the Director to use the CM Rules in the absence of a delivery call. To the contrary, this Court subsequently affirmed the Director’s determination “that the CM Rules do not apply to, limit, or supersede his authority

⁵ A copy of this decision is attached to the *Declaration of Michael C. Orr*, filed in this case on May 28, 2021, as “Exhibit B.”

⁶ A copy of this decision is attached to the *Declaration of Travis L. Thompson*, filed in this case on May 24, 2021, as “Exhibit D.”

under the Ground Water Act.” *Memorandum Decision and Order, Basin 33 Water Users, et al., supra*, at 13.

The Petitioners also assert their due process rights were violated because the Department failed to provide them with essential information. These assertions mischaracterize the record, which in turn underscores the problems with the Petitioners’ attempt to secure judicial review before the full agency record has been filed with the Court,⁷ and through mechanisms outside of IDAPA procedures and requirements, such as requests for declaratory relief, a temporary restraining order, a preliminary injunction, and a writ of prohibition.

For instance, the Petitioners assert the Department “failed to respond to the Petitioners’ *Request for Information* filed on May 13, 2021.” *Memorandum* at 30. But what the Petitioners actually filed on May 13, 2021, was a discovery-like “request for production” that sought production of documents, and also posed interrogatory-style questions that would have required narrative responses. At the time, however, the Department had not yet authorized discovery, and when it did so, the order did not authorize discovery to be served upon the Department. *Order Authorizing Discovery* (May 21, 2021).⁸ Moreover, the Petitioners subsequently filed a public records request with the Department that was largely duplicative of the “request for production” filed on May 13, 2021, and to which the Department responded.

⁷ The exhibits submitted by the Petitioners do not reflect the full record of the proceedings in the contested case. They are only the portions of the record that the Petitioners chose to submit in support of their claims for relief. *Declaration of Michael A. Short* (June 30, 2021); *Second Declaration of Michael J. Short* (June 30, 2021).

⁸ Discovery was not authorized until May 21, 2021 because the deadline for parties to file notices of intent to participate was May 19, 2021. Until then, it was not known who would be subject to, or promulgating, discovery and depositions requests.

As another example, the Petitioners also incorrectly assert that they “had no opportunity to discover these un-named seniors, their proposed water use, and whether they would be injured this irrigation season.” An attachment to one of the staff memoranda posted on the Department’s website on May 18, 2021, included a list of the water rights that were potentially injured by ground water use in the Bellevue Triangle. Ex. Q, *Short Dec.* (Tim Luke staff memorandum) at 18 & Attachment A.

The Petitioners also assert that Sun Valley Company was injured because it filed a request for information related to the staff memoranda before the hearing, but the Department “did not even produce the information until mid-week of the hearing in a series of emails.” *Memorandum* at 34. But it is undisputed that Sun Valley Company held no ground water rights within the Bellevue Triangle and that none of the Company’s water rights would be affected by curtailment within the Bellevue Triangle. In short, there was never a risk that the contested case would result in Sun Valley Company being “arbitrarily deprived” of any of its water rights. *Telford v. Nye*, 154 Idaho at 611, 301 P.3d at 269. These examples illustrate the pitfalls of allowing the Petitioners to seek judicial review, in the absence of an agency record and outside of IDAPA procedures, through a temporary restraining order and the non-IDAPA claims for relief that the Petitioners seek to add back into the *Petition* via their motion to amend the *Petition*.

b. Curtailing Junior Water Rights in Times of Shortage Does Not Constitute Irreparable Injury.

The Petitioners do not dispute that this is a year of drought and water shortage in the Wood River Basin. They also do not dispute that the shortage of water has already resulted in the curtailment of many surface water rights on Silver Creek and the Little Wood River that are senior in priority to the ground water rights in the Bellevue Triangle. The Petitioners do not

dispute that the holders of these senior surface water rights, who like the Petitioners' members also planted crops and executed contracts earlier this year, are suffering economic losses as a result of water shortage. The Petitioners simply argue that curtailment of their junior ground water rights is unlawful because it would result in economy injury to their members. These arguments ignore, and are contrary to, Idaho's prior appropriation doctrine.

The rule that "first in time is first in right" is one of the "bedrock" principles of Idaho's prior appropriation doctrine. *In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2013). "Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797-98, 252 P.3d 71, 78-79 (2011).

Moreover, as the Idaho Supreme Court has recognized, the prior appropriation doctrine as established by Idaho law can be "harsh," especially in "times of drought." *AFRD2*, 143 Idaho at 869, 154 P.3d at 440. "First in time is first in right" among those beneficially using the water, *Id.* Const. XV § 3; Idaho Code § 42-106, and "it is obvious that in times of water shortage someone is not going to receive water." *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977). The question of which appropriator—senior or junior—produces the greater economic benefit or would suffer the greater economic injury is legally irrelevant to priority administration. *See, e.g., Clear Springs*, 150 Idaho 790, 802, 252 P.3d 71, 83 (2011) (holding that "full economic development of underground water resources," does not mean that "the ground water appropriator who is producing the greater economic benefit or would suffer the greater economic loss is entitled to the use of the ground water when there is insufficient water for both the senior and junior appropriators.").

In addition, the Idaho Supreme Court has stated that the drafters of the Idaho Constitution “intended that there be no unnecessary delays in the delivery of water pursuant to a valid water right.” *AFRD2 v. IDWR*, 143 Idaho 862, 874, 153 P.3d 433, 445 (2007). “Clearly, it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water.” *Id.* at 875, 153 P.3d at 446. This Court has also emphasized the need for prompt administrative action to address a water supply deficiency “in the year in which it occurs.” *Memorandum Decision and Order on Petition for Judicial Review, Rangen, Inc. v. IDWR*, p. 13 (5th Jud. Dist. Case No. CV 2014-2446) (Dec. 3, 2014).⁹ “Curtailling ground water rights the following irrigation season is too late. The injury [to the senior appropriator], and corresponding out-of-priority use, will have already occurred.” *Id.*

This case involves a year of drought and water shortage, and “it is obvious . . . someone is not going to receive water.” *Nettleton*, 98 Idaho at 91, 558 P.2d at 1052. The Petitioner’s application for a temporary restraining order is contrary to Idaho’s prior appropriation doctrine because it elevates their junior priority ground water rights over senior priority surface water rights. It is contrary to the “[t]he presumption under Idaho law . . . that the senior is entitled to his decreed water right,” *AFRD2*, 143 Idaho at 878, 154 P.3d at 449, and “unreasonably shifts the risk of shortage to the senior surface water right holder.” *Memorandum Decision and Order on Petition for Judicial Review, Rangen, Inc., supra*, at 13-14.

The potential for priority-based curtailment is part and parcel of Idaho’s prior appropriation doctrine and water rights decreed under Idaho law. *See In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 213, 220 P.3d 318, 331 (2009) (“A water user has no property interest in being free from the State’s regulation

⁹ A copy of this decision is attached to the *Second Orr Dec.*, filed herewith, as “Exhibit G.”

of water distribution in accordance with the prior appropriation doctrine.”). Priority-based curtailment is a feature of Idaho’s prior appropriation doctrine which cannot form the basis of a claim of irreparable injury. The Petitioners’ assertions’ that curtailment of their junior priority ground water rights constitutes “immediate and irreparable harm” justifying issuance of a temporary restraining order or preliminary injunction are contrary to Idaho law and should be rejected.

2. The Petitioners Are Not Entitled to a Temporary Restraining Order for Purposes of the non-IDAPA Claims Asserted in the Amended *Petition*.

The Petitioners’ motion to amend the *Petition* seeks to add back into the *Petition* a number of claims and causes of action that this Court previously dismissed, without prejudice, pursuant to a stipulation between the Department and the Petitioners.¹⁰ *Order Granting Joint Motion to Stay Count I and Dismiss Remaining Counts Without Prejudice* (June 10, 2021). The motion to amend has not yet been granted and therefore the only claim of record at this time is the Petitioners’ request for judicial review pursuant to IDAPA. Further, the claims and causes of action that the Petitioners’ seek to amend into the *Petition* are barred by Idaho Supreme Court precedent, and therefore cannot support the Petitioners’ requests for a temporary restraining order or a preliminary injunction.

As explained in the Respondents’ motion to dismiss filed earlier in this case,¹¹ the Idaho Supreme Court has held that “[a]ctions by state agencies are not subject to judicial review

¹⁰ *Motion to Amend Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition* (June 30, 2021); *Memorandum in Support of Motion to Amend Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition* (June 30, 2021); *Amended Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition* (June 30, 2021).

unless expressly authorized by statute,” and “[w]ithout statutory authority, the reviewing court lacks subject-matter jurisdiction.” *Vickers v. Idaho Bd. of Veterinary Med.*, 167 Idaho 306, 309, 469 P.3d 634, 637 (2020). The only statute “expressly” authorizing judicial review of the Director’s orders and actions in the Basin 37 contested case is Idaho Code § 42-1701A(4), which states that “[t]he judicial review shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code.”

All of the non-IDAPA claims and causes of action that the Petitioners seek to amend into the Petition expressly or necessarily seek judicial review of the Final Order, other orders issued by the Director in the contested case, and actions taken by the Director in the course of the contested case. The Petitioners’ filings are quite candid in this regard. The additional claims and causes of actions are simply additional attempts to obtain judicial review of, and relief from, the Final Order, but outside of the procedures and requirements of IDAPA. The Petitioners, in short, are trying to circumvent Idaho Code § 42-1701A and IDAPA. This is contrary to law because such judicial review can be had only pursuant to the procedures and standards set forth in IDAPA. *Vickers*, 167 Idaho at 309, 469 P.3d at 637 (citations omitted) (brackets in original).

It follows that the Petitioners’ request for a temporary restraining in connection with the additional claims and causes of action the Petitioners seek to amend into the *Petition* must also be denied. A temporary restraining order is simply a form of relief, and cannot be granted in the absence of a viable cause of action that would allegedly justify issuance of such an order. Under *Vickers*, the additional claims and causes of action the Petitioners seek to amend into the *Petition*

¹¹ *Respondents’ Motion to Dismiss Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition* (May 28, 2021).

are not viable legal claims or causes of action, and the *Application* must therefore be denied with respect to the non-IDAPA claims the Petitioners have asserted.

CONCLUSION

For the reasons stated above, the Respondents respectfully request that this Court deny the Petitioners' *Second Application for Temporary Restraining Order*

DATED this 30th day of June, 2021.

LAWRENCE G. WASDEN
Attorney General

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division

/s/ MICHAEL C. ORR
MICHAEL C. ORR
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June, 2021, I caused to be served a true and correct copy of the foregoing document by ICourts e-filing delivery to each party listed as following:

Albert P. Barker Travis L. Thompson Michael A. Short BARKER ROSHOLT & SIMPSON LLP 1010 W. Jefferson St., Ste. 102 P.O. Box 2139 Boise, ID 83701-2139 apb@idahowaters.com tlt@idahowaters.com mas@idahowaters.com	James R. Laski Heather E. O’Leary Lawson Laski Clark, PLLC 675 Sun Valley Rd., Ste. A P.O. Box 3310 jrl@lawsonlaski.com heo@lawsonlaski.com efiling@lawsonlaski.com
Sarah A. Klahn Somach Simmons & Dunn 2033 11 th Street, #5 Boulder, CO 80302 Telephone: (303) 449-2834 sklahn@somachlaw.com	

/s/ MICHAEL C. ORR
MICHAEL C. ORR
Deputy Attorney General
Idaho Department of Water Resources