

RAÚL R. LABRADOR
ATTORNEY GENERAL

JOY M. VEGA
Chief of Energy and Natural Resources Division

GARRICK L. BAXTER, ISB No. 6301
GARRETT F. HENSLEY, ISB No. 12922

Deputy Attorney General
Idaho Department of Water Resources
PO Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
garrett.hensley@idwr.idaho.gov

Attorneys for Respondent

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM**

JERRY D. BINGHAM and VALERIE H.
BINGHAM,

Petitioners,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

Case No. CV06-26-1801

**DEPARTMENT’S RESPONSE IN
OPPOSITION TO BINGHAMS’ MOTION
TO STAY ENFORCEMENT**

Respondent Idaho Department of Water Resources (“Department”) submits this response in opposition to Jerry D. and Valerie H. Bingham’s (“Binghams”) *Motion to Stay Enforcement of Respondent’s Final Order Pending Judicial Review* (“*Motion to Stay*”).

I. INTRODUCTION

The Binghams ask this Court to permit them to resume ground water pumping that is currently curtailed under an order of the Department in the Surface Water Coalition (“SWC”)¹

¹ The SWC is comprised 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.

delivery call. Their motion rests principally on the argument that the Department has disregarded Idaho's prior appropriation doctrine by curtailing the Bingham's ground water rights while allowing those with ground water rights junior to the Bingham's to continue pumping pursuant to approved mitigation plans. *Motion to Stay* at 1, 6. That argument incorrectly characterizes both the Department's administration of the SWC delivery call and Idaho law.

The relevant priority relationship in the SWC delivery call proceeding is the relationship between the calling SWC water rights and the ground water rights subject to administration. The SWC holds surface water rights that are senior to the rights of the ground water users. October 11, 1900, is the priority date of the most senior SWC water right for which the Department has predicted injury during the 2026 irrigation season. Larsen Decl. Ex. H, at 178.² The Bingham's ground water rights have priority dates of 1950, 1951, 1952 and 1987. Bingham Decl. ¶ 3. Therefore, the Bingham's water rights are junior in priority.

Idaho law requires the Director of the Department to conjunctively administer hydraulically connected surface and ground water rights according to the prior-appropriation doctrine. *Musser v. Higginson*, 125 Idaho 392, 395–96, 871 P.2d 809, 812–13 (1994). And when the Director determines that junior ground water pumping is materially injuring a senior right, the Department's Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"), IDAPA 37.03.11, provide two alternatives—the Director must: (1) curtail the junior ground water pumping necessary to satisfy the senior right, or (2) permit continued out-of-priority diversion pursuant to an approved mitigation plan. *Rangen, Inc. v. Idaho Dep't of Water Res.*, 160 Idaho 251, 256, 371 P.3d 305, 310 (2016), *abrogated in part on other grounds by 3G AG LLC v. Idaho Dep't of Water Res.*, 170 Idaho 251, 509 P.3d 1180 (2022); IDAPA 37.03.11.040.01.

² Exhibits A through I, attached to the *Declaration of Reed W. Larsen*, are consecutively Bates numbered 1 to 190.

Thus, the fact that a ground water user with a priority date junior to the Bingham may continue pumping pursuant to an approved mitigation plan does not mean the Department has “illegally disregard[ed] the priority system at the center of Idaho water law” as the Bingham have suggested. Mem. in Supp. of Mot. to Stay at 1. A junior user is permitted to make an out-of-priority diversion when the injury attributable to its pumping is being mitigated under an approved mitigation plan. The Bingham do not have an approved mitigation plan. *See* Bingham Decl. ¶ 5 (explaining the Bingham have been trying to secure approval of a mitigation plan). Thus, pursuant to CM Rule 40.01 and the Idaho Supreme Court’s decision in *Rangen*, the Department must administer the Bingham’s junior rights through curtailment.

There is a second and independent defect in the Bingham’s argument. Although the Bingham purport to challenge the Department’s July 21, 2026 *Order Revising April 2026 Forecast Supply and Continuing May 14, 2026 Curtailment Order (Methodology Steps 5 & 6)* (“*July Order*”), their asserted legal theory does not actually challenge a determination made in that order. They do not challenge the Director’s Step 5 determination, recalculation of reasonable in-season demand, revised forecast supply, resulting in-season demand shortfall, or underlying calculations. Instead, their challenge attacks the structure of the Department’s methodology and its framework for mitigation—matters established in earlier final orders, including the 2023 *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Sixth Methodology Order*”). As the Director explained in an order denying reconsideration and a hearing, the Bingham cannot obtain review of those earlier final agency determinations by collaterally attacking them through a later as-applied order. Larsen Decl. Ex. I, at 185.

II. BACKGROUND

A. The Department administers the SWC delivery call pursuant to the CM Rules and the *Sixth Methodology Order*.

The SWC delivery call concerns the conjunctive administration of senior surface water rights and junior ground water rights within the Eastern Snake Plain Aquifer area of common ground water supply. The current *Sixth Methodology Order* was issued by the Director on July 19, 2023, following an administrative hearing. Larsen Decl. Ex. A, at 2.

The Bingham's memorandum in support of their motion for stay inaccurately describes the methodology order process. The Bingham's state that the Department is being assisted by "a rather complicated computer model that predicts, for each irrigation season, the likely shortfall in the senior users' demand." Mem. in Supp. of Mot. to Stay at 3. The *Sixth Methodology Order* does not use a model to calculate the seniors' demand or determine the amount of the anticipated in-season demand shortfall ("IDS"). Under Step 2 of the *Sixth Methodology Order*, the Director first determines forecast supply and compares that supply with the applicable demand to determine whether an IDS is anticipated and, if so, the amount of that shortfall. Larsen Decl. Ex. A, at 42. Only after the IDS volume has been determined does the Department run a transient Eastern Snake Plain Aquifer Model ("ESPAM") simulation to calculate the curtailment priority date predicted to produce a volume of water equal to the IDS in the Near Blackfoot-to-Minidoka reach during the relevant period. *Id.* The same sequence applies to subsequent in-season recalculations: the Director revises reasonable in-season demand, forecast supply, and the IDS and then uses a transient ESPAM simulation to determine the priority date to which curtailment must extend to produce the required volume to the injured senior water user. *Id.* at 43–44.

Thus, ESPAM does not generate a "computer-modeled shortfall" in senior demand. Mem. in Supp. of Mot. to Stay at 3. The IDS results from the Methodology's supply-and-demand

analysis. ESPAM then translates that predetermined volume into the scope of ground water curtailment necessary to provide that volume at the relevant place and time. Larsen Decl. Ex. A, at 38, 42.

B. Junior ground water users may avoid curtailment by participating in an approved mitigation plan.

The Bingham's state that "[t]he Department then determines how to make up for that computer-modeled shortfall from the junior users through approval of mitigation plans." Mem. in Supp. of Mot. to Stay at 3. That characterization also misstates the Director's role. The Director does not select mitigation for a junior water user. A mitigation plan is proposed by a junior ground water user who seeks authorization to continue pumping notwithstanding the senior call. *See* IDAPA 37.03.11.043. The Director determines whether the proposed plan satisfies the CM Rules and sufficiently protects the senior rights. *Id.* The Idaho Supreme Court described the Director's obligation directly in *Rangen*: when junior-priority ground water pumping materially injures a senior right, the Director must either "(1) curtail junior-priority ground water pumping to satisfy the senior's right, or (2) '[a]llow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.'" 160 Idaho at 256, 371 P.3d at 310 (quoting IDAPA 37.03.11.040.01). The Director's role is clear and mandatory. The Department followed that rule here. The 2026 orders required ground water users subject to administration to either: (1) be curtailed, or (2) establish that they could mitigate in accordance with an approved mitigation plan. *E.g.*, Larsen Decl. Ex. F, at 136–37, Ex. H, at 179. The Bingham's are junior to the calling SWC rights and are not protected by an approved mitigation plan.

III. STANDARD

Idaho Code § 67-5274 governs stays of administrative decisions. Its operative language is mirrored in Idaho Rule of Civil Procedure (“I.R.C.P.”) 84(m). Both the statute and the rule state that a reviewing court “may” grant “a stay upon appropriate terms.” The use of the term “may” confirms that whether to grant a stay is discretionary. *Med. Recovery Servs., LLC v. Siler*, 162 Idaho 30, 34, 394 P.3d 73, 77 (2017) (“the word ‘may’ is permissive”). Neither the statute nor the rule, however, defines what constitutes “appropriate terms” or specifies the showing required to obtain a stay.

In *Planned Parenthood Great Northwest v. State*, the Idaho Supreme Court addressed the standard governing a preliminary stay of enforcement. It looked to the standard for a preliminary injunction under I.R.C.P. 65(e). *Planned Parenthood Great Nw. v. State*, 172 Idaho 321, 324, 532 P.3d 801, 804 (2022). As the Court explained, “[w]hile a stay and a preliminary injunction are not identical, they result in a similar procedural outcome[.]” *Id.* Accordingly, *Planned Parenthood* instructs that a court’s authority to grant a stay is governed by the preliminary injunction standard set forth in I.R.C.P. 65(e). Under Rule 65(e), the moving party must demonstrate a substantial likelihood of success on the merits *and* that it will suffer irreparable injury absent a stay. *Planned Parenthood*, 172 Idaho at 326, 532 P.3d at 806. Because preliminary injunctive relief is “the ‘strong arm of equity’” and an extraordinary remedy, it “must be exercised with great restraint.” *Id.* at 325, 532 P.3d at 805 (citing *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 827 (C.C.D.N.J. 1830)).

IV. ARGUMENT

A. The Binghams have not shown a substantial likelihood of success on the merits.

1. The Binghams' claim is an untimely collateral attack on the *Sixth Methodology Order* rather than a challenge to a determination made in the *July Order*.

The Binghams characterize their petition as challenging the Department's "failure to consider the relative seniority of the Binghams' water rights as against the many water users who are junior to the Binghams but whom the Department allows to continue to pump out of priority." Mem. in Supp. of Mot. to Stay at 6. But the *July Order* did not establish the framework for determining the curtailment priority date. It applied Steps 5 and 6 of an already existing final *Sixth Methodology Order*.

The Director addressed this distinction in his *Order Denying Jerry D. and Valerie H. Binghams' Petition for Reconsideration and Request for Hearing* ("Order Denying Petition"). The Director observed that the Binghams did not identify any error in a finding of fact, conclusion of law, calculation, or directive in the *July Order*. Larsen Decl. Ex. I, at 185. Rather, the Binghams expressly stated that they were challenging whether the "current methodology allocates mitigation responsibilities in a manner that is consistent, priority-based, and equitable." *Id.* at 185–86. The Binghams readily admitted that their objections concern "the validity and structure of the Methodology Order and the framework for allocating mitigation responsibilities under the SWC Delivery Call," not determinations newly made in the *July Order*. *Id.* at 186. The Director therefore concluded that the Binghams could not use reconsideration of the *July Order* to collaterally challenge determinations made in the *Sixth Methodology Order*. *Id.*

That distinction is also dispositive here. The timeframe for the Binghams' to challenge the "validity and structure" of the methodology process established in the previous methodology

orders, including the *Sixth Methodology Order*, has long expired.³ See I.C. § 67-5273. A timely petition challenging a 2026 as-applied order does not reopen the time for judicial review of distinct final agency determinations made in the previous methodology orders, including the *Sixth Methodology Order*. Because the Bingham's did not timely challenge the *Sixth Methodology Order*, this Court lacks jurisdiction over the Bingham's challenge to the *Sixth Methodology Order*. *South Valley Ground Water District v. Idaho Dep't of Water Res.*, 173 Idaho 762, 797, 548 P.3d 734, 769 (2024) (stating that the failure to timely challenge a final order “‘is jurisdictional,’ barring review of that order entirely.”).

2. The Department administers according to priority; the Bingham's are junior to the calling SWC rights.

As discussed in the introduction, the Bingham's argument also rests on a mistaken understanding of how the prior appropriation doctrine works. The Director has a mandatory duty to distribute water in accordance with that doctrine, *see* Idaho Code § 42-602, and Idaho law requires conjunctive administration of connected surface and ground water resources. *Musser v. Higginson*, 125 Idaho 392, 395–96, 871 P.2d 809, 812–13 (1994). The Bingham's ground water rights may be senior to numerous other ground water rights, but the delivery call was not made by the holders of those ground water rights. The delivery call was made by the SWC, which holds water rights senior in priority to the Bingham's ground water rights. The operative SWC priority date in the current administration is October 11, 1900. The Bingham's water rights are therefore junior to the water rights whose injury the Director is required to remedy.

³ The *Sixth Methodology Order* was issued as a final order on July 19, 2023. Larsen Decl. Ex. A, at 45. The City of Pocatello, the City of Idaho Falls, and the Coalition of Cities (collectively “Cities”) and the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed timely petitions for judicial review in Ada County (Nos. CV01-23-13238 and CV01-23-13173). IGWA's petition for judicial review is stayed until December 31, 2027. The Idaho Supreme Court dismissed the Cities' petition for lack of jurisdiction. *City of Idaho Falls v. Idaho Dep't of Water Res.*, 177 Idaho 239, 587 P.3d 708, 715 (2026), *as amended* (Mar. 2, 2026), *reh'g denied* (May 4, 2026). The filing of a petition for judicial review does not stay the effectiveness of an order. I.C. § 67-5274. No party to the judicial review proceedings requested a stay of the *Sixth Methodology Order*. Thus, the *Sixth Methodology Order* is effective and a challenge by the Bingham's to the order is not timely.

3. Allowing a more-junior ground water user to pump pursuant to an approved mitigation plan does not violate prior appropriation.

The Binghams repeatedly emphasize that ground water users junior to them are permitted to continue pumping while the Binghams remain curtailed. Mem. in Supp. of Mot. to Stay at 6–7. But, as discussed in the introduction, that circumstance is expressly contemplated by the CM Rules and *Rangen*. Once material injury is found, the Director must either curtail junior-priority pumping or permit continued out-of-priority pumping under an approved mitigation plan. *Rangen*, 160 Idaho at 256, 371 P.3d at 310. Accordingly, a ground water user with a priority date junior to the Binghams may lawfully continue pumping when that user is protected by an approved mitigation plan. Such a user is not being accorded priority over the Binghams. The user is being permitted to make an out-of-priority diversion because the injury associated with that diversion is being addressed pursuant to an approved plan. The Binghams seek the benefit enjoyed by mitigating juniors—continued pumping—but without the predicate required by the CM Rules: an approved mitigation plan.

4. The Binghams conflate the determination of a curtailment priority date with the calculation of mitigation obligations.

The Binghams also assert that “[c]ritically, the Department’s determination as to the mitigation obligation of junior users does not consider the relative priority of those users.” Mem. in Supp. of Mot. to Stay at 3–4. The statement conflates two distinct inquiries.

First, the Director determines which junior ground water rights must be curtailed to remedy the injury to the senior surface water users. As discussed above, priority is central to that determination. The Department uses the volume of the IDS and ESPAM to identify the curtailment priority date, thereby determining which junior ground water rights are subject to administration.

Second, once the group of junior users subject to administration has been identified, certain approved mitigation plans have historically required calculation of a ground water user's proportionate share of the IDS. Larsen Decl. Ex. A, at 42. That calculation addresses the relative magnitude of the junior ground water users' impact for mitigation purposes; the relative priority was already considered when calculating the curtailment priority date to determine which ground water right are subject to administration.

The Bingham's' reliance on the December 30, 2025 Department staff memorandum is also misplaced because the quoted discussion concerns an alternative method for calculating proportionate mitigation shares that the Director had rejected. The memorandum explains that using the rejected alternative method to calculate proportionate shares of the IDS would shift mitigation obligations toward ground water users located closer to the river and away from users located farther from the river. Larsen Decl. Ex. C, at 96–98. Further, staff's observation that neither transient nor steady state ESPAM simulations “inherently” account for water-right priority dates does not mean that the Director disregards priority in administering the SWC delivery call. The staff memorandum describes how the Director considers ground water priority dates in the step prior to running the ESPAM simulation. *Id.* at 94. Thus, the Director does recognize the relative priority of ground water rights when determining how many groundwater rights are subject to priority administration in response to a specific IDS or carryover shortfall volume.

5. The Doctrines of beneficial use, waste, futility, and reasonable pumping levels do not preclude curtailment.

The Bingham's argue that priority administration is subject to the doctrines of beneficial use, waste, futility, and reasonable pumping levels. Mem. in Supp. of Mot. to Stay at 6–8. The Department does not dispute those general principles. They do not, however, apply in the manner

the Binghams suggest. The Department has not determined that the Binghams fail to beneficially use ground water, that they are wasting water, or that their wells are operating at an unreasonable pumping level. Nor is the curtailment order based on a determination that the SWC employs an unreasonable means of diversion. The Binghams' rights are subject to curtailment because the Director has determined that junior ground water pumping is causing material injury to the SWC, the volume of the July IDS warrants curtailment of ground water rights junior to October 11, 1900, the Binghams' water rights are junior to October 11, 1900, and the Binghams are not participating in an approved mitigation plan that authorizes out-of-priority diversion. Accordingly, the doctrines cited by the Binghams do not provide an exception from administration here. Their rights remain junior to the calling SWC rights and, absent an approved mitigation plan, remain subject to curtailment under the CM Rules.

B. The Binghams' asserted economic harm does not warrant authorizing unmitigated out-of-priority pumping.

The Department does not minimize the economic consequences that water-right administration can impose on a junior appropriator. The Binghams identify planting decisions, fertilizer applications, soil preparation, crop-insurance concerns, potato contracts, fixed farm expenses, past lost revenue, and the possibility of future bankruptcy. Mem. in Supp. of Mot. to Stay at 9–10. Those allegations demonstrate that curtailment can have serious consequences. They do not, however, establish an entitlement to pump out of priority while judicial review proceeds.

The Director expressly acknowledged in denying the Binghams' earlier administrative stay request that curtailment under Idaho's prior-appropriation doctrine can impose substantial burdens on junior water users. But the Director also recognized that such administration remains necessary to protect senior water rights. Larsen Decl. Ex. E, at 130–31. A judicial stay would not

remove the consequences of the Bingham's pumping. It would shift the risk of those consequences to the senior SWC users by permitting the Bingham's to pump without an approved mechanism to prevent or offset injury. The economic consequences of enforcing priority administration do not justify transferring the risk of an unmitigated junior diversion to the senior water users.

The Bingham's equities argument improperly treats the competing interests as the financial hardship to the Bingham's on one side and "no injury to the Department" on the other. Mem. in Supp. of Mot. to Stay at 10–11. That is not the relevant balance. The Department does not curtail the Bingham's to protect its interests. The Department administers water rights pursuant to its statutory obligation. The interests on the other side of the scale include the senior SWC rights that the Director has determined are materially injured and the orderly administration of Idaho's prior-appropriation system. A stay would permit the Bingham's, whose rights are junior to the calling SWC rights, to resume pumping without an approved mitigation plan. The risk of that continued diversion therefore would be borne by the senior right holders—not by the Department as an institution.

The Bingham's reliance on the small magnitude of their individual short-term effect on Snake River flow is misplaced. The fact that one junior user's short-term effect is small when compared to total river flow does not mean that the effect may be disregarded for purposes of conjunctive administration. Any individual junior ground water user could characterize its own short-term contribution as small when compared to the entire flow of the Snake River. If each junior user were excused from curtailment on that basis, the collective short-term and long-term depletions from junior ground water pumping would remain unabated, and the resulting injury to the senior SWC rights would be substantial. The CM Rules administer junior pumping

collectively according to priority and require each junior user subject to the call either to curtail or to mitigate. IDAPA 37.03.11.020.01. They do not create an exemption based on the relative smallness of one user's individual depletion when compared to total river flow. The Director appropriately summarized the problem in denying the earlier stay request: allowing the Bingham's to pump would permit "out-of-priority water use" without an approved mechanism to prevent or resolve injury and would undermine the protection of senior rights and timely administration of Idaho water law. Larsen Decl. Ex. E, at 131. Equity does not require shifting the consequences of an unmitigated junior diversion from the junior appropriator to the senior right holders.

Furthermore, contrary to the Bingham's suggestion, the requested relief would not maintain the "status quo." Mem in Supp. of Mot. to Stay at 1. The presently effective order requires the Bingham's to curtail. A stay would alter the status quo by permitting pumping that the Department's order presently prohibits. It would thus give the Bingham's authorization to divert out of priority without the protection to the senior rights that an approved mitigation plan would provide.

Finally, the Bingham's contend that the public interest favors a stay because the public has an interest in requiring agencies to obey the law. Mem. in Supp. of Mot. to Stay at 11. As discussed in detail above, the Bingham's argument—that the Department has disregarded priority—is incorrect. The Department is enforcing priority. The public interest is not served by suspending that system for an individual unmitigated junior user while the user challenges a methodology adopted years earlier and embodied in a final agency order. Granting such relief would undermine the orderly and timely administration upon which senior and junior water users alike depend.

V. CONCLUSION

The Bingham's motion rests on the mistaken premise that the Department has abandoned prior appropriation because some ground water users with priority dates junior to the Bingham's continue pumping. Those users are not being accorded priority over the Bingham's. They are exercising out-of-priority diversions pursuant to approved mitigation plans, as expressly authorized by the CM Rules and the Idaho Supreme Court's decision in *Rangen*. The Bingham's rights, meanwhile, remain junior to the calling SWC rights, and the Bingham's do not have an approved mitigation plan.

Their underlying challenge to the Methodology's mitigation framework also does not arise from the *July Order*. The Director correctly recognized that challenge as directed to the *Sixth Methodology Order* and the framework established there, rather than to the findings and calculations made in the *July Order*.

Although curtailment may impose serious economic consequences on the Bingham's, a stay would address that hardship only by permitting unmitigated out-of-priority pumping and shifting the resulting risk to the senior right holders. Neither the equities nor the public interest supports that result. The Court should deny the Bingham's *Motion to Stay*.

DATED this 29th day of September 2026.



GARRICK L. BAXTER
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of September 2026, I caused to be served a true and correct copy of the foregoing *Department's Response in Opposition to Bingham's Motion to Stay Enforcement*, via iCourt E-File and Serve, upon the following:

Reed W. Larsen
Cooper & Larsen Chartered
reed@cooper-larsen.com

Bradley R. Cahoon
Dentons Durham Jones Pinegar P.C.
brad.cahoon@dentons.com

Damien M. Schiff
Pacific Legal Foundation
dschiff@pacificlegal.org

A handwritten signature in blue ink, appearing to read 'G. Baxter', is written over a horizontal line.

GARRICK L. BAXTER
Deputy Attorney General