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DISTRICT COURT OF THE STATE OF IDAHO
FOURTH JUDICIAL DISTRICT
ADA COUNTY

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

CV01-23-08187

Case No. _____

**Ground Water Districts' 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**

IRRIGATION DISTRICT, MINIDOKA
IRRIGATION DISTRICT, NORTH SIDE
CANAL COMPANY, AND TWIN FALLS
CANAL COMPANY

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, Aberdeen-American Falls Area Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry’s Fork Ground Water District; and Bingham Ground Water District and Bonneville-Jefferson Ground Water District (collectively, the “Ground Water Districts”), submit this brief pursuant to Rule 84(p) of the Idaho Rules of Civil Procedure in support of *Ground Water Districts’ Motion For Stay*, *Ground Water Districts’ Motion for Injunctive Relief*, *Ground Water Districts’ Motion to Compel*, *Ground Water Districts’ Motion for Expedited Decision*, and *Ground Water Districts’ Application for Order to Show Cause* filed herewith, referred to collectively herein as the “Motions.”

INTRODUCTION

This case involves a petition for judicial review of a series of actions taken recently by the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) in the Surface Water Coalition¹ (SWC) delivery call case, which is a contested case governed by the Idaho Administrative Procedures Act, Chapter 52, Title 67, Idaho Code (“APA”).

On April 21, 2023, the Director issued the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Fifth Methodology Order*”) which radically changes the way water rights are administered under the SWC delivery call. The *Fifth Methodology Order* was issued without a prior hearing, and it is based on evidence that is not in the agency record.

The Director immediately put the *Fifth Methodology Order* to work by implementing it in the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (“*April 2023 As-Applied Order*”) issued the same day. Due to changes made in the *Fifth Methodology Order*,

¹ The SWC consists of seven irrigation entities in the Magic Valley that divert water from the Snake River: 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.

the *April 2023 As-Applied Order*, which has not yet taken effect, orders curtailment of every groundwater right from the Eastern Snake Plain Aquifer (ESPA) with a priority date junior to December 30, 1953, unless mitigation is provided.

Knowing that sweeping changes in the *Fifth Methodology Order* would cause an uproar, the Director did not wait for affected parties to request a hearing under Idaho Code 42-1701A(3). Rather, on the same day he issued the *Fifth Methodology Order* and the *April 2023 As-Applied Order*, he issued a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* (“*Hearing Notice*”) setting an after-the-fact hearing June 6-10, 2023.

As explained below, the *Fifth Methodology Order* should be set aside because it was issued in blatant violation of due process and the APA. However, the Ground Water Districts recognize this court might not set aside the *Fifth Methodology Order* before the Director holds an after-the-fact hearing. The purpose of the Motions is to ensure that the Ground Water Districts and other junior-priority groundwater users have a fair opportunity to review and contest the *Fifth Methodology Order* before it takes effect.

The Director has implemented a calculated scheme to prevent junior-priority groundwater users from having a fair opportunity to review and contest the *Fifth Methodology Order*. First, he set a rushed hearing on June 6-10, 2023, which does not afford sufficient time for adequate review and scrutiny of the *Fifth Methodology Order*. He then denied an extremely compelling motion for a continuance. Second, the Director blocked junior-priority groundwater users from discovering some of the information he considered in developing the *Fifth Methodology Order* and the *April 2023 As-Applied Order*. He did this by (i) disallowing interrogatories, (ii) issuing an order that limits the topics and information that Department witnesses can testify to at the after-the-fact hearing, (iii) issuing an order that limits the topics and information that parties to the case can access via discovery, (iv) denying a request for an I.R.P.C. 30(b)(6) deposition, (v) claiming a “deliberative process” privilege that does not exist under Idaho law, and (iv), through counsel, instructing Department deponents to not answer questions about certain information the Director considered in developing the *Fifth Methodology Order* and the *April 2023 As-Applied Order*.

The Director’s extreme actions are anathema to Idaho suite of laws designed to ensure that Idaho government agencies provide open and transparent processes and fair hearings in contested

cases (the Public Records Act, Open Meeting Law, and APA). His actions blatantly violate the APA and deprive the Ground Water Districts of due process, as explained below. To restore due process, the Ground Water Districts respectfully ask this court to take the following actions or enjoin the Director to take such actions:

1. Stay implementation the *Fifth Methodology Order* until after it is properly adjudicated. Until then, the Director can continue to 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 account for the unavailability of expert witnesses and to give junior-priority groundwater users adequate time to prepare for the hearing.
3. Instruct the Director to disclose all documents and other information he considered in developing the *Fifth Methodology Order* and the *April 2023 As-Applied Order*.
4. Instruct the Director to 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 *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* ("Order Limiting Evidence"), and the *Order Denying the Cities' Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* issued May 5, 2023 ("Order Limiting Discovery")

The Motions provide tools for this court to exercise its legal and equitable powers to grant such relief. The Ground Water Districts believe the foregoing relief can be granted under the *Ground Water Districts' Motion for Stay*. The *Ground Water Districts' Motion for Injunctive Relief* and the *Ground Water Districts' Motion to Compel* provide alternative justifications for granting such relief.

PROCEDURAL HISTORY

In January 2005, the SWC petitioned the Director to shut off groundwater diversions from the ESPA so more water will discharge from the ESPA into the Snake River in the American Falls area, upstream from SWC diversions at Minidoka Dam and Milner Dam. After a period of litigation over the constitutionality of the Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"), an evidentiary hearing was held in 2008 before former

Idaho Supreme Court Chief Justice Gerald F. Schroeder who was appointed hearing officer. On the recommendation of Justice Schroeder, former IDWR Director David R. Tuthill, Jr. developed a formula known as the “methodology” to annually predict material injury to SWC members in accordance with the CM Rules. The methodology was subsequently revised in 2010 (Second Methodology Order), 2015 (Third Methodology Order), and 2016 (Fourth Methodology Order).

In a status conference held August 5, 2022, involving a mitigation plan for the SWC delivery call, the Director verbally notified those present that he intended to convene a technical working group to review the *Fourth Methodology Order* and consider what changes might be made to improve its functionality.

In September, a Department staff member, Matt Anders, sent an email notifying various individuals that Department staff had been reviewing data used in the *Fourth Methodology Order* and would be presenting their findings to outside consultants in coming months. From November 16-December 21, 2022, Department staff held six virtual meetings where they shared new data they had reviewed and various analyses they had conducted. On December 23, 2022, Department staff issued a one-page document containing “preliminary recommendations” for changes to the *Fourth Methodology Order*. (Budge Decl., Ex. B.) The staff’s preliminary recommendations address three components of the methodology. With respect to other components it states: “IDWR will continue to evaluate the integration of these and other techniques into the methodology.” *Id.* The document then invited outside consultants to submit written comments by January 16, 2023, roughly three weeks later.

Outside consultants could not thoroughly analyze in three weeks the complex and voluminous data that Department staff spent months reviewing and analyzing, but since Department staff had provided only a one-page summary of “preliminary recommendations,” and since the APA required the Director to hold a hearing before amending the *Fourth Methodology Order*, IGWA’s consultant prepared comments that were likewise preliminary in nature, expecting that a full evidentiary record would be developed in the contested case in which the *Fourth Methodology Order* was issued. This expectation, however, was not realized.

Rather than hold a hearing in the contested case, the Director worked behind closed doors from late December 2022 through April 2023 to develop the *Fifth Methodology Order* based on information that is not in the agency record. Some changes made to the *Fourth Methodology*

Order differ wildly from the preliminary recommendation of Department staff, while other seemingly obvious changes were disregarded without explanation.

In a year of exceptionally high snowpack, with no foreseeable risk of curtailment under the *Fourth Methodology Order*, application of the *Fifth Methodology Order* in the *April 2023 As-Applied Order* generated in a predicted water supply shortage of 75,200 acre-feet to the SWC, all of which pertains to Twin Falls Canal Company. The *April 2023 As-Applied Order* orders curtailment of every groundwater right from the ESPA junior to December 30, 1953, stating: “If junior ground water user cannot establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user.” (Budge Decl., Ex. A-2; emphasis added.)

The effect has been chaotic. The Department reports that approximately 900 water rights are not covered by approved mitigation plans. (Budge Decl., Ex. E.) In addition, there is uncertainty as to whether IGWA’s mitigation plans will be effective in 2023. (Budge Decl., p. 4 ¶ 9.) Consequently, many holders of groundwater rights from the ESPA are currently in a state of fear of curtailment.

On the same day the *Fifth Methodology Order* and the *April 2023 As-Applied Order* were issued, the Director issued the *Hearing Notice* setting a prehearing conference the following week, on April 28, 2023, and an after-the-fact hearing six weeks later on June 6-10, 2023.

Prior to the prehearing conference, the Cities filed a *Motion for Continuance*, which the Ground Water Districts joined, requesting that the hearing be continued until December 2023 or January 2024 to provide adequate time to prepare. The Director verbally denied the motion at the April 28th prehearing conference, which he confirmed in writing in the *Order Limiting Discovery* issued on May 5, 2023.

On May 2, 2023, the Director issued a *Scheduling Order and Order Authorizing Remote Appearance at Hearing* (“*Scheduling Order*”) setting various deadlines, including a deadline of May 5th for the parties to submit to the Department a written statement of issues for the hearing, and a deadline of May 31st for the parties to complete all discovery, serve expert reports on the other parties, file lay and expert witness lists with a summary of anticipated testimony, and file pre-marked exhibits with the Department. In sum, junior-priority groundwater users have been

given five weeks to review two lengthy and complex orders that are predicated on a large volume of technical data—orders that the Department spent some 10 months developing—and to prepare expert reports and prepare for a four-day hearing.

On May 5, 2023, the Ground Water Districts and the Cities filed a *Motion for Reconsideration* of the Director’s denial of their prior *Motion for Continuance*, which further explained the need for a continuance, including:

1. Written responses to discovery will not be available until after May 29, 2023—weeks after the depositions scheduled by the Director and only days before the June hearing.
2. The June hearing provides inadequate time for the Ground Water Districts to obtain all discovery and the conduct inspections and analyses necessary to formulate expert opinions and develop reports addressing the complex issues involved in the *Fifth Methodology Order* such as (a) the Director’s change from steady-state to transient-state modeling, (b) the seven years of additional, voluminous hydrologic and water use data used in the *Fifth Methodology Order*, (c) revised calculations employed in the *Fifth Methodology Order*, (d) the large discrepancy between the SWC’s actual irrigated acreage and the acreage used by the Director in the *Fifth Methodology Order*, (e) increasing diversions and decreasing project efficiency of SWC members in recent years, and (f) the Director’s failure to address the doctrines of futile and reasonable use of water resources despite a massive increase in curtailment.
3. The attorney for McCain Foods, Candice McHugh, is unavailable for the June hearing due to a previously-scheduled out-of-state obligation.
4. Greg Sullivan, the sole expert consultant for the Cities, will be out of the country from May 17, 2023-June 3, 2023, leaving him unavailable to consult with the Cities’ attorneys to assist in developing strategy, preparing expert reports, preparing exhibits, and attending depositions.
5. Sophia Sigstedt, expert consultant for IGWA, is unable to perform all of the work required to properly analyze the *Fifth Methodology Order* before the June hearing, and has a medical condition that prevents her from leaving her home state of Colorado until July 10, 2022.
6. Jaxon Higgs, expert consultant for IGWA, has a long-standing out-of-country vacation planned for May 27-June 10, 2023, and is unable to participate in the June hearing.
7. IGWA has been unable to locate a qualified engineering firm that has capacity to analyze the “project efficiency” component of the *Fifth Methodology Order* by the hearing currently scheduled June 6-10, 2023.
8. Water supplies are above-average for the 2023 irrigation season, and mitigation has been secured by IGWA and the Cities, thereby causing little to no prejudice to the SWC.

9. The Director can administer water rights pursuant to the *Fourth Methodology Order* until the *Fifth Methodology Order* is properly adjudicated.

(Budge Decl., Exs. A-6 and A-9 through A-15.) As of the filing of this brief, the *Motion for Reconsideration* has sat with the Director for 14 days without action, despite a request from counsel for the Ground Water Districts to counsel for the Department requesting a prompt decision given the compressed hearing schedule.

On May 5, 2023, the Director took action to block junior-priority groundwater users from discovering some of the information he considered in developing the *Fifth Methodology Order*. First, he issued the *Order Limiting Evidence*, which (i) identifies two Department staff members who would be allowed to testify at the hearing, Matt Anders and Jennifer Sukow, and (ii) limits the topics and data that Mr. Anders and Ms. Sukow may discuss at the hearing to certain technical matters. (Budge Decl., Ex. A-9.) Second, he issued an *Order Limiting Discovery* which limits the scope of discovery to “preclude questions regarding the Director’s deliberative process on legal and policy considerations.” (Budge Decl., Ex. A-8.) Based on these orders, at the depositions for Ms. Sukow and Matt Anders held May 8 and 10, 2023, counsel for the Department instructed them to not answer almost 50 questions on the basis that they related to the Director’s deliberative process. (Budge Decl., p. 4 ¶ 11, Ex. D.) Many of the questions they did not answer requested information the Director considered in developing the *Fifth Methodology Order*, not his deliberative process for evaluating such information. In any case, the Director has used the *Order Limiting Evidence* and the *Order Limiting Discovery* to prevent the parties to the contested case from discovering and putting into evidence some of the information he considered in developing the *Fifth Methodology Order* and the *April 2023 As-Applied Order*.

On May 16, 2023, counsel for the Ground Water Districts held a “meet and confer” meeting with counsel for the Director, explaining that they were being deprived of due process and would be filing a motion to compel unless the Director provides access to all of the information he considered in developing the *Fifth Methodology Order* and the *April 2023 As-Applied Order*. Counsel for the Director confirmed that no such access would be given. (Andersen Decl., ¶¶ 6-10.)

LEGAL STANDARD

The Motions collectively authorize this court to grant the relief requested above. While the legal standards differ, the facts support judicial relief under each of the Motions.

A. Motion for Stay

The Idaho Administrative Procedures Act (APA) provides that upon the filing of a petition for judicial review, the “reviewing court may order ... a stay [of enforcement of the agency action] upon appropriate terms.” Idaho Code 67-5274. Idaho Rule of Civil Procedure 84(m) also provides that the reviewing court may grant a stay “upon appropriate terms.”

Neither the APA nor Rule 84(m) enunciate factors that must be considered when deciding whether to stay agency action, indicating that district courts sitting in an appellate capacity have broader latitude under Rule 84(m) than they do under Rule 65. The Idaho Supreme Court has held that “where it appears necessary to preserve the status quo to do complete justice the appellate court will grant a stay of proceedings in furtherance of its appellate powers.” *McHan v. McHan*, 59 Idaho 41, 46 (1938). The Idaho Court of Appeals has similarly held that a stay is appropriate “when it would be unjust to permit the execution on the judgment, such as where there are equitable grounds for the stay or where certain other proceedings are pending.” *Haley v. Clinton*, 123 Idaho 707, 709 (Ct. App. 1993).

The APA and Rule 84(m) do not prescribe what qualifies as “appropriate terms” for a stay, nor are there any published Idaho cases imposing guidelines or limitations as to what may qualify. In keeping with guidance from the Idaho Supreme Court, district courts have power to impose whatever terms the court deems appropriate “to preserve the status quo to do complete justice.”

Accordingly, this Court may grant the relief requested above as appropriate terms in connection with a stay of implementation of the *Fifth Methodology Order*.

B. Motion for Injunctive Relief

This Court has additional authority to grant the relief requested above under its general jurisdiction over cases in equity. Idaho Const. art. V, § 20. By statute, this Court may issue “all writs necessary to the exercise of its powers.” Idaho Code § 1-705(2). In addition, I.R.C.P. 65(e)(3) provides that a preliminary injunction may be granted “...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.” The Court, acting in its appellate capacity, may issue an injunction during the pendency of an appeal. Rule 62(g). The decision whether to grant or deny injunctive relief is left to the district court's discretion. *Brady v. City of Homedale*, 130 Idaho 569, 572, 944 P.2d 704, 707 (1997).

C. Motion to Compel

This Court has additional authority to rule on discovery-related matters under rule 520.02 of the rules of procedure of the Department (IDAPA 37.01.01.520.02) and Rule 37 of the Idaho Rules of Civil Procedure which authorizes this Court to compel discovery upon “a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.” A motion to compel may be granted if “a deponent fails to answer a question asked under Rule 30 or 31.” Rule 37(a)(3)(A)(i). An “evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.” I.R.C.P. 37(a)(4).

D. Motion for Expedited Decision

Idaho Rule of Civil Procedure 84(o) provides that motions “filed with this Court be determined without oral argument unless ordered by the court.” Generally, courts may “limit oral argument at any time.” Rule 7(b)(3)(F). Courts may grant any exception to the time limits for motions pursuant to Rule 7 for good cause shown. Rule 7(b)(3)(H). “If time does not permit a hearing or response on a motion to extend or shorten time, the court may rule without opportunity for response or hearing.” *Id.*

E. Exhaustion of administrative remedies is not required.

The Ground Water Districts need not exhaust their administrative remedies before this Court rules on the Motions because, under the APA, “A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy.” Idaho Code § 67-5271(2). The Idaho Supreme Court has held that exhaustion is not required “when the interests of justice so require.” *Regan v. Kootenai Cty.*, 140 Idaho 721, 725 (2004) (citing *Arnze v. State*, 123 Idaho 899, 906 (1993)).

ARGUMENT

As explained below, implementation of the *Fifth Methodology Order* should be stayed until it is properly adjudicated because (1) it was issued in violation of due process and the APA; (2) there are clear errors in the *Fifth Methodology Order*; (3) severe, irreparable harm will result from implementation of an erroneous *Fifth Methodology Order*; and (4) there is no emergency requiring immediate implementation of the *Fifth Methodology Order* because the Director can administer water rights under the *Fourth Methodology Order* until the *Fifth Methodology Order* is properly adjudicated.

As an appropriate term of the stay and/or under this court's equitable power to grant injunctive relief, this court should restore due process by instructing the Director to (a) continue the after-the-fact hearing until October 16-20, 2023; (b) disclose all documents and other information he considered in developing the *Fifth Methodology Order*; (c) 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*; (d) instruct counsel for the Director refrain from instructing Department deponents or witnesses to not answer questions on the basis that the information pertains to the Director's deliberative process; and (e) vacate the *Scheduling Order* and the *Discovery Order*.

1. The *Fifth Methodology Order* was issued in violation of due process and the APA.

The *Fifth Methodology Order* was issued in violation of due process and the APA because (i) it was issued in a contested case governed by the APA, (ii) there was no emergency, (iii) the Director failed to provide a hearing before issuing the order, and (iv) it is based on information outside the record of the contested case.

1.1 In the absence of an emergency, due process and the APA require the Director to hold a hearing before issuing an order on contested issues.

A fundamental right afforded by the United States Constitution is that "No state ... shall deprive any person of life, liberty, or property without due process of law." U.S. Const., Amend. 14 §1; Idaho Const. art. I, § 13. Under Idaho law, "individual water rights are real property rights which must be afforded the protection of due process." *Nettleton v. Higginson*, 98 Idaho 87, 90 (1977); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815-16 (2011).

Due process entitles a property owner to “an opportunity for a hearing before he is deprived of any significant property interest.” *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). Not only must a hearing be held, but the decision-making process must be fair to those persons affected by the decision, as explained by the U.S. Supreme Court:

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon application of and for the benefit of a private party.

Id. at 80-81. The hearing requirement “is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.” *Id.* at 90, fn 22.

Importantly, a hearing “must be granted at a meaningful time and in a meaningful manner.” *Id.* at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Usually the hearing must be held “*before* [a property owner] is deprived of any significant property interest, except for extraordinary situations when some valid governmental interest is at stake that justifies postponing the hearing until after the event.” *Id.* at 81 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971) (emphasis in original)).

Furthermore, the hearing “must be provided at a time which allows the person to reasonably be prepared to address the issue.” *State v. Doe*, 147 Idaho 542, 546 (Ct. App. 2009). “An individual must have an opportunity to confront all the evidence adduced against him, in particular that evidence with which the decisionmaker is familiar.” *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 780 (9th Cir. 1982). When a government agency fails to provide due process before issuing an order, a court may instruct the agency “to vacate the Final Order ... and hold a new hearing that complies with due process.” *Citizens Allied for Integrity & Accountability, Inc. v. Schultz*, 335 F. Supp. 3d 1216, 1230 (D. Idaho 2018).

To ensure that Idaho agencies afford due process in contested cases, the Idaho legislature enacted the APA which requires state agencies, in any case that is not resolved by stipulation of the parties, and in the absence of an emergency, to hold a hearing *before* the agency decides the

matter. Idaho Code § 67-5242. The purpose of the hearing is “to assure that there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary.” Idaho Code § 67-5242(3)(a) (emphasis added). At the hearing, parties must be given “the opportunity to respond and present evidence and argument on all issues involved,” Idaho Code § 67-5242(3)(b), and all findings of fact must be “based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding,” Idaho Code § 67-5248(2).

The only time a state agency can take action in a contested case, other than by stipulation of the parties, without first holding a hearing, is “in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate government action.” Idaho Code § 67-5247(1). When emergency action is taken, the order must include a “brief, reasoned statement to justify both the decision that an immediate danger exists and the decision to take the specific action.” Idaho Code § 67-5247(2). In addition, the agency must “proceed as quickly as feasible to complete any proceedings that could be required.” Idaho Code § 67-5247(4).

The Idaho Supreme Court has confirmed that in the context of conjunctive management of surface and ground water rights, if there is no emergency a hearing must be held *before* an order is issued. In *American Falls Reservoir District No. 2 vs. Idaho Department of Water Resources* (“AFRD2”), the Idaho Supreme Court reversed the district court decision which would have allowed the Director to make conjunctive management decisions first and hold hearings later. The Supreme Court explained that when it comes to conjunctive management, “It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.” *AFRD2*, 143 Idaho 862, 875 (2006). In keeping with that decision, the Court later reprimanded the Director for issuing a curtailment order before holding a hearing, stating: “the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for a hearing.” *Clear Springs Foods*, 150 Idaho at 815.

1.2 IGWA notified the Director that any revision of the *Fourth Methodology Order* must comply with due process and the APA.

When the Director announced at a status conference on August 5, 2022, that he wished to undertake a review and update of the *Fourth Methodology Order*, counsel for IGWA expressed

concern about the process the Department would follow, stating: “It would be helpful if we had a more clear picture of the process the Department anticipates going through in terms of revising the Methodology Order ... this was all created in the context of a contested and litigated case so we’ve got principals of ... due process that need to be taken into account.” (Budge Decl., Ex. C.)

In late September, a Department staff member, Matt Anders, sent an email stating that Department staff had begun analyzing the data used in the *Fourth Methodology Order* and would be sharing their findings with outside consultants in coming months. Counsel for the Department, Garrick Baxter, informed counsel for IGWA that attorneys were not invited to participate. Counsel for IGWA responded as follows, reiterating that any revision of the *Fourth Methodology Order* must comply with the APA:

... I would also like to understand how this working group will function within the contested case structure of the Administrative Procedures Act. ... Before any technical issues are discussed, I recommend that a scoping meeting be held to discuss which elements of the Methodology Order will be reconsidered, the process that will be followed, and how it fits within the contested case structure of the APA. Please advise if the Department will do this.

(Budge Decl., Ex. D.) In a subsequent email to Mr. Baxter, counsel for IGWA repeated his concern that any review of the *Fourth Methodology Order* must comply with due process and the APA:

Please know that I do not wish to make things difficult. I appreciate that the Department is inviting input on technical issues as it reconsiders the Methodology Order. It is important that the process comply with the APA, which as you know requires that decisions in contested cases be confined to the agency record. It would help me, and presumably others, to understand how the actions of the TWG fit within the APA, including how and when the Department envisions evidence being added to the agency record, action being taken on this new evidence, etc. I kindly ask that these issues be clarified up front so we avoid disputes down the road over compliance with the APA.

Id.

Despite IGWA’s request, the Director did not hold a scoping meeting, status conference, or any other meeting with the parties to the SWC delivery call case to discuss how he intended to comply with the APA, nor did he hold a hearing to develop the evidentiary record upon which the methodology would be revised. He simply undertook a review of the *Fourth Methodology*

Order on his own, and then proceeded to develop the *Fifth Methodology Order* behind closed doors, outside of the contested case parameters of the APA.

1.3 The *Fifth Methodology Order* was issued in a contested case, in the absence of an emergency.

The *Fifth Methodology Order* was issued in what is commonly known as the SWC delivery call case, IDWR Docket No. CM-DC-2010-001. This is a contested case under the APA that has been ongoing since 2005 when the SWC filed its delivery call (IDWR did not begin using docket numbers until 2010). Every iteration of the methodology order has been issued in this case.

The *Fifth Methodology Order* was not issued in an emergency. The *Fourth Methodology Order* has been in place since 2016, and there is no reason it could not continue functioning in 2023. The Department began reviewing the *Fourth Methodology Order* in August of 2022. Nothing has occurred in recent months that creates “a situation involving an immediate danger to the public health, safety, or welfare requiring immediate action.” Idaho Code § 67-5247(1). Indeed, the *Fifth Methodology Order* contains no such statement.

1.4 The *Fifth Methodology Order* was issued in violation of due process and the APA.

Since there was no emergency, the APA requires the Director to hold a hearing prior to issuing the *Fifth Methodology Order* to assure that “there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary,” Idaho Code § 67-5242(3)(a), the parties are given “the opportunity to respond and present evidence and argument on all issues involved,” Idaho Code § 67-5242(3)(b), and all findings of fact are “based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding,” Idaho Code § 67-5248(2).

The Director initiated his review of the *Fourth Methodology Order* on August 5, 2022. He had ample time to hold an evidentiary hearing before developing or issuing the *Fifth Methodology Order*. For reasons unknown, he intentionally chose not to. Instead, he developed the *Fifth Methodology Order* based on facts and analyses developed internally, that are not contained in the evidentiary record of the contested case. In so doing, he violated due process and the APA.

1.5 The so-called “Technical Working Group” cited by the Director does not satisfy due process or the APA.

The Director’s rationale for refusing to hold a hearing before developing the *Fifth Methodology Order* appears to rely, in part, on the fact that Department staff disclosed some of their technical analyses to outside consultants in November-December 2022, which the Director refers to as a “technical working group.” However, the actions of Department staff fall far short of what due process and the APA require.

First, the term “working group” is a misnomer. The term suggests a collaborative process among Department staff and outside consultants, yet in fact it was limited to Department staff working under the directions of the Director.

Second, there was no formal notice to the parties to the contested case of the so-called “working group,” nor of what the working group would be doing, nor of how or when a hearing would be held to develop an evidentiary record upon which the *Fourth Methodology Order* may be amended.

Third, outside consultants had no input as to what components of the *Fourth Methodology Order* would be analyzed or what types of studies would be performed; rather, that was all directed by the Director, who personally directed the analyses and then reviewed and edited the presentations of Department staff to outside consultants in advance.

Fourth, the “preliminary recommendations” of Department staff did not preview major changes that were ultimately made to the *Fifth Methodology Order*. Department staff published nothing more than a one-page document with conclusory recommendations. What’s more, the Ground Water Districts recently learned in depositions that while this document masquerades as a recommendation from Department staff to the Director, the Director actually reviewed and edited the content of the document before it was shared with consultants of the parties to the contested case.

Fifth, the preliminary recommendation document fails to provide any analysis of why certain critical components of the methodology were not modified. For example, the *Fifth Methodology Order* calculates water demand for Twin Falls Canal Company based on the number of acres that TFCC reports to the Department as being irrigated even though the Department’s own investigation shows that there are more than 15,000 fewer acres that are

actually irrigated. (Budge Decl., Ex. A-11.) Ordering curtailment to service non-irrigated acres is contrary to law: “[T]he Director has the duty and authority to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority of water be extended only to those using the water.” *A&B v. Idaho Dept. of Water Res.*, 155 Idaho 640, 652, 315 P.3d 828, 840 (2013) (emphasis added).

2. There are obvious errors in the *Fifth Methodology Order*.

The *Fifth Methodology Order* contains severe and obvious errors. For the purpose of this brief, two are demonstrated.

First, as mentioned above, the *Fifth Methodology Order* calculates TFCC’s water demand based on the number of acres that TFCC reports to the Director as being irrigated instead of the number of acres actually irrigated.

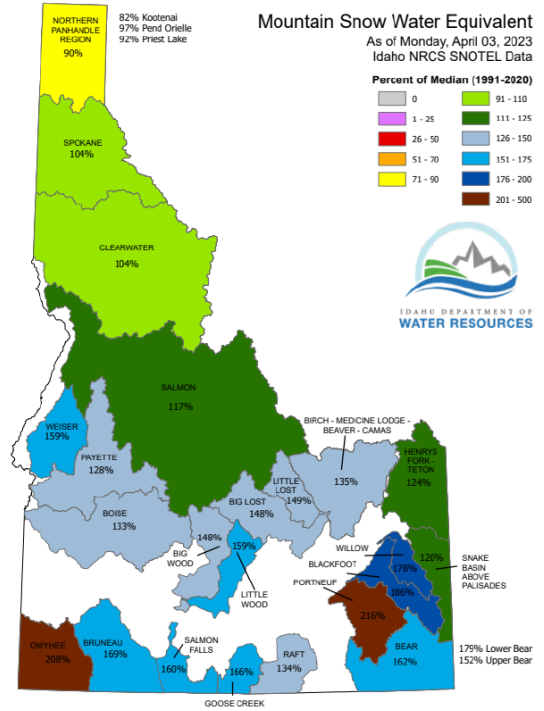
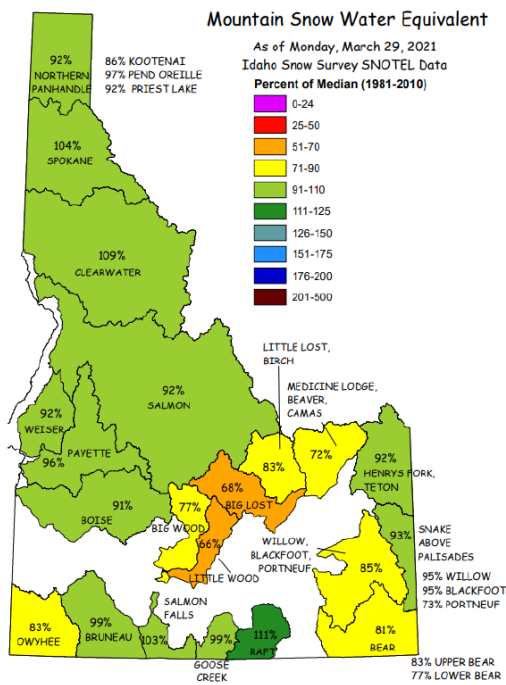
Second, the *Fifth Methodology Order* shifts from a steady-state model to a transient-state model, which causes the methodology to curtail exponentially more acres in response to a demand shortfall. To illustrate, the *April 2023 As-Applied Order* predicts a shortfall to TFCC of 75,200 acre-feet, then orders curtailments all water rights junior to December 30, 1953, which would eliminate beneficial use of an estimated 1.4 to 1.8 million acre-feet of water in an effort to provide an additional 75,200 acre-feet of water to TFC. Given this massive change in water rights administration, the Director must apply CM Rules 10.07, 10.08, 20.03, 20.04, 40.03, and 42.01 and make findings of fact and conclusions of law concerning the futile call doctrine and the principle of reasonable use of water resources. Yet, the *Fifth Methodology Order* contain no application of these rules.

The *Fifth Methodology Order* suggests that the Director declined to apply these rules because it is the junior’s burden to prove futile call, but this only underscores the injustice caused by the Director’s failure to provide a hearing before developing the *Fifth Methodology Order*. In any case, the omission of any findings of fact concerning these rules is an egregious error.

3. Severe, irreparable harm will result from implementation of an erroneous *Fifth Methodology Order*.

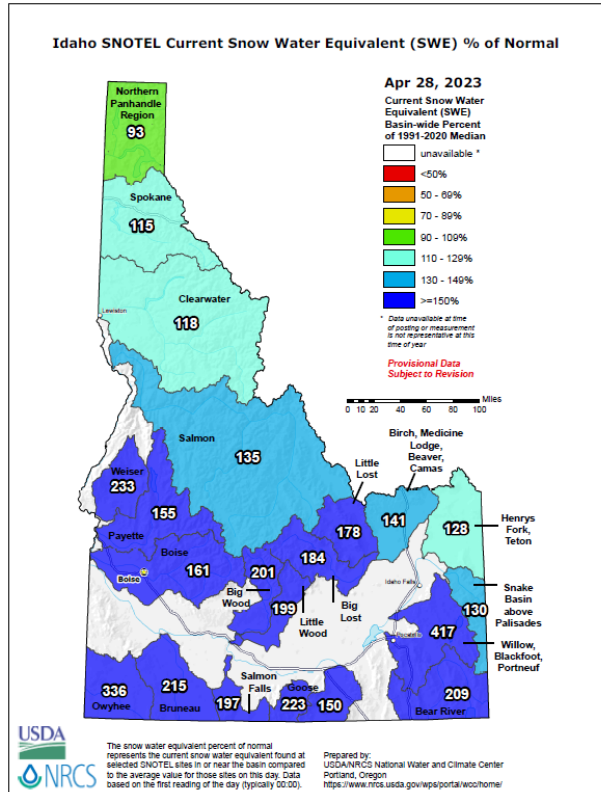
The *April 2023 As-Applied Order* states: “If a junior ground water user cannot establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user.” (*April 2023 As-Applied Order*, p. 6; Budge Decl., Ex. A-2.) The Department has issued a news release stating: “Approximately 900 ground water rights junior to December 30, 1953, not protected by an approved mitigation plan, could be subject to curtailment as this irrigation season develops.” (Budge Decl., Ex. E.) In addition, there is uncertainty as to whether IGWA’s mitigation plans will be effective in 2023, putting hundreds of thousands more acres at risk of curtailment. (Budge Decl., p. 4, ¶ 9.)

It is important to distinguish the present circumstance against the Basin 37 delivery call where the Director was permitted to take immediate action. There, there was no methodology order in place, and Basin 37 was in a severe drought. By contrast, the snowpack in the Upper Snake River Basin is well above average, with some tributary basins such as the Portneuf experiencing flooding for several weeks. Ironically, flooding of the Portneuf River is not taken into account in the *Fifth Methodology Order*, resulting in a water supply windfall to the SWC. Below are Idaho snow water equivalency maps comparing the spring of 2021, when curtailment was allowed in Basin 37, with the Spring of 2023:



<https://idwr.idaho.gov/water-data/water-supply/snow-water-equivalency/>

The situation has even improved since then, as shown by the April 28, 2023, snow water equivalency:



https://www.wcc.nrcs.usda.gov/ftpref/data/water/wcs/gis/maps/id_swepctnormal_update.pdf

4. There is no need to immediately implement the *Fifth Methodology Order* because the Director can administer water rights under the *Fourth Methodology Order*.

A stay of implementation of the *Fifth Methodology Order* will not interfere with or prevent water rights administration because the Director can apply the *Fourth Methodology Order*, as has occurred since 2016, until the *Fifth Methodology Order* are properly adjudicated.

5. The Director should be ordered to continue the after-the-fact hearing to October 16-20, 2023.

Due process requires that the Ground Water Districts be given a hearing “at a time which allows [them] to reasonably be prepared to address the issue[s].” *State v. Doe*, 147 Idaho at 546. They are entitled to “to confront all the evidence adduced against [them], in particular that evidence with which the decisionmaker is familiar.” *Vanelli*, 667 F.2d at 780.

The Department spent eight months analyzing data and developing the *Fifth Methodology Order*. The Director then scheduled a hearing in 39 days, giving junior-priority groundwater

users five weeks to review what took the Department some eight months to develop. This is woefully inadequate, patently unjust, and unnecessary as any sense of urgency was created by the Director's decision to wait until the start of the irrigation season to spring the *Fifth Methodology Order* on water users when he could and should have held a hearing in advance. Monumental changes to the methodology must be published long before crops are in the ground so farmers, cities, and other can prepare for it.

Given the volume of the data utilized in the *Fifth Methodology Order*, the complexity of the analyses, and the fact that it was developed behind closed doors based on evidence that is not in the record of the contested case, it is impossible for the Ground Water Districts to be fairly prepared for a hearing in five or six weeks, especially with the Director blocking the Ground Water Districts from access to some of the information he considered. It is simply impossible to conduct discovery necessary to collect the data and analyses underlying the *Fifth Methodology Order*, analyze that data, conduct site inspections, prepare expert reports, formulate legal and technical positions, develop evidence, organize evidence for presentation at a contested case hearing, and otherwise prepared for a hearing in 39 days. As mentioned above, one of the Ground Water Districts' retained experts will be out of the country for three weeks leading up to the hearing, another will be out of the country during the hearing, and another is unable to attend the hearing for medical reasons.

A rushed after-the-fact hearing does not remedy the Director's violations of due process and the APA. Staying implementation of the *Fifth Methodology Order* and allowing the Director to proceed with administration under the *Fourth Methodology Order* removes the exigency that compelled the Director to schedule an immediately hearing, allowing the hearing to be continued to the Fall of 2023 to allow affected parties to adequately prepare.

Therefore, this court should instruct the Director to continue the after-the-fact hearing to October 16-20, 2023. The parties to this case are all involved in another case that is scheduled for hearing that week but is not time-sensitive and can be continued to a later date. The court has authority to require this as an "appropriate term" of the stay of agency action under Idaho Code § 67-5274, and also pursuant to the court's power to grant equitable relief when justice so requires.

6. The Director should be ordered to disclose all documents and other information he considered in developing the *Fifth Methodology Order*.

On May 5, 2023, the Director implemented a scheme to block the Ground Water Districts from discovering all of the information he considered in developing the *Fifth Methodology Order*. First, he issued the *Order Limiting Evidence* which (i) designates two Department staff members, Matt Anders and Jennifer Sukow, who would be permitted to testify at the hearing, and (ii) limits the topics and data they may discuss to certain technical matters. (Budge Decl., Ex. L.) In addition, the Director issued the *Order Limiting Discovery* which precludes the Ground Water Districts from asking Mr. Anders and Ms. Sukow “questions regarding the Director’s deliberative process on legal and policy considerations.” (Budge Decl., Ex. M.)

Based on these orders, at the depositions for Ms. Sukow and Matt Anders held May 8 and 10, 2023, respectively, counsel for the Department instructed them to not answer almost 50 questions on the basis that they related to the Director’s deliberative process. (Budge Decl., Ex. F). Among the questions they refused to answer are the following:

- What other documents are responsive to [Deposition Notice] Request No. 1, that show your involvement in the issuance of the *Fifth Methodology Order* outside of the technical working group documents that you’ve just described?
- Did you prepare any analysis, memos, those kinds of things that you would have shared?
- Are you aware of any documents, whether or not they were authored by you, that reflect other Department employees’ input on the Department’s decision to move from the steady state to transit modeling in the *Fifth Methodology Order* that are not uploaded to the website?
- Was there any discussion about whether or not using the transient model might impact analysis of futile call?
- Did you provide to Mat Weaver any documents relating to the *Fifth Methodology Order* or the *April 2023 As-Applied Order* that have not been uploaded to the Department’s website?
- Did you participate in any meetings involving Mat Weaver, or meetings with Mat Weaver or the Director involving the *Fifth Methodology Order* or the *April 2023 As-Applied Order*?
- How were the comments that Sophia and Greg considered on January 16th, how are those considered in the Department?

- Did you have discussions with any Department staff members about potential use of a trim line?
- Were concepts of reasonable use, futile call, or full economic development ever brought up during your work on the *Fifth Methodology Order*?

As this list shows, many of the questions that Department staff refused to answer asked for information the Director considered in developing the *Fifth Methodology Order*, not his deliberative process for evaluating information.

Since the topics that these orders allow Mr. Andrews and Ms. Sukow to discuss do not encompass all of the information the Director considered in developing the *Fifth Methodology Order*, and do not address all of the issues involved in the *Fifth Methodology Order*, the Ground Water Districts served upon the Department an I.R.C.P. 30(b)(6) deposition notice asking to depose Department personnel who can speak to information considered by the Director that goes beyond the topics and data that Mr. Anders and Ms. Sukow are permitted to address under the *Order Limiting Evidence* and the *Order Limiting Discovery*. (Budge Decl., p. 5 ¶ 15.) The Department refused to produce deponents in response to the I.R.C.P. 30(b)(6) based on the *Order Limiting Evidence* and the *Order Limiting Discovery*. *Id.*

Thus, the *Order Limiting Evidence* and the *Order Limiting Discovery* have been employed to hide not only the Director’s deliberative process but to also hide information he considered in developing the *Fifth Methodology Order*. The Director has taken these actions in reliance on rule 521 of the Department’s rules of procedure which authorizes the Director to “limit the type and scope of discovery.” IDAPA 37.01.01.521. However, this rule must be applied in a manner that is both constitutional and consistent with the APA. *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 241 (2009); *State v. Perkins*, 135 Idaho 17, 22 (Ct. App. 2000).

Due process entitles the Ground Water Districts “to confront all the evidence adduced against [them], in particular that evidence with which the decisionmaker is familiar.” *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 780 (9th Cir. 1982) (emphasis added). Likewise, the APA requires “a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary,” and “the opportunity to respond and present evidence and argument on all issues involved,” Idaho Code § 67-5242(3) (emphasis added). The Director has applied rule 521 in a manner that violates both due process and the APA.

The Director appears to claim that information related to his deliberative process is exempt from due process and the APA. This argument fails, first and foremost, because neither the APA nor Idaho courts have recognized such a privilege. When pressed to provide a legal basis for claiming such a privilege, counsel for the Director could provide none. Because there is none. In fact, Idaho courts have already rejected the deliberative process privilege theory espoused by the Director. *The Idaho Press Club, Inc., v. Ada County*, Case No. CV 01-19-16277 (Decision and Order, filed 12/13/2019, Budge Decl., Ex. G).

Moreover, as explained above, the Department has employed the Order Limiting Evidence and the Order Limiting Discovery to block the Ground Water Districts from considering, not just his deliberative process, but actual *information* the Director considered in developing the *Fifth Methodology Order*.

Therefore, this court should instruct the Director to (a) disclose all documents and other information he considered in developing the *Fifth Methodology Order*, (b) 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*, and (c) refrain from instructing Department deponents or witnesses to not answer questions on the basis that the information pertains to the Director's deliberative process. In connection therewith, this court should vacate the *Order Limiting Evidence* and *Order Limiting Discovery*. The fact that such information has been kept from the Ground Water Districts is further reason to continue the after-the-fact hearing to October 16-20, 2023.

CONCLUSION


For the foregoing reasons, the Ground Water Districts respectfully ask this court to:

1. Stay implementation the *Fifth Methodology Order* until after it is properly adjudicated, and, in until then, continue to 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 account for the unavailability of the Ground Water Districts' expert witnesses and to give the Ground Water Districts adequate time to prepare for the hearing.
3. Instruct the Director to disclose all documents and other information he considered in developing the *Fifth Methodology Order* or the *April 2023 As-Applied Order*.


4. Instruct the Director to 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 *Order Limiting Evidence* and the *Order Limiting Discovery*.

DATED this 19th day of May, 2023.


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Signed for: Skyler C. Johns
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DYLAN ANDERSON LAW

By: 
Signed for: Dylan Anderson
Attorney for Bingham Ground Water
District

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2023, I served the foregoing document on the persons below via email or as otherwise indicated:



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