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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CITY OF POCATELLO, CITY OF IDAHO FALLS, CITY OF BLISS, CITY OF BURLEY, CITY OF CAREY, CITY OF DECLO, CITY OF DIETRICH, CITY OF GOODING, CITY OF HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF SHOSHONE, CITY OF WENDELL, BINGHAM GROUND WATER DISTRICT, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, and MCCAIN FOODS USA, INC.,

Petitioners,

vs.

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

Case No. CV01-23-08258

RESPONDENTS' MOTION AND SUPPORTING POINTS TO VACATE SHOW CAUSE HEARING

RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY

The Idaho Department of Water Resources ("Department") and its Director, Gary Spackman, move this Court to vacate the show cause hearing set for June 1, 2023, at 1:30 P.M. This motion is brought pursuant to Idaho Rules of Civil Procedure 7, 72, and 74 and other applicable law discussed below. The Court should vacate the June 1, 2023 show cause hearing because Petitioners' application for an order to show cause is procedurally flawed, and also because Petitioners improperly seek extraordinary writs for purely discretionary acts for which Petitioners have an adequate remedy at law.

BACKGROUND

On May 19, 2023, Petitioners filed *City of Pocatello, Coalition of Cities, City of Idaho Falls, Bonneville Jefferson Groundwater District, Bingham Groundwater District, and McCain Foods USA, Inc., Complaint for Declaratory Relief, Petition for Writ of Prohibition, and Petition for Writ of Mandamus* ("Complaint" or "Petition").

On the same day, the Petitioners filed *Petitioners' Motion for Order to Show Cause* ("Motion for Order to Show Cause"). In the motion, the Petitioners moved the Court "pursuant to Rule 72 of the Idaho Rules of Civil Procedure to compel Gary Spackman, Director of the Department of Water Resources, to appear and show cause, if any he has, why the Court should not grant *Petitioners' Petition for Writ of*

Prohibition and *Petition for Writ of Mandamus* filed herewith." *Motion for Order to Show Cause* at 2–3.

On May 23, 2023, Petitioners filed *Petitioners' Motion to Shorten Time for Hearing to Show Cause* ("Motion to Shorten Time"), in which they "petition the [Court] to set a hearing on June 1, 2023, at 1:30 p.m. to allow Respondents to show cause, if any they may have, why this Court should not grant Petitioners' Petition for Writ of Prohibition and Petition for Writ of Mandamus." *Motion to Shorten Time* at 2–3.

On May 24, 2023, Petitioners filed their *Second Amended Notice of Hearing to Show Cause*, noticing a hearing for June 1, 2023, at 1:30 p.m. 2d Am. Notice of Hr'g to Show Cause at 2.

ARGUMENT

The Court must vacate the June 1, 2023 show cause hearing because Petitioners setting a show cause hearing is contrary to the plain language of the Idaho Rules of Civil Procedure, and also because Idaho law forbids Petitioners from seeking extraordinary writs for purely discretionary acts for which Petitioners have an adequate remedy at law.

I. Petitioners cannot independently schedule a show cause hearing.

First, it is important to examine how Petitioners noticed the June 1, 2023 hearing. Petitioners' notice of hearing characterizes the June 1, 2023 hearing as a "Hearing to Show Cause." The June 1, 2023 hearing cannot be a hearing to show

cause. Under the Idaho Rules of Civil Procedure, parties cannot notice a hearing to show cause. I.R.C.P. 72(a) states in pertinent part that:

> An application for an order to show cause must be by verified complaint, or accompanied by an affidavit, stating the facts and grounds on which the application is based. If the court finds that an application makes a prima facie showing for an order commanding a person to do or refrain from doing specific acts… *the court must enter an order to show cause* to the opposing party to comply with the request or show cause before the court at a time and place certain why the order should not be entered. An order to show cause must be served on the party to whom it is directed, or the party's attorney of record in the action, at least 7 days before the date of the show cause hearing in the same manner as a notice for hearing of a motion. If the party to whom the order to show cause is directed opposes the entry of the order, the court must hear the show cause proceeding.

(Emphasis added.)

As the above illustrates, if a show cause hearing is set, it must be set by the court after the court itself makes a finding that an application makes a prima facie showing justifying a show cause order. Only after the court makes the necessary finding will the court—not the petitioner—issue a show cause order and schedule a hearing. "If the *court finds* that an application makes a prima facie showing for an order commanding a person to do or refrain from doing specific acts… *the court must enter an order to show cause*… ." I.R.C.P. 72(a) (emphasis added). Accordingly, Petitioners went outside the Idaho Rules of Civil Procedure by taking it upon themselves to contact the clerk of court and setting the June 1 show cause hearing.

There is no authority for Petitioners to do what they are attempting to do. If the Court allows the show cause hearing to proceed, the Court is setting a precedent

that parties may ignore the Idaho Rules of Civil Procedure to obtain what amounts to an impermissible interlocutory appeal. The Idaho Supreme Court warned of this just last month, advising that:

> We are also mindful that under the circumstances presented here, granting Petitioners' request would essentially invite the media and others to bring a direct challenge to this Court any time a trial judge issues a nondissemination order or admonishes the attorneys not to discuss the case with the media—without first attempting to resolve the issue before the court issuing the order. While we recognize the high public interest in such matters, and the media's important role in providing the public information, we cannot routinely entertain requests to grant an extraordinary writ where a plain, speedy, and adequate remedy is still available.

In re Petition for Writ of Mandamus or Writ of Prohibition, No. 50482, 2023 WL 3050829, at *10 (Idaho Apr. 24, 2023).

Because Petitioners have acted outside the Idaho Rules of Civil Procedure, the Court must vacate the hearing.

II. Even if Petitioners could set their own show cause hearing, the hearing set for June 1 violates I.R.C.P. 74(b)(1)(B)'s 14-day requirement.

Petitioners seek an alternative writ of mandate and prohibition pursuant to I.R.C.P. 74(a)(3).[1] The proper procedure for obtaining an alternative writ is articulated under I.R.C.P. 74(b)(1)(B), which states that:

[1] The Petitioners' fail to specify whether they are seeking peremptory or alternative writs. "[W]rits must be either alternative or peremptory." I.C. § 7-403; *see also* I.C. § 7-304 ("The writ may be either alternative or peremptory.") The Nebraska Supreme Court succinctly summarized the difference as follows:

> The basic difference between these two types of writs is that alternative writs require the defendant be given an opportunity to show cause why he or she has not done as commanded, whereas peremptory writs are

> Copies of the summons, petition, any affidavits, *and the alternative writ must be served upon the defendant at least 14 days before to [sic] the date of any show cause hearing.*[2]

(Emphasis added.)

Here, the Court has not yet issued a writ, let alone served the Director with it, and an "alternative writ must be served upon the defendant at least 14 days before to [sic] the date of any show cause hearing." I.R.C.P 74(b)(1)(B).

Moreover, the Petitioners filed their respective petition and supporting declarations on Friday May 19, 2023. Yet Petitioners set a show cause hearing only 13 days later on Thursday June 1, 2023. Apparently recognizing the procedural problem, on May 23, 2023, Petitioners filed their Motion to Shorten Time requesting that the Court "exercise its discretion to shorten the time for the hearing." *Motion to Shorten Time* at 2. The 14-day requirement is not discretionary, it is mandatory: "[c]opies of the summons, petition, any affidavits, and the alternative writ *must be*

> generally issued in an ex parte fashion and do not require notice or that the defendant be given an opportunity to show cause why he or she has not done as commanded. When the right to require the performance of the act is clear and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance. In all other cases, the alternative writ must be first issued….

State ex rel. Shepherd v. Nebraska Equal Opportunity Comm'n, 251 Neb. 517, 522 (1997) (internal citations and quotations omitted).

It is clear the Petitioners are requesting alternative writs as evidenced by their request for a show cause hearing. *Motion for Order to Show Cause* at 3; *see also* I.R.C.P 74(b)(1)(C) ("([N]o peremptory writ may issue as a result of a contested show cause hearing[]").

[2] I.R.C.P 74(b)(1)(B) also buttresses the earlier point that only the court may set a show cause hearing (as part of the writ itself).

served upon the defendant at least 14 days before to [*sic*] the date of any show cause hearing." I.R.C.P. 74(b)(1)(B) (emphasis added). Again, because the June 1 show cause hearing is counter to the Idaho Rules of Civil Procedure, the Court must vacate the hearing.

III. Writs of mandate and prohibition are never an appropriate remedy when a public official is exercising discretionary authority.

Petitioners seek to compel the Director of the Department of Water Resources, Gary Spackman, to appear and show cause why the Court should not issue a writ of mandamus and/or writ of prohibition:

> (1) instruct[ing] the Department to vacate the Scheduling Order and Discovery Order and reschedule the hearing for late 2023 or early 2024 to accommodate discovery in this matter; (2) instruct[ing] the Director to disclose all documents and other information he considered in developing the Fifth Methodology Order, including documents on the Department's deliberative process; [and] (3) instruct[ing] the Director to allow deposition of Department witnesses on issues the Department claims are protected by deliberative process.

Motion for Order to Show Cause at 3.

A writ of mandamus is the "proper remedy for one seeking to require a public officer to carry out a clearly mandated, *non-discretionary ministerial act*… ." *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, 523, 387 P.3d 761, 776 (2015) (emphasis added) (citations omitted). Similarly, a writ of prohibition "will not issue to compel the performance of a purely discretionary function." *Hepworth Holzer, LLP v. Fourth Jud. Dist. of State*, 169 Idaho 387, 395, 496 P.3d 873, 881 (2021) (citations omitted). "Matters which clearly fall within the discretion of the district court and are, therefore, not proper for a writ of mandate or prohibition, which can issue only

in matters where there is *no discretion to be exercised*." *State v. Dist. Ct. of Fourth Jud. Dist.*, 143 Idaho 695, 700, 152 P.3d 566, 571 (2007) (emphasis added).

Yet as noted above, I.R.C.P. 72(a) makes clear that a court must first make a finding that an application makes a prima facie showing of entitlement to a writ, and only then does the court issue a show cause order and schedule a hearing. Here, the Petitioners' application fails to make a prima facie showing because Petitioners seek writs for purely discretionary acts. The parties have asked the Director to continue the hearing to a later date and the Director has denied their requests. Whether to continue the June 6–10 hearing is a discretionary decision by the Director. IDAPA 37.01.01.560 ("The presiding office *may* continue proceedings…."). Discovery rulings that limit the scope of discovery are likewise discretionary. IDAPA 37.01.01.521 ("The presiding officer *may* limit the type and scope of discovery.")

During the prehearing conference on April 28, 2023, in response to the Director's offer to make technical staff available to discuss the technical aspects of the Methodology Order, IGWA's counsel T.J. Budge stated that he was "interested more in the policy related decisions… outside of the technical input...." Prehr'g 37:55–38:17. Mr. Budge then advised that "I am assuming the Director was not involved in writing [the Methodology Order]… [but he] could be mistaken about that." *Id.* 38:30–38:37. Mr. Budge then stated "[w]e need to understand who participated [in writing the Methodology Order] because we need to understand what their thinking was about some of those decisions." *Id.* 38:38–38:45.

The Director responded:

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

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

On May 5, 2023, the Director issued an *Order Denying the Cities' Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions*, reiterating that Matthew Anders and Jennifer Sukow are the witnesses that will testify on behalf of the Department at the hearing to explain the facts and information the Department considered in updating the Methodology Order and As-Applied Order. The Director also limited the scope of deposition questions to Department employees, stating:

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

Order Den. the Cities' Mot. for Appoint. of Independent Hr'g Officer & Mot. for Continuance & Limit'g Scope of Deps. at 4, *In re Distribution of Water to Various Water Rights Held by or for Benefit of A&B Irr. Dist., Am. Falls Reservoir Dist. #2, Burley Irr. Dis., Milner Irr. Dist., Minidoka Irri. Dist., North Side Canal Co., & Twin Falls Canal Co.* (Idaho Dep't of Water Res. May 5, 2023). The above discussion shows that the Director perceived the decision to limit the scope of discovery as a discretionary function and acted within the scope of that authority.

Because extraordinary writs are only properly sought to compel non-discretionary acts and because Petitioners are seeking extraordinary writs related to discretionary functions, the Petitioners' application fails to make a prima facie showing of entitlement to a show cause hearing under I.R.C.P. 72. Accordingly, the Court can and should deny Petitioners' request for a writ of mandate and a writ of prohibition and vacate the June 1 show cause hearing.

IV. Writs of mandate and prohibition are not an appropriate remedy when petitioners have an adequate alternative remedy.

Similarly, extraordinary writs are only permissible when the petitioner lacks an adequate alternative remedy. "[T]he existence of an adequate remedy in the ordinary course of law, either legal or equitable in nature, will prevent the issuance of a writ of mandamus." *Coeur D'Alene Tribe*, 161 Idaho at 523, 387 P.3d at 776. The party seeking the writ bears the burden of proving the lack of an adequate alternative remedy. *Beck v. Elmore Cty. Magistrate Court (In re Writ of*

Prohibition), 168 Idaho 909, 928, 489 P.3d 820, 839 (2021); *see also Coeur D'Alene Tribe*, 161 Idaho at 523, 387 P.3d at 776.

Petitioners have failed to make a prima facie showing that they lack an adequate alternative remedy. Petitioners make a conclusory statement that they lack an adequate remedy to prevent what they describe as "Respondent's violations of the APA, IRCP and Petitioners' procedural due process rights."[3] *Complaint* at 28. Petitioners' conclusory allegation is inadequate to make a prima facie showing for an extraordinary writ. The party seeking an extraordinary writ bears the burden of *proving* the absence of an adequate remedy. *In re Petition for Writ of Mandamus or Writ of Prohibition*, No. 50482, 2023 WL 3050829, at *6 (Idaho Apr. 24, 2023).

Here, the Petitioners have alternative remedies. The Petitioners have an administrative hearing under Idaho Code § 42-1701A(3) scheduled for June 6–10, 2023. The Petitioners then have the right to petition the district court for review under I.R.C.P. 84 and Idaho Code § 67-5270 and the right to appeal to the Idaho Supreme Court after that. In another case, this Court stated that the issues raised by the petitioner "can properly be raised and addressed on judicial review following issuance of a final order. That there is no impediment to raising these issues on

[3] As an aside, the Idaho Supreme Court has been clear that even due process allegations first require exhausting administrative remedies. *See White v. Bannock Cnty. Commissioners*, 139 Idaho 396, 400, 80 P.3d 332, 336 (2003) (Whether due process is satisfied is an issue which should have been pursued before the county zoning authority). Even purported First Amendment violations require exhausting all available remedies before seeking relief via an extraordinary writ. *In re Petition for Writ of Mandamus or Writ of Prohibition, No. 50482*, 2023 WL 3050829, at *7 (Idaho Apr. 24, 2023).

review of a final order is telling proof that judicial review of the final order is an adequate remedy." Order Dismissing Pet. for Judicial Review at 4–5, *City of Pocatello v. Spackman*, No. CV01-17-23146 (Ada County Dist. Ct. Idaho June 4, 2018). While Petitioners will also undoubtedly complain about the expenditure of time and resources if they are forced to go forward with the hearing on June 6, such complaints are not valid grounds for claiming an inadequate remedy. *Id*. at 5. Indeed, if the Petitioners' argument prevailed, every criminal defendant or litigant in Idaho would be entitled to immediate interlocutory appellate review (via extraordinary writ) for every discretionary ruling made by any trial judge or agency head. This is not the law in Idaho. Extraordinary writs are not a substitute for the appeal process. *Smith v. Young,* 71 Idaho 31, 34, 225 P.2d 446, 468 (1950).

Because extraordinary writs are only proper when no adequate alternative remedy exists, Petitioners' application fails to make a prima facie showing of entitlement to a show cause hearing under I.R.C.P 72. Respondents request that the Court vacate the June 1, 2023 show cause hearing and reject Petitioners' request for writs of mandate and prohibition.

CONCLUSION

Petitioners' timing and action of setting a show cause hearing is contrary to the plain language of the Idaho Rules of Civil Procedure. In accordance with IDAPA 37.01.01.560 and 37.01.01.521, the Director of the Department acted within his discretionary authority regarding the actions for which Petitioners now seek an order to show cause, therefore, writs of mandate and prohibition are not an

appropriate remedy in this matter. Finally, Petitioners have an adequate alternative remedy, removing the possibility of writs of mandate and prohibition being an appropriate remedy in this matter.

For the foregoing reasons, the Department and its Director respectfully request the Court vacate Petitioners' June 1, 2023 show cause hearing and reject Petitioners' request for writs of mandate and prohibition.

DATED this 26th day of May 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

GARRICK L. BAXTER
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of May 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

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