

LAWRENCE G. WASDEN
Attorney General

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

GARRICK BAXTER #6301
MICHAEL C. ORR # 6720
MEGHAN CARTER #8863
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
michael.orr@ag.idaho.gov
meghan.carter@idwr.idaho.gov

Attorneys for Respondents

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

SOUTH VALLEY GROUND WATER
DISTRICT and GALENA GROUND WATER
DISTRICT,

Petitioners,

vs.

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

Respondents.

CASE NO. CV07-2021-00243

**RESPONDENTS' MOTION TO
DISMISS PETITION FOR JUDICIAL
REVIEW, COMPLAINT FOR
DECLARATORY RELIEF,
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION, OR
ALTERNATIVELY, WRIT OF
PROHIBITION**

RESPONDENTS, the Idaho Department of Water Resources and Gary Spackman, in his official capacity as the Director of the Department (respectively, the “Department” and the “Director”; collectively, the “Respondents”), by and through counsel of record, and pursuant to Rule 12(b)(1) of the Idaho Rules of Civil Procedure, hereby move this Court to dismiss, for lack of subject matter jurisdiction, the *Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition*, filed in this proceeding on May 24, 2021 (“*Petition*”). The grounds for this motion are discussed below. Respondents also request oral argument and expedited consideration of this motion. This motion is made in lieu of a responsive pleading solely for purposes of asserting the defense of lack of subject matter jurisdiction. I.R.C.P. 12(b)(1). Respondents reserve their right to file a responsive pleading or additional motions if this Court denies this motion in whole or part.¹

BACKGROUND

The Director issued a *Notice of Administrative Proceeding, Pre-Hearing Conference and Hearing* on May 4, 2021, under the caption “In the Matter of Basin 37 Administration,” and Department Docket No. AA-WRA-2021-001 (“*Notice*”). *Thompson Dec.*, Ex. I.² The *Notice* stated that a drought is predicted for the 2021 irrigation season, and the water supply in Silver

¹ The *Petition* includes many allegations that are irrelevant to the question of whether this Court has subject matter jurisdiction over the claims for relief asserted in the *Petition*, and therefore are not addressed in this motion. This should not be construed as an admission of any allegation not specifically confirmed by this motion. Respondents reserve their right to deny any and all other allegations in the *Petition* via a responsive pleading, should this Court deny this motion in whole or part.

² “*Thompson Dec.*” refers to the *Declaration of Travis L. Thompson in Support of Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition*, filed in this proceeding on May 24, 2021.

Creek³ and its tributaries may be inadequate to meet the needs of surface water users. *Id.* The Notice also stated that curtailment model runs of the Wood River Valley Groundwater Flow Model v.1.1 show that curtailment of ground water rights during the 2021 irrigation season would result in increased surface flows for the holders of senior surface water rights during the 2021 irrigation season. *Id.* The Notice also stated that based on the information from the model, the Director believes that withdrawal of water from ground water wells in the Wood River Valley south of the City of Bellevue (commonly referred to as the Bellevue Triangle), would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season. *Id.* The Notice also stated that “pursuant to Idaho Code § 42-237a.g. and IDAPA 37.01.01.01.104, the Director is initiating an administrative proceeding to determine whether water is available to fill the ground water rights,” excluding domestic and stockwater rights as defined in Idaho Code §§ 42-111 and 42-1401A(11), “within the Wood River Valley south of Bellevue, as depicted in the attached map.” *Id.* The Notice stated that “[i]f the Director concludes that water is not available to fill the ground water rights, the Director may order the ground water rights curtailed for the 2021 irrigation season.” *Id.* The attached map showed the “Potential Area of Curtailment.” *Id.*

The Notice instructed those who wish to participate in the hearing to send written notice to the Department by May 19, scheduled a prehearing conference for May 24, and a hearing on the merits for June 7-11. *Id.* The Notice stated that participants in the prehearing conference should be prepared to discuss the procedure for the hearing, remote participation at the hearing, discovery, witnesses, and burdens. *Id.* The Director also issued, on May 11, a request for a staff

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

memorandum addressing facts and technical information potentially relevant to the administrative proceeding, to be provided on May 17. *Id.*, Ex. N. The staff memorandum was posted on the Department’s website on May 17.⁴

Numerous persons and entities filed notices of intent to participate in the administrative proceeding. *Id.*, Ex. U. Several motions were filed prior to the prehearing conference, including two motions to dismiss the administrative proceeding, an alternative motion for a continuance of the hearing, and a motion for postponement of the hearing.⁵ *Id.* The Director issued orders denying the motions (except for the motion to authorize discovery, which was granted) on May 21 and May 22. *Id.*, Exs. O, P, Q. Later, on May 22, South Valley Ground Water District (“South Valley”), filed a motion requesting that the Director designate the order denying South Valley’s motion to dismiss as a “final order” subject to judicial review under the Idaho Administrative Procedure Act. *Id.* ¶ 24. The Director denied that motion in an order issued on May 24. *Id.*, Ex. T.

The prehearing conference was held on May 24. *Id.* ¶ 25. The discussion included, but was not limited to, the subjects identified in the Notice, and the Director made determinations on these subjects. The Director also informed the parties that he was denying South Valley’s motion to designate the order denying South Valley’s motion to dismiss as a final order, and

⁴ The “staff memorandum” consists of four memoranda prepared by four different Department staff members, each of which addresses different aspects of the Director’s requests for facts and technical information. The supporting data files for one memorandum was posted on May 19, and reposted on May 21 after it was discovered that one of the files would not open. Minor typographical errors in two of the memoranda were addressed in the *Prehearing Order; Scheduling Order* issued on May 25. *Declaration of Michael C. Orr* (filed herewith) (“*Orr Dec.*”), Ex. A.

⁵ Motions were also filed for clarification or more definite statements of certain matters, to appoint an independent hearing officer, and to authorize discovery. *Thompson Dec.*, Ex. U.

would issue a written order to that effect. *Id.* ¶ 25. Later that day (May 24), South Valley filed the *Petition*, and other related documents, with this Court. The next day, the Director issued a prehearing and scheduling order, *Declaration of Michael C. Orr*, Ex. A, and the order denying South Valley’s motion to designate the order denying South Valley’s motion to dismiss as a final order. *Thompson Dec.*, Ex. T.⁶

ARGUMENT

The *Petition* should be dismissed because this Court lacks subject matter jurisdiction over the *Petition*’s claims. All of the *Petition*’s counts expressly or necessarily seek judicial review of actions taken by the Director before the Petitioners have exhausted administrative remedies, and in the absence of a final appealable order. No exceptions to the exhaustion and final order requirements apply in this case; and requiring the Petitioners to exhaust the full gamut of their administrative remedies, including participation in the pending administrative proceeding, does not inflict an irreparable injury on the Petitioners.

I. Legal Standards.

“To adjudicate a given claim, a court must have jurisdiction over the subject matter of the claim” *Matter of Hanson*, 121 Idaho 507, 509, 826 P.2d 468, 470 (1992) (citation omitted).

“Whether an appeal is taken from an appealable order implicates the subject matter jurisdiction of this Court,” and thus “can be raised at any time by the parties or by the Court *sua sponte*.” *Int. of Dudley*, 167 Idaho 56, 57, 467 P.3d 420, 421 (2020). Idaho courts “are obligated” to ensure their own subject-matter jurisdiction. *Laughy v. Idaho Dep’t of Transp.*, 149 Idaho 867, 870, 243

⁶ The Director retained discretion to reconsider the motion to designate a final order if the parties to the contested case entered into stipulation regarding designation of the order denying South Valley’s motion to dismiss as a “final order.” *Id.*

P.3d 1055, 1058 (2010). Rule 12(b)(1) authorizes the filing of motion to dismiss a civil action for lack of subject matter jurisdiction prior to the filing of a responsive pleading. I.R.C.P.

12(b)(1). “Factual challenges” to subject matter jurisdiction under Rule 12(b)(1) do not provide non-movants with the same protections as a 12(b)(6) motion, and “allow the court to go outside the pleadings without converting the motion into one for summary judgment.” *Vickers v. Idaho Bd. of Veterinary Med.*, 167 Idaho 306, 309, 469 P.3d 634, 637 (2020) (citations omitted).

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE PETITION’S REQUEST FOR JUDICIAL REVIEW.

The *Petition* expressly seeks “judicial review” of “the Director’s actions” in the pending administrative proceeding, pursuant to the judicial review provisions of Idaho Administrative Procedure Act (“IDAPA”). *Petition* at 1, 4, 11-12, 17.⁷ The Idaho Supreme Court has held that “[a]ctions by state agencies are not subject to judicial review unless expressly authorized by statute,” and “[w]ithout statutory authority, the reviewing court lacks subject-matter jurisdiction.” *Vickers*, 167 Idaho at 309, 469 P.3d at 637 (citations omitted) (brackets in original). The pending administrative proceeding is a “formal proceeding” initiated pursuant to IDAPA 37.01.01.104 that may result in issuance of an “order” as defined in Idaho Code § 67-5201(12), and therefore is a “contested case.” *Laughy*, 149 Idaho at 870, 243 P.3d at 1058. IDAPA does not authorize judicial review of the Director’s actions in a contested case, however, unless the petitioner has exhausted administrative remedies, and until the Director has issued a final administrative order. Idaho Code §§ 67-5270(3), 67-5271(1); *Laughy*, 149 Idaho at 875, 243 P.3d at 1063 (2010). Thus, a court lacks subject matter jurisdiction over a petition for

⁷ The pages of the *Petition* are not numbered. Citations to page numbers of the *Petition*, therefore, refer to the page number displayed at the top of screen when viewing the .pdf file copy of the *Petition*.

judicial review of the Director's actions in a contested case unless and until the petitioners have exhausted administrative remedies, and the Director has issued a final order.

a. There is no “Final Order” for Purposes of Judicial Review.

Under IDAPA, an “order” is “an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons.” *Williams v. State, Bd. of Real Est. Appraisers*, 149 Idaho 675, 677, 239 P.3d 780, 782 (2010) (quoting Idaho Code § 67–5201(12)). A “final order” is an order “that is not subject to further administrative review” and “resolves all issues, or the last unresolved issue, presented in the contested case so that it constitutes a final determination of the rights of the parties. If issues necessary for a final determination of the parties’ rights remain unresolved, there is no final order.” *Id.* at 678, 239 P.3d at 783. Intermediate or interlocutory orders that are “not a final decision of the whole controversy” or are “made or done during the progress of an action,” are not “final orders” for purposes of judicial review under IDAPA. *Id.* This rule specifically includes agency orders denying motions to dismiss. *See id.* (“An order simply denying a motion to dismiss is not a final order.”).

Under this framework, no “final order” has yet been issued in this case. The only orders that have been issued are intermediate or interlocutory orders. *Id.* “Absent a final order, any petition for judicial review is premature.” *Laughy*, 149 Idaho at 876, 243 P.3d at 1064.

b. The Petitioners Have Not Exhausted Administrative Remedies.

The pending contested case is only in its preliminary stages. While the staff memorandum has been lodged, a prehearing conference has taken place, and some preliminary motions have been decided, discovery is still underway and the parties have not yet disclosed all

witnesses or submitted exhibits lists.⁸ The hearing on the merits will not take place until the second week of June. In the absence of a hearing, the Ground Water Act requires parties aggrieved by the Director's actions to comply with the requirements of Idaho Code § 42-1701A (3) before seeking judicial review. Idaho Code § 42-237e; *Order on Motion to Determine Jurisdiction; Order Dismissing Petition for Judicial Review, Sun Valley Co. v. Spackman, et al.*, Ada County Case No. CV-01-16-23185 at 2-4 (Feb. 16, 2017).⁹ The Petitioners have not done so.

Moreover, the administrative hearing will provide the Petitioners with opportunities to protect their interests and water rights. The Petitioners and other ground water users within the potential area of curtailment will have a full opportunity at the hearing to call witnesses and submit evidence showing that they should not be subject to curtailment, to make motions, and to oppose motions offered by other parties. The Petitioners will also have an opportunity to challenge and object the staff memorandum, to cross-examine the Department staff members who prepared the staff memorandum, to object to witness testimony and exhibits offered by other parties, and to cross-examine witnesses called by other parties. Even if the Director ultimately issues a curtailment order that includes ground water rights held by the Petitioners, they will have the opportunity to seek reconsideration or modification of the order. Timely and meaningful administrative remedies remain available to the Petitioners.

The Petitioners argue, however, that they have exhausted administrated remedies simply because they moved for dismissal or continuance of the contested case, and then moved for

⁸ Expert witness disclosures were due on May 26; all fact witnesses must be disclosed by close of business today, May 28.

⁹ This Court may take judicial notice of this decision pursuant to I.R.E. 201.

designation of the order denying the motion to dismiss as a “final order.” *Petitioners’ Mem.* at 13-14.¹⁰ This argument lacks merit because the requirement of exhausting administrative remedies means “[a] party seeking judicial review must ‘run the full gamut of administrative proceedings before an application for judicial relief may be considered.’” *Hart v. Idaho State Tax Comm’n*, 154 Idaho 621, 623, 301 P.3d 627, 629 (2012) (citation omitted). The motions cited by the Petitioners do not “run the full gamut of administrative proceedings” in this case, *id.*, because discovery is still underway, witness and exhibits lists have not been submitted, the hearing has not taken place, and no final order has been issued.

c. No Exceptions to the Exhaustion Requirement Apply.

The Petitioners argue in the alternative that they are not required to exhaust administrative remedies because of exceptions to the exhaustion requirement recognized in Idaho Code § 67-5271(2)¹¹ and several decisions of the Idaho Supreme Court. *Petitioners’ Mem.* at 12-14. The Petitioners argue they will be irreparably harmed by “being forced to endure an unprecedented proceeding that does not provide ‘a meaningful opportunity to be heard in a meaningful manner.’” *Id.* at 14 (underlining removed). The Petitioners argue that the contested case is a “rush to judgment” that violates their due process rights and results in “an arbitrary process” that threatens curtailment of their water rights. *Id.* The Petitioners argue that the schedule for this contested case “violates Idaho law” because it is contrary to the Idaho Supreme

¹⁰ “*Petitioners’ Mem.*” refers to the *Memorandum in Support of Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition*, which was filed on May 24, 2021.

¹¹ Section 67-5271(2) states as follows: “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.”

Court’s decision in *Am. Falls Reservoir Dist. No. 2 v. IDWR* (“ARFD2”),¹² and thus “the ‘interests of justice’ clearly require an exception to prevent imminent and irreparable harm.” *Id.*

i. Any Alleged Procedural or Due Process Violations Can, and Must, be Addressed in Review of the Final Order.

The Petitioners, however, have not asserted, and cannot show, that any alleged procedural or due process violations that may arise from the schedule established for this contested case cannot be adequately remedied by “review of the final agency action.” Idaho Code § 67-5271(2). Indeed, at this point the Petitioners’ allegations that their due process rights will be violated and “irreparable harm” will be inflicted are speculation and lack support in the record. *Order Denying Application for Temporary Restraining Order* at 3 (May 27, 2021). As previously discussed, the schedule allows for the Petitioners to fully develop their evidence and arguments, and to challenge the evidence and arguments offered by other parties. Section 67-5271(2)’s exception to the exhaustion requirement thus does not apply in this contested case. Any alleged procedural or due process violations that occur during the hearing and the remaining course of the contested case can—and therefore must—be addressed through judicial review of the final order.

Moreover, the Petitioners’ assertions of “irreparable injury” incorrectly assume that curtailment of their water rights under any circumstances would be a legally cognizable “injury.” This view is contrary to Idaho’s prior appropriation doctrine. Senior surface water users presumably have also “planted and started irrigating . . . valuable crops and forage,” *Petitioners’ Mem.* at 2, 14, 27, and these investments may be threatened by water shortages due to the drought predicted for the 2021 irrigation season. As the Idaho Supreme Court has recognized,

¹² 143 Idaho 862, 154 P.3d 433 (2007).

the prior appropriation doctrine as established by Idaho law can be “harsh,” especially in “times of drought.” *AFRD2 v. IDWR*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007). “First in time is first in right” among those beneficially using the water, *Id.* Const. XV § 3; Idaho Code § 42-106, and “it is obvious that in times of water shortage someone is not going to receive water.”

Nettleton v. Higginson, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977). The Director has an affirmative duty to distribute water in accordance with these principles of the prior appropriation doctrine. *In Re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014). Protecting the water rights of senior appropriators diverting from Silver Creek and its tributaries from the effects of ground water diversions during the 2021 irrigation season may require prompt administration of junior ground water rights in the Bellevue Triangle.

ii. *AFRD2 and the CM Rules Do Not Establish Procedural or Due Process Requirements for Scheduling of this Contested Case.*

There is no merit in the Petitioners’ argument that the exhaustion requirement does not apply because the schedule in this contested case violates the *AFRD2* decision. *Petitioners’ Mem.* at 14. The *AFRD2* decision involved questions arising under the *Rules for Conjunctive Management of Surface and Ground Water Resources* (“CM Rules”),¹³ 143 Idaho at 866, 154 P.3d at 437, which “prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right[.]” IDAPA 37.03.11.001.

This contested case is not “responding to a delivery call,” *id.*, however, but rather was initiated pursuant to the Director’s “discretionary power” under the Ground Water Act to “initiate administrative proceedings to prohibit or limit the withdrawal of water from any well”

¹³ IDAPA 37.03.11.000—050.

during any period the Director determines “that water to fill any water right in said well is not there available.” Idaho Code § 42-237a.g. This provision states that “[w]ater in a well shall not be deemed available to fill a water right therein” if “withdrawal of the amount called for by such right” would affect, contrary to the policy of the Ground Water Act, “the present or future use of any prior surface or ground water right” *Id.* (underlining added). This discretionary authority is separate from the affirmative requirement of responding to delivery calls under the CM Rules, and was not addressed in *AFRD2*. The CM Rules and *AFRD2* do not establish the legal standards for the Director’s exercise of the discretionary authority to initiate administrative proceedings under Idaho Code § 42-237a.g. See *Memorandum Decision and Order, Basin 33 Water Users, et al., v. IDWR*, Ada County Case No. CV01-20-8069, at 8-12 (Nov. 6, 2020) (distinguishing the CM Rules and the Ground Water Act).¹⁴

The Petitioners’ suggestion that this case should nonetheless be governed by the CM Rules because verbal assertions made at a water users’ meeting constituted a “delivery call” within the meaning of the CM Rules, *Petitioners’ Mem.* at 23, is contrary to the detailed requirements of a “delivery call” under CM Rule 30, which this Court discussed in the *Memorandum Decision and Order* issued on April 22, 2016, in the judicial review proceeding under Ada County Case No. CV-WA-2015-14500.¹⁵ The same conclusion applies to the Petitioners’ assertion that a declaration filed in the contested case amounted to a “delivery call.” *Petitioners’ Mem.* at 23. The declaration does not satisfy the requirements of Rule 30, and was not filed as a request to initiate administration under CM Rule 30. It was filed, rather, in response to the Director’s determination at the prehearing conference that senior surface water

¹⁴ A copy of this decision is attached to the *Orr Dec.* as “Exhibit B.”

¹⁵ A copy of this decision is attached to the *Thompson Dec.* as “Exhibit D.”

right holders would not be allowed to simply rely upon their decrees, but would also have to provide some evidence of actual injury due to ground water withdrawals in the Bellevue Triangle. *See also Prehearing Order; Scheduling Order* at 4-6 (addressing hearing procedure and setting deadlines for identification of witnesses and submission of exhibits).

The Petitioners' related argument that "every other case on conjunctive administration has spanned months or years," *Petitioners' Mem.* at 14, is also inapposite because the referenced cases were responses to delivery calls filed under the CM Rules, not under Idaho Code § 42-237.a.g. Those cases addressed delivery calls upon the Eastern Snake Plain Aquifer ("ESPA"), and involved a far larger geographic area and many more ground water diversions than this contested case. The vast majority of the ESPA diversions were much farther away from the Snake River than ground water diversions in the Bellevue Triangle are from Silver Creek and its tributaries. The impacts of the ESPA diversions on surface flows of the Snake River are far more diffuse, delayed, and attenuated than the impacts of ground water diversions in the Bellevue Triangle on the surface flows of Silver Creek and its tributaries. Resolving the ESPA cases often required long-term, multiple-season curtailments and/or mitigation plans.¹⁶

This contested case, in contrast, involves a smaller number of ground water rights pumping from a more limited area that is immediately adjacent to Silver Creek and its tributaries. These ground water uses appear to have direct, largely un-attenuated impacts on the surface

¹⁶ *See, e.g., AFRD2 v. IDWR*, 143 Idaho 862 (2007); *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 284 P.3d 225 (2012); *In the Matter of Distribution to Various Water Rights held by and for the Benefit of A&B Irr. Dist.*, 155 Idaho 640, 315 P.3d 828 (2012); *IGWA v. IDWR*, 160 Idaho 119, 369 P.3d 897 (2016); *Rangen, Inc. v. IDWR*, 160 Idaho 251, 371 P.3d 305 (2016); *North Snake Ground Water Dist. v. IDWRT*, 160 Idaho 518, 376 P.3d 722 (2016).

flows in Silver Creek and its tributaries. Further, this case only addresses potential shortages during the 2021 irrigation season, which likely will be a time of drought.

iii. The Exception to the Exhaustion Requirement Regarding Agency Actions Outside the Agency's Authority Does Not Apply in This Case.

The Petitioners' argument that the exhaustion requirement does not apply because "the agency acted outside its authority," *Petitioners' Mem.* at 13 (quoting *Lochsa Falls, LLC v. State*, 147 Idaho 232, 237 (2009)), also lacks merit. This limited exception only applies "when the agency is palpably without jurisdiction." *Schweitzer Basin Water Co. v. Schweitzer Fire Dist.*, 163 Idaho 186, 193, 408 P.3d 1258, 1265 (2017); *Park v. Banbury*, 143 Idaho 576, 581, 149 P.3d 851, 856 (2006).

This is not a case in which the Department or the Director are palpably without jurisdiction. *Id.* To the contrary, Idaho law expressly grants the Director "discretionary power" to "initiate administrative proceedings to prohibit or limit the withdrawal of water from any well" when it "would affect . . . the present or future use of any surface . . . water right" Idaho Code § 42-237a.g.

Further, the Petitioners' assertions that Idaho Code § 42-237a.g. requires the Director, before initiating such an administrative proceeding, to establish an "area of common ground water supply," or a "reasonable pumping level," or an "anticipated rate of future natural recharge," *Petitioners' Mem.* at 16-17, are not assertions that "the agency is palpably without jurisdiction" under Idaho Code § 42-237a.g. *Schweitzer Basin Water Co.*, 163 Idaho at 193, 408 P.3d at 1265; *Park*, 143 Idaho at 581, 149 P.3d at 856. They are, rather, simply assertions that the Director misinterpreted or misapplied a statute that the Director is expressly authorized to interpret and apply: Idaho Code § 42-237a sets forth the "Powers of the Director of the Department of Water Resources." Moreover, the statute explicitly provides that actions such as

establishing an “area of common ground supply” are discretionary rather than mandatory. *See* Idaho Code § 42-237a.g. (“To assist the director . . . in the administration and enforcement of this act . . . he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him”) (italics and underlining added).

IDAPA is the sole authority for obtaining judicial review of assertions that the Director’s actions in a contested case misapply a statute the Director is empowered to administer, or are an abuse of the Director’s discretion under the statute. Idaho Code § 67-5279(3)(a)-(e); *see also Vickers*, 167 Idaho at 309, 469 P.3d at 637 (“[a]ctions by state agencies are not subject to judicial review unless expressly authorized by statute,” and “[w]ithout statutory authority, the reviewing court lacks subject-matter jurisdiction.”) (citations omitted; brackets in original). IDAPA bars judicial review of such assertions in the absence of a final order and before exhausting administrative remedies. Idaho Code §§ 67-5270(3), 67-5271(1); *cf. Regan v. Kootenai Cty.*, 140 Idaho 721, 726, 100 P.3d 615, 620 (2004) (holding that “the recognized exceptions to the exhaustion doctrine do not apply” to a question of interpretation of a zoning ordinance since the ordinance was “within the zoning authority’s specialization” and “the administrative remedy is as likely as the judicial remedy to provide the wanted relief.”).

These conclusions are not altered by the Petitioners’ argument that in the *Clear Springs* decision¹⁷ the Idaho Supreme Court held that “the Director could prohibit ground water diversions under the statute in only two scenarios”—when “pumping is causing material injury,” and “to prevent aquifer mining.” *Petitioners’ Mem.* at 18. This argument finds no support in the *Clear Springs* decision, which addressed a delivery call under the CM Rules and did not engage

¹⁷ 150 Idaho 790, 252 P.3d 71 (2011).

in an analysis of the Director’s “discretionary power” under Idaho Code § 42-237a.g. To the contrary, the only purpose for which the Court looked to Idaho Code § 42-237a.g. in *Clear Springs* was to consider the ground water users’ argument that under this provision “they are protected from delivery call as long as they are maintaining reasonable pumping levels.” 150 Idaho at 803, 252 P.3d at 84. The distinctly different questions of the nature and extent of the Director’s “discretionary power” to initiate and conduct the administrative proceedings authorized under Idaho Code § 42-237a.g. were not raised or decided in the *Clear Springs* case.

For these same reasons, there is no merit in the Petitioners’ argument that the Notice is outside the Director’s authority because it “wholly ignores steps 1 and 2 of the Supreme Court’s [three-step] procedure” for conjunctive administration as set forth in *In the Matter of Distribution of Water to Various Water Rights Held By and For the Benefit of A&B Irrigation District*.¹⁸ *Petitioners’ Mem.* at 18-19. That case only addressed questions of administration under the CM Rules; it did not address any question of the Director’s “discretionary power” to initiate or conduct administrative proceedings pursuant to Idaho Code § 42-237a.g.

III. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE PETITION’S CLAIMS FOR DECLARATORY JUDGMENT.

Counts II and III of the *Petition* are declaratory judgment claims under Idaho Code § 10-1201. *Petition* at 4, 13-15. Count II alleges that Idaho Code § 42-237a.g. “does not authorize the Director to unilaterally administer ground water rights in the present case” and that “IDWR has failed to follow the proper CM Rules procedure for administration of ground water.” *Id.* at 14. Count II seeks a declaratory judgment that the Director is “without authority to unilaterally conjunctively administer ground water rights in Basin 37 without following and applying the

¹⁸ 155 Idaho 640, 315 P.3d 828 (2013).

procedures set forth in the CM Rules.” *Id.* at 19. Count III alleges that the Director “has failed to follow the proper prescribed procedures for administration and curtailment of ground water rights in Basin 37,” and this “deprives [South Valley] of a meaningful opportunity to be heard and to participate in process to take its members water rights.” *Id.* at 15. Count III seeks a declaratory judgment that “the Director’s proposed administrative process is improper, will violate the Petitioners’ right to due process rights [sic], and will cause immediate, irreparable, direct harm that is a taking.” *Id.*

These allegations and requests for relief, and the arguments offered in support, are expressly and inextricably intertwined with the Notice, orders, and proceedings to date in the pending contested case. *Petition* at 13-15, 18; *Petitioners’ Mem.* at 15-38. Any consideration by this Court of the allegations, arguments, and requests for relief will unavoidably require review of the Notice, orders, and proceedings to date in the pending contested case to determine whether the Director has violated any of the applicable standards set forth in the judicial review provisions of IDAPA. Idaho Code § 67-5279(3). Indeed, the pages of the *Petitioners’ Mem.* addressing Counts II and III read as if they are the Petitioners’ opening brief on judicial review. *Petitioners’ Mem.* at 15-38. The “declaratory judgment” claims are simply attempts to obtain judicial review outside of IDAPA’s requirements of a final order and exhaustion of administrative remedies.

As the Idaho Supreme Court held in the *Regan* decision, “[a]ctions for declaratory judgment are not intended as a substitute for a statutory procedure and such administrative remedies must be exhausted.” *Regan v. Kootenai Cty.*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004) (citation omitted). In that case, “[t]he Regans’ failure to exhaust their administrative remedies deprived the district court of subject matter jurisdiction over their claim for declaratory

relief,” and the Court therefore vacated the district court’s decision and remanded with instructions to enter an order dismissing the Regans’ declaratory judgment claim. *Id.* at 726, 100 P.3d at 620.

This principle was also confirmed in the *AFRD2* decision. That case also involved a declaratory judgment action filed in response to a pending administrative proceeding. *See AFRD2*, 143 Idaho at 868, 154 P.3d at 439 (“before the hearing could be held, American Falls filed this declaratory judgment action”). The complaint alleged the CM Rules were unconstitutional, both “on their face” and also as applied in the pending administrative case, *id.*, and in deciding these issues the district court reviewed “the actual and ‘threatened application’” of the CM Rules in the pending administrative proceeding. *Id.* The Idaho Supreme Court held the district court “was in error” when it “engaged in an analysis of the constitutionality of the Rules “‘as applied’ to the facts of this case before administrative remedies were exhausted.” *Id.* at 882–83, 154 P.3d at 453–54. The Court reasoned that a party to an administrative proceeding should not be allowed to “bypass his administrative remedies and go straight to the courthouse by the simple expedient of raising a constitutional issue” through a declaratory judgment claim. *Id.* at 871, 154 P.3d at 442.

These holdings of *Regan* and *AFRD2* are directly applicable to this case, and require dismissal of the *Petition*’s declaratory judgment counts for lack of subject matter jurisdiction. The sole avenue for obtaining judicial review of an agency’s actions and orders in a contested case is through IDAPA’s judicial review provisions, including its requirements of a final order and exhaustion of administration remedies. *Vickers*, 167 Idaho at 309, 469 P.3d at 637. This Court therefore lacks subject matter jurisdiction over the declaratory judgment counts of the

Petition. Id.; *Regan*, 140 Idaho at 726, 100 P.3d at 620; *AFRD2*, 143 Idaho at 871, 154 P.3d at 442.¹⁹

IV. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE PETITION’S REQUEST FOR A PRELIMINARY INJUNCTION.

Count IV of the *Petition* requests issuance of a Preliminary Injunction pursuant to I.R.C.P. 65. *Petition* at 15-16, 18.²⁰ A “preliminary injunction,” however, is not a cause of action unto itself but simply a remedy, and therefore is available only to the extent a court has subject matter jurisdiction over the underlying claim. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, (2008) (“A preliminary injunction is an extraordinary remedy never awarded as of right.”); *Staples v. Rossi*, 7 Idaho 618, 65 P. 67, 68 (1901) (An interlocutory or preliminary injunction is a provisional remedy granted before a hearing on the merits . . .”). In other words, this Court lacks subject matter jurisdiction over the *Petition*’s request for a preliminary injunction for the same reasons that it lacks subject matter jurisdiction over the *Petition*’s declaratory judgment claims.

This conclusion is confirmed by the allegations and arguments made in support of Count IV. This count, like the declaratory judgment counts, is based on allegations and arguments that the Director’s initiation of the pending contested case was not authorized by Idaho Code § 42-237a.g., and that the CM Rules provide the exclusive, and required, procedures for the initiation, scheduling, and conduct of a proceeding initiated pursuant to Idaho Code § 42-237a.g. *Petition* at 15-16, 18; *Petitioners’ Mem.* at 38-40.

¹⁹ The Respondents reserve any and all of their arguments that this Court should deny the requests for declaratory judgment under the applicable legal standards.

²⁰ This count’s additional request for a temporary restraining order has been denied. *Order Denying Application for Temporary Restraining Order* (May 27, 2021).

Like the declaratory judgment counts, the preliminary injunction count, and the arguments made in support of it, are expressly and inextricably intertwined with the Notice, orders, and proceedings to date in the pending contested case. *Id.* Any consideration by this Court of these allegations, arguments, and requests for relief will unavoidably require review of the Notice, orders, and proceedings to date in the pending contested case to determine whether the Director has violated any of the applicable standards set forth in the judicial review provisions of IDAPA. Idaho Code § 67-5279(3).

Like the declaratory judgment claims, the Petitioners' request for a preliminary injunction is simply an attempt to obtain judicial review outside of IDAPA's requirements of a final order and exhaustion of administrative remedies. This Court therefore lacks subject matter jurisdiction over the *Petition's* count requesting issuance of a preliminary injunction.²¹

V. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE PETITION'S REQUEST FOR A WRIT OF PROHIBITION.

Count V of the *Petition* requests issuance of a writ of prohibition "that restrains IDWR from further proceedings pursuant to its *Notice* until further order of the Court." *Petition* at 17. The allegations and arguments presented in support of this request are, again, expressly based upon the asserted legal deficiencies in the initiation, conduct, and scheduling of the pending contested case. *Id.*; *Petitioners' Mem.* at 40-42.

A request for a writ of prohibition is a civil action, however, and subject matter jurisdiction is a fundamental and unavoidable requirement to maintain a civil action in an Idaho court and obtain judicial relief. *Matter of Hanson*, 121 Idaho at 509, 826 P.2d at 470; *Int. of*

²¹ The Respondents reserve any and all of their arguments that this Court should deny the request for a preliminary injunction under the applicable legal standards.

Dudley, 167 Idaho at 57, 467 P.3d at 421. Idaho courts are “obligated” to endure that they have subject matter jurisdiction over a claim. *Laughy*, 149 Idaho at 870, 243 P.3d at 1058. The actions of administrative agencies “are not subject to judicial review unless expressly authorized by statute,” and without such statutory authority, “the reviewing court lacks subject-matter jurisdiction.” *Vickers*, 167 Idaho at 309, 469 P.3d at 637 (citations omitted). Thus, unless an exception to the exhaustion requirement applies, *Lochsa Falls, L.L.C.*, 147 Idaho at 237, 207 P.3d at 968, a court lacks subject matter jurisdiction to review agency actions in a pending contested case in which no final appealable order has been issued. A request for a writ of prohibition is not exempt from these rules and principles.

The Petitioners’ request for a writ of prohibition seeks to establish subject matter jurisdiction by alleging that an exception to the requirement of exhausting administrative remedies applies in this case. The Petitioners allege that the Notice, “and the hearing and procedure which it seeks to pursue, exceeds IDWR’s statutory authority” and “exceed IDWR’s jurisdiction.” *Petition* at 17; *Petitioners’ Mem.* at 41; see *Lochsa Falls, L.L.C.*, 147 Idaho at 237, 207 P.3d at 968 (recognizing an exception to the rule requiring exhaustion of administrative remedies “when the agency has acted outside its authority”).

These arguments fail because, as previously discussed, the “outside its authority” exception only applies “when the agency is palpably without jurisdiction.” *Schweitzer Basin Water Co.*, 163 Idaho at 193, 408 P.3d at 1265; *Park*, 143 Idaho at 581, 149 P.3d at 856. In other words, the “outside its authority” exception does not apply simply because a party asserts that an agency has incorrectly interpreted or applied a statute that expressly authorizes agency action. It applies only when the language of the statute leaves no doubt that the agency “simply

has no jurisdiction” over the matter or the parties. *Schweitzer Basin Water Co.*, 163 Idaho at 193, 408 P.3d at 1265.

In this case, Idaho Code § 42-237a.g. expressly recognizes the Director’s “discretionary power” to “initiate administrative proceedings to prohibit or limit the withdrawal of water from any well” when the Director determines “that water to fill any water right in said well is not there available.” Idaho Code § 42-237a.g. This provision also states that “[w]ater in a well shall not be deemed available to fill a water right therein” if “withdrawal of the amount called for by such right” would affect, contrary to the policy of the Ground Water Act, “the present or future use of any prior surface or ground water right” *Id.* (underlining added). This statute clearly and unambiguously confers jurisdiction and authority on the Director to initiate the contested case that the Petitioners are attempting to derail. The Petitioners’ arguments that the Director has misapplied or misinterpreted Idaho Code § 42-237a.g. do not satisfy the requirement of showing a “palpable” lack of jurisdiction or statutory authority in this case. *Schweitzer Basin Water Co.*, 163 Idaho at 193, 408 P.3d at 1265; *Park*, 143 Idaho at 581, 149 P.3d at 856. It follows that this the Petitioners’ count for a writ of prohibition must be dismissed for lack of subject matter jurisdiction. *Matter of Hanson*, 121 Idaho at 509, 826 P.2d at 470; *Int. of Dudley*, 167 Idaho at 57, 467 P.3d at 421; *Vickers*, 167 Idaho at 309, 469 P.3d at 637.²²

CONCLUSION

This Court lacks subject matter jurisdiction over the *Petition*’s claims. All of the *Petition*’s counts expressly or necessarily seek judicial review of actions taken by the Director in a pending contested case, in the absence of a final order, and before the Petitioners have

²² The Respondents reserve any and all of their arguments that this Court should deny the request for a writ of prohibition under the applicable legal standards.

exhausted administrative remedies. No exceptions to the exhaustion and final order requirements apply in this case, and requiring the Petitioners to exhaust the full gamut of their administrative remedies before seeking judicial review, including participating in the pending administrative proceeding, does not inflict an irreparable injury on the Petitioners. The Respondents therefore respectfully request, pursuant to Rule 12(b)(1) of the Idaho Rules of Civil Procedure, that this Court dismiss the *Petition* in its entirety.

Respectfully submitted this 28th day of May, 2021.

LAWRENCE G. WASDEN
Attorney General

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

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of May, 2021, I caused to be served a true and correct copy of the foregoing document by ICourts e-filing delivery to each party listed as following:

<p>Albert P. Barker Travis L. Thompson Michael A. Short BARKER ROSHOLT & SIMPSON LLP 1010 W. Jefferson St., Ste. 102 P.O. Box 2139 Boise, ID 83701-2139 apb@idahowaters.com tlt@idahowaters.com mas@idahowaters.com</p>	<p>Candice M. McHugh Chris M. Bromley McHugh BROMLEY, PLLC 380 S. 4th Street, Suite 103 Boise, ID 83702 cmchugh@mchughbromley.com cbromley@mchughbromley.com</p>
<p>James R. Laski Heather E. O’Leary Lawson Laski Clark, PLLC 675 Sun Valley Rd., Ste. A P.O. Box 3310 jrl@lawsonlaski.com heo@lawsonlaski.com efiling@lawsonlaski.com</p>	<p>Jerry R. Rigby (ISBN 2470) Chase Hendricks (ISBN 8604) RIGBY, ANDRUS & RIGBY LAW, PLLC 25 North Second East Rexburg, ID 83440 jrigbv@.rex-law.com</p>
<p>Joseph F. James James Law Office, PLLC 125 5th Ave. West Gooding, ID 83330 Telephone: (208) 934-4429 joe@jamesmvlaw.com</p>	

/s/ MICHAEL C. ORR

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