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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, and MCCAIN FOODS USA, INC.,

Petitioners,

vs.

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

Case No. CV01-23-08306

IDWR Docket No. CM-DC-2010-001

PETITIONERS' MEMORANDUM IN SUPPORT OF MOTION FOR STAY BASED ON IDWR'S INTERFERENCE WITH LAWFUL DISCOVERY

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

Petitioners, the Cities of Idaho Falls, Pocatello, Jerome, Burley, Bliss, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Paul, Richfield, Rupert, Shoshone, and Wendell; and McCain Foods USA, Inc. (collectively, the "Petitioners"), by and through their respective counsel, submit this memorandum pursuant to Idaho Code § 67-5274 and Rule 84(m) of the Idaho Rule of Civil Procedure ("I.R.C.P.") in support of *Petitioners' Motion for Stay Based on IDWR's Interference with Lawful Discovery* ("Motion for Stay") filed herewith.

INTRODUCTION

This case involves a petition for judicial review of an order issued recently by the Director of the Idaho Department of Water Resources ("IDWR" or "Department") in the Surface Water Coalition[1] ("SWC") delivery call case which is a contested case governed by the Idaho Administrative Procedures Act, Chapter 52, Title 67, Idaho Code ("APA").

The Department's *Order Denying Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* ("Discovery Order") issued on

[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.

May 5, 2023, imposed this limitation on the Petitioners' discovery efforts:

> 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. . . Accordingly, the Director will limit the scope of the depositions to preclude questions regarding the Director's deliberative process on legal and policy considerations."

Discovery Order (Declaration of Maximilian Bricker, Attachment 1) at 4.

During depositions of Department witnesses, Department counsel invoked the limitations of the Director's Order, and deponents refused to answer numerous questions. *See* Tr. of Dep. Of Matt Anders (Declaration of Maximilian Bricker, Attachment 2) at 7:25-11:9, 12:11-15, 23:16-24:1, 26:11-21, 27:8-10, 48:9-49:11, 66:20-67:6, 113:14-21, 143:23-3, 195:16-196-3, 203:7-205:9, 207:8-208:3, 209:13-213:10; Tr. of Dep. of Jennifer Sukow (Declaration of Maximilian Bricker, Attachment 3) at 7:4-8:8, 15:12-19:13, 20:12-17, 21:11-22:3, 25:11-23, 26:14-28:7, 34:11-35:25, 39:7-41:5, 41:15-22, 44:8-17, 44:25-45:11, 51:21-52:9, 74:24-77:16, 89:18-95:13, 96:12-23, 98:1-99:15, 100:1-101:14, 105:11-106:15. The Petitioners dispute the Department's ability to prevent discovery of relevant information, but the Department continues to assert that it may validly assert the "deliberative process" privilege, or, possibly, that in the absence of such a privilege, the Director is authorized to limit discovery in any manner it likes, whether or not it is consistent with Idaho law. *See* email correspondence between G. Baxter and T. Budge dated May 16, 2023 (Declaration of Maximilian Bricker, Attachment 4).

As the Court is by now aware, the Department *sua sponte* set a hearing in this matter for June 6-10, 2023, which, as alleged in pleadings filed in parallel actions contemporaneously, is insufficient time in any event to prepare for hearing. Not content with making the Petitioners' task of litigating the contested orders impossible, the Department has interfered with

discovery by erroneously limiting discovery on all relevant information concerning the Department's preparation of the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Fifth Methodology Order"). Accordingly, the Petitioners submit the accompanying *Motion for Stay* to ask the Court to stay the Department's hearing until this Court rules on the *Petition for Judicial Review of May 5, 2023 Discovery Order* ("Petition for Judicial Review") filed herewith.

PROCEDURAL HISTORY

On April 21, 2023, the Department issued the *Fifth Methodology Order*. On that same day, the Department also issued a *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* ("April 2023 As-Applied Order") and a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* ("Notice of Hearing"). The Notice of Hearing set a hearing for June 6-10, 2023.

On May 4, 2023, the Petitioners filed a *Joint Notice of Deposition Duces Tecum of Jennifer Sukow, P.E., P.G.*, and *Joint Notice of Deposition Duces Tecum of Matt Anders, P.G*. The Department issued the *Discovery Order* on May 5, 2023.

The Petitioners deposed Department witnesses Jennifer Sukow and Matt Anders on May 10, 2023, and May 12, 2023, respectively, wherein counsel for the Department repeatedly asserted a "deliberative process" privilege, instructing Ms. Sukow and Mr. Anders not to answer questions posed by counsel for the Petitioners. On May 16, 2023, counsel for one or more of the Petitioners attempted to "meet and confer" with the Department to resolve the ongoing dispute over whether the Department has the right to invoke the "deliberative process" privilege, but to no avail.

LEGAL STANDARD

The APA provides that upon the filing of a petition for judicial review, the "reviewing court may order … a stay [of the enforcement of the agency action] upon appropriate terms." Idaho Code 67-5274. I.R.C.P. 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 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. The court should exercise its broad discretion to impose whatever it deems prudent "to do complete justice."

Finally, the Petitioners need not exhaust their administrative remedies before this Court rules on the *Petition for Judicial Review* and *Motion for Stay* 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). In addition, the Idaho Supreme Court has held that exhaustion of administrative

remedies 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

There is no authority or precedent in Idaho that allows the Department to use the "deliberative process" privilege to prevent its witnesses or deponents from answering questions posed by opposing counsel. Nonetheless, the Department continuously asserted this privilege in the two depositions referenced above.[2] Alternatively, the Department in subsequent communications seems to suggest that even if there isn't a "deliberative process" privilege, the Department is authorized to impose *any* limitations on discovery even if the limits are inconsistent with Idaho law. *See* Declaration of Maximilian Bricker, Attachment 4. Whatever the source of the Department's legal theory, the deponents refused to answer questions seeking discoverable information about the Department's preparation of the *Fifth Methodology Order*, which caused those depositions to be fruitless and unsatisfying to the Petitioners.

The Petitioners have refuted the Department's right to assert a "deliberative process" privilege. *Id.* Counsel for one or more of the Petitioners attempted to "meet and confer" with the Department on May 16, 2023, as required under I.R.C.P. Rule 37(a)(1) to resolve the disagreement; the Department doubled down, affirming that it would not authorize disclosure of information that concerns the Department's "deliberative process." *Id.*

[2] *See* Declaration of Maximilian Bricker, Attachment 2, at 7:25-11:9, 12:11-15, 23:16-24:1, 26:11-21, 27:8-10, 48:9-49:11, 66:20-67:6, 113:14-21, 143:23-3, 195:16-196-3, 203:7-205:9, 207:8-208:3, 209:13-213:10; Declaration of Maximilian Bricker, Attachment 3, at 7:4-8:8, 15:12-19:13, 20:12-17, 21:11-22:3, 25:11-23, 26:14-28:7, 34:11-35:25, 39:7-41:5, 41:15-22, 44:8-17, 44:25-45:11, 51:21-52:9, 74:24-77:16, 89:18-95:13, 96:12-23, 98:1-99:15, 100:1-101:14, 105:11-106:15.

The Petitioners have the constitutional right "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). Furthermore, 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 Department's reliance on a "deliberative process" privilege to withhold information is illegal because the State of Idaho has not adopted such a privilege as a bar to discovery. *See The Idaho Press Club, Inc., v. Ada County*, Case No. CV 01-19-16277 (Decision and Order, filed 12/13/2019) (Declaration of Maximilian Bricker, Attachment 5) at 30 ("There is no 'Deliberative Process' privilege in Idaho law"). Therefore, the Court should reject the Department's assertion of a "deliberative process" privilege as a means to evade discovery of agency decision-making. *Id*. About secrecy in government decision-making, the New Mexico Supreme Court held:

> Transparency is an essential feature of the relationship between the people and their government. This foundational principle far predates IPRA, New Mexico's statehood, and even George Washington's first term as our nation's President. In 1788, during debate on the ratification of the United States Constitution, the patriot Patrick Henry so eloquently stated:
>
> > Give us at least a plausible apology why Congress should keep their proceedings in secret.... The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them.... [T]o cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man, and every friend to this country.

> *3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, As Recommended by the General Convention at Philadelphia in 1787 169–70 (Jonathan Elliott ed., 1881).*[3]

Here, the Department is interfering with its decisional transparency, preventing the Petitioners and the public from accessing information about its workings in the name of "deliberative process." Not only is this generally repugnant, the Department's shielding of discoverable information severely prejudices the Petitioners' ability to prepare for and participate in the June 6-10, 2023 hearing.

Accordingly, the Court should rule that the Department does not have the right to assert a "deliberative process" privilege, thus allowing the Petitioners to engage in a full and proper discovery. Further, to the extent the Department may argue that the complained-of limitation on discovery is based on its *Discovery Order* and/or procedural rules (and not on the deliberative process privilege *per se*), the Department's argument is quite literally the exception that swallows the rule—the Department has no statutory basis to limit discovery under its procedural rules in a manner that is broader than the types of limitations authorized under Idaho law. This court should stay the hearing until it rules on the *Petition for Judicial Review* and impose additional relief as necessary to ensure the Petitioners have a full and fair opportunity to inquire into the basis for the contested Orders.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully ask this Court to grant the Petitioners' *Motion for Stay*, thereby staying the hearing set for June 6-10, 2023, in IDWR Docket No. CM-DC-2010-001, until the Court rules on the *Petition for Judicial Review*.

[3] *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't,* 283 P.3d 853, 870-71 (N.M. 2012).

DATED this 22nd day of May, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May, 2023, I caused to be filed a true and correct copy of the foregoing document via iCourt E-File and Serve, and upon such filing, the following parties were served via electronic mail:

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