

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' RESPONSE
OPPOSING, IN PART, MOTION TO
AMEND 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 84(o) of the Idaho Rules of Civil Procedure and this Court’s *Procedural Order* (May 27, 2021), hereby submit their response to the Petitioners’ *Motion to Amend Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition*, filed in this case on June 30, 2021 (“*Motion to Amend*”). The Respondents oppose the *Motion to Amend* in part.

The Respondents do not oppose the proposed amendments to Count I of the *Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition* (May 24, 2021) (“*Petition*”).¹ The Respondents do oppose, however, the proposed amendments that would add additional “Counts” to the *Petition* (Counts II, III, IV, V, VI, and VII). The Respondents request, for reasons explained below, that this Court grant the *Motion to Amend* only as to the proposed amendments to Count I, and otherwise deny the *Motion to Amend*.

BACKGROUND

The *Petition* was filed in connection with a contested case regarding administration of water rights in Basin 37, but before the administrative hearing was held and a final order was issued.² *Order Denying Application for Temporary Restraining Order* at 3-4 (May 27, 2021).

¹ Count I is a petition for judicial review pursuant to the applicable provisions of the Idaho Administrative Procedure Act, and is the only claim for relief currently before this Court in this case. *Order Granting Joint Motion to Stay Count I and Dismiss Remaining Counts Without Prejudice* (Jun. 10, 2021).

² The contested case was captioned “In the Matter of Basin 37 Administrative Proceeding” and assigned Docket No. AA-WRA-2021-001.

The *Petition* sought, among other things, issuance of a temporary restraining order restraining the Director from proceeding with the administrative hearing or issuing any curtailment orders, pending a hearing on the *Petition*'s request for a preliminary injunction. *Id.* This Court issued an order denying the request for a temporary restraining order on May 27, 2021. *Id.*

The following day, the Respondents filed the *Respondents' Motion to Dismiss Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition* (May 28, 2021) ("*Motion to Dismiss*"). The *Motion to Dismiss* requested that the *Petition* be dismissed "in its entirety" for lack of subject matter jurisdiction. *Motion to Dismiss* at 2, 5, 23. Subsequently, the Petitioners and the Respondents stipulated to a stay of Count I (the petition for judicial review) pending issuance of a final order, and to dismissal of all of the remaining Counts without prejudice, and jointly moved this Court for a corresponding order. *Order Granting Joint Motion to Stay Count I and Dismiss Remaining Counts Without Prejudice* at 2 (Jun. 10, 2021). In granting the joint motion, this Court recognized that the stipulation reserved the Petitioners' rights to seek amendment of the *Petition* to add additional counts and requests for relief, and also reserved the Respondents' rights to oppose such amendments or seek dismissal of any additional counts or requests for relief. *Id.* at 2.

The administrative hearing was held on June 7-12, 2021, post-hearing briefs were submitted on June 14, 2021, and the Director issued a final order on June 28, 2021. *Final Order* at 2 (Jun. 28, 2021).³ The Petitioners filed the *Motion to Amend* on June 30, 2021, along with a number of other related or supporting documents.

³ A copy of the *Final Order* is attached to the *Declaration of Michael A. Short* (Jun. 30, 2021) as "Exhibit S."

ARGUMENT

The Respondents do not oppose the proposed amendments to Count I of the *Petition*. The Respondents oppose the remainder of the *Motion to Amend*, however, which seeks to add six Counts to the *Petition*. The additional Counts also seek judicial review of the Director’s actions and orders in the Basin 37 contested case, but outside of the procedures, standards, and requirements of the judicial review provisions of the Idaho Administrative Procedure Act (“IDAPA”), Idaho Code §§ 67-5270—67-5279. Actions by a state agency are not subject to judicial review unless expressly authorized by statute. *Vickers v. Idaho Bd. of Veterinary Med.*, 167 Idaho 306, 309, 469 P.3d 634, 637 (2020); *Laughy v. Idaho Dep’t of Transp.*, 149 Idaho 867, 870, 243 P.3d 1055, 1058 (2010). Parties aggrieved by the action or decision of a state agency may not seek judicial review and relief via actions or procedures other than those expressly authorized by the Legislature. *See Cobbley v. City of Challis*, 143 Idaho 130, 133, 139 P.3d 732, 735 (2006) (“Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant.”).

I. LEGAL STANDARDS.

The *Motion to Amend* relies on Rule 15(a)(2) of the Idaho Rules of Civil Procedure. *Motion to Amend* at 2. This provision states that a court “should freely give leave [to amend] when justice so requires.” I.R.C.P. 15(a)(2). The decision of whether to allow amendment of a pleading pursuant to Rule 15(a)(2) is committed to the district court’s sound discretion. *Elliott v. Murdock*, 161 Idaho 281, 286, 385 P.3d 459, 464 (2016).

II. RESPONDENTS DO NOT OPPOSE THE AMENDMENTS TO COUNT I.

The *Petition* sought judicial review, pursuant to Idaho Code §§ 67-5270(2) and 67-5271(2), of “the Director’s *Notice*, proposed hearing, denial of Petitioner’s motion to dismiss,

and denial of Petitioner’s motion to continue the administrative proceeding.” *Petition* at 11.⁴

The Petitioners seek to amend Count I to obtain judicial review of the Director’s *Final Order*,⁵ “as well as judicial review of due process violations occurring as a result of the Director’s truncated hearing process.” *First Amended Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition* at 11 (June 30, 2021) (“*Amended Petition*”). The *Amended Petition* states that “Petitioners “seek judicial review of the Director’s actions in excess of his authority, the Director’s [*Final*] *Order* which is arbitrary and capricious, and other violations Petitioners’ constitutional rights to due process.” *Id.* at 11. The *Amended Petition* further states that the Petitioners “have a right to immediate judicial review pursuant to I.C. §§ 67-5270(3) and 67-5273(1) as a final agency action has been ordered.”

The Respondents do not oppose these amendments to Count I of the *Petition*. The Respondents do not concede, however, that the Petitioners’ due process rights were violated, that the Director acted in excess of his authority, or that the *Final Order* is arbitrary and capricious. To the contrary, the Respondents assert that these allegations lack legal and factual merit, and the Respondents reserve all of their rights to oppose the Petitioners’ allegations and arguments, pursuant to the judicial review provisions of IDAPA, I.R.C.P. 84, this Court’s *Procedural Order*, and any other applicable Idaho law.

⁴ The pages of the *Petition* are not numbered. The cited page number refers to the page number displayed at the top of the screen when viewing the .pdf file copy of the *Petition*.

⁵ The Petitioners refer to the *Final Order* as the “Curtailed Order.”

III. THE *MOTION TO AMEND* SHOULD BE DENIED AS TO COUNTS II, III, IV, V, VI, AND VII.

The *Motion to Amend* seeks to add six Counts to the *Petition*. See *Amended Petition* at 13-18 (Counts II – VII); *id.* at 19 (“Prayer for Relief”). The Respondents oppose this part of the *Motion to Amend* and request that it be denied, for the reasons discussed below.

a. This Court Lacks Subject Matter Jurisdiction over Counts II, III, IV, V, VI, and VII.

i. Counts II, III, IV, V, VI, and VII Seek Judicial Review of the Director’s Actions and Orders in the Contested Case.

Counts II through VII of the *Amended Petition* rely on the same basic factual allegations as Count I. See *Amended Petition* at 4-11 (“Allegation Common to All Counts”). Further, and like Count I, the additional counts allege that the Petitioners have been injured by the *Final Order*, and by the schedule and procedures used in the contested case. See *e.g.*, *Amended Petition* at 14 (“The [*Final*] *Order* will result in immediate, irreparable and direct harm to Petitioners and their members”⁶); *id.* at 15 (“The Director’s procedural violations deprived Petitioners of a meaningful opportunity to be heard and to participate in the process that resulted in the [*Final*] *Order*, and the taking of its members’ water rights.”⁷).

The additional Counts also request judicial relief to remedy the injuries the Petitioners have allegedly suffered as a result of the Director’s actions and decisions in the Basin 37 contested case. Counts II, III, IV, and V request issuance of orders under the Uniform Declaratory Judgment Act, Idaho Code § 10-1201—10-1217, declaring that Director’s actions

⁶ This allegation is stated in Count II and specifically re-alleged and incorporated in all subsequent Counts.

⁷ This allegation is stated in Count III and specifically re-alleged and incorporated in all subsequent Counts.

and orders in the Basin 37 contested case violated Idaho law and the Petitioners' rights. *Amended Petition* at 4, 13-17, 19. Counts VI and VII request issuance of a preliminary injunction and temporary restraining order pursuant to I.R.C. P. 65, and a writ of prohibition pursuant to Idaho Code §§ 7-401—7-404, to restrain the Director from enforcing the *Final Order*. *Amended Petition* at 4, 17-18, 19.

Thus, the Director's actions and decisions in the Basin 37 contested case are the entire basis for, and the sole focus of, the additional Counts that the *Motion to Amend* seeks to add to the *Petition*. Counts II, III, IV, V, VI, and VII are, in short, requests for judicial review of the Director's actions and decisions in the contested case.

ii. This Court Lacks Subject Matter Jurisdiction Over The Petitioners' Requests for Judicial Review Outside of the Provisions and Standards of the Idaho Administrative Procedure Act.

The Idaho Supreme Court has held that actions by state agencies are not subject to judicial review ““unless *expressly* authorized by statute,”” and that without such statutory authority, “the reviewing court lacks subject-matter jurisdiction.” *Vickers*, 167 Idaho at 309, 469 P.3d at 637 (citations omitted) (italics and underlining added); *see also Laughy*, 149 Idaho at 870, 243 P.3d at 1058 (same). “Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant.” *Cobbley*, 143 Idaho at 133, 139 P.3d at 735.

The only statute “expressly” authorizing judicial review of the Director's orders and actions in the Basin 37 contested case is Idaho Code § 42-1701A, which states that judicial review “shall be had in accordance with the provisions and standards” of the Idaho Administrative Procedure Act:

Any person who is aggrieved by a final decision or order of the director is entitled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code.

Idaho Code § 42-1701A(4).

The additional Counts in the *Amended Petition* do not seek judicial review “in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code.” *Id.* Rather, they seek judicial review and relief pursuant to Idaho Code §§ 7-401—7-404, the Uniform Declaratory Judgment Act, Idaho Code § 10-1201—10-1217, and Rule 65 of the Idaho Rules of Civil Procedure. None of these provisions “expressly” authorizes judicial review of the Director’s actions and orders, *Vickers*, 167 Idaho at 309, 469 P.3d at 637, or is a “statutory grant” of a “right to judicial review.” *Cobbley*, 143 Idaho at 133-34, 139 P.3d at 735-36.

Moreover, Idaho Code §§ 7-401—7-404, the Uniform Declaratory Judgment Act, and I.R.C.P. Rule 65 do not include the procedural and substantive requirements and safeguards of IDAPA’s judicial review provisions. Under IDAPA, judicial review of the Director’s actions and decisions in a contested case is an appeal of the Director’s orders, with specific procedural requirements, and limitations on the nature and scope of judicial review. Idaho Code §§ 67-5270—67-5279; *see Sylte v. IDWR*, 165 Idaho 238, 257, 443 P.3d 252, 243 (2019) (“a district court acts in an appellate capacity under the Idaho Administrative Procedure Act”). The additional Counts alleged in the *Amended Petition* are not appeals, however. Rather, they explicitly seek *de novo* determinations of whether the Petitioners have been injured by the *Final Order*, untethered from IDAPA’s procedural framework, its requirement of a full agency record, its limitations on the scope of judicial review, and its limitations on the relief a court may provide.

The Uniform Declaratory Judgment Act, for instance, provides that issues of fact may be “tried and determined in the same manner as issues of fact are tried and determined in other actions at law or suits in equity[.]” Idaho Code § 10-1209. This provision is entirely contrary to IDAPA’s requirements that judicial review must be based on an agency record compiled pursuant to statutory requirements, and that “judicial review of disputed issues of fact must be confined to the agency record” unless specific requirements for admitting “additional evidence” are satisfied. Idaho Code §§ 67-5275—67-5277. The Uniform Declaratory Judgment Act also broadly empowers a court “to declare rights, status, and other legal relations whether or not further relief is or could be claimed,” Idaho Code § 10-1201, and to provide “further relief based on a declaratory judgment or decree . . . whenever necessary or proper.” *Id.* § 10-1208. IDAPA, in contrast, strictly limits the scope of review, and the relief that may be provided. Idaho Code § 67-5279(3).

In sum, Counts II, III, IV, V, VI, and VII explicitly seek judicial review of the Director’s actions and orders in the Basin 37 contested case, but under procedural and substantive provisions and standards that are wholly inconsistent with IDAPA’s “provisions and standards.” Idaho Code § 42-1701A(4). In effect, Counts II, III, IV, V, VI, and VII are attempts to circumvent IDAPA, and obtain judicial review of the Director’s actions and orders in the contested case under procedures and standards that are more to the Petitioners’ liking. This is contrary to Idaho law. “Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant,” *Cobbley*, 143 Idaho at 133-34, 139 P.3d at 735-36, and actions by state agencies are not subject to judicial review ““unless expressly authorized by statute.”” *Vickers*, 167 Idaho at 309, 469 P.3d at 637 (citations omitted) (italics and underlining added). In the absence of such authority, “the reviewing court lacks subject-matter

jurisdiction.” *Id.* The *Motion to Amend* should be denied as to Counts II, III, IV, V, VI, and VII. See *Matter of Hanson*, 121 Idaho 507, 509, 826 P.2d 468, 470 (1992) (“To adjudicate a given claim, a court must have jurisdiction over the subject matter of the claim” (citation omitted)).

b. The *Motion to Amend* Should Be Denied as to Counts II, III, IV, V, VI, and VII Even if This Court Has Subject Matter Jurisdiction.

The Petitioners’ request to add Counts II, III, IV, V, and VI to the *Petition* should be denied even if this Court determines that it has subject matter jurisdiction over these additional Counts. Counts II, III, IV, and V are requests for declaratory relief based on allegations that can and should be addressed as part of Count I’s the request for judicial review pursuant to Idaho Code §§ 67-5270—67-5279. Moreover, this Court has already denied the Petitioner’s request for a preliminary injunction (Count VI), and the availability of judicial review under the Idaho Administrative Procedure Act forecloses the Petitioners’ request for a writ of prohibition (Count VII).

i. The Errors and Injuries Alleged in Declaratory Relief Counts II, III, IV, and V Can and Should Be Addressed Within the Judicial Review Proceedings Under Count I.

Counts II, III, IV, and V of the *Amended Petition* seek declaratory relief pursuant to Idaho Code § 10-1201. *Amended Petition* at 4, 13-17, 19. These Counts are based on allegations that the Director lacked authority to initiate and conduct the Basin 37 contested case, used a procedure that violated the Petitioners’ due process rights, and issued a *Final Order* that is not supported by substantial evidence, is arbitrary and capricious, and contrary to public policy. *Id.* at 13-17. Declaratory judgment actions “are not intended as a substitute for a statutory procedure,” however. *Regan v. Kootenai Cty.*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004) (citation omitted). The *Motion to Amend* should be denied as to Counts II-VII because it seeks to

substitute declaratory judgment actions for the statutory procedures of IDAPA’s judicial review provisions.

Further, declaratory judgment actions “may be maintained only for the purpose of determining and declaring fixed legal rights,” and “cannot be invoked merely to try issues and determine questions which are uncertain and hypothetical.” *Ennis v. Casey*, 72 Idaho 181, 185–86, 238 P.2d 435, 438 (1951). While Count II might be characterized as posing a purely legal question,⁸ Counts III, IV, and V hinge on factual allegations regarding the effects of the hearing schedule and procedures, the asserted lack of “substantial evidence” to support the *Final Order*, and the asserted “waste of water” and “considerable and disproportionate harm to surface water rights.” *Amended Petition* at 14-16. Thus, Counts III, IV, and V are not requests to determine or declare “fixed legal rights,” *Ennis*, 72 Idaho at 185–86, 238 P.2d at 438, but rather requests to address and resolve “complex issues of fact that are not free from doubt.” *Order Denying Second Application for Temporary Restraining Order; Order Denying Second Motion for Preliminary Injunction* at 6 (Jul. 2, 2021) (“*Order Denying Motion for Preliminary Injunction*”). By definition, Counts III, IV, and V would require this Court to “try issues and determine questions which are uncertain and hypothetical.” *Ennis*, 72 Idaho at 185–86, 238 P.2d at 438. These are not appropriate subjects for declaratory relief, *id.*, especially when they can and should be addressed under Count I’s request for judicial review pursuant to IDAPA. *See Regan*, 140 Idaho at 725, 100 P.3d at 619 (“Actions for declaratory judgment are not intended as a substitute for a statutory procedure”) (citation omitted).

⁸ Count II alleges that the Director was without legal authority to initiate and conduct the Basin 37 administrative case because he did so under Idaho Code § 42-237a.g. rather than the CM Rules. *Amended Petition* at 13-14. This Count is discussed further below.

The *Motion to Amend* should also be denied as to Count II. Count II claims that the Director acted “without authority” by relying on Idaho Code § 42-237a.g. rather than the CM Rules. *Amended Petition* at 13-14. To the extent Count II presents purely legal questions, it is superfluous because a court reviews such matters *de novo* in IDAPA judicial review proceedings. *City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017). To the extent Count II may require this Court to resolve disputed or uncertain factual issues, on the other hand, these issues must be addressed through IDAPA judicial review proceedings rather than a declaratory judgment action (for reasons discussed above). Either way, Count II raises a claim that can and should be addressed in Count I’s judicial review proceeding rather than in a separate cause of action.

The *Motion to Amend*, therefore, should be denied as to all of the declaratory relief claims alleged in the *Amended Complaint* (Counts II, III, IV, and V). The errors and injuries alleged in the Counts for declaratory relief can and should be addressed within the judicial review proceedings under Count I.

ii. This Court Has Denied the Petitioners’ Requests for a Preliminary Injunction and Temporary Restraining Order.

Count VI of the *Amended Petition* seeks a preliminary injunction precluding enforcement of the *Final Order*, and also requests immediate entry of a temporary restraining order. *Amended Complaint* at 17-18, 19. This Court has already considered and denied the Petitioners’ requests for a preliminary injunction and a temporary restraining order. *Order Denying Motion for Preliminary Injunction*. Thus, the *Motion to Amend* should be denied as to Count VI.

iii. The Petitioners Have an Adequate Remedy under Count I.

Count VII of the *Amended Petition* is a request for a writ of prohibition, pursuant to Idaho Code §§ 7-401, *et seq.*, that would restrain the Director from enforcing the *Final Order*.

Amended Petition at 18, 19. Like the other Counts in the *Amended Petition*, Count VII is based on allegations that the Director lacked authority to initiate and conduct the Basin 37 contested case, that the schedule and hearing procedures in the contested case violated the Petitioners' due process rights, and that the *Final Order* injures the Petitioners and their water rights. *Id.*

A writ of prohibition "is the counterpart of a writ of mandate," and like a writ of mandate may be issued only when "there is not a plain, speedy and adequate remedy in the ordinary course of law." Idaho Code §§ 7-401—7-402. This Court has held that judicial review proceedings pursuant to IDAPA provide a plain, speedy, and adequate remedy at law. *Order Denying Application for Peremptory Writ of Mandate* at 3-4, *Blue Lakes Trout Farm, Inc. v. Spackman*, Ada County Case No. CV WA 2010-19823 (Oct. 29, 2010); *cf. Order Dismissing Petition for Judicial Review* at 4-5, *City of Pocatello v. Spackman*, Ada County Case no. CV-01-17-23146) (Jun. 4, 2018) ("That there is no impediment to raising these issues on review of a final order is telling proof that judicial review of the final order is an adequate remedy.").⁹

Count I of the *Amended Petition* seeks judicial review of the Director's actions and orders in the Basin 37 contested case pursuant to IDAPA. Because such a proceeding provides a plain, speedy, and adequate remedy in the ordinary course of law, Idaho Code § 7-402, a writ of prohibition may not issue in this case. It follows that the *Motion to Amend* should be denied as to Count VII.

CONCLUSION

For the reason as discussed above, the Respondents respectfully request that the *Motion to Amend* be denied to the extent it seeks to add Counts II, III, IV, V, VI, and VII to the *Petition*.

⁹ Copies of these orders are attached to the *Third Declaration of Michael C. Orr*, filed herewith.

The Respondents have no objection to the *Motion to Amend*'s proposed amendments to Count I of the *Petition*.

Respectfully submitted this 9th day of July, 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 9th day of July, 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:

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	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
Jerry R. Rigby Chase Hendricks Rigby, Andrus & Rigby Law, PLLC 25 North Second East Rexburg, ID 83440 jrigbv@.rex-law.com	W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, ID 83318 wkf@pmt.org
Joseph F. James James Law Office, PLLC 125 5 th Ave. West Gooding, ID 83330 joe@jamesmvlaw.com	Candice M. McHugh Christopher M. Bromley McHugh Bromley, PLLC 380 S. 4th Street, Suite 103 Boise, ID 83702 cmchugh@mchugbromley.com cbromley@mchugbromley.com
Sarah A. Klahn Somach Simmons & Dunn 2033 11 th Street, #5 Boulder, CO 80302 sklahn@somachlaw.com	

/s/ MICHAEL C. ORR

MICHAEL C. ORR