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

CLEAR SPRINGS FOODS, INC.,)
)
Petitioner,)

vs.)

BLUE LAKES TROUT FARM, INC.,)
)
Cross-Petitioner,)

vs.)

IDAHO GROUND WATER)
APPROPRIATORS, INC., NORTH SNAKE)
GROUNDS WATER DISTRICT and MAGIC)
VALLEY GROUND WATER DISTRICT,)
)
Cross-Petitioner,)

vs.)

IDAHO DAIRYMEN’S ASSOCIATION,)
INC.,)
)
Cross-Petitioner,)

Case No. 2008-0000444

**BLUE LAKES TROUT FARM
INC.’S BRIEF IN RESPONSE TO
MOTION FOR STAY**

vs.)
)
RANGEN, INC.,)
)
Cross-Petitioner,)
)
vs.)
)
DAVID R. TUTHILL, JR., in his capacity as)
Director of the Idaho Department of Water)
Resources, and THE DEPARTMENT OF)
WATER RESOURCES,)
)
Respondents.)
)
IN THE MATTER OF DISTRIBUTION)
OF WATER TO WATER RIGHTS NOS.)
36-0413A, 36-04013B, and 36-07148,)
)
(Clear Springs Delivery Call))
)
IN THE MATTER OF DISTRIBUTION OF)
WATER TO WATER RIGHTS NOS. 36-)
02356A, 36-07210, and 36-07427,)
)
(Blue Lakes Delivery Call))
_____)

COMES NOW, Cross-Petitioner Blue Lakes Trout Farm, Inc., (“Blue Lakes”) and files this *Brief in Response to Motion for Stay*.

ARGUMENT

The Ground Water Users have suggested that this Court’s *Order Granting in Part Motion to Enforce Orders* (“*Enforcement Order*”) “invited” them to file a motion to stay the Court’s remand order, as if the Court is predisposed to grant a stay. This self-serving interpretation of the Court’s Enforcement Order is highly improbable, given the court’s directive that the Director comply with the Court’s year-old remand order “forthwith,” and this court’s orders in other ESPA cases denying

requests to enjoin or stay water right administration pending administrative or judicial review.

The Ground Water Users' sole argument for a stay is that the Idaho Supreme Court might adopt one or more of their novel arguments that were rejected by the Hearing Officer, the Director and this Court, and "require the Director to do some things differently." Obviously, the pendency of an appeal is not itself a sufficient reason to grant a stay. If it were, stays pending appeal would be automatic. The Director would have been excused from any administration of junior ground water rights beginning in 2005 when Blue Lakes and other parties filed their initial administrative challenges to the Director's 2005 Orders. Five years would have passed with no action to protect Blue Lakes' senior water rights.

Granting stays simply because an appeal is pending would undermine water right administration and allow out-of-priority diversions to continue to injure senior water rights, further reducing senior rights to "the mere right to a lawsuit against an interfering water user." *Almo Water Co. V. Darrington*, 95 Idaho 16, 21 501 P.2d 700, 705 (1972). Effective water right administration requires strong judicial support for the statutory scheme of Title 42, chapter 6, whose purpose is to protect and implement established rights. *Id.* Granting a stay simply because administrative and/or district court orders are subject to an appeal would not provide this essential judicial support.

The Ground Water Users have not attempted to show extraordinary circumstances that would justify staying this Courts Orders pending the appeal. The Director has committed to this Court that he and his staff are working diligently to comply with the Court's remand order and will issue a decision very soon. The Ground Water Users are not prejudiced by the Director's performing the required injury analysis to comply with the Court's remand order, though they may be concerned about the decision he will make. The potential for additional administrative proceedings involving

the parties does not arise until after the Director issues a decision.

Idaho Appellate Rule 13(b)(14) allows the district court to stay execution of an order “upon the posting of such security and upon such conditions as the district court shall determine.” The decision to grant a stay pending appeal is committed to the Court’s discretion. *Waters v. Dunn*, 18 Idaho 450, 457, 110 P. 258, 260 (1910). Granting the motion for stay will require the Ground Water Users to post a bond, a point they have neglected to address in their motion.

There is no reported Idaho case defining the standard for granting an IAR 13(b) stay. The closest analogy is a preliminary injunction. Many other state and federal courts look to their jurisdiction’s preliminary injunction standard when evaluating a motion for stay. *See e.g., Michigan Coalition of radioactive Material Users, Inc., v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). The Ground Water Users have the burden of proving a right to a stay of this Court’s Orders. *See e.g., Harris v. Cassia County*, 106 Idaho 513, 518 (1984) (discussing the burden of proof for a preliminary injunction). Like injunctive relief, a stay should only be granted “in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal.” *Id.*

Requests for preliminary injunction and stay of administration of junior ground and surface water rights to the ESPA and to the hydraulically-connected springs pending administrative or judicial review related to administration of junior ESPA ground water right have been denied. As discussed in Blue Lakes briefing in support of its motion to enforce the Court’s remand order, the Director’s motion for stay in the *Musser* and *AFRD#2* cases were denied by the district courts and by the Idaho Supreme Court. In 2002, Clear Lakes Trout Company sought a preliminary injunction against the Director to prevent curtailment of its junior priority water right in order to deliver water to Clear Springs’ senior right. In addition to finding that Clear Lakes had not demonstrated a likelihood of

success on the merits, Judge Burdick found that Clear Lakes had not shown irreparable injury, even though the curtailment would require removal of thousands of fish from the Clear Lakes' fish rearing facility. "In the Court's opinion, the injury resulting from reduced water supply is the same for Clear Lakes and Clear Springs because both would suffer from an inability to run their respective fish hatcheries at full design capacity." Attachment 1 at 3. In other words, not having water for beneficial use under a water right is equally damaging to the senior and the junior. As between them, the senior has the prior and superior right.

The record conclusively shows that Blue Lakes has been deprived of its 1971 and 1973 water rights, and that ground water pumping is a cause of Blue Lakes' shortage. Five years after Blue Lakes' made its water delivery call, one year after this Court's remand order, and two months after this Court's order enforcing its remand order, the Director has still not made a proper determination of injury to Blue Lakes' 1971 water right as required by Idaho law and this Court's orders. An attitude of antipathy or apathy seems to have settled in at IDWR toward the well-documented injury to Blue Lakes' 1971 water right, to the point where even this Court's orders have not been sufficient to prompt the Director to act. As discussed in Blue Lakes' prior briefing to this Court, at an earlier time, when Alvin Musser made a water delivery call, the Director was concerned about being held in contempt of court for not abiding the SRBA Judge's orders. Today, the Director apparently feels no such sense of accountability.

Meanwhile, no protection and safe harbor has been afforded junior spring and surface water rights within the same water districts. Clear Lakes Trout Company's water rights have been curtailed since 2002 in order to supply Clear Springs. Junior Alpheus Creek water rights have been curtailed in order to supply Blue Lakes. Senior rights across the springs remain unfilled.

This malaise in water right administration has emboldened the Ground Water Users to argue that they are exempt from the constitutional law of prior appropriation that has governed water use Idaho for over a century. They argue that they are protected from the old, constitutional law by a new law of "full economic development," whereby the economic interests of the many outweigh the rights of the few. They argue that the Swan Falls Agreement, to which Blue Lakes was not a party, should now be construed to eviscerate the priority of Blue Lakes' and all other spring rights. They argue that Blue Lakes is not entitled to water until it has submitted information never before required of any senior right holder to prove its water need.

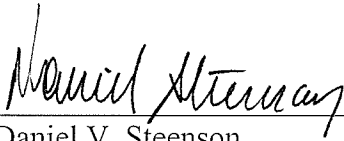
The only sense in which the Ground Water Users' appeal to the Idaho Supreme Court is "groundbreaking" is in the Ground Water Users' effort to separate and break administration of their water rights from the fundamental law of prior appropriation that has governed water use in Idaho. The Ground Water Users failed to make any of these arguments when the basis for administration of their water rights was established by the SRBA Court's issuance of decrees for their water rights, the connected sources general provisions for ground and surface water rights connected to the ESPA, and orders authorizing interim administration, as well as the Director's creations of water districts to effectuate administration.

The Ground Water Users are no more likely to succeed in these arguments before the Supreme Court, than they have been before the Hearing Officer, the Director, and this Court.

CONCLUSION

For the foregoing reasons, Blue Lakes respectfully requests that the Court deny the Ground Water Users' motion for stay.

Dated this 6th day of July, 2010.



Daniel V. Steenson

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

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Daniel V. Steenson

ATTACHMENT 1

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

CLEAR LAKES TROUT)	
COMPANY, INC.)	CASE NO. CV-02-00377
Plaintiff,)	
)	
vs.)	
)	
IDAHO DEPARTMENT OF)	
WATER RESOURCES, Karl J.)	
Dreher, Director of the Idaho)	ORDER GRANTING INTERVENTION;
Department of Water Resources,)	AND DENYING MOTION FOR
and Cindy Yenter, Watermaster)	PRELIMINARY INJUNCTION
for Water District 130)	
Defendants)	
and)	
)	
CLER SPRING FOODS, INC.)	
Intervenor.)	
_____)	

I.

PROCEDURAL BACKGROUND

On July 2, 2002, this Court heard argument on the *Motion for Preliminary Injunction* filed by Plaintiff Clear Lakes Trout Company, Inc. (“Clear Lakes”) in this action. Also before the Court was the *Motion to Intervene* filed by Clear Springs Foods, Inc. (“Clear Springs”). For the convenience of the Court, the matter was heard at the Twin Falls County Courthouse.

Appearing for Clear Lakes were James G. Reid and Charles L. Honsinger of the firm Ringert Clark, Chatered; appearing for the Defendant Idaho Department of Water Resources (“IDWR”) was Phillip J. Rassier, Deputy Attorney General; and appearing for Clear Springs was John K. Simpson of the firm Barker, Rosholt & Simpson LLP.

At the start of the hearing, the Court informed the parties that it was approving Clear Springs' *Motion to Intervene* in the lawsuit pursuant to Idaho Rule of Civil Procedure ("I.R.C.P.") 24. The Court determined that Clear Springs had demonstrated a right to intervene under I.R.C.P. 24(a). The Court also informed the parties that even though an order to show cause had been served upon Defendant IDWR, the Plaintiff Clear Lakes would proceed first as the moving party under its motion for preliminary injunction and bear the burden of persuasion in the proceeding.

The parties apprised the Court that they would not present further evidence or testimony at the hearing and would rely upon their previously submitted affidavits and briefs. The parties presented oral argument on the motion for preliminary injunction. Following presentation of argument by counsel, the Court recessed for a time before reconvening to render the following ruling from the bench on the *Motion for Preliminary Injunction*.

II.

COURT DENIES MOTION FOR PRELIMINARY INJUNCTION

First, the Court agrees with Clear Lakes that it is not making a ruling on the ultimate issue of whether Clear Lakes has the right to demand the proportional amount of water that will be delivered out of the eastern or western pools under its partial decree for water right no. 36-02659. However, an examination of that issue is relevant for determining whether Clear Lakes has a likelihood of ultimately prevailing on that issue under I.R.C.P. 65(e) in order to grant a preliminary injunction. Under the Court's reading of *Harris v. Cassia County*, 106 Idaho 513, 681 P.2d 988 (1984), an examination of the likelihood of prevailing should be taken into account when granting or denying a preliminary injunction regardless of whether the injunction is issued under subsection (1) or subsection (2) of I.R.C.P. 65(e). Under I.R.C.P. 65(e)(1), Clear Lakes has the burden to show its right to dictate what portion of water right no. 36-02659 will be delivered out of either pool. For purposes of this hearing only, the Court finds that Clear Lakes did not meet this burden.

For purposes of this hearing the Court has reviewed the partial decree for water right no. 36-02659 and determined that it is silent as to the quantities that can be delivered out of the respective pools to satisfy water right no. 36-02659.

The decree states only that the right is "diverted through a combination of two spring-fed diversion pools." Thus, it appears that IDWR, in administering the partial decrees, has the authority to allocate the diversions out of the pools in a manner that first satisfies the senior right (water right no. 36-02659) and then the junior rights in ranking order. Based upon the pleadings, and statutory interpretation, IDWR's method of administering these rights appears consistent with the law and within IDWR's administrative authority. For purposes of this hearing, Clear Lakes has not met its burden under I.R.C.P. 65(e)(1) as to the likelihood of prevailing on the merits.

Clear Lakes also has the burden under I.R.C.P. 65(e)(2) to show irreparable injury. In the Court's opinion, the injury resulting from reduced water supply is the same for Clear Lakes or Clear Springs because both would suffer from an inability to run their respective hatcheries at full design capacity. Clear Lakes has taken the position that if injury is occasioned upon Clear Springs, the damages can be redressed in monetary terms through the posting of a bond, but if the injury is placed upon Clear Lakes, it is irreparable. The Court disagrees with this position and finds that Clear Lakes has not met its burden of showing irreparable injury under I.R.C.P. 65(e)(2).

III.


ORDER

Pursuant to I.R.C.P. 24(a) concerning intervention, and pursuant to I.R.C.P. 65(e) providing grounds for preliminary injunction, and based upon the pleadings, briefs and argument of counsel, and the comments and rulings of the Court at the July 2, 2002, hearing:

IT IS HEREBY ORDERED that Clear Springs Foods, Inc.'s *Motion to Intervene* in this lawsuit is **granted**.

IT IS FURTHER ORDERED that for the foregoing states reasons Clear Lakes' *Motion for Preliminary Injunction* is **denied**. All parties shall bear their own costs and fees.

Dated 7-22-02



ROGER S. BURDICK
Administrative District Judge

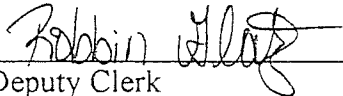
CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING INTERVENTION; AND DENYING MOTION FOR PRELIMINARY INJUNCTION was mailed on July 22, 2002, with sufficient first-class postage to the following:

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