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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ~~TWIN FALLS~~ MINIDOKA Jerome

IDAHO GROUND WATER APPROPRIATORS, INC., ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT, and BINGHAM GROUND WATER DISTRICT

Petitioners,

vs.

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

Respondents.

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR 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.

Case No. _____

APPLICATION FOR STAY OR Temporary ~~&~~ Restraining order I.R.C.P. 65(b)

IDAHO GROUND WATER APPROPRIATORS, INC., MAGIC VALLEY GROUND WATER DISTRICT, and NORTH SNAKE GROUND WATER DISTRICT (collectively the "Ground Water Users"), acting for and on behalf of their members, hereby asks the Court to stay enforcement of the *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4)* ("As-Applied Order") during consideration of the Petition for Judicial Review pursuant to Idaho Code § 67-5274 and Rule 84(m) of the Idaho Rules of Civil Procedure. This *Application for Stay* is supported by affidavits of Timothy Deeg, Charles Brendecke, and Candice McHugh filed contemporaneously herewith.

LEGAL STANDARD

Idaho courts have long recognized their authority to grant equitable relief during judicial review of agency action. *Hollingsworth v. Koelsch*, 76 Idaho 203 (1955). In 1992 the Idaho legislature codified that authority by amending the Idaho Administrative Procedures Act to provide that "the reviewing court may order a stay [of agency action] upon appropriate terms." Idaho Code § 67-5274; 1992 Idaho Sess. Laws., ch. 263, § 46, p. 783. This authority is incorporated almost verbatim into Rule 84(m) of the Idaho Rules of Civil Procedure.

A stay is the appellate equivalent of a temporary restraining order or injunction issued by a trial court, though the requirements for a stay are less stringent. Both Idaho Code § 67-5274 and I.R.C.P. 84(m) grant judges broad authority to issue a stay, providing only that the stay shall be "upon appropriate terms." In considering applications for stay, Idaho courts as well as other jurisdictions commonly employ the criteria used by trial courts when considering applications for equitable relief.

In *Hollingsworth*, the Idaho Supreme Court stayed enforcement of an order issued by the Commissioner of Law Enforcement during the appeal. 76 Idaho at 210. The court reasoned that "irreparable damage would be suffered by plaintiff unless granted a stay of the order." *Id.* Relying on a decision of the United States Supreme Court, the court explained that "[i]f the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made." *Id.* (quoting *Scripps-Howard Radio, Inc. v. Federal Communications Comm'n*, 316 U.S. 4, 10 (1942)).

The United States Court of Appeal for the Sixth Circuit thoroughly addressed a motion for stay of an administrative action during appeal by applying "the same four factors traditionally considered in evaluating the granting of a preliminary injunction." *Michigan Coalition of*

Radioactive Material Users, Inc. v. *Griepentrog,* 945 F.2d 150, 153 (6th Cir. 1991). In Idaho, the grounds for a preliminary injunction are expressly defined in I.R.C.P. 65(e):

> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.
>
> (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.
>
> (3) When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

A temporary restraining order similarly requires a demonstration that "immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the party's attorney can be heard in opposition." I.R.C.P. 65(b). In *Michigan*, the court pointed out that these standards "are not prerequisites that must be met, but are interrelated considerations that must be balanced together." 94 F.2d at 153.

This balancing means that the greater the harm, the less critical that the movant show a likelihood of success on the merits. This was explained in *Michigan*:

> a movant need not always establish a high probability of success on the merits. The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other. This relationship, however, is not without its limits; the movant is always required to demonstrate more than the mere "possibility" of success on the merits. For example, even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the defendant if a stay is granted, he is still required to show, at a minimum, "serious questions going to the merits."

Id. at 153-54 (internal cites omitted). If a party demonstrates they will be irreparably harmed without a stay, the party "will be deemed to have satisfied the likelihood of success on appeal element if they show 'questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation.'" *McClendon* v. *City of Albuquerque,* 79 F.3d 1014, 1020 (10th Cir. 1996) (citation omitted). The need to show a likelihood of success is further minimized if the appeal presents significant legal questions:

> An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public

> and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

Washington Metropolitan Area Transit Commission v. *Holiday Tours, Inc.*, 559 F.2d 841,843 (D.C. Cir. 1977) (emphasis added).

The Idaho Supreme Court has already declared that "[w]ater rights are real property, and as such may be protected by injunction, mandamus or prohibition when threatened by irreparable injury." Olson v. Bedke, 97 Idaho 825, 830 (1976). The ultimate question presented by this Application is simply whether it makes sense to "maintain the status quo and prevent irreparable injury during the pendency of the action." *Blue Creek Land and Livestock Co. v. Battle Creek Sheep Co.*, 52 Idaho 728, 19 P.2d 628 (1933).

STATEMENT OF FACTS

The Ground Water Users own lawful and vested ground water rights that are diverted from the East Snake Plain Aquifer ("ESPA") and put to beneficial use for agriculture, municipal, commercial, and industrial purposes, including the irrigation of hundreds of thousands of acres of farmland. American Falls-Aberdeen Ground Water District represents approximately 120 owners of ground water rights in Bannock and Power Counties. Bingham Ground Water District represents approximately 495 owners of ground water rights in Bingham, Blackfoot, and Bonneville Counties. The locations and boundaries of the Ground Water Districts are depicted on the map attached as Exhibit B to the McHugh Aff.

The As-Applied Order was issued after the farming season began and after crops had been planted. The Order states that the Director will shut down ground water irrigation to 73,782 acres unless by May 13, 2010, the Ground Water Users are able to secure 84,300 acre-feet of storage water for delivery to American Falls Reservoir District #2 (AFRD2) and Twin Falls Canal Company (TFCC). (As-Applied Order, ¶3 at 7.) Curtailment is expected to increase reach gains to the Snake River by 77,985 acre-feet over time. *Id.* However, those gains will be realized throughout the year. (Brendecke Aff.) AFRD2 and TFCC will receive approximately twenty percent of those gains, or 15,597 acre-feet. *Id.* Thus, the As-Applied Order requires the Ground Water Users to provide 68,703 acre-feet more as mitigation than AFRD2 and TFCC are expected to receive from curtailment.

The requirement to secure the 84,300 acre-feet is in addition to the approximately 25,000 acre-feet that the Ground Water Users are already required to provide to forestall curtailment

under water delivery calls made by Blue Lakes Trout Farm, Inc., and Clear Springs Foods, Inc. (Deeg Aff.) It is an insurmountable obligation.

Extreme economic harm that will result from drying up 73,782 acres of irrigated farmland. In another recent delivery call made against ground water diversions on the Eastern Snake River Plain, the curtailment of 70,000 acres was expected to result in $34 million in losses to the farmers alone.

Waiting until a final decision on the As-Applied Order or the Methodology Order after the limited hearing will not provide relief to the Ground Water Users because curtailment is expected before the hearing, unless the Ground Water Users secure 84,300 acre-feet of water by May 13, 2010.

PROCEDURAL HISTORY

On September 5, 2008, Gary Spackman (the "Director"), acting in his capacity as Interim Director of the Idaho Department Water Resources ("IDWR"), issued a final order ("2008 Final Order") *In The Matter of Distribution of Water To Various Water Rights Held by or 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* (the "SWC Delivery Call"). (McHugh Aff. Ex. C.) All issues that had been raised at the hearing were ruled upon in the 2008 Final Order, except for the Director's methodology for determining material injury, reasonable in-season demand, and reasonable carryover to AFRD2, TFCC, and the other entities that make up the "Surface Water Coalition."

The Honorable John M. Melanson issued his *Order on Judicial Review* on July 24, 2009 ("Judicial Review Order"). (McHugh Aff., Ex. D.) The Judicial Review Order remanded the issue of methodology for determining the material injury to in-season demand and reasonable carry over to the Director for further proceedings.

The City of Pocatello and the Ground Water Users filed petitions for rehearing on the Order on Petition for Judicial Review. One of the issues on rehearing was whether the Director should be required to issue an order, based on the agency record, describing the methodology used to determine material injury. On February 22, 2010, a hearing was held on the petitions for rehearing. On March 4, 2010, the court issued its *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order* ("Stay Order on Rehearing") and charged

the Director to issue a final order determining the methodology to use to determine material injury to reasonable in-season demand and reasonable carryover by March 31, 2010. (McHugh Aff. Ex. E.) Pursuant to an *Order Granting Unopposed Motion for Extension of Time to File Order on Remand*, the court extended the deadline to April 7, 2010 ("Order Granting Extension"). (McHugh Aff. Ex. F.)

The Director issued the *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order") on April 7, 2010. (McHugh Aff. Ex. G.) The Methodology Order set forth ten steps that would be taken to determine the material injury for reasonable in-season demand and reasonable carryover. Each step sets forth specific tasks and deadlines which are to be met.

The Ground Water Users, City of Pocatello, and Surface Water Coalition filed petitions for reconsideration of the Methodology Order on April 21, 2010. The Ground Water Users filed a corrected petition for reconsideration on April 22, 2010.

The Director issued the As-Applied Order on April 29, 2010, requiring the Ground Water Users to suffer curtailment unless they come up with 84,300 acre-feet of water to deliver to TFCC and AFRD2 as mitigation.

On May 6, 2010, the Director granted the all of the petitions for reconsideration of the Methodology Order. (McHugh Aff. Ex. H.)

Also on May 6, 2010, the Ground Water Users filed a motion requesting reconsideration and a stay of the As-Applied Order until after a hearing on the Methodology Order, the As-Applied Order, and the Ground Water Users' mitigation plan that had been pending before the Director since November. (McHugh Aff. Ex. K.) The motion also sought and permission to conduct discovery. *Id.* The Ground Water Users also filed notices of deposition of IDWR personnel Lyle Swank and Tony Olenichak. (McHugh Aff. Ex. M.)

On May 10, 2010, the Director entered an order granted the Ground Water Users' request for reconsideration, but denied their request for stay and extension of time, limited the discovery to only those matters relating to steps 3 and 4, denied discovery on the Methodology Order, and quashed the notices of deposition for Lyle Swank and Tony Olenichak. (McHugh Aff. Ex. I.) One critical issue is that the Director had failed to provide the 2008 data upon which he relied in the Methodology Order, which was outside the record of the district court case, until the day before the petitions for reconsideration were due.. The Methodology Order contains forty pages of highly technical, legal and factual information. (McHugh Aff. Ex. G.) The parties and their

consultants had a mere fourteen days to analyze, review and respond appropriately, but without the underlying data and calculations. Moreover, some of the data missing and the Ground Water Users have been precluded from discovering how the data was used because the Director has denied the Ground Water Users access to key IDWR personnel.

On May 10, 2010, the Director issued a Notice of Hearing regarding 2008 data relative to the Methodology Order and set a hearing to commence on May 24, 2010, starting at 9 a.m. at the IDWR. (McHugh Aff. Ex. J.) The hearing is limited specifically to provide the parties the opportunity to "contest or rebut the 2008 data." *Id.* The Director also issued a Notice of Hearing on the As-Applied Order, but limited that hearing to whether the As-Applied Order followed "steps 3 and 4 of the Methodology Order." (McHugh Aff. Ex. I.) The Director also issued an Amended Notice of Hearing relating to the Ground Water Users' pending mitigation plan, postponing the hearing that was originally scheduled to start May 24, 2010, until after the hearings on the 2008 data and steps 3 and 4 used in the As-Applied Order. (McHugh Aff. Ex. L.)

ARGUMENT

The As-Applied Order must be stayed because it incorrect both factually and legally, the Ground Water Users will be severely and irreparably harmed if the Order is enforced during the pendency of judicial review, the Ground Water Users are prepared to provide security that will compensate the calling senior water users if the Order is found to have been wrongfully stayed, and the issuance of a stay is in the public interest.

A. The Director erred by calculating water demand solely by past headgate deliveries, without considering whether the seniors' need for additional water.

The water users who are seeking curtailment of ground water rights in this case (the Surface Water Coalition) brought suit not long ago to have the IDWR's administrative Rules for Conjunctive Management of Surface and Ground Water Sources ("CM Rules") declared unconstitutional. *American Falls Reservoir District No. 2 v. Idaho Dep't of Water Resources*, 143 Idaho 863 (2007). One of the issues addressed by the Idaho Supreme Court was whether the Director should administer water solely the face of partial decrees, or whether he should consider a senior's actual use of water and need for additional water. The court affirmed the latter, explaining that the Director has the "duty and authority to consider circumstances when the water user is no irrigating the full number of acres decreed under the water right in a delivery call to evaluate whether the senior is putting the water to beneficial use." *Id.* at 876 (internal quotes omitted).

It is imperative that the Director consider the number of acres actually irrigated because economic development and population grown often result in irrigated land being taken out of production to make way for roads, shopping centers, etc. However, in this case the Director refused to consider the number of acres actually irrigated TFCC and AFRD2. Instead, the Director calculated their water demand solely based on past headgate deliveries. This conclusion wrongly assumes both that past water deliveries reflect actual irrigation needs and that there will never be any changes to the number of acres actually irrigated. (*See* McHugh Aff., Ex. N.)

Another reason why headgate deliveries are not a reliable estimate of legitimate irrigation demand is because canal companies like AFRD2 and TFCC commonly dump excess water out the end of their systems. A third problem is that headgate deliveries ignore the reality that TFCC and AFRD2 operate hydropower facilities on their irrigation canals. Their relatively late-priority water rights for these hydro facilities are supplied simultaneously with water diverted under their early-priority irrigation rights. They have an economic motivation to divert water under their early-priority irrigation rights in order to generate hydropower during times when water is not applied to beneficial use for irrigation. Consequently, headgate deliveries for TFCC and AFRD2 simply do not accurately reflect the amount of water needed for irrigation.

Further, the As-Applied Order is not based on the record or the evidence presented by parties, but instead on the concept that:

> Given that the water balance method for estimating annual diversion requirements is subject to varying results based on the range of parameters used as input, an alternate approach is to assume that unknown parameters are practically constant from year-to-year across the entire project.

(Methodology Order at 15; McHugh Aff., Ex. A (emphasis added).

The Director's reliance on "unknown parameters" is arbitrary and capricious and must be stopped before he dries up more than 70,000 acres of irrigated farmland.

The As-Applied Order violates Idaho law and the CM Rules and is arbitrary, capricious, and an abuse of discretion because the Director refused to calculate irrigation demand based on actual acres irrigated, and because he relied upon "unknown paramaters." The result of these errors is the imposition of a mitigation obligation that is that is twice as large any anything the Ground Water Users have ever experienced and is far greater than *anyone* anticipated.

B. The Director erred by requiring junior-priority ground water users to supply more water as mitigation than would accrue to the calling senior water users from curtailment.

The As-Applied Order requires the Ground Water Users to provide 84,300 acre-feet of water for mitigation even though curtailment is expected to increase provide AFRD2 and TFCC with approximately 15,000 acre-feet. (McHugh Aff., Ex. N.) The As-Applied order violates Idaho Code §§ 42-607 and 42-226 and is arbitrary, capricious, and an abuse of discretion because it requires junior-priority ground water users to provide as mitigation more than four times the amount of water that AFRD2 and TFCC will receive from curtailment,

C. The Director erred by requiring junior-priority ground water users to provide mitigation to AFRD2 or suffer curtailment, even though curtailment will not provide additional water to AFRD2.

Idaho Code § 42-607 governs the distribution of water among appropriators and gives the watermaster, under the direction of the IDWR, the authority "to shut and fasten, or cause to be shut or fastened . . . the headgates of the ditches or other facilities for diversions of water from such stream, streams, or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply . . ." (Emphasis added.) In this case, ground water diversions do not interfere with the water supply of AFRD2, and curtailment will not provide additional water to AFRD2. Yet, the As-Applied Order requires the Ground Water Users to provide 27,400 acre-feet to AFRD2 or face curtailment. The Order violates Idaho Code § 42-607, the futile call doctrine, and the law of full economic development of ground water resources set forth in Idaho Code § 42-226. (McHugh Aff. Ex. N)

D. The Director erred by requiring junior-priority ground water users to mitigate for evaporation from the Upper Snake River Basin reservoir system.

The As-Applied Order requires the Ground Water Users to mitigate for evaporation from the reservoir system. (McHugh Aff., Ex. N.) Ground water pumping has no impact on reservoir storage and no impact on evaporation. The As-Applied Order violates Idaho law and is arbitrary, capricious, and an abuse of discretion, by requiring the Ground Water Users to mitigate for evaporation.

E. The Ground Water Users will suffer severe and irreparable harm if the As-applied Order is not stayed during judicial review.

The Ground Water Users submitted a Mitigation Plan for the Surface Water Coalition Delivery Call in November of 2009. (Deeg Aff.; McHugh Aff. Ex. O.) This mitigation plan was intended to avoid the very crisis that the Ground Water Users currently face. Yet, the Director did not set a hearing on the plan until *after* the Ground Water Users had planted their crops.

The Ground Water Users obligation to provide approximately 110,000 acre-feet of mitigation to avoid curtailment is insurmountable. (Deeg Aff.) This is twice as much water as

the Ground Water Users have ever had to provide as mitigation in the past. What's more, the upper Snake River Basin reservoir system is full! Nobody anticipated the Director would or even could come up with such a massive mitigation obligation with a full storage supply.

Further, the Ground Water Users were given only 14 days to attempt to secure the 84,300 acre-feet of storage water for mitigation. Had the Ground Water Users been provided adequate opportunity, there would have been at least a realistic possibility of avoiding curtailment. Now, however, curtailment of irrigation water to growing crops is unavoidable unless the Court stays execution of the As-Applied Order during judicial review.

The As-Applied Order will cause severe and irreparable harm if not stayed, by:

a. preventing the lawful diversion and use of ground water to beneficial use under licensed, decreed and constitutionally appropriated water rights;

b. impairing the Ground Water Users' access to capital for continued business operations;

c. foreclosing any further enrollment in certain federally and state funded agricultural programs;

d. impairing the ability of certain municipalities to provide for the public welfare and safety of citizens;

e. causing the death and destruction of livestock;

f. forcing numerous industries and commercial businesses to cease production and close causing untold harm to the economy of the State of Idaho and to the southern region of the state in particular;

g. causing the loss of already planted crops; and

h. causing economic doom to the Ground Water Users individually.

Based on evidence presented in the district court appeals from the original delivery calls of the Surface Water Coalition, Blue Lakes Trout Farm, Inc., and Clear Springs Foods, Inc., the net economic loss from curtailment will undoubtedly reach tens of millions in the short-term and could easily reach billions of dollars in the long-term.

CONCLUSION

The As-Applied Order indicates that curtailment will be immediate if the Ground Water Users are unable to provide 84,300 acre-feet in mitigation by May 13, 2010. Therefore, the Ground Water Users ask the court to immediately issue a temporary stay and order to show cause why the stay should not be continued through the duration of judicial review of the As-Applied Order. For the reasons stated above, the As-Applied Order violates Idaho law and is arbitrary, capricious, and an abuse of discretion in multiple respects.

The As-Applied Order is a train wreck. To the Ground Water Users, who had planted their crops in anticipation of a far lesser and practically achievable mitigation obligation, it has been a nightmare. If the curtailment order is issued, the Ground Water Users must dry up lands, suffer their ultimate fate, irreparable harm and the devastating economic losses even though they have had a mitigation plan pending since November of 2009.

The Ground Water Users have no adequate remedy at law. Enforcement of the As-Applied Order will result in immediate, extreme, and irreparable harm. In contrast, curtailment will provide no benefit to AFRD2, and no substantial benefit to TFCC—both of whom have the benefit of a full storage supply. Further, the Ground Water Users have secured sufficient storage water to provide TFCC and AFRD2 (if necessary) with as much water as they will receive from curtailment. With such security, there is no risk of harm to TFCC and AFRD2 from staying enforcement of the As-Applied Order, whereas there will be extreme and irreversible harm to entire economies of the Order is not stayed.

This is a circumstance that must compel the court to "maintain the status quo and prevent irreparable injury during the pendency of the action." *Blue Creek Land and Livestock Co. v. Battle Creek Sheep Co.*, 52 Idaho 728, 19 P.2d 628 (1933). Waiting until after the Director hold a hearing and issues a final order will be "an idle ceremony [since] the situation [will be] irreparably changed before the correction could be made." *Hollingsworth*, 76 Idaho at 210.

DATED this 12th day of May, 2010.

RACINE OLSON NYE BUDGE & BAILEY

By: _____
Randall C. Budge
Candice M. McHugh
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May, 2010, the above and foregoing document was served in the following manner:

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