

RECEIVED

FEB 12 2014

DEPARTMENT OF
WATER RESOURCES

via email

Randall C. Budge (ISB# 1949)
Thomas J. Budge (ISB# 7465)
RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED
201 E. Center St. / P.O. Box 1391
Pocatello, Idaho 83204
(208) 232-6101 – phone
(208) 232-6109 – fax
rcb@racinelaw.net
tjb@racinelaw.net

Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-02551
& 36-07694
(RANGEN, INC.)

Docket No. CM-DC-2011-004

**IGWA's Petition to Stay
Curtailement, and Request for
Expedited Decision**

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, hereby petitions the Director pursuant to IDAPA 37.01.01.780 to stay implementation of curtailement under the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights junior to July 13, 1962* (referred to herein as the "Curtailement Order") entered January 29, 2014, during the 2014 growing season until a decision is made on IGWA's Mitigation Plan filed herewith.

LEGAL STANDARD

The Director has authority to stay an order pursuant to IDAPA 37.01.01.780, which states:

Any party or person affected by an order may petition the agency to stay any order, whether interlocutory or final. Interlocutory or final orders may be stayed by the judiciary according to statute.

This rule does not specify a particular standard for granting a stay. However, the Idaho Administrative Procedure Act provides that an agency "may grant, or the reviewing court may order, a stay upon appropriate terms."¹ Idaho Rule of Civil

¹ Idaho Code § 67-5274.

Procedure 84(m) similarly provides that “an agency may grant... a stay upon appropriate terms.”

While Idaho law does not specifically elaborate on what “appropriate terms” are for granting a stay under Idaho Code § 67-5274 or I.R.C.P. 84(m), petitions for stay are generally decided based on principles of equity.² The following factors are often considered:

(1) the likelihood the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.³

ARGUMENT

The Director should stay regulation of groundwater use during the 2014 growing season and adequate time is afforded to implement approved mitigation solutions because (1) due process warrants consideration of IGWA’s mitigation plan before implementing curtailment; (2) it is highly likely that IGWA will obtain approval of its mitigation plan, making curtailment unnecessary; (3) Junior groundwater users and many others will suffer severe, irreparable harm if the stay is not granted; (4) Rangen will not be materially harmed if the Director the stay; (5) granting the stay is in the public’s interest; and (6) principles of equity warrant a stay in this proceeding.

1. Due process warrants a determination on IGWA’s pending mitigation plan before implementing curtailment.

The Curtailment Order allows groundwater users to avoid curtailment by participating in an approved mitigation plan.⁴ As such, principles of due process require adequate time to submit, obtain approval of, and implement a mitigation plan before curtailment occurs. In the Clear Springs Foods and Blue Lakes Trout

² *Haley v. Clinton*, 123 Idaho 707, 709 (Ct. App. 1993); *see also McHan v. McHan*, 59 Idaho 41, 46 (1938) (“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. It is entirely possible that the refusal to grant a stay would injuriously affect appellant, and it likewise is apparent that granting such a stay will not be seriously injurious to respondent.”).

³ *Michigan Coalition of radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *see also Utah Power & Light Co. v. Idaho Pub. Utils. Comm’n*, 107 Idaho 47, 50 (1984) (Stay justified when there is irreparable loss to moving party); *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996); *Lopez v. Heckler*, 713 F.2d 1432, 1435-1436 (9th Cir. 1983); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); 5 Am.Jur.2d *Appellate Review* § 470 (“Standards for granting stay”).

⁴ Curtailment Order, p. 42.

delivery call case, District Court Judge John Melanson held that while Idaho Code § 42-607 does not expressly require a hearing before undertaking curtailment, “because water rights are property rights, a due process argument can be made that notice and a hearing are indeed required before curtailment of such rights by a watermaster”⁵ The Judge suggested the following process:

Under the CMR, a more appropriate course of action for the Director to follow would have been to issue the initial curtailment order, provide the junior Ground Water Users time to submit a mitigation plan before making that order final, and then hold a hearing on the order of curtailment and material injury.⁶

IGWA recognizes that the procedural history is a little different in the present case, since a hearing has already been held on the issue of material injury; however, that does not negate the need to consider mitigation before making the Curtailment Order final. Judge Melanson affirmed this on rehearing, explaining that while a mitigation plan hearing is not mandatory following a finding of injury, “neither I.C. § 42-607 nor the CMR preclude the Director from providing for a hearing after the material injury determination and prior to curtailment.”⁷

In this case, the Director could have issued a preliminary order finding material injury, then provided an opportunity to submit a mitigation plan before making the order final, as Judge Melanson suggests. While the Curtailment Order was instead issued as a final order, the Director can achieve the same result by exercising his authority under IDAPA 37.01.01.780 to stay curtailment until a decision is made on IGWA’s pending mitigation plan and a reasonable time is afforded to implement approved mitigation solutions. This course is consistent with due process and orderly administration of Idaho’s water resources.

2. IGWA’s Mitigation Plan will likely be approved, making curtailment unnecessary.

IGWA is diligently working to provide mitigation. Some of the solutions in IGWA’s mitigation plan have already been undertaken and are in place, such as recharge, conversions of farmland from surface water to groundwater irrigation, and delivery of water through the Sandy Pipe. These actions have benefitted Rangen for many years, and will continue to benefit Rangen while the Director considers IGWA’s mitigation plan.

Further, IGWA has a proven track record of developing and implementing mitigation plans, and it is highly probable that IGWA’s mitigation plan will be approved, making curtailment unnecessary.

⁵ Order on Petitions for Judicial Review, *Clear Springs Foods, Inc., v. Blue Lakes Trout Farm Inc.*, Gooding County Case No. 2008-444 (June 19, 2009) p. 44.

⁶ *Id.* at 51;

⁷ Order on Petitions for Rehearing, *Clear Springs Foods, Inc., v. Blue Lakes Trout Farm Inc.*, Gooding County Case No. 2008-444, (Dec. 4, 2009) p. 12.

3. IGWA's members and many others will suffer severe irreparable harm if a stay is not granted.

The short timeframe afforded by the Curtailment Order to provide mitigation has thrown the Magic Valley agriculture industry into disarray. Curtailment will dry up a large percentage of the irrigated farmland in the Magic Valley. Banks, dairies, cheese producers, suppliers, and many other businesses are dependent upon, and have planned for, production from this farmland. If curtailment is implemented, loans will go into default, thousands of jobs will be lost, cities will be unable to provide services, businesses will close, and land will be foreclosed on. The harm that will result will be devastating, irreparable, and likely unmatched in the history of the state.

4. The granting of the stay is in the public's interest.

For the reasons stated above, few would argue that the magnitude of the pending curtailment rises to the level of a public crisis. Given Idaho's heavily agriculture-dependent economy, the effects of curtailment will ripple throughout Idaho's economy. Though IGWA's mitigation plan will be approved, the damage will have already been done. If there was ever a time for the Director to exercise his stay authority in the interest of public welfare, this is it.

5. Rangen will not be materially harmed if the stay is granted.

Rangen will not be significantly harmed if the Director grants the stay. Since irrigation does not begin until April, curtailment will not provide any benefit to Rangen until sometime thereafter. Yet, given the time it takes for the effects of curtailment to be realized, the benefits to Rangen will be small within the first year after curtailment. If the Director phases in curtailment as requested in IGWA's Petition for Reconsideration, only 0.7 cfs is expected to accrue to the Curren Tunnel in year 1. This is not enough water to make any material difference in the way Rangen operates, considering the lack of efficiency with which Rangen has operated in recent years, and this will presumably be satisfied by actions already taken by groundwater users (recharge, conversions, etc.).

The amount of water Rangen may receive in the year 2014 from curtailment is so small, coupled with the fact that IGWA has already taken measures that have and will provide water Rangen, including the Sandy Pipe which provides far more water to Rangen than it will get from curtailment, compels granting a stay.

6. Principles of equity warrant a stay on the curtailment order.

Had the Curtailment Order been issued well in advance of the 2014 irrigation season, mitigation could have been provided, or curtailment could have been prepared for, without creating the dire circumstance farmers, businesses, and cities now find themselves in. Implementation of curtailment within a matter of weeks after the Curtailment Order was issued creates an incredible hardship on

affected water right holders, and does not leave adequate time to seek alternative remedies such as mitigation or judicial appeal, nor does it provide adequate time for users to prepare for curtailment and the effect it will have on their businesses.

Idaho Code § 42-607 does not set timeframes for groundwater regulation, but the Idaho legislature has recognized the need for early warning of curtailment risks. The statutes governing critical ground water areas and ground water management areas (Idaho Code § 42-233(a) and (b)) require the Director to issue curtailment orders no later than September 1 prior to the irrigation season when the order is to be effective. These statutes recognize that planting and business decisions are made long before the actual growing season begins. Although the Department's Order was not issued under I.C. § 42-233(a) and (b), the same equity principles apply to the Curtailment Order. This is particularly true in this case where Rangen's call was previously declared a futile call, and was previously subject to a 10% trimline that exposed 735 acres to curtailment. The potential for 157,000 acres to be curtailed on short notice was inconceivable.

Moreover, the timing problem created by the Curtailment Order is partly of Rangen's own making. The Curtailment Order was delayed because of Rangen's unnecessary request that attorney Chris Bromley not contribute to the decision even though Mr. Bromley sat through most of the hearing. Rangen should not be able to profit from its delay of the Curtailment Order.

CONCLUSION

Due process and principles of equity warrant staying curtailment during the 2014 growing season because (1) the Curtailment Order provides that parties may submit a mitigation plan, and due process requires sufficient time to implement mitigation before curtailment becomes effective; (2) there is a high likelihood IGWA's pending mitigation plan will be approved and successfully implemented, avoiding curtailment altogether; (3) if a stay is not granted, junior groundwater users will suffer severe, irreparable harm; (4) Rangen will not be significantly harmed if a stay is granted; (5) a stay is in the public interest; and (6) equitable principles warrant a stay.

REQUEST FOR EXPEDITED DECISION

Given the urgent for Magic Valley farmers and others to make planting and other agribusiness decisions related to the 2014 irrigation season, IGWA asks that the Director rule on this Petition as soon as possible.

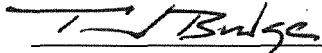
RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED

By: T.J. Budge
T.J. Budge
Attorneys for IGWA

February 11, 2014
Date

CERTIFICATE OF MAILING

I certify that on this 11th day of February, 2014, the foregoing document was served on the following persons in the manner indicated.


Signature of person mailing form

Director, Gary Spackman Idaho Department of Water Resources PO Box 83720 Boise, ID 83720-0098 Deborah.Gibson@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
Garrick Baxter Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
Robyn M. Brody Brody Law Office, PLLC PO Box 554 Rupert, ID 83350 robynbrody@hotmail.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
Fritz X. Haemmerle Haemmerle & Haemmerle, PLLC PO Box 1800 Hailey, ID 83333 fxh@haemlaw.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
J. Justin May May, Browning & May, PLLC 1419 West Washington Boise, ID 83702 jmay@maybrowning.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail

<p>Sarah Klahn Mitra Pemberton WHITE JANKOWSKI, LLP 511 16th St., Suite 500 Denver, Colorado 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com</p>	<p><input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail</p>
<p>Dean Tranmer City of Pocatello PO Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us</p>	<p><input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail</p>
<p>C. Thomas Arkoosh Arkoosh Law Offices PO Box 2900 Boise, ID 83702 tom.arkoosh@arkoosh.com</p>	<p><input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail</p>
<p>John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson 195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 tlt@idahowaters.com jks@idahowaters.com pla@idahowaters.com</p>	<p><input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail</p>
<p>W. Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p><input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail</p>