

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

IN THE MATTER OF DISTRIBUTION OF)	
WATER TO WATER RIGHT NOS. 36-02551)	CM-DC-2011-004
AND 36-07694)	
(RANGEN, INC.))	ORDER GRANTING
)	IGWA'S PETITION TO
)	STAY CURTAILMENT
)	

BACKGROUND

On January 29, 2014, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued a *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“Final Order”) in this proceeding.

On February 11, 2014, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed *IGWA’s Mitigation Plan and Request for Hearing* (“Mitigation Plan”).

On February 12, 2014, IGWA filed *IGWA’s Petition to Stay Curtailment, and Request for Expedited Decision* (“Petition to Stay”). The petition asks the Director to issue a stay of the Final Order “during the 2014 growing season until a decision is made on IGWA’s Mitigation Plan...” *Petition to Stay* at 1. That same day the Department issued its *Order Shortening Time to File Responses to IGWA’s Petition to Stay Curtailment*, which shortened the time for parties to respond to the Petition to Stay to February 19, 2014.

On February 19, 2014, Rangen, Inc. (“Rangen”) filed *Rangen, Inc.’s Response in Opposition to IGWA’s Petition to Stay Curtailment* (“Response”). No other parties filed responses to the Petition to Stay.¹

¹ On February 14, 2014, a *Petition for Limited Intervention* was filed by a number of municipalities located within the curtailment area. In the petition, the municipalities seek to join in IGWA’s petition to stay. *Petition for Limited Intervention* at 5. Because the municipalities are not currently parties to this proceeding, the Director will not consider the municipalities’ arguments. The Director notes, however, that the arguments raised by the municipalities echo those raised by IGWA in its petition.

LEGAL STANDARD FOR A STAY

The Director has authority to stay a final order pursuant to the Department's rules of procedure:

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. The agency may stay any interlocutory or final order on its own motion.

IDAPA 37.01.01.780 ("Rule 780").

The authority to stay a final order is also reflected in I.C. § 67-5274 and I.R.C.P. 84(m), which provide that an "agency may grant, or the reviewing court may order, a stay upon appropriate terms." The use of the word "may" demonstrates the Director's discretionary authority to stay enforcement of an order. *See Bank of Idaho v. Nesselth*, 104 Idaho 842, 846, 664 P.2d 270, 274 (1983). As both IGWA and Rangen recognize in their briefing, however, neither the statute nor the rule define what constitutes "appropriate terms" or establish a clear test for determining when a stay is appropriate. There are no reported judicial opinions in Idaho discussing what qualifies as "appropriate terms" or that describe when a stay is appropriate pursuant to Rule 780, I.C. § 67-5274 or I.R.C.P. 84(m). Consequently, the Director must look to other authorities to help determine when a stay is appropriate.

The authority of the Director to stay an order in an administrative proceeding is analogous to the authority of a district court to stay the enforcement of a judgment under I.R.C.P. 62(a). In both circumstances, an order has been issued deciding the matter and a party can seek to have enforcement of the order stayed pending appeal or pending further action. A stay pursuant to I.R.C.P. 62(a) may be granted by a district court "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, 851 P.2d 1003, 1005 (Ct. App. 1993). A stay is appropriate "[w]here it appears necessary to preserve the status quo" *McHan v. McHan*, 59 Idaho 41, 80 P.2d 29, 31 (1938). Likewise, a stay is appropriate when, "[i]t 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." *Id.* This standard parallels the standard for issuing a preliminary injunction found in I.R.C.P. 65(e). The relevant sections of I.R.C.P. 65(e) provide:

A preliminary injunction may be granted in the following cases:

- (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.

...

(5) A preliminary injunction may also be granted on the motion of the defendant upon filing a counterclaim, praying for affirmative relief upon any of the grounds mentioned above in this section, subject to the same rules and provisions provided for the issuance of injunctions on behalf of the plaintiff.

Based on the foregoing, the Director will consider the following factors when deciding whether a stay should be issued:

1. The likelihood the moving party will prevail on appeal or in another pending proceeding;
2. Whether denial of the stay will result in irreparable harm to the moving party;
3. Whether granting the stay will cause irreparable harm to the respondent.

ANALYSIS

A. There are equitable grounds for the stay as it is likely that IGWA's mitigation plan will be approved for the irrigation season.

Junior ground water users may avoid curtailment by participating in an approved mitigation plan. *Final Order* at 42. IGWA submitted a mitigation plan to the Department and the process of advertising the mitigation plan is occurring. The last day of publication of the plan is February 27, 2014. The deadline for protests to the mitigation plan is March 10, 2014. A hearing on the mitigation plan has been scheduled for March 17 - 18, 2014,. IGWA has represented that it has secured and is ready to supply water directly to Rangen in the amount required by the Rangen Order. Specifically, North Snake Ground Water District ("NSGWD"), a member of IGWA, has reached a five year agreement with Butch Morris to provide Morris surface water through the Sandy Pipeline in return for allowing NSGWD to use certain water rights owned by Morris which have a source of the Curren Tunnel. *Mitigation Plan* at 2-3. The Morris rights are for 6.05 cfs. Because the Morris water rights are senior to Rangen's injured water rights and because the agreement with Morris gives IGWA the right to use the Morris water rights for mitigation purposes, IGWA is likely entitled to mitigation credit related to the exercise of the Morris rights.

In addition, IGWA has implemented a number of mitigation solutions that continue to this day. For example, IGWA has undertaken recharge, conversion of farmland from surface water to ground water irrigation, and voluntary dry-ups. *Mitigation Plan* at 2. The Director has previously approved mitigation credit for these activities in other delivery call proceedings and expects that IGWA will be entitled to approximately 1.5 to 2 cfs of credit for these activities.

Furthermore, NSGWD has proposed additional mitigation actions that it intends to undertake to comply with the Director's Order. Cumulatively, the proposed measures, once implemented, will fully satisfy the requirements of the Director's Order and it appears that IGWA will be able to demonstrate that it has satisfied the requirement for direct delivery of water to Rangen.

B. Denial of the stay will result in irreparable harm to IGWA

If the curtailment order is left in place, it will have significant negative and potentially irreversible effects on the water right holders subject to the curtailment order. Curtailment will result in the drying up of approximately 157,000 acres of irrigated farm land. *Final Order* at 28. It is likely that many, if not most, of the water right holders will suffer significant financial hardship. The financial hardship will not be limited to the affected water right holders but will be shared by all industries with overlapping economic sectors. If the curtailment order is not lifted until IGWA's mitigation plan is approved, the damage to these businesses and communities will have already occurred and will not be able to be undone.

C. Granting IGWA's request to stay the curtailment order will not cause irreparable harm to Rangen.

Granting the stay will not result in irreparable harm to Rangen. As recognized by the Idaho Supreme Court in *Clear Springs*, ground water pumping does not cause a sudden loss of water discharge from the springs. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815, 252 P.3d 71, 96 (2011). The reduction in flows from the springs in the Thousand Springs area has been gradual and immediate curtailment will not quickly restore the Curren Tunnel spring flows. The effects of curtailment may take years to be fully realized. *Final Order* at 42. Furthermore, most of the irrigation in the area of curtailment does not commence until April, so most of the benefits of curtailment will be even further delayed. The Director has already scheduled a hearing for IGWA's mitigation plan and anticipates a decision for the plan in early spring. If the stay only lasts until a decision is issued for the mitigation plan, the amount of water that would have accrued to the Curren Tunnel as a result of curtailment in the time frame for making a decision on the mitigation plan is small.

D. The stay will be in effect until a decision is made on IGWA's pending mitigation plan.

As correctly pointed out by Rangen, IGWA cannot claim surprise that a curtailment order was issued as part of the Final Order. At the start of the Rangen proceeding, the Director advised all parties that curtailment was a possible result of the hearing. *Transcript of May 24, 2012 Hearing*, p. 43-45, attached as Exhibit 3 to *Affidavit of J. Justin May*. Then in a subsequent order, the parties were again directly warned:

The Director must use the best available science, and at the same time must also protect senior-priority rights by enforcing an order finding material injury. **Therefore, the parties should be fully aware that if material injury is found, the order finding material injury will be enforced, regardless of the time of year in which it is issued.**

Order Suspending Hearing and Setting Status Conference, p. 2 (emphasis added).

Given that IGWA has submitted a mitigation plan, which appears on its face to satisfy the criteria for a mitigation plan pursuant to the Conjunctive Management Rules and the requirements of the Director's curtailment order, and because of the disproportional harm to IGWA members when compared with the harm to Rangen if a temporary stay is granted, the Director will approve a temporary stay pending a decision on the mitigation plan. The Director will conduct an expedited hearing for the mitigation plan and to issue a decision shortly thereafter. Ground water users are advised that in the event the mitigation plan is not approved, the curtailment order will go into effect immediately.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that IGWA's Petition to Stay is GRANTED. Enforcement of the curtailment order issued in conjunction with the Final Order is stayed for members of IGWA and the non-member participants in IGWA's mitigation plan until a decision is issued on IGWA's mitigation plan. The stay does not apply to the holders of junior ground water rights identified in Attachment C of the Final Order that are not members of IGWA or are not non-member participants in IGWA's migration plan. Pursuant to Idaho Code § 42-5259, junior ground water right holders may contact their nearest ground water district to become a non-member participant in the mitigation plan.

Dated this 21st day of February, 2014.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of February, 2014, I served a true and correct copy of the ORDER DENYING IGWA'S PETITION FOR RECONSIDERATION on the following parties by the methods indicated:

J. JUSTIN MAY
MAY BROWNING
1419 W. WASHINGTON
BOISE, ID 83702
jmay@maybrowning.com

(x) U.S. Mail, Postage Prepaid
() Hand Delivery
() Facsimile
(x) E-mail

ROBYN BRODY
BRODY LAW OFFICE
P.O. BOX 554
RUPERT, ID 83350
robynbrody@hotmail.com

(x) U.S. Mail, Postage Prepaid
() Hand Delivery
() Facsimile
(x) E-mail

FRITZ HAEMMERLE
HAEMMERLE & HAEMMERLE
P.O. BOX 1800
HAILEY, ID 83333
fxh@haemlaw.com

(x) U.S. Mail, Postage Prepaid
() Hand Delivery
() Facsimile
(x) E-mail

RANDALL C. BUDGE
T.J. BUDGE
RACINE OLSON
P.O. BOX 1391
POCATELLO, ID 83204-1391
rcb@racinelaw.net
tjb@racinelaw.net

(x) U.S. Mail, Postage Prepaid
() Hand Delivery
() Facsimile
(x) E-mail

SARAH KLAHN
MITRA PEMBERTON
WHITE & JANKOWSKI, LLP
511 16TH ST., STE 500
DENVER, CO 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com

(x) U.S. Mail, Postage Prepaid
() Hand Delivery
() Facsimile
(x) E-mail

C. THOMAS ARKOOSH
ARKOOSH LAW OFFICES
P.O. BOX 2900
BOISE, ID 83701
tom.arkoosh@arkoosh.com

(x) U.S. Mail, Postage Prepaid
() Hand Delivery
() Facsimile
(x) E-mail

JOHN K. SIMPSON
TRAVIS L. THOMPSON
PAUL L. ARRINGTON
BARKER, ROSHOLT & SIMPSON
195 RIVER VISTA PLACE, STE. 204
TWIN FALLS, ID 83301-3029
tlt@idahowaters.com
jks@idahowaters.com
pla@idahowaters.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

W. KENT FLETCHER
FLETCHER LAW OFFICE
P.O. BOX 248
BURLEY, ID 83318
wkf@pmt.org

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

JERRY R. RIGBY
HYRUM ERICKSON
ROBERT H. WOOD
RIGBY, ANDRUS & RIGBY, CHTD
25 NORTH SECOND EAST
REXBURG, ID 83440
jrigby@rex-law.com
herickson@rex-law.com
rwood@rex-law.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

A. DEAN TRANMER
CITY OF POCA TELLO
P.O. BOX 4169
POCA TELLO, ID 83205
dtranmer@pocatello.us

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail


Deborah Gibson
Assistant to the Director