

On March 10, 2014, IGWA filed *IGWA's Second Mitigation Plan and Request for Hearing* ("Second Mitigation Plan"). IGWA asserts the Second Mitigation Plan, referred to as the "Tucker Springs Project," is capable of meeting the full 9.1 cfs mitigation obligation on a year-round basis. *Second Mitigation Plan* at 2.

A hearing was held on IGWA's First Mitigation Plan on March 17-19, 2014. On April 11, 2014, the Director issued an *Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* ("Mitigation Order"). The Mitigation Order recognized credit for only two components of IGWA's First Mitigation Plan: (1) IGWA's ongoing aquifer enhancement activities, and (2) exchange of irrigation water diverted from the Curren Tunnel with operational spill water from the North Side Canal Company. *Mitigation Order* at 4. IGWA's First Mitigation Plan failed to provide the full 3.4 cfs required for the first year, resulting in a mitigation shortfall of 0.4 to 0.6 cfs. *Mitigation Order* at 17.

On April 17, 2014, IGWA filed *IGWA's Second Petition to Stay Curtailment, and Request for Expedited Decision* ("Second Petition"). The Second Petition asked the Director to stay implementation of the Curtailment Order until the judiciary completes its review of the Curtailment Order in *IGWA v. IDWR*, Gooding County Case No. CV-2014-179, and *Rangen v. IDWR*, Twin Falls County Case No. CV-2014-1338.

On April 25, 2014, Rangen filed *Rangen's Motion for Reconsideration of Order Re: IGWA's Mitigation Plan; Order Lifting Stay; Amended Curtailment Order*. On April 25, 2014, IGWA filed *IGWA's Petition for Reconsideration and Clarification*. On May 9, 2014, Rangen filed *Rangen, Inc.'s Response to IGWA's Petition for Reconsideration and Clarification*.

On April 28, 2014, the Director issued an *Order Granting IGWA's Second Petition to Stay Curtailment* indicating the Director will revisit the stay at the time a decision on IGWA's Second Mitigation Plan is issued. That order did not stay curtailment for water users not participating in IGWA's mitigation plans.

On May 8, 2014, a *Notice of Potential Curtailment of Ground Water Use in Water District 130 for Non-Participation in a Mitigation Plan* ("Notice") was sent to Little Sky Farms, holder of water right no. 37-7480. The Notice informed Little Sky Farms that its water right no. 37-7480 would be curtailed in accordance with the Director's curtailment orders unless Little Sky Farms provided written proof of mitigation participation with one of the IGWA participating ground water districts.

On May 16, 2014, the Director issued a *Final Order on Reconsideration* and an *Amended Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order*. The amended order did not substantively modify the curtailment requirements.

On May 28, 2014, Little Sky Farms filed a *Petition for Stay of Curtailment Order and Determination of Proportionate Share of Mitigation Costs* (“Petition”).

On June 10, 2014, Rangen filed *Rangen, Inc.’s Response in Opposition to Little Sky Farms’ Petition to Stay Curtailment* (“Rangen Response”).

On June 13, 2014, North Snake Ground Water District (“NSGWD”) filed *North Snake Ground Water District’s Response to Petition of Little Sky Farms* (“NSGWD Response”).

A hearing on IGWA’s Second Mitigation Plan was held June 4-5, 2014, at the Department’s State office in Boise, Idaho. On June 20, 2014, the Director issued his *Order Approving IGWA’s Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order* (“Second Mitigation Order”). In approving the Second Mitigation Plan, the Director reconsidered components of the First Mitigation Plan, specifically the Howard “Butch” Morris water. The Director concluded the Morris water will provide mitigation water at an average rate of 2.2 cfs through Monday, January 19, 2015. *Second Mitigation Order* at 18. The Director ordered IGWA to deliver Tucker Springs water to Rangen no later than January 19, 2015, or junior ground water rights held by members of IGWA will be curtailed. Alternatively, another mitigation plan could be approved that delivers water to Rangen by the January date that will mitigate for depletions caused by ground water pumping. *Id.* Because the Morris water will provide mitigation for IGWA members up to January 19, 2015, the April 28, 2014, stay was no longer necessary and was lifted.

ANALYSIS

A. The Department lacks authority to require NSGWD to alter its determination of what Little Sky Farms must pay to participate as a nonmember for mitigation purposes

In its Petition, Little Sky Farms explains that, on May 19, 2014, and pursuant to Idaho Code § 42-5259, it “caused a statutory request for participation in the Rangen mitigation plan of NSGWD to be given to the counsel of NSGWD.” *Petition* at 2. Little Sky Farms claims that “NSGWD will not accept Little Sky Farms for mitigation as mandated by Idaho Code § 42-5259, unless and until Little Sky Farms pays full assessments to NSGWD for the last four years.” *Id.* at 3. Little Sky Farms asserts it has no obligation to participate in NSGWD’s prior mitigation costs and NSGWD has no right or authority to demand such participation in order for Little Sky Farms to participate in the current Rangen mitigation plan or plans. *Id.* Little Sky Farms asks the Director to require NSGWD to “provide, disclose, and account for Little Sky Farms’ proportionate share of the costs of mitigation for the pending Rangen orders referenced in [the Notice].” *Id.* at 3-4.

Idaho Code § 42-5259 provides:

(1) Upon written request from a ground water user who is not a member of a district, and regardless of whether such user is an irrigator, a district board of directors shall enter a

contract with such nonmember pursuant to which the nonmember shall be allowed to participate fully in, and obtain all benefits of, any mitigation plan, purpose or activity the district currently has in force or is developing, provided that:

- (a) The board finds that the plan is likely to be effective in mitigating the effects of such nonmember's ground water use, and that including the nonmember within the mitigation plan's coverage will not impair the plan's effectiveness as to district members;
- (b) If the district's mitigation plan has been approved by the director, the board shall evaluate the contract request in accordance with any conditions of the district's mitigation plan which address equitable participation by ground water users who do not initially participate in such mitigation plan;
- (c) Before the contract may be effective, the board may collect from the nonmember a payment adequate to compensate the district for the nonmember's proportional share of the costs the district already has incurred in developing and implementing the mitigation plan;
- (d) The board may include in the contract a provision requiring the nonmember to pay a reasonable surcharge, either annually or on some other basis, to reimburse the district for such nonmember's proportional share of those past or future costs of operating the district attributable to formulating or implementing the mitigation plan or plans in which the nonmember is participating;
- (e) The board may require the nonmember to provide security to assure the payment of all assessments and charges related to the contract;
- (f) Nothing in this section shall be interpreted to limit the district's ability to enter into a contract with nonmembers pursuant to terms and conditions acceptable to both parties.

NSGWD opposes Little Sky Farms' motion, arguing the Director "lacks jurisdiction and authority to require NSGWD to enter into a contract to provide mitigation or to establish the amount of reasonable surcharge for past mitigation activities pursuant to Idaho Code § 42-5259." *NSGWD Response* at 3.

The Director agrees with NSGWD. Little Sky Farms' dispute is with the NSGWD Board of Directors, a local government entity with authority to exercise powers and duties assigned to it by the Ground Water District Act, Idaho Code §§ 42-5201 to 5276. The Department cannot provide the relief requested by Little Sky Farms because the Department lacks the statutory authority to require NSGWD to alter its determination of what Little Sky Farms must pay the district in order to participate as a nonmember for mitigation purposes pursuant to Idaho Code § 42-5259. *See In re Bd. of Psychologist Examiners' Final Order Case No. PSY-P4B-01-010-002 ex rel. Wright*, 148 Idaho 542, 548, 224 P.3d 1131, 1137 (2010) ("An administrative agency is a creature of statute, limited to the power and authority granted it by the Legislature....") (quoting *Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996)).

NSGWD's Board of Directors can be sued and be a party to suits, actions, and proceedings. Idaho Code § 42-5224(14). If, as alleged by Little Sky Farms, NSGWD's Board of Directors has incorrectly interpreted and applied Idaho Code, Little Sky Farms must seek review of the Board's decision from an entity that has authority to review decisions of the Board. The Department is not the appropriate entity to address the complaints of Little Sky Farms.

B. The Director will temporarily stay curtailment of water right no. 37-7480

Little Sky Farms requests that the Director stay curtailment of its water right no. 37-7480 as referenced in the Notice "unless and until NSGWD provides a calculation and accounting for Little Sky Farms' proportionate share of the mitigation in the Rangen order or orders." *Petition* at 3.

NSGWD takes no position on Little Sky Farms' request for stay. Rangen however opposes the request for stay:

Rangen is interested in Little Sky's Petition to the extent that Little Sky seeks an order from the Director staying curtailment while Little Sky's Petition is pending. Rangen contends that no stay should be granted, but if it is, it should be on the same terms and conditions as any stay granted to IGWA, and if Little Sky fails to become a non-member participant in NSGWD after a determination of the amount owed, then any stay granted should be lifted until such time as Little Sky files its own mitigation plan.

Rangen Response at 1.

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. Nesseth*, 104 Idaho 842, 846, 664 P.2d 270, 274 (1983).

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). Because of this, 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.*

While it would be unjust to immediately order curtailment of Little Sky Farms water right, granting an indefinite stay would be unjust to Rangen. The Director is not convinced that Little Sky Farms and NSGWD will timely resolve the matter if the Director grants an indefinite stay. The Director should grant Little Sky Farms time to pursue its dispute with the NSGWD Board of Directors in the appropriate forum, but also encourage timely resolution of the matter. The Director will grant Little Sky Farms’ request to stay curtailment of its water right no. 37-7480 for a period of two weeks from the date of this order. Little Sky Farms might not resolve the dispute in two weeks, but injunctive or similar relief against NSGWD may be available to Little Sky Farms in the appropriate forum.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that Little Sky Farms’ Petition for Determination of Proportionate Share of Mitigation Costs is DENIED.

IT IS FURTHER ORDERED that Little Sky Farms’ Petition for Stay of Curtailment Order is GRANTED, but only on a temporary basis. Curtailment of water right no. 37-7480 will be stayed for two (2) weeks from the date of this order.

IT IS FURTHER ORDERED that this is a FINAL ORDER of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that, pursuant to Idaho Code 42-1701A(3), unless the right to a hearing before the Director or the Water Resource Board is otherwise provided by statute, any person who is aggrieved by the action of the Director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the Director to contest the action. The person shall file with the Director, within fifteen (15) days after receipt of written notice of the action issued by the Director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the Director and requesting a hearing.

IT IS FURTHER ORDERED that, pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 3rd day of July, 2014.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of July, 2014, the above and foregoing document was served on the following by providing a copy in the manner selected:

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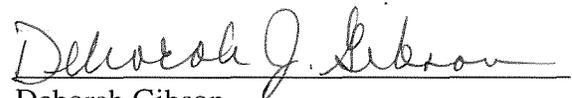
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EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.