

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

IN THE MATTER OF DISTRIBUTION OF)	CM-DC-2011-004
WATER TO WATER RIGHT NOS. 36-02551)	
AND 36-07694)	FINAL ORDER RE: MOTION
)	FOR STAY OF ORDER OF
(RANGEN, INC.))	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* (“Curtailment Order”).

On February 11, 2014, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed with the Department *IGWA’s Mitigation Plan and Request for Hearing* (“First Mitigation Plan”) to avoid curtailment imposed by the Curtailment Order.

On February 12, 2014, IGWA filed *IGWA’s Petition to Stay Curtailment, and Request for Expedited Decision*. On February 21, 2014, the Director issued an *Order Granting IGWA’s Petition to Stay Curtailment* which stayed enforcement of the Curtailment Order for members of IGWA and the non-member participants in IGWA’s First Mitigation Plan until a decision was issued on the First Mitigation Plan.

On March 10, 2014, IGWA filed *IGWA’s Second Mitigation Plan and Request for Hearing* (“Second Mitigation Plan”).

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*.

On April 17, 2014, IGWA filed *IGWA’s Second Petition to Stay Curtailment, and Request for Expedited Decision*.

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 would revisit the stay at the time a decision on IGWA's Second Mitigation Plan was 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 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*. On July 3, 2014, the Director issued a *Final Order RE: Petition for Stay of Curtailment and Determination of Proportionate Share of Mitigation Costs* ("July 3rd Order"). The Director denied Little Sky Farms' request for determination of proportionate share of mitigation costs because the Director determined the Department lacks authority to require North Snake Ground Water District ("NSGWD") to alter its determination of what Little Sky Farms must pay to participate as a nonmember for mitigation purposes. *July 3rd Order* at 3, 6. In order to grant Little Sky Farms time to pursue its dispute in the appropriate forum and encourage timely resolution of the matter, the Director temporarily granted the request for stay of curtailment of water right no. 37-7480 for a period of two weeks from the date of the July 3rd Order. *Id.* at 6.

On July 11, 2014, Little Sky Farms filed with the Department a *Motion for Stay of Order of Curtailment* ("Motion"). Little Sky Farms seeks to stay the order of curtailment set forth in the Department's July 3rd Order. *Motion* at 1. Little Sky Farms asserts it is proceeding "with all due haste" in the District Court to resolve its dispute with NSGWD. *Id.* Attached to the Motion are a *Notice of Appeal and Petition for Judicial Review of Final Agency Action and Verified Complaint for Writ of Mandate and Declaratory Judgment* filed on July 11, 2014, by Little Sky Farms in the District Court of the Fifth Judicial District, Gooding County (Case No. CV-2014-382) ("Petition and Complaint"). Little Sky Farms seeks judicial review of the Department's July 3rd Order. *Petition and Complaint* at 9. Little Sky Farms also seeks issuance of a writ of mandate pursuant to Idaho Code § 7-301, *et seq.* "requiring IGWA and NSGWD herein to account for Little Sky Farms' equitable and proportionate share of the costs of IGWA and NSGWD's mitigation in the Rangen Call." *Id.* at 10. Little Sky Farms further seeks a

declaratory judgment pursuant to Idaho Code § 10-1201, *et seq.* declaring that “IGWA and NSGWD must account for and accept Little Sky Farms’ equitable and proportionate share of cost for the mitigation in the Rangen call” *Id.* at 11. On July 11, 2014, Case No. CV-2014-382 was reassigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District (“SRBA Court”) for disposition and further proceedings.

ANALYSIS

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.*

As described above, Little Sky Farms commenced a judicial proceeding on July 11, 2014, that is currently pending before the SRBA Court in an attempt to timely resolve its dispute with NSGWD in the appropriate forum as encouraged by the July 3rd Order. Specifically, Little Sky Farms seeks issuance of a writ of mandate and declaratory judgment against NSGWD and IGWA. Little Sky Farms' previous request for a stay was only granted on a temporary basis because the Director was not convinced Little Sky Farms and NSGWD would move quickly to resolve their dispute. A long delay would be unfair to Rangen and other ground water users who are mitigating. Little Sky Farms is quickly acting to resolve its dispute with NSGWD. The Director will, on equitable grounds and because another judicial proceeding is pending, grant Little Sky Farms' request to stay curtailment of its water right no. 37-7480. The Director will re-visit the stay upon resolution of Little Sky Farms' request for issuance of a writ of mandate and declaratory judgment against NSGWD and IGWA as set forth in Case No. CV-2014-382.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that Little Sky Farms' Motion for Stay of Order of Curtailment is GRANTED, but the Director will re-visit the stay upon resolution of Little Sky Farms' request for issuance of a writ of mandate and declaratory judgment against NSGWD and IGWA as set forth in Case No. CV-2014-382.

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 16th day of July, 2014.



A handwritten signature in cursive script that reads "Gary Spackman". The signature is written in black ink and is positioned above a horizontal line.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th 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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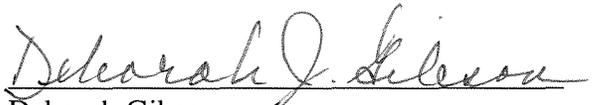
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Deborah Gibson
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EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(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.