

COPY

C. Tom Arkoosh, ISB No. 2253
AR KOOSH LAW OFFICES
802 W. Bannock St., Suite 900
P.O. Box 2900
Boise, ID 83701
Telephone: (208) 343-5105
Facsimile: (208) 343-5456
Email: tom.arkoosh@arkoosh.com

RECEIVED
AUG 06 2014
DEPARTMENT OF
WATER RESOURCES

Attorneys for Little Sky Farms

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

LITTLE SKY FARMS,

Petitioner,

v.

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

Respondents,

Case No. CV-2014-382

**AMENDED NOTICE OF APPEAL AND
PETITION FOR JUDICIAL REVIEW OF
FINAL AGENCY ACTION**

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

The undersigned on behalf of Petitioner Little Sky Farms files this Petition seeking judicial review of a final agency action by the Idaho Department of Water Resources ("Department").

I.

STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code §§ 67-5270 and 67-5279 seeking judicial review of a final order issued by the Director of the Department, Gary Spackman (“Director”), on July 3, 2014.

2. Little Sky Farms is a holder of Water Right No. 37-7480.

3. The point of diversion and place of use of Water Right No. 37-7480 is within the territorial boundaries of North Snake Ground Water District (“NSGWD”), but Little Sky Farms is not a member of NSGWD.

4. On January 29, 2014, the Director issued a *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“Curtailment Order”). The Curtailment Order recognizes that holders of junior-priority groundwater rights may avoid curtailment if they participate in a mitigation plan which provides “simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen.” *Curtailment Order* at 42. The Curtailment Order explains that mitigation provided by direct flow to Rangen, Inc. (“Rangen”) “may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year.” *Id.*

5. 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. The First Mitigation Plan set forth nine proposals for junior-priority groundwater pumpers to meet mitigation obligations.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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*.

11. 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.

12. 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.

13. North Snake Ground Water District ("NSGWD") is an IGWA participating ground water district.

14. 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.

15. On or about May 19, 2014, Little Sky Farms caused a statutory request for participation in the Rangen mitigation plan of NSGWD to be given to the counsel of IGWA and NSGWD. *See Exhibit 1 attached hereto.*

16. As set out in Exhibit 1, Idaho Code § 42-5259 provides as follows:

(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.

17. Further, in April 2007, the Governor for the State of Idaho signed into law HB737, providing that in the event that a water right holder does not either join a ground water district for mitigation purposes or does not have an approved mitigation plan, “the Director of the Department of Water Resources may proceed with any appropriate remedy or take any other action within his authority that he deems appropriate.” A true and correct copy of HB737 is attached hereto as Exhibit 2, and incorporated herein by this reference.

18. That pursuant to IDAPA 37.01.01.780, as an appropriate remedy, the Director “may grant, or the reviewing court may order, a stay upon appropriate terms.”

19. NSGWD has advised Little Sky Farms, by and through its attorney of record, that it declines and refuses to either provide the equitable and proportionate amount of cost for which Little Sky Farms has responsibility in the Rangen Call, or will consider allowing Little Sky Farms to join the NSGWD mitigation plan or plans unless or until Little Sky Farms has paid to NSGWD all of the assessments that would have been paid had Little Sky Farms been a member of NSGWD from the year 2011 through the year 2014. Stated otherwise and summarized, 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.

20. The behavior and refusal of NSGWD to allow Little Sky Farms to participate in the Rangen mitigation plan or plans is directly contrary to the expressed direction of Idaho Code § 42-5259 and HB737.

21. Little Sky Farms has no obligation to participate in NSGWD prior mitigation costs, and NSGWD has no right or authority to demand such participation in order to participate in the current Rangen mitigation plan or plans, because Little Sky Farms was, and at all times herein relevant remains, outside the “clip” for prior calls against ground water in the Water District 130, such that the diversion of Water Right No. 37-7480, when conjunctively managed, did not injure the calling water rights.

22. Little Sky Farms remains ready and able to tender to NSGWD its proportionate share of costs of mitigation for the Rangen order or orders upon disclosure of the same.

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

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

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

26. 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 9, 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 for IGWA members up to January 19, 2015, the April 28, 2014, stay regarding IGWA was no longer necessary and was lifted. On July 3, 2014, the Director issued the *Final Order Re: Petition for Stay of Curtailment and Determination of Proportionate Share of Mitigation Costs*, attached as Exhibit 3, determining that 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.

II.

JURISDICTION AND VENUE

27. This Petition is authorized by Idaho Code §§ 67-5270 and 67-5279.

28. This Court has jurisdiction over this action pursuant to Idaho Code § 67-5272 and the above statutes.

29. Venue lies in this Court pursuant to Idaho Code § 67-5272(c) because Little Sky Farms operated its principal place of business in Gooding County.

30. Pursuant to the Idaho Supreme Court's *Administrative Order* issued on December 9, 2009, all petitions for judicial review of any decision regarding administration of water rights from the Department shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District. The SRBA Court's procedures instruct the Clerk of the District Court in which the petition is filed to deliver a *Notice of Reassignment*.

Attached as Exhibit 4 for the convenience of the Clerk is a copy of the SRBA Court's *Notice of Reassignment*.

31. The Director's *Final Order Re: Petition for Stay of Curtailment and Determination of Proportionate Share of Mitigation Costs* is a final agency action subject to judicial review pursuant to Idaho Code § 67-5270(3).

III.

PARTIES

32. Little Sky Farms is a limited partnership organized and existing under the laws of the State of Idaho with its principal place of business in the city of Bliss, Gooding County, Idaho. Little Sky Farms delivers water to irrigations located in Gooding County.

33. Respondent, Gary Spackman, is the Director of the Department and is a resident of Ada County.

34. Respondent, Department, is the executive department existing under the laws of the State of Idaho pursuant to Idaho Code § 42-1701 *et seq.*, with its state offices located at 322 E. Front Street, Boise, Ada County, Idaho.

IV.

STATEMENT OF INITIAL ISSUES

35. Little Sky Farms intends to assert the following issues on judicial review:

35.1 Does the Director have jurisdiction to determine the equitable and proportionate share of Little Sky Farms in the cost of mitigation for the Rangen Call.

35.2 Is the Director's action arbitrary and capricious or otherwise not in accordance with the law?

35.3 Pursuant to I.R.C.P. 84(d)(5), Little Sky Farms reserves the right to assert additional issues and/or clarify or further specify the issues for judicial review stated herein which become later discovered.

V.

AGENCY RECORD

36. Judicial review is sought of the Director's July 3, 2014 *Final Order*.

37. The only documents in the record, to Little Sky Farms' knowledge consist of the following: Little Sky Farms Petition, Objections to the Petition, and the Final Order.

38. Little Sky Farms anticipates it can reach a stipulation regarding the agency record with Respondents and other parties, and will pay its necessary share of the fee for preparation of the record at such time.

39. Service of this Petition for Judicial Review of Agency Action has been made on the Respondents at the time of the filing of this Petition.

Respectfully submitted,

DATED this 5th day of ~~July~~ ^{August}, 2014.



C. Tom Arkoosh
Attorneys for Little Sky Farms

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of ~~July~~ ^{August}, 2014, I caused to be served the original of the above and foregoing document by the method indicated below, and addressed to the following:

Clerk of the Court	<u> X </u>	U.S. Mail, postage prepaid
SRBA District Court	<u> </u>	Hand Delivery
Fifth Judicial District	<u> </u>	Overnight Courier
P.O. Box 2707	<u> </u>	Facsimile
Twin Falls, ID 83303-2707	<u> </u>	Email

I hereby also certify that on the 5th day of ~~July~~ ^{August}, 2014, I caused to be served a true and correct copy of the above and foregoing document by the method indicated below, and addressed to the following:

Idaho Department of Water Resources	<u> X </u>	U.S. Mail, postage prepaid
322 East Front Street	<u> </u>	Hand Delivery
P.O. Box 83720	<u> </u>	Overnight Courier
Boise, ID 83720-0098	<u> </u>	Facsimile
	<u> </u>	Email

Snake River Basin Adjudication	<u> X </u>	U.S. Mail, postage prepaid
P.O. Box 126	<u> </u>	Hand Delivery
Twin Falls, ID 83301	<u> </u>	Overnight Courier
	<u> </u>	Facsimile
	<u> </u>	Email

Robyn M. Brody	<u> X </u>	U.S. Mail, postage prepaid
Brody Law Office, PLLC	<u> </u>	Hand Delivery
P.O. Box 554	<u> </u>	Overnight Courier
Rupert, ID 83350	<u> </u>	Facsimile
<u>robynbrody@hotmail.com</u>	<u> X </u>	Email

Fritz X. Haemmerle	<u> X </u>	U.S. Mail, postage prepaid
Haemmerle & Haemmerle, PLLC	<u> </u>	Hand Delivery
P.O. Box 1800	<u> </u>	Overnight Courier
Hailey, ID 83333	<u> </u>	Facsimile
<u>fxh@haemlaw.com</u>	<u> X </u>	Email

J. Justin May	<u> X </u>	U.S. Mail, postage prepaid
May, Browning & May, PLLC	<u> </u>	Hand Delivery
1419 W. Washington	<u> </u>	Overnight Courier
Boise, ID 83702	<u> </u>	Facsimile
<u>jmay@maybrowning.com</u>	<u> X </u>	Email

Sarah Klahn
Mitra Pemberton
White Jankowski, LLP
511 16th St., Suite 500
Denver, CO 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Courier
 Facsimile
 Email

Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello, ID 83201
dtranmer@pocatello.us

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Courier
 Facsimile
 Email

John K. Simpson
Travis L. Thompson
Paul L. Arrington
Barker Rosholt & Simpson
195 River Vista Place, Suite 204
Twin Falls, ID 83301-3029
flt@idahowaters.com
jks@idahowaters.com
pla@idahowaters.com

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Courier
 Facsimile
 Email

W. Kent Fletcher
Fletcher Law Office
P.O. Box 248
Burley, ID 83318
wkf@pmt.org

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Courier
 Facsimile
 Email

Tim Luke
Cindy Yenter
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
tim.luke@idwr.idaho.gov
cindy.yenter@idwr.idaho.gov

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Courier
 Facsimile
 Email

Randy Budge
T.J. Budge
Racine Olson
PO Box 1391
Pocatello, ID 83204-1391
rcb@racinelaw.net
tjb@racinelaw.net

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Courier
 Facsimile
 Email

Jerry R. Rigby
Rigby, Andrus & Rigby Law, PLLC
25 North Second East
Rexburg, ID 83440
jrigby@rex-law.com

<u>X</u>	U.S. Mail, postage prepaid
_____	Hand Delivery
_____	Overnight Courier
_____	Facsimile
<u>X</u>	Email



C. Tom Arkoosh

ARKOOSH LAW OFFICES

C. Tom Arkoosh
tom.arkoosh@arkoosh.com

May 19, 2014

Randy Budge
P.O. Box 1391
Pocatello, ID 83204

Re: Little Sky Farms Water Right No. 37-7480

Dear Randy:

As you know, this office represents the above ground water user.

You write in your email to me of May 12, 2013: "As we discussed, it is the District's position that they have a statutory right under I.C. 42-5232 and I.C. 42-5259 to collect from nonmembers who wish to join for mitigation purposes both past and future costs of formulating and implementing mitigation plans." Your email then continues to explain that North Snake Ground Water District ("District") asserts entitlement to collect from non-members seeking mitigation plan coverage under the District's mitigation plan the entire amount of full member assessments from 2011 through the present in order to participate as a non-member in the Rangen call mitigation plan.

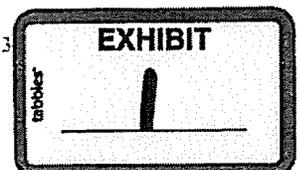
Having cited I.C. 42-5259, you are aware it provides in pertinent part regarding payments from non-members as follows:

(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 the 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.**

[Emphasis added.]

To be clear, the referenced ground water user seeks to participate only in the plan or plans responsive to the Rangen call. This is the first call in which the referenced water right falls within the clip line. While it may be possible that some expenditures in past years paid for



Page - 2
May 19, 2014

measures the District has included as mitigation in the Rangen matter, not all of those expenses have gone toward measures included in the Rangen mitigation plan.

Please consider this written request to by the above water right holder to enter a contract with the District to participate in and obtain all benefits of any mitigation plan or plans concerning the Rangen call pursuant to I.C. 42-5259. Please provide the costs of that plan or those plans and the above water right's proportionate share of those costs.

Sincerely,

ARKOOSH LAW OFFICES

A handwritten signature in black ink, appearing to be 'C. Tom Arkoosh', with a long horizontal line extending to the right.

C. Tom Arkoosh

CTA/cmc

HOUSE BILL NO. 737[View Bill Status](#)[View Bill Text](#)[View Amendment](#)[View Engrossed Bill \(Original Bill with Amendment\(s\) Incorporated\)](#)[View Statement of Purpose / Fiscal Impact](#)

Text to be added within a bill has been marked with Bold and Underline. Text to be removed has been marked with Strikethrough and Italic. How these codes are actually displayed will vary based on the browser software you are using.

This sentence is marked with bold and underline to show added text.

~~This sentence is marked with strikethrough and italic, indicating text to be removed.~~

Bill Status

H0737aa.....by STATE AFFAIRS
GROUND WATER RIGHTS - EASTERN SNAKE RIVER - Amends existing law relating to the administration of ground water rights within the Eastern Snake River Plain; to strike a date; to provide for notice by the Director of the Department of Water Resources to the holders of certain junior ground water rights relating to joining and participating in ground water districts for mitigation purposes; and to authorize the Director to take certain action in the event any of the junior priority ground water right holders elect not to join ground water districts or do not have approved mitigation plans.

02/24 House intro - 1st rdg - to printing
02/27 Rpt prt - to Res/Con
03/14 Rpt out - to Gen Ord
03/17 Rpt out amen - to engros
03/20 Rpt engros - 1st rdg - to 2nd rdg as amen
03/21 Rls susp - PASSED - 70-0-0

AYES -- Anderson, Andrus, Barraclough, Barrett, Bastian, Bayer, Bedke, Bell, Bilbao, Black, Block, Boe, Bolz, Brackett, Bradford, Cannon, Chadderdon, Clark, Collins, Crow, Deal, Denney, Edmunson, Ellsworth, Eskridge, Field(18), Field(23), Garrett, Hart, Harwood, Henbest, Henderson, Jaquet, Kemp, Lake, LeFavour, Loertscher, Martinez, Mathews, McGeachin, McKague, Miller, Mitchell, Moyle, Nielsen, Nonini, Pasley-Stuart, Pence, Raybould, Ring, Ringo, Roberts, Rusche, Rydalch, Sali, Saylor, Schaefer, Shepherd(2), Shepherd(8), Shirley, Skippen, Smith(30), Smith(24), Smylie, Snodgrass, Stevenson, Trail, Wills, Wood, Mr. Speaker
NAYS -- None
Absent and excused -- None

Floor Sponsor - Stevenson

Title apvd - to Senate

03/22 Senate intro - 1st rdg - to Res/Env
03/28 Rpt out - rec d/p - to 2nd rdg
03/29 2nd rdg - to 3rd rdg
03/30 3rd rdg - PASSED - 33-0-2

AYES -- Andreason, Brandt, Broadsword, Burkett, Burtenshaw, Cameron, Coiner, Compton, Corder, Darrington, Davis, Fulcher, Gannon, Geddes, Goedde, Jorgenson, Kelly, Keough, Langhorst, Little, Lodge, Malepeai, Marley, McGee, McKenzie, Pearce, Richardson, Schroeder, Stegner,



Stennett, Sweet, Werk, Williams
 NAYS -- None
 Absent and excused -- Bunderson, Hill
 Floor Sponsor - Burtenshaw
 Title apvd - to House
 03/31 To enrol
 04/03 Rpt enrol - Sp signed - Pres signed
 04/04 To Governor
 04/07 Governor signed
 Session Law Chapter 356
 Effective: 04/07/06

Bill Text

]]]] LEGISLATURE OF THE STATE OF IDAHO]]]]
 Fifty-eighth Legislature Second Regular Session - 2006

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 737

BY STATE AFFAIRS COMMITTEE

1 AN ACT
 2 RELATING TO THE ADMINISTRATION OF GROUND WATER RIGHTS WITHIN THE EASTERN SNAKE
 3 RIVER PLAIN; AMENDING SECTION 3, CHAPTER 352, LAWS OF 2004, TO STRIKE A
 4 DATE, TO PROVIDE FOR NOTICE BY THE DIRECTOR OF THE DEPARTMENT OF WATER
 5 RESOURCES TO HOLDERS OF CERTAIN JUNIOR GROUND WATER RIGHTS RELATING TO
 6 JOINING AND PARTICIPATING IN GROUND WATER DISTRICTS FOR MITIGATION PUR-
 7 POSES AND TO AUTHORIZE THE DIRECTOR TO TAKE CERTAIN ACTION IN THE EVENT
 8 ANY OF THE JUNIOR PRIORITY GROUND WATER RIGHT HOLDERS ELECT NOT TO JOIN
 9 GROUND WATER DISTRICTS OR DO NOT HAVE APPROVED MITIGATION OR REPLACEMENT
 10 WATER PLANS; AND DECLARING AN EMERGENCY.

11 Be It Enacted by the Legislature of the State of Idaho:

12 SECTION 1. That Section 3, Chapter 352, Laws of 2004, is hereby amended
 13 to read as follows:

14 SECTION 3. It is the intent of the Legislature to ensure that the burden
 15 of providing mitigation for junior ground water diversions from the Eastern
 16 Snake River Plain Aquifer causing material injury to senior priority water
 17 rights is equitably shared by the holders of all such junior ground water
 18 rights subject to administration within water districts created pursuant to
 19 Chapter 6, Title 42, Idaho Code. It is, therefore, hereby provided that ~~begin-~~
 20 ~~ning April 1, 2004,~~ all holders of such ground water rights not otherwise cov-
 21 ered by a mitigation plan and that are not members or applicants for member-
 22 ship of a ground water district created pursuant to Chapter 52, Title 42,
 23 Idaho Code, with a mitigation plan approved by the Director of the Department
 24 of Water Resources, shall be ~~deemed a nonmember participant solely for mitiga-~~
 25 ~~tion purposes and shall be required to pay for mitigation, pursuant to Section~~
 26 ~~42-5259, Idaho Code given notice by the Director of the Department of Water~~
 27 Resources that such holder shall have fifteen (15) days to join, solely for
 28 mitigation purposes, in the ground water district situated nearest the lands
 29 to which the water right is appurtenant, as determined by the Director of the
 30 Department of Water Resources in case of dispute, and participate in the dis-
 31 trict pursuant to Section 42-5259, Idaho Code. If any holder of such a junior

32 priority ground water right elects not to join the ground water district or
33 does not have an approved mitigation or replacement water plan, the Director
34 of the Department of Water Resources may proceed with any appropriate remedy
35 or take any other action within his authority that he deems appropriate.

36 SECTION 2. An emergency existing therefor, which emergency is hereby
37 declared to exist, this act shall be in full force and effect on and after its
38 passage and approval.

Amendment

]]]] LEGISLATURE OF THE STATE OF IDAHO]]]]
Fifty-eighth Legislature Second Regular Session - 2006

Moved by Stevenson

Seconded by Moyle

IN THE HOUSE OF REPRESENTATIVES
HOUSE AMENDMENT TO H.B. NO. 737

1 AMENDMENT TO SECTION 1
2 On page 1 of the printed bill, in line 33, delete "or replacement water".

3 CORRECTION TO TITLE
4 On page 1, in line 9, delete "OR REPLACEMENT"; and in line 10, delete
5 "WATER".

Engrossed Bill (Original Bill with Amendment(s) Incorporated)

]]]] LEGISLATURE OF THE STATE OF IDAHO]]]]
Fifty-eighth Legislature Second Regular Session - 2006

IN THE HOUSE OF REPRESENTATIVES
HOUSE BILL NO. 737, As Amended
BY STATE AFFAIRS COMMITTEE

1 AN ACT
2 RELATING TO THE ADMINISTRATION OF GROUND WATER RIGHTS WITHIN THE EASTERN SNAKE
3 RIVER PLAIN; AMENDING SECTION 3, CHAPTER 352, LAWS OF 2004, TO STRIKE A
4 DATE, TO PROVIDE FOR NOTICE BY THE DIRECTOR OF THE DEPARTMENT OF WATER
5 RESOURCES TO HOLDERS OF CERTAIN JUNIOR GROUND WATER RIGHTS RELATING TO
6 JOINING AND PARTICIPATING IN GROUND WATER DISTRICTS FOR MITIGATION PUR-
7 POSES AND TO AUTHORIZE THE DIRECTOR TO TAKE CERTAIN ACTION IN THE EVENT
8 ANY OF THE JUNIOR PRIORITY GROUND WATER RIGHT HOLDERS ELECT NOT TO JOIN
9 GROUND WATER DISTRICTS OR DO NOT HAVE APPROVED MITIGATION PLANS; AND
10 DECLARING AN EMERGENCY.

11 Be It Enacted by the Legislature of the State of Idaho:

12 SECTION 1. That Section 3, Chapter 352, Laws of 2004, is hereby amended
13 to read as follows:

14 SECTION 3. It is the intent of the Legislature to ensure that the burden
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16 Snake River Plain Aquifer causing material injury to senior priority water
17 rights is equitably shared by the holders of all such junior ground water
18 rights subject to administration within water districts created pursuant to
19 Chapter 6, Title 42, Idaho Code. It is, therefore, hereby provided that ~~begin-~~
20 ~~ning April 1, 2004,~~ all holders of such ground water rights not otherwise cover-
21 ed by a mitigation plan and that are not members or applicants for member-
22 ship of a ground water district created pursuant to Chapter 52, Title 42,
23 Idaho Code, with a mitigation plan approved by the Director of the Department
24 of Water Resources, shall be ~~deemed a nonmember participant solely for mitiga-~~
25 ~~tion purposes and shall be required to pay for mitigation, pursuant to Section~~
26 ~~42-5259, Idaho Code~~ given notice by the Director of the Department of Water
27 Resources that such holder shall have fifteen (15) days to join, solely for
28 mitigation purposes, in the ground water district situated nearest the lands
29 to which the water right is appurtenant, as determined by the Director of the
30 Department of Water Resources in case of dispute, and participate in the dis-
31 trict pursuant to Section 42-5259, Idaho Code. If any holder of such a junior
32 priority ground water right elects not to join the ground water district or
33 does not have an approved mitigation plan, the Director of the Department of
34 Water Resources may proceed with any appropriate remedy or take any other
35 action within his authority that he deems appropriate.

36 SECTION 2. An emergency existing therefor, which emergency is hereby
37 declared to exist, this act shall be in full force and effect on and after its
38 passage and approval.

Statement of Purpose / Fiscal Impact

STATEMENT OF PURPOSE

RS 16109

This legislation amends existing law relating to when the holders of certain ground water rights shall be deemed nonmember participants solely for mitigation purposes in a ground water district pursuant to the provisions of Section 42-5259, Idaho Code; to provide that the holder of such a ground water right shall be provided reasonable notice and the opportunity to join a ground water district solely for mitigation purposes; and to provide that the Director of the Department of Water Resources has the right to proceed with any appropriate action or remedy against such ground water right if the holder of such water right elects not to join a ground water district and does not have an approved mitigation alternative.

FISCAL NOTE

There is no fiscal impact to any state agency.

Contact

Name: Representative John A. Stevenson

Phone: (208) 332-1000

STATEMENT OF PURPOSE/FISCAL NOTE

H 737

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.)) FINAL ORDER RE: PETITION
) FOR STAY OF CURTAILMENT
) AND DETERMINATION OF
) PROPORTIONATE SHARE OF
_____) MITIGATION COSTS

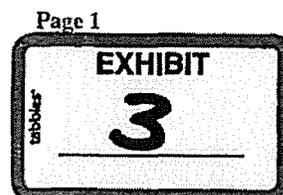
BACKGROUND

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") in this proceeding. The Curtailment Order recognizes that holders of junior-priority groundwater rights may avoid curtailment if they participate in a mitigation plan which provides "simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen." *Curtailment Order* at 42. The Curtailment Order explains that mitigation provided by direct flow to Rangen, Inc. ("Rangen") "may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year." *Id.*

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. The First Mitigation Plan set forth nine proposals for junior-priority groundwater pumpers to meet mitigation obligations.

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.

**FINAL ORDER RE: PETITION FOR STAY OF CURTAILMENT AND
DETERMINATION OF PROPORTIONATE SHARE OF MITIGATION COSTS**



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. Nesselth*, 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 30th 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:

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

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

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

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

RANDY BUDGE
TJ 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
(x) E-mail

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

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

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

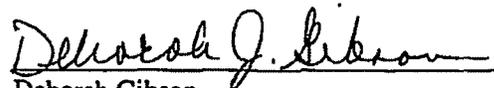
U.S. Mail, Postage Prepaid
 Hand Delivery
 E-mail

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
 E-mail

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

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


Deborah Gibson
Assistant to the Director
Idaho Department of Water Resources

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.

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF _____.

RE: PETITIONS FOR JUDICIAL)
REVIEW OR ACTIONS FOR)
DECLARATORY RELIEF OF) CASE NO. _____
DECISIONS FROM THE IDAHO)
DEPARTMENT OF WATER) NOTICE OF REASSIGNMENT
RESOURCES)

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, declares that all petitions for judicial review made pursuant to I.C. § 42-1701A of any decision from the Department of Water Resources be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District, and

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, vests in the Snake River Basin Adjudication District Court the authority to adopt procedural rules necessary to implement said Order, and

WHEREAS on July 1, 2010, the Snake River Basin Adjudication District Court issued an Administrative Order regarding the Rule of Procedure Governing Petitions for Judicial Review or Actions for Declaratory Relief of Decisions from the Idaho Department of Water Resources.

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

1. The above-matter is hereby assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District for disposition and further proceedings.

2. All further documents filed or otherwise submitted in this matter, and all further filing fees filed or otherwise submitted in this matter, shall be filed with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho

NOTICE OF REASSIGNMENT

- 1 -



83303-2707, provided that checks representing further filing fees shall be made payable to the county where the original petition for judicial review or action for declaratory judgment was filed.

DATED this ___ day of _____, 2010.

CLERK OF THE DISTRICT COURT

By: _____
Deputy Clerk