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**DISTRICT COURT OF THE STATE OF IDAHO
SEVENTH JUDICIAL DISTRICT
BINGHAM COUNTY**

JERRY D. BINGHAM and VALERIE H.
BINGHAM,

Petitioners,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

Case No. CV06-26-1801

**REPLY IN OPPOSITION TO
RESPONSE IN OPPOSITION TO
MOTION TO STAY**

Reply in Opp'n to Resp. in Opp'n
to Motion to Stay

Pursuant to Idaho Rule of Civil Procedure 84(o), Petitioners Jerry and Valerie Bingham respectfully submit this reply in opposition to the response filed by Respondent Idaho Department of Water Resources.

Introduction

A stay of the Department's curtailment order is necessary to prevent severe and immediate economic harm to the Bingham while this Court considers whether the Department's order unlawfully departs from Idaho's foundational rule of prior appropriation. Because the proposed late-season pumping would cause no measurable reduction in water available to senior users, staying the Department's curtailment order would protect the Bingham without impairing the rights of others.

The Department's opposition does not justify denying that relief. Its collateral-attack argument fails because the *Sixth Methodology Order*, and the orders that implement it, remain subject to challenge as void acts because they exceed the Department's authority by violating the rule of priority. The Department's merits defense fails because it focuses on the seniority of the Surface Water Coalition ("SWC") and improperly dismisses the Bingham's relative seniority to junior users who receive the benefit of out-of-priority diversions. Finally, the Department's recasting of the equities and the public interest is unpersuasive because the Department identifies no measurable injury to senior users that would result from the limited—and priority-consistent—pumping at issue. The Court should therefore grant the motion.

Argument

The Department contends that the Bingham's petition is an impermissible collateral attack on the Department's *Sixth Methodology Order*. Opp'n 7–8. But the Department fails to engage with the Bingham's argument that the *Sixth Methodology Order*, and any orders based upon or incorporating that *Order*, can be collaterally attacked if they violate the fundamental rule of priority because such a legal defect would render them void. *See* Mem. 8. Indeed, it is a basic principle of administrative law that parties may challenge otherwise time-barred agency action as *ultra vires* when subsequent agency action relies on or implements that prior action. *See generally Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) ("If, however, a challenger contests the substance of an agency

decision as exceeding constitutional or statutory authority, the challenger may do so later [beyond the limitations period] by filing a complaint for review of the adverse application of the decision to the particular challenger.”). Thus, the Bingham may challenge the current curtailment order on the ground that it violates the law of priority, regardless of how long ago the Department adopted its priority-ignoring framework for issuing curtailment orders.

On the merits, the Department argues that its curtailment orders are consistent with the law of priority because the pertinent senior user—SWC—is senior to the Bingham. But that defense overlooks the main issue: whether the Department can ignore the priority of users junior to SWC.¹ Evidently, the Department seeks to convert the law of prior appropriation from “first in time, first in right,” to “first in time, first in right, everyone else no rights.” That is not the law. An appropriator may use water “only at such times as *all prior appropriators* are being supplied.” *Beecher v. Cassia Creek Irrig. Co.*, 66 Idaho 1, 9, 154 P.2d 507, 510 (1944) (emphasis added). Hence, users junior to the Bingham are allowed to pump only if *all* senior users—among them not just SWC but also the Bingham and others—“are being supplied.” Put another way, a junior user has a mitigation duty not just to the most senior user in the system, but to *all* senior users.

As support for the contrary, the Department cites *Rangen, Inc. v. Idaho Department of Water Resources*, 160 Idaho 251, 371 P.3d 305 (2016). Opp’n 9. But there, a senior user contested the adequacy of *one* association’s mitigation plan. *See* 160 Idaho at 254–55, 371 P.3d at 308–09. The Court therefore had no occasion to consider the issue here—namely, whether large groups of otherwise unrelated junior users can be lumped together and treated as having identical priority.² The Department also cites its Conjunctive Management Rules. Opp’n 5. But those rules do not define and cannot change the law of priority; they are rather made expressly subject to it. *See* IDAPA 37.03.11.020.02.

¹ Notably, the Department’s argument also overlooks the fact that there are several members of the SWC whose surface rights are *junior* to the Bingham’s ground water rights. *See, e.g.*, 1-9A, 1-9B, 1-10237, 1-10238, 1-10239, 1-10240, 1-10241, 1-7022, 1-10225, 1-7124, and 1-10633.

² The Court did, however, affirm that injury to other water users *is* relevant to the legal sufficiency of a mitigation plan and an application to transfer a water right’s place of use. *Rangen*, 160 Idaho at 256–59, 371 P.3d at 310–13.

The Department itself impliedly acknowledges that its current mitigation-or-curtailment regime is inconsistent with priority. Per the Department, a “junior user is permitted to make an out-of-priority diversion *when the injury attributable to its pumping is being mitigated under an approved mitigation plan.*” Opp’n 3 (emphasis added). In a true priority system, an “injury attributable” to the pumping of junior user X can exist only if the senior is still shorted despite curtailment of *all users junior to X*. See Mem. 6. Yet the Department’s system allows users junior to the Binghams to continue pumping, while demanding mitigation or curtailment from the Binghams, effectively foisting burdens onto the Binghams that should be borne by those more junior users. That’s not the way priority is supposed to work. Cf. *In re Distribution of Water to A&B Irrig. Dist.*, 155 Idaho 640, 651, 315 P.3d 828, 839 (2013) (although a baseline methodology is permissible because the water source “simply cannot be managed without a great deal of prior analysis and planning,” the purpose of the methodology is to determine “the proper apportionment of water to and among the various water right holders *according to their priority*”) (emphasis added).

The Department avows that “priority is central” to the determination of whether junior users should be subject to any possible curtailment-or-mitigation, contending that, for those junior users such as the Binghams who are subject to curtailment, their “relative priority was already considered” before the ESPAM calculation was run. Opp’n 9–10. But the Department nowhere explains why priority is only to be considered halfway. For example, in December 2024, the Department ordered curtailment-or-mitigation for users junior to January 1970. See Mem. 4. Thus, the Binghams were allowed to pump on their pre-1970 rights, despite being junior to SWC and providing no mitigation. Why then should priority matter at the Department’s first analytical step (whether a junior user should be subject to curtailment-or-mitigation at all) but be completely ignored at the second step (whether a junior user should be required to mitigate irrespective of the mitigation capacity of more junior users)?

While acknowledging the severe economic consequences on the Binghams from curtailment, the Department contends that the balance of equities does not favor a stay, citing potential harm to other users. Opp’n 11–13. But the Department doesn’t contest the Binghams’ expert declaration affirming that the proposed late-season pumping would result

in no measurable reduction of available supplies to senior users. *See* Mem. 10–11. Rather, the Department argues that a stay would frustrate “the orderly administration of Idaho’s prior-appropriation system,” reasoning that, if the Bingham’s are allowed to pump because their use is small compared to the overall system, then any junior user could make the same argument, thereby frustrating the entire priority system. Opp’n 12–13. This argument overlooks that the Bingham’s stay request is based not just on the small impact of their proposed pumping, but also on the fact that such pumping is fully justified under the law of priority, which wouldn’t necessarily be the case with respect to more junior users.

Last, the Department argues that a stay would be contrary to the public interest, but its reasoning is based entirely on its merits arguments. Opp’n 13. And the Department concedes that curtailment of the Bingham’s has nothing to do with its own governmental interests. *Id.* at 12. Hence, if the Bingham’s are correct that the Department’s curtailment order violates priority, then the public interest would be served by staying the order. Mem. 11.

Conclusion

The Department has not shown that the Bingham’s petition is procedurally barred or that its curtailment order is consistent with Idaho’s law of priority. The undisputed evidence instead establishes that denying a stay would impose severe economic harm on the Bingham’s, while the proposed limited pumping would cause no measurable reduction in supplies available to senior users. Because a stay would preserve rather than frustrate the lawful administration of the prior-appropriation system and would serve the public interest, the Court should grant the Bingham’s motion and stay the Department’s curtailment order pending resolution of this proceeding.

DATED: October 7, 2026.

Respectfully submitted,

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/s/ Reed W. Larsen
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of October, 2026, I caused a true and correct copy of the foregoing REPLY IN OPPOSITION TO RESPONSE IN OPPOSITION TO MOTION TO STAY to be served upon the following individuals by the designated method:

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