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

AMERICAN FALLS RESERVOIR DISTRICT )  
NO. 2, A & B IRRIGATION DISTRICT, )  
BURLEY IRRIGATION DISTRICT, )  
MINIDOKA IRRIGATION DISTRICT, and )  
TWIN FALLS CANAL COMPANY, )

Plaintiffs-Respondents, and )

RANGEN, INC., CLEAR SPRINGS FOODS, )  
INC., THOUSAND SPRINGS WATER USERS )  
ASSOCIATION, and IDAHO POWER )  
COMPANY, )

Intervenors-Respondents, )

v. )

THE IDAHO DEPARTMENT OF WATER )  
RESOURCES and KARL J. DREHER, its )  
Director, )

Defendants-Appellants, and )

IDAHO GROUND WATER APPROPRIATORS, )  
INC., )

Intervenors. )

**Case No. CV-2005-600**

**MEMORANDUM IN SUPPORT  
OF MOTION FOR STAY  
UNDER IRCP 62(d) AND IDAHO  
APPELLATE RULE 13(b)**

## **BACKGROUND**

The Court entered an Order on Plaintiffs' Motion for Summary Judgment on June 2, 2006 ("Order"), and a Judgment Granting Partial Summary Judgment on June 30, 2006 ("Judgment"). The Judgment stated that the Rules for the Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.011 *et. seq* (the "CM Rules" or "Rules"), are "constitutionally deficient" and "facially unconstitutional." Judgment at 2. The Court certified the Judgment under Rule 54(b) of the Idaho Rules of Civil Procedure on July 11, 2006. *See* Order Certifying Judgment Granting Partial Summary Judgment Under Rule 54(b). The Defendants filed a Notice of Appeal on the same date.

## **DISCUSSION**

### **I. LEGAL STANDARDS**

When an appeal is taken to the Idaho Supreme Court, the Idaho Rules of Civil Procedure provide that "the proceedings in the district court upon the judgment or order appealed from shall be stayed as provided by the Idaho Appellate Rules." I.R.C.P. 62(d). Under the Idaho Appellate Rules, this Court is authorized to "[s]tay the execution or enforcement" of the Judgment while the Defendants' appeal is pending. I.A.R. 13(b). The decision of whether to grant a stay pending appeal is committed to the Court's discretion. *Waters v. Dunn*, 18 Idaho 450, 457, 110 P. 258, 260 (1910); *see also Continental Cas. Co. v. Brady*, 127 Idaho 830, 834, 907 P.2d 807, 811 (1995) ("The determination as to whether to grant a stay of proceedings pending the resolution of related proceedings in another court is a matter vested in the sound discretion of the trial court.")

No reported Idaho case defines or explains "the legal standards applicable to" a motion for a stay under I.A.R. 13(b). *Craig Johnson Const., L.L.C. v. Floyd Town Architects, P.A.*, 142

Idaho 797, 800, 134 P.3d 648, 651 (2006) (holding that in exercising its discretion, a trial court must act consistently with “the legal standards applicable to the specific choices available to it”).<sup>1</sup> The widely accepted approach in other states and in the federal courts under rules analogous to I.A.R. 13(b) is that four factors, similar to those considered in preliminary injunction cases, are considered in analyzing a motion to stay a judgment pending appeal.

These well-known factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

*Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6<sup>th</sup> Cir. 1991).<sup>2</sup> “These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together.” *Id.*; see also *State v. Gudenschwager*, 529 N.W.2d 225, 229 (Wisc. 1995) (same).

## **II. APPLICATION OF THE FOUR FACTORS TO THE DEFENDANTS’ MOTION**

The Judgment in this case decided difficult and pivotal questions of Idaho water law on which the Idaho Supreme Court has not yet passed, and which have far-reaching ramifications for holders of water rights in Idaho, whether the rights apply to surface water or ground water, and whether the use is for irrigation, domestic purposes, municipal water supplies, industrial activity, or any other purpose. If the Judgment is not stayed during the appeal, implementation of the Judgment is likely to cause additional litigation, increase the uncertainty and delay in the

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<sup>1</sup> Prior to the enactment of I.A.R. 13(b), the Idaho Supreme Court held that a stay pending appeal was appropriate when (1) necessary “to preserve the status quo to do complete justice,” (2) the stay would “not be seriously injurious to respondent,” and (3) it was “entirely possible that refusal to grant a stay would injuriously affect the appellant.” *McHan v. McHan*, 59 Idaho 41, 46, 80 P.2d 29, 32 (1938) (citing *Kiefer v. City of Idaho Falls*, 46 Idaho 1, 265 P. 701 (1928)). These pre-I.A.R. 13(b) standards are similar to the approach described in the discussion below.

<sup>2</sup> See also, e.g., *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10<sup>th</sup> Cir. 1996); *Lopez v. Heckler*, 713 F.2d 1432, 1435 -1436 (9<sup>th</sup> Cir. 1983); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir. 1977); *State v. Gudenschwager*, 529 N.W.2d 225, 29 (Wisc. 1995); 5 Am.Jur.2d *Appellate Review* § 470 (“Standards for granting stay”).

administration of water rights in interconnected surface and ground water sources, and cause needless irreparable harm to water users and the economy of the state should the Judgment ultimately be reversed.

Moreover, the Judgment is a ruling on an application for declaratory judgment regarding the facial constitutionality of the CM Rules. It is not a decision on judicial review of a final action of the Director, and does not entitle the Plaintiffs to any specific relief in their delivery call, other than effectively barring the Director from continuing to apply the CM Rules. A stay will preserve the relief the Plaintiffs have already obtained under the Director's orders, and allow the Director to continue to provide any additional relief determined to be necessary in the existing proceeding while preserving the status quo on what is admittedly an unsettled area of law. Given the uncertainties regarding the applicable legal principles, it is not in the public interest to undertake yet another approach to conjunctive administration at this intermediate point in the determination of the constitutionality of the CM Rules, because doing so would threaten even more economic disruption and uncertainty with respect to existing water rights. The public interest thus weighs heavily in favor of a stay until the Idaho Supreme Court resolves the Defendants' appeal. Under these circumstances, a stay until the appeal is decided is necessary and appropriate.

A. THE LIKELIHOOD THE DEFENDANTS WILL PREVAIL ON APPEAL

1. LEGAL PRINCIPLES APPLICABLE UNDER THE "LIKELIHOOD OF SUCCESS" FACTOR

Courts have repeatedly held that this factor does not require a showing that an appeal will probably succeed. Indeed, in an oft-cited explanation of the standards for granting a stay pending appeal, the United States Court of Appeals for the District of Columbia Circuit observed

that depending on the showing made under the other factors, a stay may be warranted even when the court believes the appeal will probably fail on the merits:

The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors.

*Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir. 1977).<sup>3</sup>

Other courts have agreed that the showing required under this factor depends largely on how the other factors apply in the circumstances of a particular case. "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other." *Michigan Coalition of Radioactive Material Users, Inc.*, 945 F.2d at 153 (citation omitted). Moreover, the importance of the perceived likelihood of success diminishes sharply when the appeal raises difficult and significant legal questions:

If Defendants can meet the other requirements for a stay pending appeal, they will be deemed to have satisfied the likelihood of success on appeal element if they show "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation."

*McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10<sup>th</sup> Cir. 1996) (citations omitted); see also *Ruiz v. Estelle*, 650 F.2d 555, 565 (5<sup>th</sup> Cir. 1981) ("when a serious legal question is

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<sup>3</sup> Indeed, as the Fifth Circuit has observed, the fact that the rules require a movant to seek a stay pending appeal from the District Court before asking the same of an appellate court necessarily implies that the movant is not required to show a "probability of success" on appeal. See *Ruiz v. Estelle*, 650 F.2d 555, 565 (5<sup>th</sup> Cir. 1981) ("If a movant were required in every case to establish that the appeal would probably be successful, the Rule would not require as it does a prior presentation to the district judge whose order is being appealed. That judge has already decided the merits of the legal issue.")

involved,” the movant “need only present a substantial case on the merits . . . and show that the balance of the equities weighs heavily in favor of granting the stay.”)

Thus, when serious and significant legal questions are at issue, irreparable harm would result without a stay, and a stay would be in the public interest, the question of the likelihood of success on appeal recedes to the point of becoming largely irrelevant:

An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

*Washington Metropolitan Area Transit Commission*, 559 F.2d at 844.

2. THE OVERRIDING IMPORTANCE OF THE QUESTIONS PRESENTED BY THE DEFENDANTS’ APPEAL OBVIATES ANY NEED TO SHOW A “LIKELIHOOD” OR “PROBABILITY” OF SUCCESS ON APPEAL.

It is beyond dispute that the Defendants’ appeal involves difficult and pivotal questions of Idaho water law. This case is no ordinary lawsuit. It directly challenges the facial constitutionality of a comprehensive set of administrative rules that have been in place for nearly twelve years. *See* IDAPA 37.03.11.001 (dated Oct. 7, 1994). Further, the CM Rules, and the Judgment, go to the heart of an issue that “is one of the main reasons for the commencement of the Snake River Basin Adjudication.” *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997). Indeed, “a major objective” of the SRBA has always been to provide the foundation for the Director of IDWR to administer water rights in interconnected surface water sources and ground water sources. *Id.*; *see also* Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits, *In re SRBA Case No. 39576* (Subcase

91-00005 (Basin Wide Issue 5)) (July 2, 2001) (“Order on Basin-Wide Issue 5”) at 7, 34 (similar).<sup>4</sup>

[C]onjunctive management is not the typical administrative duty. Historically ground and surface water have not been managed together and the implementation of such an administrative plan potentially affects all water rights in the Snake River basin. Thus the potential for future controversy is almost certain. Because of the attendant complexities, the reasoning behind IDWR’s administrative actions may not be as readily apparent as in the situation of the administration of surface rights only. The Idaho Supreme Court and the Idaho Legislature have both acknowledged that the resolution of the conjunctive management issue is one of the most important objectives of the SRBA.

Order on Basin-Wide Issue 5 at 24.

Thus, it is not surprising that the issue of validity of the CM Rules has lurked behind the scene of Idaho water law for some years, with general recognition that the case that properly raised and presented the question would certainly make its way to the Idaho Supreme Court. *Cf.* Order on Basin-Wide Issue 5 at 7 (“[r]esolving the issue of conjunctive management is one of the major objectives of the SRBA. . . . In all likelihood, review of this Court’s decision will be sought whatever the result”); *Twin Falls Canal Co. v. Idaho Dept. of Water Resources*, 127 Idaho 688, 905 P.2d 89 (1995) (holding that the SRBA District Court lacked jurisdiction in a declaratory action challenging the validity of the CM Rules); *A & B Irr. Dist.*, 131 Idaho at 422-23, 958 P.2d at 579-80 (commenting on but making no ruling as to the CM Rules). This may well be that case.

The question of the constitutionality of the CM Rules is a crucial part of one the most important issues to arise in Idaho water law. There are enormous interests and compelling arguments on both sides of the question, and the consequences of the ultimate outcome of this case will be dramatic and far-reaching. The importance of the legal issues raised by this lawsuit

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<sup>4</sup> Attached as Exhibit B to the Affidavit of Travis L. Thompson in Support of Plaintiffs’ Motion for Summary Judgment (Oct. 14, 2005) (“Thompson Affidavit”).

can scarcely be overstated, and this Court has noted on more than one occasion, an appeal to the Idaho Supreme Court was inevitable, regardless of the outcome in this Court. *See, e.g.*, Transcript of Hearing of Tuesday, November 29, 2005 at 63 (“whatever the decision is . . . it’s not going to stop here. And it’s most probably – in fact, I’d bet a lot of money it will go on to Boise, and we need to get that going and get this resolved”).<sup>5</sup>

In short, the issues raised by the Defendants’ appeal are too important, and the impact of the Judgment is too potentially far-reaching and disruptive, to require any particular minimum showing of a certain “likelihood” or “probability” of success on appeal. The likelihood of success factor weighs in favor of a stay pending appeal simply because of the legal and factual gravity of the questions raised in the case and decided by the Judgment. This is particularly true in light of the fact that the CM Rules have been in force for nearly twelve years—staying the Judgment will maintain the established status quo and minimize uncertainty. The likelihood of success on appeal is essentially a *de minimis* consideration in this case and should be deemed satisfied. *See supra McClendon*, 79 F.3d at 1020; *Washington Metropolitan Area Transit Commission*, 559 F.2d at 844.

Even under the most demanding standard courts have imposed in cases of substantial public importance, the Defendants must only demonstrate a “substantial case” or “strong position” on the merits of the appeal. *Ruiz*, 650 F.2d at 565; *Securities Investor Protection Corp. v. Blinder, Robinson & Co., Inc.*, 962 F.2d 960, 968 (10<sup>th</sup> Cir. 1992). Under these circumstances, a stay is appropriate even if the Court is of the view that the Defendants’ appeal will probably fail, as long as the other factors weigh in favor of a stay. *Washington Metropolitan Area Transit Commission*, 559 F.2d at 843.

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<sup>5</sup> Attached as Exhibit A to the Affidavit of Phillip J. Rassier in Support of Defendants’ Memorandum in Response to Motions for Summary Judgment.

The Defendants have a “substantial case” or a “strong position” on the merits of their appeal, as the record in this case demonstrates. The number and complexity of the substantive and procedural issues raised, the extent of the briefing, and the depth of the Court’s summary judgment analysis show not only that many of the legal questions are of the utmost importance in Idaho water law, but also that the Defendants had strong and substantial arguments on the issues, even though the Court ultimately concluded that the CM Rules are facially defective. Indeed, the Order and Judgment rejected several of the arguments and positions strenuously urged by the Plaintiffs, thus upholding certain important aspects of the CM Rules.

In addition, the Court’s decision raises another important issue that must be considered on appeal. The Court’s Order and Judgment appear to contemplate that the Director is limited to acting principally as a referee or special master in responding to a delivery call, and must therefore adhere to standards, burdens and procedures that were judicially developed in the context of private litigation between water users, as if a delivery call was a lawsuit. The Director is not a mere referee, however, and a delivery call is not a traditional lawsuit. As the Court has recognized, the Director is a statutorily appointed water management professional vested by the Legislature with authority to direct and control the distribution of water. *See* Order at 82 (“Authorization to administer/distribute/curtail water is vested only in the Director and his watermasters and the Director has a clear legal duty to do so”); *see also* Idaho Code § 42-602 (“The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district”). This is a grant of administrative authority, and a delivery call is an invocation of this authority and the Director’s professional expertise. As such, it is the Defendants’ position that the Idaho Administrative

Procedure Act provides the procedures, burdens and standards that the Court concluded were lacking in the CM Rules, and, therefore, that the CM Rules are not procedurally deficient.

B. THE LIKELIHOOD THERE WILL BE IRREPARABLE HARM ABSENT A STAY

Unless stayed, the Judgment will cause irreparable harm because it presents the Director with a Hobson's choice: either initiate conjunctive administration rulemaking before the appeal is decided, or respond to delivery calls and perform conjunctive administration without any rules, presumably under the procedure described in the Order. Until the Idaho Supreme Court decides the appeal, however, the State will not know what substantive guidelines, principles and concepts will ultimately be required in the CM Rules, if any. On the other hand, any other action the Director takes to respond to the Plaintiffs' delivery call in the absence of duly promulgated rules will expose him to legal challenges for acting arbitrarily and capriciously. Both situations invite litigation and delay, and the final outcome of the appeal may well render any rulemaking or administrative action a false start, thus potentially requiring the Director to begin anew. Further, the lack of a stay will generally increase uncertainty and delay in the administration of water rights in interconnected surface and ground water sources, to the detriment of the parties and other water right holders in the Snake River basin, and the State of Idaho at large.

1. ABSENT A STAY, THE DEFENDANTS DO NOT HAVE THE LEGAL AUTHORITY TO CONJUNCTIVELY ADMINISTER WATER RIGHTS.

The SRBA District Court concluded in the *Musser* case that the Director must respond to conjunctive administration delivery calls according to duly promulgated rules and regulations, and that it would be arbitrary and capricious for the Director to respond to such a call in the absence of duly promulgated rules:

The issue here is not whether the Director must exercise discretion in how to carry out the call by distributing water. The issue is whether the Director possesses any discretion as to what he must do to answer the call. In this regard, the Director

must respond to calls for distribution by following rules and regulations for the distribution of water which he is authorized to adopt under I.C. § 42-603 and which must conform with chapter 52, title 67, Idaho Code. Failure to respond to calls under duly promulgated rules and regulations renders the Director's actions arbitrary and capricious. Therefore, in this case the Director has not met his duty to distribute water by failing to have adopted the required rules and regulations under which he determines both whether and how to answer a call. The duty to lawfully distribute water through duly promulgated rules and regulations under the Administrative Procedures Act is ministerial or executive and not discretionary.

*Musser v. Higginson (In re SRBA Case No. 39576)*, Order and Memorandum Granting Petition for Writ of Mandate (Dist. Ct. of the Fifth Jud. Dist. of the State of Idaho, Twin Falls County, Aug. 5, 1993) at 5, *affirmed*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994).

This Court has similarly recognized that suitable administrative rules are “essential” for proper administration of water rights in interconnected surface and ground water sources. Order at 124 (“Rules for the administration of hydraulically connected ground and surface water sources are not only specifically authorized by the Legislature, they are essential in proper administration and to protect vested property rights”).<sup>6</sup> Duly promulgated rules for conjunctive administration guide the Director in analyzing the complex questions inherent in a conjunctive administration delivery call—questions such as the extent of the hydraulic interconnection and injury, the determination of which specific juniors are causing injury, whether (and to whom) the call is futile, and the delay inherent in providing relief through curtailment of junior ground water rights causing injury. *See* Order at 99 (“[T]he determination of which specific juniors are causing injury with respect to ground water is infinitely more complex than making the same determination as between surface users, and the methodology and science is not exact.”).

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<sup>6</sup> Similarly, the Order recognized that Idaho water distribution statutes are not self-executing and do not require a watermaster to “simply engage in curtailment to satisfy rights in order of priority,” and that the Director is statutorily authorized to adopt rules and regulations for the proper distribution of water in accordance with Idaho law. Order at 98 (citing Idaho Code § 42-406); *see also* Idaho Code § 42-603 (authorizing the Director to adopt rules and regulations for the distribution of water).

In the absence of rules tailored to provide the legal principles and framework necessary for analyzing these questions, a conjunctive administration delivery call can easily become intractable from both practical and legal perspectives. Further, in such an administrative vacuum, the factual investigations the Director undertakes, the determinations he makes, and the orders he enters, all invite litigation regarding their substantive and procedural compliance with Idaho law.

This is the situation the Judgment forces on the Director. The Judgment invalidates the only administrative rules available to the Director for responding to delivery calls by surface water right holders against ground water right holders.<sup>7</sup> The Director may be required to respond to such calls even in the absence of suitable administrative rules. *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994). Thus, the Director could not proceed with administration until the CM Rules are amended or re-promulgated.

Such an undertaking makes little sense until the Idaho Supreme Court has resolved the Defendants' appeal because any rulemaking in the interim is an exercise in guesswork. As this case has demonstrated, the issues that the rules must address are numerous and complex, and there are very different and strongly held views of what must be in the rules—and what must not—if they are to conform to Idaho law. Experience has shown that in the absence of substantive and procedural guidance from the Supreme Court, any new rulemaking on such a complex and controversial subject is no more likely to pass constitutional muster than the existing CM Rules.<sup>8</sup> Further, rulemaking prior to the resolution of the appeal entails a substantial risk that the new rules would eventually be deemed invalid under the Supreme

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<sup>7</sup> See Judgment at 2 (holding that the CM Rules are “constitutionally deficient” and “facially unconstitutional”).

<sup>8</sup> The CM Rules were the product of negotiated rulemaking. Then, as now, the surface water right holders and ground water right holders were unable to reach agreement on many of the points that are at issue in this case.

Court's decision, which would in turn invite more lawsuits. Moreover, unless the new rules substantially conformed to all of the holdings of the Idaho Supreme Court's decision—an unlikely result, given the nature and complexity of the subject—the Director would have to re-start the rulemaking process and promulgate new rules.

In short, the law governing conjunctive administration is unsettled and must be clarified by the Idaho Supreme Court. The Judgment is an important and necessary step in this process, but it is not the final one. The Supreme Court's decision will provide direction on the question of the implementation of constitutional requirements in administrative rules for conjunctive administration, but until then the Defendants lack the appellate guidance necessary to craft new rules.

2. AS A PRACTICAL MATTER, THE DIRECTOR MAY NOT BE ABLE TO RESPOND TO THE PLAINTIFFS' DELIVERY CALL WITHOUT RULES.

The potential for irreparable harm if the Director attempted to substantively respond to the Plaintiffs' delivery call in the absence of suitable administrative rules is great. Under such circumstances, the Director would be faced with making factual and legal determinations that are “infinitely more complex” than those involved in the administration of surface water rights, Order at 99, but without rules that provide the analytical framework, procedures or principles necessary for making such determinations. Without rules in place, the Director's actions could be challenged as arbitrary and capricious. *See Musser*, Order and Memorandum Granting Petition for Writ of Mandate at 5 (“arbitrary and capricious”); *see also* Order at 95 (stating that even the CM Rules are “devoid of any objective standards against which the Director is to apply the various criteria.”).

Further, this lack of structure in an important and contentious administrative case is a formula for sidetracking the proceedings from the central issues, engendering additional disagreements and litigation among the parties, and generally delaying resolution of the matter and running up costs. It is virtually assured that whatever actions the Director did take in such a context would be procedurally and/or substantively defective in some manner under the Idaho Supreme Court's final decision, raising the possibility that the entire exercise would eventually be invalidated, again resulting in the need to re-do the process.

3. APPLICATION OF THE ILLUSTRATIVE PROCEDURE DESCRIBED IN THE ORDER IN RESPONDING TO THE PLAINTIFFS' DELIVERY CALL WOULD RESULT IN IRREPARABLE HARM.

Irreparable harm is just as likely under the delivery call procedure the Court set forth as an illustration of the deficiencies the Court identified in the CM Rules. *See* Order at 99-103. This illustrative procedure does not constitute rules duly promulgated under the Idaho Administrative Procedure Act, and therefore any action the Director took under such procedure would also be vulnerable to the legal challenges described above. Indeed, as the Order itself recognizes, the suggested procedure should not be viewed as a stand-alone process ready for immediate adoption and direct application by the Director, but rather as an illustration of the Court's view of concepts and principles "that the CMR's need to also incorporate." Order at 98.<sup>9</sup>

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<sup>9</sup> The prefatory statements to the illustrative procedure show that it is not, and was not intended as, a self-contained method for responding to a conjunctive administration delivery call in the absence of duly promulgated rules: "However, based on the foregoing discussion, and by way of illustrating the deficiencies and providing context, it is this Court's view that the CMR's need to also incorporate the following." Order at 98. It should also be noted that, as previously discussed, the statutory authority to direct and control the distribution of water and to adopt appropriate administrative rules is vested in the Director. Moreover, the questions of the validity of the specific actions taken or the specific procedures applied in the Plaintiffs' delivery call were not before this Court on summary judgment, and were not decided by the Judgment or Order.

Moreover, just as new CM Rules promulgated or amended while the Defendants' appeal is pending may effectively be invalidated by the Idaho Supreme Court's ultimate decision, the illustrative procedure may also turn out to be incomplete or flawed under that decision. If so, once again the process would have to be re-started, in conformance with the requirements of the Supreme Court's directives.

Similarly, the illustrative procedure appears to contemplate that the Director would not issue an order for relief until after an evidentiary hearing on issues such as injury, futile call, and waste. *See* Order at 101-02. Under the existing CM Rules, in contrast, the Director can and has entered an order for relief prior to a hearing.<sup>10</sup> In this regard, the illustrative procedure could result in less-timely administration than the existing CM Rules.

It should also be noted that, by its own terms, the illustrative procedure probably cannot be implemented without legislative guidance on futile call principles, along with appellate court review of the same. The Director historically has made futile call determinations on a case-by-case basis, using case-specific facts and principles from the common law of prior appropriation. In describing the illustrative procedure, the Order states, as to the futile call doctrine, that “[a]lthough the determination would be a mixed question of law and fact, some of the legal standards or criteria may have to come from the legislature, subject to constitutional review by the Idaho Supreme Court.” Order at 100 (emphasis added). In other words, even the Order acknowledges that the illustrative procedure probably cannot be implemented without predicate

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<sup>10</sup> The initial relief order was issued just three weeks after the beginning of the irrigation season, without the requirement of first holding a hearing. *See* Defendants' Sur-Reply in Opposition to Motions for Summary Judgment at 12; Third Affidavit of Phillip J. Rassier at Exhibit A. Moreover, the Director issued an order for relief only two and a half weeks after the 2005 joint inflow forecast by the U.S. Bureau of Reclamation and the U.S. Army Corps of Engineers became available. *See id.* The fact that the Director can issue an order for relief prior to a hearing under the CM Rules does not deprive a senior (or a junior) of the opportunity for a hearing—the Plaintiffs were entitled to seek a hearing on the Director's order, and did so

action by the Legislature and the Idaho Supreme Court clarifying the application of the futile call doctrine, which is a crucial consideration in conjunctive administration.

C. THE PROSPECT THAT OTHERS WILL BE HARMED IF THE COURT GRANTS THE STAY

A stay will allow the Director to continue applying the CM Rules to the Plaintiffs' delivery call and any other similar calls, providing a degree of relief to the Plaintiffs while the appeal is pending, albeit not the specific type or extent of relief to which the Plaintiffs believe they are entitled.<sup>11</sup> In contrast, the absence of a stay will effectively prevent relief during the pendency of the appeal because as a practical matter the absence of appropriate administrative rules will prevent the Director from effectively administering water rights in interconnected surface and ground water sources, for reasons discussed above.<sup>12</sup> It should also be noted that the juniors subject to the relief orders that the Director has entered to date in response to the Plaintiffs' delivery call could certainly challenge the orders as being arbitrary and capricious, and seek a stay of any relief ordered, potentially leaving the Plaintiffs with even less relief than they currently receive under the Director's orders.

In the broader sense, a stay would also minimize uncertainty by retaining the existing system of administration while the appeal is pending. To be sure, a certain amount of uncertainty regarding the present course of conjunctive administration is inevitable until the Idaho Supreme Court resolves the Defendants' appeal, but staying the Judgment will minimize

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<sup>11</sup> As the Court is well aware, the Plaintiffs have repeatedly asserted that they have yet to receive any relief on their delivery call, and the Director has also repeatedly pointed out that he ordered timely and adequate relief shortly after the start of the 2005 irrigation seasons. There is a genuine dispute issue of material fact on this point, as the Court has recognized. *See* Order at 7 ("This Court understands IDWR disputes that it has not administered some water pursuant to the call.") The parties have not presented evidence on this issue and no final action of the Director is properly before this Court.

<sup>12</sup> As also discussed above, any substantive action the Director might take in response to the Plaintiffs' delivery call in the absence of administrative rules would likely bog down in more disputes over substance and procedure, thus generating further litigation.

this uncertainty. Further, while the parties have significantly different views of the law, they have the common objective of expeditiously resolving these issues in a manner that minimizes uncertainty and potentially unnecessary economic disruption. A stay will advance this common objective by reducing the risk of collateral litigation.

Staying the Judgment will preserve the status quo. The absence of a stay, in contrast, would force dramatic changes in conjunctive administration while the appeal is pending, thereby creating even more uncertainty in the conjunctive administration of surface and ground water rights.

D. THE PUBLIC INTEREST WEIGHS STRONGLY IN FAVOR OF GRANTING A STAY

The public interest is best served by minimizing the disruption of the day-to-day conduct of irrigation, agriculture, domestic use, municipal and commercial water use, and business in general while issues of critical importance to these sectors are resolved. This is best accomplished by maintaining the status quo while the Defendants' appeal is pending, without resort to interim measures and procedures that are temporary by definition, and by avoiding the potentially dramatic and costly effects of the Judgment before the Idaho Supreme Court has resolved the appeal. It should also be noted that it is too late to provide any additional relief to the Plaintiffs in 2006, and the current good water year minimizes the potential injury to the Plaintiffs while the appeal is pending. In contrast, implementation of the Judgment and Order during the pendency of the appeal is likely to have irreversible consequences to the junior water users.

One example in particular brings this point into sharp focus. The Judgment holds that, the "reasonable carryover" provision of the CM Rules is facially unconstitutional, Judgment at 2,

and the Court has determined that storage right holders are “allowed to store up to the quantity stated in the storage right . . . [and] . . . carry it over to future years.” Order at 114-15.

A potential reading of the Order suggests Plaintiffs are entitled to carryover the full amount of their storage authorizations each year. Applying this holding alone, even if the Court had ruled that the rest of the provisions of the CM Rules were entirely valid, would result in a material injury finding for 2005 of 2,018,600 acre-feet, which is approximately *fifteen times* that in the Amended Order.<sup>13</sup> The combined total of annual ESPA depletions due to ground water withdrawals is estimated at “nearly 2 million acre-feet.” Amended Order at 5 ¶ 22. Thus, under this interpretation of the Order, the vast majority, if not all, ground water rights on the ESPA for irrigation, municipal and domestic uses, as well as commercial and industrial uses, likely would have to be curtailed.<sup>14</sup> Such large scale curtailment of ESPA ground water right holders before the Idaho Supreme Court has resolved the appeal and identified the legal principles required of conjunctive administration rules is not in the public interest and would cause irreparable harm to

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<sup>13</sup> Using the “reasonable carryover” methodology, the Director determined that the reasonably likely material injury to the Plaintiffs during 2005 would be approximately 133,400 AF. Amended Order at 27 ¶ 120. If, as the Court’s Judgment and Order appear to require, the Director had determined reasonably likely material injury using the full face amount of the Plaintiffs’ storage authorizations rather than “reasonable carryover,” this projected injury would have been 2,018,600 AF (as explained below), which is approximately fifteen times as large an injury as the 133,400 AF of reasonably likely material injury that the Director originally determined, and approximately the same as the amount of annual depletions from the ESPA due to ground water withdrawals.

The revised determination of 2,018,600 AF of reasonably likely material injury is the sum of (1) the combined total of the predicted shortfalls and surpluses in the Plaintiffs’ surface flow and storage supplies during the irrigation season, plus (2) the combined total of the face amount of the Plaintiffs’ reservoir storage authorizations. The value of (1) in this equation is -320,000 AF, which is the sum of the shortages and shortages set forth in the “Predicted Shortages” column of Finding 116 of the Amended Order. Amended Order at 25-26 ¶ 116. (The negative sign means that for all the Plaintiffs taken together there was a net supply surplus. Some of the Plaintiffs had supply surpluses while others did not. *See id.* The sum of the surpluses and shortfalls for all the Plaintiffs combined is a net surplus.) The value of (2) in the equation is 2,320,636 AF, which is the sum of the face amounts of the Plaintiffs’ storage authorizations. *See id.* at 15-16 ¶ 70. Using these values, the calculation becomes (-320,000 AF + 2,320,636 AF), or 2,018,600 AF. This is the revised predicted material injury to the Plaintiffs using the face amounts of the Plaintiffs’ storage authorizations rather than the Director’s “reasonable carryover” determinations.

<sup>14</sup> The futile call doctrine would presumably apply to prevent curtailment of some ground water rights.

junior water right holders, who planted their crops this year in reliance on duly adopted conjunctive management rules and the Director's orders.

The Order and Judgment also appear to mean that that Plaintiffs may not need to have water released from storage for subsequent diversion during a particular irrigation year, but instead can leave their water in storage and carryover the amounts of water in storage up to the entirety of their storage water authorizations for use in the future, even if a significant portion of the water in carryover storage would have to be discharged soon after that irrigation year to make storage space available for flood control purposes. These holdings imply that Plaintiffs are entitled to have junior priority water rights curtailed, or replacement water provided by the junior right holders, whenever either the senior natural flow water rights are not filled, which occurs during every irrigation year, or the quantities of authorized reservoir storage allotments under senior rights are not met, including the amounts in carryover storage at the end of the irrigation year.

While the Court may be correct that a harsh and irreversible result may be required under Idaho's version of the prior appropriation doctrine, nothing therein requires such a result during the pendency of an appeal that challenges duly adopted administrative rules that have been in place for twelve years. The public interest clearly militates against it.

These are just a few aspects of the potentially sweeping and fundamental changes that the Judgment would work in the historic practice for management of the Snake River reservoir system. Reservoir storage allotments and authorizations have historically been administered as supplemental to surface flow supplies and surface water rights. *See, e.g.*, Exhibit J to Third Affidavit of Phillip J. Rassier. Further, the reservoirs must be managed not only for irrigation storage but also for flood control operations, and the interactions of these different uses and their

effects on each other must be taken into account in responding to a conjunctive administration delivery call in accordance with the prior appropriation doctrine as established by Idaho law.<sup>15</sup>

The Judgment potentially essentially severs these historic linkages, ignores long-standing management practices and operations, and the effect is to create a parallel system of storage water rights that are entirely independent of surface flow rights. This is being done without the benefit of a full record regarding the actual nature of the reservoir storage rights. The magnitude of such changes means that the public interest weighs strongly in favor of a stay until the Idaho Supreme Court has had an opportunity to review the issue.

### CONCLUSION

In this case, the equities and practical considerations weigh heavily in favor of a stay of the Judgment until the Idaho Supreme Court resolves the Defendants' appeal. A stay will prevent irreparable harm, preserve the status quo, minimize uncertainty and facilitate water rights administration while the appeal is pending. A stay will preserve the relief the Plaintiffs have obtained to date and will serve the public interest. For the reasons discussed herein, a stay pending the final resolution of the Defendants' appeal under Idaho Appellate Rule 13(b) is appropriate and warranted in this case.

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<sup>15</sup> For instance, in Water District 01, the determinations of how much surface flow and how much reservoir storage each water right holder used during the season are made retrospectively, in a year-end accounting that allocates the appropriate quantities used to either surface flow or storage.

DATED this 30<sup>th</sup> day of July 2006.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 20<sup>th</sup> day of July 2006, I caused to be served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR STAY UNDER IRCP 62(d) AND IDAHO APPELLATE RULE 13(b)** to the following parties by the indicated methods:

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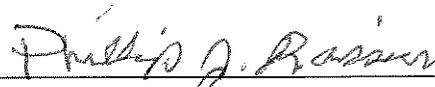
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