C. Tom Arkoosh, ISB #2253
ARKOOSH LAW OFFICES, CHTD.
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

Attorneys for American Falls Reservoir District #2

Roger D. Ling, ISB #1018
LING ROBINSON & WALKER
P.O. Box 396
Rupert, Idaho 83350
Telephone: (208) 436-4717
Facsimile: (208) 436-6804

Attorneys for A & B Irrigation District and Burley Irrigation District

John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
BARKER ROSHOLT & SIMPSON LLP
P.O. Box 485
Twin Falls, Idaho 83303-485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for Twin Falls Canal Company and Clear Springs Foods, Inc.

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

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 #2, A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, and TWIN FALLS CANAL COMPANY, Plaintiffs, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and KARL J. DREHER, its Director, Defendants.	Case No. CV-2005-600 **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR STAY**

COME NOW, Plaintiffs AMERICAN FALLS RESERVOIR DISTRICT #2, A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION

DISTIRCT. and TWIN FALLS CANAL COMPANY (collectively referred to as "Plaintiffs"), by and through counsel of record, and hereby file this response to the Defendants' *Motion for Stay* that was submitted on July 20, 2006. Plaintiffs oppose the Defendants' motion for the reasons set forth below. Plaintiffs' response is supported by the *Third Affidavit of Travis L. Thompson* ("*Third Thompson Aff.*") and the prior documents and affidavits filed in this matter.

DEFENDANTS ARE NOT ENTITLED TO SEEK EQUITY FROM THIS COURT

I. The Defendants are Not Entitled to Invoke the Process of This Court Until the Director Abides by the Court's Orders

The Department's conjunctive management rules (IDAPA 37.03.11 et seq.) ("Rules") were declared unconstitutional by the Gooding County District Court, in its June 2, 2006, *Order on Plaintiffs' Motion for Summary Judgment*. The Director took the position in the Department's June 29, 2006 *Third Supplemental Order Amending Replacement Water Requirements Final 2005 and Estimated 2006* ("*Third Supplemental Order*") that "[i]n the absence of a judgment in [the Gooding County case], it is not possible at this time to anticipate whether and how such judgment may affect this proceeding." *See* Ex. A to *Third Thompson Aff.* To that end, the *Third Supplemental Order* simply continued to apply the Rules.

The Gooding County District Court certified its final judgment as of July 11, 2006. The judgment was certified as final based upon the Defendants' representations that the Director would abide by the decision:

> MS. McHUGH: Well, Your Honor, first of all, the director has every intention of following this court's order. At the time, your judgment wasn't entered, so he went ahead and acted.
>
> At this point, it's a little speculative for the plaintiffs to say that they're going to have to respond to the department, you know, ignoring this court's order. That hasn't happened.
>
> I can represent to you that the department plans to follow this court's order and any judgments that are entered.

Transcript on Appeal at p. 347, lns. 16 -25, p. 348 ln. 1. *See* Ex. H to *Third Thompson Aff.*

The Director then entered the Department's *Fourth Supplemental Order on Replacement Water Requirements for 2005* ("*Fourth Supplemental Order*") on July 17, 2006, which did not address the issue of the judgment whatsoever and, instead, proceeded to apply the Rules as if they had never been invalidated. *See* Ex. B to *Third Thompson Aff.* Through the *Fourth Supplemental Order* the Director continued to apply the Rules for 2006 water right administration:

> 5. All other provisions of the [*Third Supplemental Order*] remain in effect including that the Director will continue to monitor water supply and climatic conditions through the 2006 irrigation season and issue additional orders requiring additional replacement water in 2006 or further instructions to the watermasters for Water District No. 120, No. 130, and 01 should material injury occur to the rights held by or for the benefit of members of the Surface Water Coalition, including the Twin Falls Canal Company.

Fourth Supplemental Order at 6, ¶ 5. Ex. B to *Third Thompson Aff.*

On July 12, 2006, the Plaintiffs filed a petition for reconsideration in the administrative proceeding requesting the Director to reconsider the *Third Supplemental Order* in light of the unconstitutionality of the Rules. *See* Ex. C to *Third Thompson Aff.* Counsel for Twin Falls Canal Company also sent a separate letter to the Director on July 27, 2006, requesting the Director to reconsider his prior orders and further requesting lawful water right administration this year. *See* Ex. D to *Third Thompson Aff.* The Director has yet to respond to either the petition for reconsideration or the July 27th letter.

The Defendants and IGWA have now requested a stay of the Court's July 11, 2006, *Judgment.* At issue is whether a party's contempt of court prevents it from seeking relief until a contempt of court has been cured. The general rule on the matter is that:

> A court should have the right to deny its processes and aid to one who stands in contempt or is in contempt of its orders. One in contempt may be denied certain favors of court and privileges as a litigant until he or she has purged himself or herself of the contempt . . . [and] [i]n the absence of exceptional extenuating circumstances, courts are not inclined to hear a litigant who resists or evades the enforcement of its orders until her or she has satisfactorily settled his or her default.

17 C.J.S. Contempt § 108.

The majority rule is that remedy for non-compliance is one of continuance until the default is corrected instead of dismissal. *See Theesen v. Continental Life & Acc. Co.*, 90 Idaho 58, 62 (1965).[1] This rule is extended in many jurisdictions to allow dismissal of a party's appeal if the party remains in contempt of the lower court just as long as the party in contempt is given proper time to purge the contempt.[2] The rationale to the above being that "it would be a flagrant abuse of the principles of equity and the due administration of justice to allow a party who flaunts court orders to seek judicial aid." *D'Aston*, 790 P.2d at 593.

The Defendants have failed to give any reason for which the Director has sought to ignore the ruling of this Court on the conjunctive management rules. At first, the Director challenged whether the Court could enforce its June 2, 2006 order without a judgment. Now, the Director wishes to simply bury his head in the sand and ignore the July 11, 2006, *Judgment*, while continuing to apply the Rules which have been adjudged unconstitutional. This cannot continue and the attempt to stay the order is not appropriate given that the Defendants clearly

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[1] *Theesen* holds, in part, that "a party or his attorney may be penalized or punished for disobeying court orders. However, the punishment must not be such as to render to the opponent of the offending party an unfair advantage at the trial and permit him to do what he otherwise would be foreclosed from doing."

[2] *See generally, D'Aston v. D'Aston*, 790 P.2d 590, 593-95 (Utah App.1990) (30 days to comply) (citing *Stewart v. Stewart*, 91 Ariz. 356, 372 P.2d 697, 700 (1962) (en banc) (30 days to comply); *Tobin v. Casaus*, 128 Cal.App.2d 588, 275 P.2d 792, 795 (1954) (30 days to comply); *Greenwood v. Greenwood*, 191 Conn. 309, 464 A.2d 771, 774 (1983) (30 days to comply); *Pasin v. Pasin*, 517 So.2d 742, 742 (Fla.Dist.Ct.App.1987) (15 days to comply); *In re Marriage of Marks*, 96 Ill.App.3d 360, 51 Ill.Dec. 626, 629, 420 N.E.2d 1184, 1187 (1981) (30 days to comply); *Henderson v. Henderson*, 329 Mass. 257, 107 N.E.2d 773, 774 (1952) (30 days to comply); *Prevenas v. Prevenas*, 193 Neb. 399, 227 N.W.2d 29, 30 (1975) (20 days to comply); *Hemenway v. Hemenway*, 114 R.I. 718, 339 A.2d 247, 250 (1975) (30 days to comply); *Strange v. Strange*, 464 S.W.2d 216, 219 (Tex.Civ.App.1970) (per curiam) (10 days to comply); *Pike v. Pike*, 24 Wash.2d 735, 167 P.2d 401, 404 (1946) (10 days to comply).

seek a favor from the Court while continuing to ignore the Court's ruling.

As an aside, the general rule that a party in contempt may not seek favors from the court also extends to third parties that abet the party in contempt in violating the court's order or are legally identified with the same (provided that they have notice of the order). *See Peterson v. Highland Music, Inc.* 140 F.3d 1313, 1323 (9th Cir. 1998). IGWA, and the junior priority ground water right holders it represents, are clearly third parties that stand to benefit if the Director is allowed to continue to remain in contempt of the Court's ruling that the Rules are unconstitutional. Therefore, any attempt to seek a stay on the part of IGWA, as implied by its response to the Defendants' motion, should be denied until the Director purges his contempt of this Court.

RESPONSE TO MOTION FOR STAY

I. Introduction

The Department's Rules were promulgated in 1994 despite the fact that "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." *Memorandum in Support of Motion for Stay* ("*Defs. Br.*") at 12, n. 8. The Rules were immediately challenged as unconstitutional, but the case was dismissed on jurisdictional grounds. *See Twin Falls Canal Co. v. Idaho Dept. of Water Resources*, 127 Idaho 688 (1995). Thereafter, the Rules sat dormant on the Department's shelves and were not used until the Director responded to requests for water right administration filed by spring users in Water District 130 in the fall of 2003.[3] Again, the constitutionality of the Rules was immediately challenged in district court by senior surface water right holders. *Rim View Trout*

[3] Notably, the Rules were not implicated when the Director designated the Thousand Springs and American Falls Ground Water Management Areas in August 2001. *See* Ex. Y to *Steenson Aff.*; Ex. E to *Third Thompson Aff.* Moreover, the Rules were not implicated when the Director issued final orders creating Water District Nos. 120 and 130 in February 2002. *See* Ex. A to *Affidavit of Travis L. Thompson in Support of Plaintiffs' Motion for Summary Judgment* (filed in this case on October 14, 2005).

Company, et al. v. Karl J. Dreher, et al. (Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV-03-07551D). Despite the Defendants' statements that the Rules have "been in place for twelve years", it is illustrative that the Department only began administering under the Rules in the last two and a half years, resulting in three separate lawsuits. The Defendants inherently recognize the legal questions that have clouded the Rules, and the Director's accompanying actions, since their inception.

It is with this background that the Defendants' motion should be considered. Contrary to the Defendants' claims about "uncertainty", "additional litigation and delay", and what is in the "public interest" if this Court's judgment is not stayed, it is evident that senior water rights will not receive constitutional water right administration if the Defendants are permitted to continue to employ the Rules. The Defendants' efforts to stay this Court's judgment are made for one reason – to permit the Director to avoid his statutory duty to administer water rights in a timely basis and continue with various "after-the-fact" administrative processes provided by the Rules. Moreover, a stay is requested to further allow the Director to disregard decreed water rights. This so-called "status quo" is unacceptable. The "public interest" does not favor allowing a state agency and its Director to proceed on an unconstitutional path that continues with a taking of private property rights. Accordingly, the Defendants should be required to follow this Court's judgment and the prior appropriation doctrine as set forth in the Idaho Constitution and their motion for a stay should be denied.

STANDARD OF REVIEW

The Defendants admit that a decision to grant or deny a stay of the final judgment pending the appeal, an equitable determination, is "vested in the sound discretion" of this Court.

See Continental Cas. Co. v. Brady, 127 Idaho 830, 834 (1995). Idaho's "abuse of discretion" standard has been described as follows:

> Because imposition of an equitable remedy requires a balancing of the equities, which is inherently a factual determination, . . . [it] should be reviewed for an abuse of discretion. Whether a district court abused its discretion is a three-pronged inquiry to determine whether the district court: (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion and consistently with the legal standards applicable to the specific choices before it; and (3) reached its decision by an exercise of reason.

West Wood Investments, Inc. v. Acord, 141 Idaho 75, 82 (2005).

Without a governing legal standard, the Defendants urge the Court to apply a test accepted in other jurisdictions, which they contend is similar to that considered in "preliminary injunction cases". *Defs. Br.* at 3. Rather than adopt a new "stay test", this Court should look to Idaho's "preliminary injunction" standard set forth under Rule 65(e)(1) and (2) for guidance.[4]

The Defendants, as movants, have the "burden of proving a right" to a stay of this Court's judgment. *See e.g. Harris v. Cassia County*, 106 Idaho 513, 518 (1984) (discussing burden of proof in the context of a preliminary injunction). Stays, like injunctive relief, should only be granted "in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Id.* Denying a motion for preliminary injunction which is filed for the obvious benefit of junior water rights to the detriment of senior water rights is proper where the movant fails to demonstrate a "likelihood of success of on the merits" and "irreparable harm". *See e.g. Clear Lakes Trout Company v. Clear Springs Foods, Inc.*, 141 Idaho 117, 119 (2005).

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[4] The only applicable grounds under Rule 65(e) to look to in evaluating the Defendants' motion are (1) and (2) since the Defendants only argue :

1) "likelihood of success" *see Defs. Br.* at 4 – 10 (compare Rule 65(e)(1), where it appears the movant is entitled to the relief demanded); and

2) "irreparable injury" *see Defs. Br.* at 10 – 16 (compare Rule 65(e)(2), continuance of some act would produce waste, or great or irreparable injury to the plaintiff).

In summary, the decision to grant or deny a stay is committed to the Court's discretion. Under Idaho's "preliminary injunction" standard, the Defendants have failed to prove a "likelihood of success" on appeal, and have not demonstrated that denying a stay will result in "irreparable injury" to the state agency and its Director. The Defendants' motion should therefore be denied.

ARGUMENT

The Defendants request a stay of the Court's final judgment in order to continue with unlawful water right administration pursuant to the Department's Rules. As explained below, granting the Defendants' motion would result in a continued taking of Plaintiffs' senior water rights, whereas the Defendants will not suffer "irreparable injury" if the motion is denied. The Court should deny the motion and prohibit the Defendants from taking any further administrative action pursuant to the Department's unconstitutional conjunctive management rules.

I. Defendants Have Failed to Prove a "Likelihood of Success" on Appeal.

The Defendants offer a "four part" stay standard but then immediately proceed to downplay the first factor the Court analyzes, and even go so far to claim that it is "largely irrelevant" and "essentially a *de minimus* consideration in this case". *Defs. Br.* at 8. The Defendants then fall back and claim they must only show a "substantial case" or "strong position" on the merits of the appeal to meet this factor. *Id.* If, as the Defendants suggest, their test is truly similar to Idaho's "preliminary injunction" standard, it is evident they cannot meet the "likelihood of success" factor set forth in Rule 65(e)(1).

First, the Defendants make several claims about the "difficult and pivotal" legal questions posed in this case, as well as the "number and complexity of the substantive and procedural issues raised" to support their case for a stay. *Defs. Br.* at 3, 9. Although such claims may

support the factor under the Defendants' stay test, they weigh just the opposite under Idaho's preliminary injunction standard. *See Harris*, 106 Idaho at 518 ("The substantial likelihood of success necessary to demonstrate that appellants are entitled to the relief they demanded cannot exist where complex issues of law or fact exist which are not free from doubt."). By the Defendants' own arguments, the issues in this case are "complex" and therefore they cannot demonstrate a "likelihood of success" on appeal. Since the Defendants have failed to meet their burden of proof with respect to this factor, their motion should be denied.

II. Defendants Have Failed to Show That Denying a Stay Will Cause Them "Irreparable Injury".

The Defendants' arguments with respect to the "irreparable injury" factor are twofold. First, the Defendants argue they will be helpless to perform water right administration without the Rules, and if they do so, such action will subject them to further litigation, causing uncertainty and delay in administration. Second, they claim "third party" junior ground water users will be harmed and that the public interest does not favor curtailing junior ground water rights. These arguments fail for purposes of staying this Court's judgment.

The Defendants' lack of a plain and concrete "irreparable injury" is further highlighted by IGWA's "response" to the motion for stay, and the fact junior priority ground water users are not actually "seeking" a stay of this Court's judgment. If "third parties", or junior ground water users, stand to be "irreparably injured" by enforcement of this Court's judgment, it should be expected that those right holders would be the ones actually moving the Court for a stay. No such motion has been filed by IGWA. Apparently IGWA and its members do not want to "post security" for a stay as required by law, and instead would have the Defendants make the motion, thereby receiving the benefit of the sovereign's shield from the security requirement. *See* I.R.C.P. 62(e). The so-called "third parties" are not absent from this case but instead are

represented by IGWA. If a stay is necessary to protect their interests, IGWA should file the motion. The Court should see through this effort to avoid the law's requirements and should reject the Defendants' basis for "irreparable injury" on the account that IGWA, or its members, may be harmed.

With this background in mind it is obvious the Defendants do not want to curtail junior priority ground water rights consistent with Idaho's prior appropriation doctrine and instead would rather continue with unconstitutional rules to the detriment of Plaintiffs and their senior water rights. As explained below, administration of junior priority ground water rights under the law is not predicated upon having a set of agency rules. Whereas the Defendants have previously recognized their duty to administer water rights pursuant to constitutional and statutory directives, the Court should hold the Defendants to their prior representations and not allow them to evade the judgment in this case on the meritless claim that water distribution is conditioned upon agency rules.

A. Agency Rules are Not Required for Administration of Junior Priority Ground Water Rights.

The Director possesses express constitutional and statutory authority to administer junior priority ground water rights and distribute water to satisfy senior surface water rights. The following constitutional provisions and statutes provide the Director with the requisite authority in the absence of administrative rules:

> Priority of appropriations shall give the better right as between those using the water;

IDAHO CONST. art. XV, § 3.

> As between appropriators, the first in time is first in right.

Idaho Code § 42-106.

> The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority basis, within the area determined by the director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. Such order shall be given only before September 1 and shall be effective for the growing season during the year following the date the order is given.

Idaho Code §§ 42-233a, 233b.

The Director has the statutory authority to designate the ESPA, or "designated part[s] thereof" as either "critical ground water areas" or "ground water management areas." The Director can make these designations at any time. Upon such designation and finding that the water supplies are insufficient to meet the demands of water rights, the Director can order water right holders on a "time priority basis" and order juniors to "cease or reduce" pumping provided notice is provided before September 1st. Such administration is "prospective" and is available to the Director this year.

The Director previously used I.C. § 42-233b to designate two ground water management areas in August 2001 in the Thousand Springs and American Falls reaches. *See* Ex. Y to *Affidavit of Daniel V. Steenson* (filed November 1, 2005).; Ex. E *Third Thompson Aff.* In those orders, the Director expressly recognized:

> The Director initiates this matter in response to his recognition that he has a responsibility . . . to exercise statutory authorities to administer rights to the use of ground water in a manner that recognizes and protects senior priority surface water rights in accordance with the directives of Idaho law.

See Thousand Springs Order at 2 (Ex. Y to *Steenson Aff.*); *American Falls Order* at 5 (Ex. E to *Third Thompson Aff.*).

Given the Director's express acknowledgment that junior priority "ground water diversions occurring within a band on both sides of the American Falls reach varying in width from 1.6 kilometers to five (5) kilometers on each side of the river result in seasonal reach gain

reductions equal to fifty percent (50 percent) or more of the amount of water diverted and consumptively used, and such reductions occur within six (6) months" there is no reason to condition administration of those water rights on a new set of agency rules. *See American Falls Order* at 2, ¶ 4; Ex. E to *Third Thompson Aff.* The same applies equally to junior priority ground water diversions within the 5 to 10 km band in the Thousand Springs reach. *See Thousand Springs Order* at 2, ¶ 4; Ex. Y to *Steenson Aff.*

Even assuming that the analysis the Defendants argue is necessary to perform under new rules, "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", it is obvious such analysis has already been completed with respect to ground water rights diverting within the 1.6 to 5 km band adjacent to the American Falls reach and within the 5 to 10 km band adjacent to the Thousand Springs reach.

The Director knows that ground water diversions in these areas deplete the springs and reach gains and that these depletions are realized within 6 months. The depletions to the source injure senior surface water rights that rely upon those water supplies. Real-time administration and relief can be provided to the Plaintiffs in 2007 if the Director complies with his statutory responsibility and designates the ESPA, or portions thereof, as either a "critical ground water area" or "ground water management area" and properly notifies junior ground water right holders by September 1, 2006. In addition, no new designation is necessary for the existing portion of the American Falls Ground Water Management Area, unless it is changed to a "critical ground water area." *See* Ex. F to *Third Thompson Aff.*

Apart from the above process, the Director can further administer water rights immediately going forward pursuant to his authority in Chapters 6 and 14, Title 42.

> The director of the department of water resources shall distribute water in water districts accordance with the prior appropriation doctrine.

Idaho Code § 42-602.

> It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, . . . according to the prior rights of each respectively, and to shut and fasten . . . facilities for diversion of water from such stream, streams, or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply . . .

Idaho Code § 42-607.

> (1) The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code: (a) in accordance with the director's report or as modified by the court's order; (b) in accordance with the applicable partial decree(s) for water rights acquired under state law . . . (2)(c) upon a determination by the court, after hearing, that the interim administration of water rights in accordance with the report, or as the report is modified by the court's order, and in accordance with any partial decree(s), is reasonably necessary to protect senior water rights.

Idaho Code § 42-1417.

The Director requested authority from the SRBA Court to perform interim administration, based upon the above statutes, not the conjunctive management rules. The final orders creating Water Districts 120 and 130 make no mention of the Department's now invalid Rules. *See* Ex. A to *Affidavit of Travis L. Thompson in Support of Plaintiffs' Motion for Summary Judgment*. Contrary to the Defendants' claims, the Director can and must proceed with administration in the absence of new conjunctive management rules.

B. As in *Musser*, the Director Can Perform Legal Duties Absent Rules.

As set forth above, the Idaho Constitution and several statutes authorize and require the Director to administer junior priority ground water rights. Although I.C. § 42-603 allows the Director to adopt rules for the distribution of water "in accordance with the priorities of the rights of the users thereof", water distribution as provided by Idaho's prior appropriation doctrine is not

conditioned upon the adoption of such rules. Moreover, the Director's authority to administer water rights is not conditioned upon any agency rules either.

In support of their motion, the Defendants misinterpret *Musser* in an effort to claim they cannot administer junior priority ground water rights unless the unconstitutional conjunctive management rules are left in place. The Defendants even hopelessly argue that any new rules they adopt are "no more likely to pass constitutional muster than the existing CM Rules." *Defs. Br.* at 12. This fatalistic view of water right administration is inexcusable under the law and only serves to protect junior priority ground water rights, which have continued to divert out-of-priority both last year and this year. This Court provided the Defendants with guidance on the inadequacies of the Rules with clear direction that the Director has the tools to administer water rights and must do so. If the Defendants believe that new rules are still necessary, it may begin rulemaking. During the interim, however, just as during the same timeframe in *Musser*, administration must go forward to protect senior water rights.

The Director has a "clear legal duty" to distribute water to senior water rights by priority, and the failure to do so warrants a writ of mandate. *Musser v. Higginson*, 125 Idaho 392, 395 (1994). Although the "details of the performance of the duty" are left to the Director's discretion, and must be consistent with Idaho law, the *Musser* Court did not hold that performing water right administration was contingent upon using a set of administrative rules. Although the district court in *Musser* determined that the Director's failure to adopt rules to distribute water to the plaintiffs violated his duty under I.C. § 42-602, the fact the Director initiated a "contested case" and "negotiated rulemaking" process in response to the plaintiffs' petition for mandamus was no defense, and plaintiffs were entitled to compel performance under the law. 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 9. The same rationale is applicable to denying the Defendants' motion in this case. *See Defs. Br.* at 12 ("the Director could not proceed with administration until the CM Rules are amended or re-promulgated").

The plaintiffs in *Musser* requested distribution of water to their senior rights even though the Department did not have a set of administrative rules that could be used in performing that administration. Despite not having a set of rules, the *Musser* District Court issued a writ of mandate commanding the Director "to immediately comply with I.C. § 42-602 and distribute water in accordance with the Constitution of the State of Idaho and the laws of this state commonly referred to as the Doctrine of Prior Appropriation." 125 Idaho at 394. Based upon the Director's compliance, the District Court and Supreme Court denied the Department's motion for a stay of the writ. *See id.* ("I don't see what there is in the writ of mandate that needs to be stayed since the department is proceeding to honor it in its entirety."). Importantly, neither the district court nor Supreme Court forced the *Musser* plaintiffs to wait until after administrative rules were promulgated before ordering the Director to distribute water to their senior water rights.

C. Defendants Have Previously Administered Surface and Ground Water Rights Together.

Idaho Code § 42-101 provides, in part, that when the use of waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state, are duly appropriated, "the right to continue the use of any such water shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water." (Emphasis added.) It is clear in the State of Idaho that one who appropriates water for beneficial use, and then sells, rents, or distributes it to others who apply it

to such beneficial use, has a valuable right which is entitled to protection as a property right. *Murray v. Public Utilities Commission*, 27 Idaho 603 (1915). It is settled law in Idaho that a downstream landowner is entitled to have the water of the stream flow uninterrupted any time it would reach his land. *Ward v. Kidd*, 87 Idaho 216, 226 (1964).

In *Silkey v. Tiegs*, 54 Idaho 126 (1934), the Idaho Supreme Court reviewed the provisional supervision ordered by the trial court in the administration of water in an artesian basin. *See Silkey v. Tiegs*, 51 Idaho 344 (1931). The provisional supervision ordered by the court had allowed junior appropriators to use the available supply of water from their wells, the use of which would not deplete the amount available to and discharged by the wells of the senior appropriators, as shown by the measurements made and to be made by the Commissioner of Reclamation. In seeking relief in the second *Silkey* case, *supra*, the junior appropriators asserted that the senior appropriator had never been able to obtain the full flow decreed to them and that there were at least 60 inches that could be withdrawn from the basin that would not injuriously affect the senior appropriator. They further argued that to not permit such withdrawal was to permit such excess to be wasted by not being put to beneficial use, with no correspondent benefit to the senior appropriator. The Idaho Supreme Court affirmed the trial court when it refused to change the decreed right of the senior appropriators to the flows from their artesian wells, especially in view of the fact that in the previous trial between these parties, the court found that the junior appropriators were responsible for any decrease in diversions by the senior appropriators under their rights, if any. The court then quoted with approval from *Moe v. Harger*, 10 Idaho 302 (1904), as follows:

> This court has uniformly adhered to the principle, announced both in the Constitution and by the statute, that the first appropriator has the first right; and it would take more than a theory, and in fact clear and convincing evidence, in any given case, showing that the prior appropriator would not be injured or affected

> by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable in this application, and so generally and uniformly applied by the courts. Theories neither create nor produce water, and when the volume of a stream is diverted, and 75 per cent. of it never returns to the stream, it is pretty clear that not exceeding 25 per cent. of it will ever reach the settler and appropriator down the stream, and below the point of diversion by the prior user.

Silkey, 54 Idaho at 128-129.

The unanimous Supreme Court then upheld the decision of the trial court which denied the junior appropriators the diversion of additional water under their junior rights for the reason that he was not satisfied under the provisional test that additional water could be diverted without interference with the senior appropriator's prior right, and the junior appropriators had not sustained their motion for additional water by direct and convincing evidence.

Notwithstanding the early cases, the Defendants wrongly claim that ground and surface water have not and cannot be managed together without rules. *See Defs. Br.* at 11-12. This statement is particularly disconcerting to senior surface water users in view the Idaho Supreme Court's decision in *Musser*. In the motion to stay, the Defendants seem to ignore certain legal principles clearly stated in the *Musser* decision. The *Musser* Court clearly noted that the Director has a "clear legal duty" to distribute water to senior water rights pursuant to I.C. § 42-602. The Court further announced that I.C. § 42-226, enacted in 1951, which addresses the unreasonably blocking of the full use of the resource, is not applicable to delivery calls from senior water right holders with priorities predating 1951.[5]

Unlike the facts in *Musser*, Defendants here have refused to honor this Court's final judgment and have refused to administer water rights as required by Idaho law. Instead, the

[5] The Ground Water Act does not apply to pre-1951 surface or ground water rights. *See Musser*, 125 Idaho at 396; *see also Basin-Wide 5 Order* at 27 ("Idaho's groundwater management statutes, I.C. § 42-226 *et seq.*, do not apply to water rights with priorities earlier than 1951."); Ex. B to *Affidavit of Travis L. Thompson in Support of Plaintiffs' Motion for Summary Judgment.*

Director insists on proceeding with administration pursuant to the now void conjunctive management rules, and continues to implement his prior orders as if they were valid and of legal effect. *See Third and Fourth Supplemental Orders*; Exs. A, B to *Third Thompson Aff.* By moving for a stay of the judgment until the Supreme Court renders a decision on appeal, the Defendants are essentially seeking this Court's blessing to continue with unconstitutional water distribution both in 2006 and again in 2007. Such a result is unacceptable to senior surface water users and is contrary to Idaho law.

II. The "Status Quo" Is an Unconstitutional Taking of Senior Water Rights / A Stay Will Not Do "Complete Justice"

The Defendants argue that 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" while preserving the "status quo". *Defs. Br.* at 4. As this Court is aware, the "status quo" under the Department's Rules is an unconstitutional taking of senior water rights. Plaintiffs filed this case in August 2005 in order to prevent the "after-the-fact" administration they received under the Rules from occurring again. Unfortunately, the same scenario has played out in 2006, only this time the Director waited an extra two months, until the end of June, instead of the beginning of May, before issuing an order and determining "no injury" to the Plaintiffs' senior surface water rights. *See Third Supplemental Order* at 20, ¶ 56 ("There is no reasonably likely material injury predicted for 2006"); Ex. A to *Third Thompson Aff.*

While groundwater users have continued to pump unabated throughout the irrigation season, and are left to participate in various "after-the-fact" mitigation processes, the "status quo" affords them relief from curtailment and the benefit of the administrative scheme provided by the Department's Rules. On the other hand, Plaintiffs continue to suffer curtailment of their

senior water rights due to low spring flows and reach gains that have been depleted by interfering junior priority ground water rights. Plaintiffs are also forced to exhaust their storage water supplies in order to make up the depletion caused by junior ground water diversions, even to the extent that the Director finds they are entitled to no carryover for the following season. Further, Plaintiffs must face the prospect of having their storage water rights suffer the same curtailment in the future when their storage rights fail to fill due to depletions by junior priority ground water rights. Obviously the Defendants' idea of the "status quo" does not do "complete justice" but instead continues a process that injures senior water rights. To preserve unconstitutional action for yet another year flies in the face of this Court's decision and further diminishes Plaintiffs' property rights.

III. Defendants Have Not Demonstrated "Irreparable Harm" to the Agency and Its Director If a Stay is Denied Whereas Plaintiffs Will Continue to Suffer "Irreparable Harm" If a Stay is Granted.

The Defendants allege that "irreparable harm" will result if a stay is denied, but completely fail to demonstrate what harm will befall the agency and its Director. Instead, the Defendants argue that denying a stay may invite future "litigation and delay". This allegation does not suffice for an "irreparable injury" showing. Interestingly, the Defendants emphasize that whatever action the Director might take absent the Department's Rules would be "procedurally and/or substantively defective in some manner under the Idaho Supreme Court's final decision" and that the Director would have to "re-do the process." *Defs. Br.* at 14. In other words, no matter what the Director does, the Defendants claim he is destined to violate Idaho law therefore requiring a stay of the Court's judgment. The Defendants conveniently ignore the prospect that if the Director continues with the existing administrative processes using the now void rules and the Idaho Supreme Court affirms this Court's judgment, he is destined to "re-do

the process." This will come at the expense of all parties involved who will be forced to expend considerable time and resources on administrative hearings that are predicated upon unconstitutional rules and orders.

Instead of showing any actual harm to the agency or its Director, the Defendants rely upon some alleged "irreparable harm" that junior priority ground water users would suffer if forced to curtail in order to satisfy senior water rights. *Defs. Br.* at 17. The Defendants suggest that implementation of the Court's judgment is "likely to have irreversible consequences to the junior water users." *Id.* Presumably referring to "curtailment" of junior priority water rights, such an action is expressly contemplated by Idaho's Constitution and water distribution statutes as recognized by the Defendants in prior litigation in this Court where they opposed a preliminary injunction in the context of water right administration:

> The watermaster instructions require the reduction or curtailment of a junior priority water right in order to fulfill a more senior water right. The action will not "produce waste" because the water will be used by Clear Springs as the senior right holder. Although Clear Lakes will experience an adverse impact as a result of the proposed regulation of its water right by the watermaster, the impact does not constitute "great or irreparable injury" because it is an impact contemplated under the priority doctrine which governs the administration of rights to the use of water in Idaho.
>
> As part of the prior appropriation doctrine, it is understood that reduction or curtailment of a junior water right in order to satisfy a senior water right will result in an adverse effect upon the holder of the junior water right.

See IDWR Memo in Response to Order to Show Cause and in Opposition to Entry of Preliminary Injunction at 5 (emphasis added). *See* Ex. G to *Third Thompson Aff.*

A water right holder, by virtue of his or her priority date, is on notice that such right may be curtailed at any time to satisfy a more senior right. Administration pursuant to Idaho's Constitution and water distribution statutes requires curtailment when water supplies are insufficient to satisfy all rights. The Defendants admittedly understand this concept. However,

the Defendants' arguments in this case suggest that the impact of curtailment to junior "ground water users" is somehow different and would have "irretrievable consequences" whereas the impact of curtailment to a junior "surface water user" is acceptable because it is "contemplated under the priority doctrine." The inconsistency in the Defendants' positions is obvious. Contrary to the Defendants' claim, there is no difference between shutting of a ditch headgate and a well when viewed from the standpoint of a junior water right holder, the water is deemed unavailable to fill the inferior right.

The Defendants, as the moving party, have failed to carry their burden and demonstrate "irreparable injury" to the agency and its Director. Since the Court has declared the Rules unconstitutional and the Director insists upon using those Rules in administering water rights today, Plaintiffs are suffering "irreparable injury" by the Director's failure to follow the law. The Director's *Fourth Supplemental Order*, issued just six days after the judgment in this case was certified as final, determines that none of the Plaintiffs will suffer "injury" in 2006 according to the procedures defined by the Rules. *See Fourth Supplemental Order* at 20, ¶ 56; Ex. B to *Third Thompson Aff.* The continued use of unconstitutional rules does not provide the Plaintiffs with the administration required by Idaho's constitution and water distribution statutes.

CONCLUSION

The Defendants are seeking an equitable remedy from this Court despite continuing to use the Department's Rules for water right administration. The Defendants obtained a final certification of the judgment on the representation that they would follow and abide by the Court's decision. Given the blatant disregard of this Court's prior order, the Defendants are precluded from using the available processes and obtaining a stay of the judgment.

Regardless of the Defendants' attempt to use the Court's processes with "unclean hands", it is obvious they do not meet the requirements for a stay under Idaho law. Using the "preliminary injunction" standard, the Defendants have failed to demonstrate a "likelihood of success on the merits" and "irreparable injury" to the state agency and its Director. The Defendants' motion for stay should therefore be denied.

Dated this 15th day of August 2006.

LING ROBINSON & WALKER

Roger D. Ling

Attorneys for A & B Irrigation District and Burley Irrigation District

ARKOOSH LAW OFFICES CHTD.

C. Tom Arkoosh

Attorneys for American Falls Reservoir District #2

FLETCHER LAW OFFICES

W. Kent Fletcher

Attorneys for Minidoka Irrigation District

BARKER ROSHOLT & SIMPSON LLP

John A. Rosholt
John K. Simpson
Travis L. Thompson

Attorneys for Twin Falls Canal Company

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2006, I served a true and correct copy of the foregoing document(s) on the person(s) listed below, in the manner indicated:

Phil Rassier Candice McHugh Michael Orr Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098	✓ United States Mail, Postage Pr epaid ✓ E -mail ____ Via Fa csimile ____ Hand Deliver ed

Attorneys for Idaho Department of Water Resources and Karl J. Dreher

John K. Simpson BARKER ROSHOLT & SIMPSON LLP P.O. Box 2139 Boise, Idaho 83701-2139	✓ United States Mail, Po stage Prepaid ✓ E -mail ____ Via Fa csimile ____ Hand Deliver ed

Attorneys for Clear Springs Foods, Inc.

Daniel V. Steenson Charles L. Honsinger S. Bryce Farris Jon C. Gould RINGERT CLARK, CHTD. P.O. Box 2773 Boise, Idaho 83702	✓ United States Mail, Postage Pr epaid ✓ E -mail ____ Via Fa csimile ____ Hand Deliver ed

Attorneys for Thousand Springs Water Users Assn.

J. Justin May MAY SUDWEEKS & BROWING LLP 1419 W. Washington P.O. Box 6091 Boise, Idaho 83707	✓ United States Mail, Postage Prepaid ✓ E -mail ____ Via Fa csimile ____ Hand Deliver ed

Attorneys for Rangen, Inc.

James C. Tucker IDAHO POWER COMPANY 1221 West Idaho Street Boise, ID 83702-5627	✓ United States Mail, Postage Pr epaid ✓ E -mail ____ Via Fa csimile ____ Hand Deliver ed

James S. Lochhead
Adam T. Devoe
BROWNSTEIN HYATT & FARBER
410 17th Street, 22nd Floor
Denver, CO 80202

_✓_ United States Mail, Postage Pr epaid
_✓_ E -mail
_____ Via Fa csimile
_____ Hand Deliver ed

Attorneys for Idaho Power Company

Jeffrey C. Fereday
Michael C. Creamer
GIVENS PURSLEY, LLP
Post Office Box 2720
Boise, ID 83701-2720

_✓_ United States Mail, Postage Pr epaid
_✓_ E -mail
_____ Via Fa csimile
_____ Hand Deliver ed

Attorneys for Idaho Ground Water Appropriators, Inc.

Josephine P. Beeman
BEEMAN & ASSOC.
409 W. Jefferson St.
Boise, Idaho 83702

_✓_ United States Mail, Postage Pr epaid
_✓_ E -mail
_____ Via Fa csimile
_____ Hand Deliver ed

Sarah Klahn
WHITE & JANKOWSKI LLP
Kittredge Building
511 16th St., Suite 500
Denver, Colorado 80202

_✓_ United States Mail, Postage Pr epaid
_✓_ E -mail
_____ Via Fa csimile
_____ Hand Deliver ed

Attorneys for City of Pocatello

Travis L. Thompson