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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**

CLEAR SPRINGS FOODS, INC.,

Petitioner,

vs.

BLUE LAKES TROUT FARM, INC.,

Cross-Petitioner,

vs.

IDAHO GROUND WATER APPROPRIATORS,
INC., NORTH SNAKE GROUND WATER
DISTRICT, and MAGIC VALLEY GROUND
WATER DISTRICT,

Cross-Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.,

Cross-Petitioner,

vs.

DAVID K. TUTHILL, JR., in his capacity as Director
of the Idaho Department of Water Resources; and the
IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents.

Case No. CV-2008-444

**GROUND WATER USERS'
MOTION FOR STAY**

IN THE MATTER OF DISTRIBUTION OF WATER
TO WATER RIGHT NOS. 36-02356A, 36-07210,
AND 36-07427

(Blue Lakes Delivery Call)

IN THE MATTER OF DISTRIBUTION OF WATER
TO WATER RIGHT NOS. 36-04013A, 36-04013B,
AND 36-07148

(Clear Springs Delivery Call)

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District, acting for and on behalf of their members (collectively, the “Ground Water Users”), respectfully move the Court to stay enforcement of its *Order Granting in Part Motion to Enforce Orders* filed May 11, 2010 (the “*Order*”) pursuant to Rules 84(m) of the Idaho Rules of Civil Procedure (I.R.C.P.) and/or Rule 13(b) of the Idaho Appellate Rules (I.A.R.).

Background

On June 19, 2009, this Court issued its *Order on Petition for Judicial Review*, remanding the case to the Director of the Idaho Department of Water Resources (the “Director”) “so that the Director may apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury analysis” concerning Blue Lake’s water right no. 36-7210 and Clear Springs’ water right no. 36-4013A. On December 4, 2009, the Court issued its *Order on Petitions for Rehearing* again ordering that the foregoing issue be remanded to the Director. On April 12, 2010, Blue Lakes filed a *Motion to Enforce Orders*, asserting that the Director had not complied with the remand of this Court. On May 11, 2010, this Court issued its *Order*, instructing the Director to “forthwith comply with this Court’s earlier *Orders* on remand and apply the proper burdens of proof and evidentiary standards when considering seasonal [sic] variations as part of a material injury analysis for water right nos. 36-7210 and 36-4013A.” (*Order 5*; emphasis in original.)

On January 15, 2010, the Ground Water Users filed a *Notice of Appeal* of the *Order on Petition for Judicial Review* and *Order on Petitions for Rehearing*. On February 5, 2010, Blue

Lakes and Clear Springs filed a *Notice of Cross-Appeal*. The Court acknowledged in its *Order* that there is an appeal pending before the Idaho Supreme Court, and ordered the Director to comply with the remand “unless a party requests and is granted a stay.” (*Order 3*.)

Legal Standard

I.R.C.P. 84(m) authorizes a district court which is reviewing an agency action to order a stay of the administrative proceedings being reviewed. I.A.R. 13(b) authorizes a district court to stay enforcement of its own orders during an appeal.

Argument

The Court should stay further administrative proceedings, and/or stay enforcement of its *Order* requiring further administrative proceedings, concerning water right nos. 36-7210 and 36-4013A, because there are significant issues on appeal affecting the Director’s administration of those water rights, including the procedures and burdens of proof the Director should apply when administering those water rights.

The *Ground Water Users’ Opening Brief* to the Supreme Court, which was filed on June 4, 2010, raises important issues concerning the Swan Falls Agreement, the law of full economic development of ground water resources, the Director’s material injury analysis, and the futile call doctrine. The *Notice of Cross-Appeal* filed by Blue Lakes and Clear Springs raises issues concerning the burdens of proof to be applied by the Director in the context of conjunctive administration of surface and ground water sources. All of these issues affect how the Director should administer water right nos. 36-7210 and 36-4013A.

For instance, this Court’s remand instructs the Director to “apply the appropriate burdens of proof and evidentiary standards,” which is intertwined with issues on appeal involving material injury, the futile call doctrine, and the ESPA Model. Because this case presents matters of first impression concerning the Director’s application of the IDWR’s administrative *Rules for Conjunctive Management of Surface and Ground Water Sources* (“CM Rules”), an important issue is whether the Director is to apply the same burdens and evidentiary standards traditionally used in the administration of surface water rights, or whether the burdens and evidentiary standards should be different for ground water administration. As the Idaho Supreme Court noted in its decision *I American Falls Reservoir District No. 2 v. IDWR*, when administering ground water rights, “[t]he issues presented are simply not the same.” 143 Idaho 862, 877 (2007). In fact, there is precedent that different burdens and evidentiary standards apply in the

context of ground water administration. In *Jones v. Vanausdeln*, the Court refused to curtail groundwater pumping for lack of clear evidence that the senior was injured, explaining that “very convincing proof of the interference of one well with the flow of another should be adduced before a court of equity would be justified in restraining its proprietors from operating it on that ground.” 28 Idaho 743, 749 (1916).

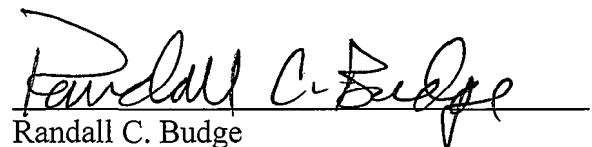
Conclusion

Given the groundbreaking nature of this case, which presents important matters of first impression concerning the application of the Ground Water Act, the Swan Falls Agreement, and the CM Rules, there is a significant likelihood that the decision of the Idaho Supreme Court will require the Director to do some things differently, including the burdens of proof and evidentiary standards to be applied, when administering hydraulically connected ground and surface water rights.

It is an inefficient use of both the Director’s and the parties’ resources to potentially undertake new administrative proceedings on water right nos. 36-7210 and 36-4013A when the pending decision from the Idaho Supreme Court is likely to materially affect the procedures and analyses to be applied by the Director. There is a substantial risk that further administrative proceedings on water right nos. 36-7210 and 36-4013A will be utterly for naught or create yet another round of delivery calls and administration before the rule of law can be conclusively established in the pending Supreme Court appeal. Therefore, the Ground Water Users urge the Court to stay any further administrative proceedings, and/or stay enforcement of its *Order* requiring further administrative proceedings, concerning water right nos. 36-7210 and 36-4013A, pending the outcome of the appeal to the Idaho Supreme Court.

RESPECTFULLY SUBMITTED this 10th day of June, 2010.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED



Randall C. Budge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2010, the above and foregoing document was served in the following manner:

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