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

SOUTH VALLEY GROUND WATER
DISTRICT and GALENA GROUND
WATER DISTRICT,

Petitioners,

vs.

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

Respondents.

Case No. CV07-21-243

**BWLWWUA AND BWCC'S
RESPONSE TO SVGWD AND
GGWD'S MOTION TO STAY
CURTAILMENT, TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

and

SUN VALLEY COMPANY, CITY OF
BELLEVUE, BIG WOOD CANAL
COMPANY, BIG WOOD & LITTLE WOOD
WATER USERS ASSOCIATION, and CITY
OF POCA TELLO,

Intervenors.

COMES NOW, the BIG WOOD & LITTLE WOOD WATER USERS ASSOCIATION, as the representative of its individual parties to the above-entitled matter, and the BIG WOOD CANAL COMPANY (“BWLWWU” and “BWCC”), collectively, by and through its attorneys of record, RIGBY, ANDRUS & RIGBY LAW, PLLC, JAMES LAW OFFICE, PLLC, and FLETCHER LAW OFFICE, hereby respond to the *Motion to Stay During Consideration of Petition for Judicial Review and Amended Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition*, and, filed by the South Valley Ground Water District and Galena Ground Water District, as the Petitioner’s, (collectively “Ground Water Districts”) on June 30th 2021.

LEGAL STANDARD FOR A STAY

I. Standard for issuance of a Motion to Stay.

The authority to stay a final order is reflected in I.C. § 67-5274 and LR.C.P. 84(m), which provide that an "agency may grant, or the reviewing court may order, a stay upon appropriate terms." The use of the word "may" demonstrates the Director's discretionary authority to stay enforcement of an order. See *Bank of Idaho v. Nesseth*, 104 Idaho 842, 846, 664 P.2d 270, 274 (1983).

The Director has authority to stay a final order pursuant to the Department's rules of procedure:

Any party or person affected by an order may petition the agency to stay any order, whether interlocutory or final. Interlocutory or final orders may be stayed by the judiciary according to statute. The agency may stay any interlocutory or final order on its own motion.

IDAPA 37.01.01.780 ("Rule 780").

In determining whether an agency abused its discretion, the Idaho Supreme Court has held that a court "must determine whether the agency perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 813, 252 P.3d 71, 94 (2011). The Director in this case has denied the Petitioner's Stay in the underlying proceeding and set for his reasoning. *See Final Order Denying Petition to Stay Curtailment/Granting Request for Expedited Decision/Granting Request for Hearing filed*. Basin 37 Administrative Hearing, Docket No. AA-WRA-2021-001.

The authority of the Director to stay an order in an administrative proceeding is analogous to the authority of a district court to stay the enforcement of a judgment under LR.C.P 62(a). In both circumstances, an order has been issued deciding the matter and a party can seek to have enforcement of the order stayed pending appeal or pending further action. A stay pursuant to LR.C.P 62(a) may be granted by a district court "when it would be unjust to permit the execution on the judgment, such as where there are equitable grounds for the stay or where certain other proceedings are pending." *Haley v. Clinton*, 123 Idaho 707, 709, 851 P.2d 1003, 1005 (Ct. App. 1993). A stay is appropriate "[w]here it appears necessary to preserve the status quo" *McHan v. McHan*, 59 Idaho 41, 80 P.2d 29, 31 (1938). Likewise, a stay is appropriate

when, "[i]t is entirely possible that the refusal to grant a stay would injuriously affect appellant, and it likewise is apparent that granting such a stay will not be seriously injurious to respondent."

Id.

II. Standard for issuance of a Preliminary Injunction.

This standard parallels the standard for issuing a preliminary injunction found in LR.C.P.

65(e). The relevant sections of I.R.C.P. 65(e) provide:

A preliminary injunction may be granted in the following cases:

(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.

(2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.

....

(5) A preliminary injunction may also be granted on the motion of the defendant upon filing a counterclaim, praying for affirmative relief upon any of the grounds mentioned above in this section, subject to the same rules and provisions provided for the issuance of injunctions on behalf of the plaintiff.

III. Standard for issuance of a Temporary Restraining Order.

Rule 65(b) provides, among other things, that a temporary restraining order may only be granted if "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage ,will result to the applicant before the adverse party or the party's attorney can be heard in opposition" and the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the party's claim that notice should not be required. I.R.C.P. 65(b). Rule 65(c) provides that no restraining order shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages that may be incurred or suffered by any party who is found to have been wrongfully restrained.

The decision to grant or deny a request for a temporary restraining order rests in the sound discretion of the court. *White v. Coeur d'Alene Big Creek Mining Co.*, 56 Idaho 282, 55 P.2d 720 (1936).

Granting or denying injunctive relief is a matter of discretion vested in the trial court, and that such discretion is not to be abused. *Harris v. Cassia County*, 106 Idaho at 517, 681 P.2d at 992 (1984). The court which is to exercise the discretion is the trial court and not the appellate court, and an appellate court will not interfere absent a manifest abuse of discretion. *Id.*, citing *Milbert v. Carl Carbon, Inc.*, 89 Idaho 471, 406 P.2d 113 (1965); *Western Gas & Power of Idaho, Inc. v. Nash*, 75 Idaho 327, 272 P.2d 316 (1954).

ANALYSIS

A. There are not equitable grounds for the stay as it is likely that SVGWD and GGWD's mitigation plan could be ineffective to redress Senior Surface Water User's Material Injury for the 2021 Season and is unjust.

The Groundwater user's present motion seeks a stay of the Director's Order to allow out-of-priority diversion without the hearing of a mitigation plan. The basis cited for this request is IDAPA 37.01.01.780, which provides generally that "[a]ny party or person affected by an order may petition the agency to stay any order, whether interlocutory or final." In the context of a petition for review, Idaho Code § 67-5274 similarly provides that "[t]he agency may grant, or the reviewing court may order, a stay upon appropriate terms." I.C. § 67-5274.

Unlike the detailed methodology of mitigation allowed in the conjunctive management rules, I.C. Sec. 42-237a.g. does not specifically provide for mitigation and therefore, a stay, pending a review and hearing of a mitigation plan, is not now appropriate. The senior surface users have no objection to the hearing of the *Proposed Mitigation Plan* but a stay only

exasperates the injury's senior surface water users are now suffering while allowing ground water users to continue to divert out-of-priority.

Furthermore, the senior surface water users have previously responded that the *Proposed Mitigation Plan* by the ground water users as insufficient. The Ground Water Districts' attempt to mitigate to a specific subset of priority dates fails to fully mitigate the impacts that will be realized by the BWLWWU & BWCC's rights should full curtailment of the ground water rights within the Bellevue Triangle be ordered for as contained in the previously filed *Response to Proposed Mitigation Plan* filed in this proceeding. See *Response to Mitigation Plan*

Additionally, as the Director explained in the *Final Order*,

The argument that curtailment cannot be ordered until the junior ground water users secure mitigation is also contrary to the holdings of the District Court for in the second *Rangen* decision. *Memorandum Decision and Order* (5th Jud. Dist. Case o. CV 2014-4970) (June 3, 2015) ("*Second Rangen Dec.*"). In *Second Rangen Dec.*, the Director delayed curtailment to allow junior ground water users "sufficient time ... to prepare for curtailment." *Second Rangen Dec.*, at 4. The District Court rejected the Director's approach because it resulted in Rangen's senior rights being "prejudiced and subjected to unmitigated material injury while junior users were permitted to continue out-of-priority diversions." *Id.* at 7-8. The District Court held that "under the Director's rationale, the senior user's water use and operations should be disrupted so as to not unduly disrupt the juniors," which was contrary to Idaho's prior appropriation doctrine. *Id.* at 8. The argument that curtailment cannot be ordered in this case until junior ground water users secure mitigation is contrary to Idaho's prior appropriation doctrine for the same reasons.

Final Order, pg. 35.

Unreasonable shifting the risk of shortage to the senior surface water right holder during the pendency of these post hearing proceedings is unequitable and the stay should not be granted. As SVGWD AND GGWD'S acknowledges, the Director has already held an extensive hearing in this matter and made a determination that BWLWWU & BWCC's users are being materially injured by junior ground water pumping. SVGWD AND GGWD'S have not provided any authority suggesting that there is a due process right to a further hearing on mitigation before the

order finding material injury may be enforced. Whether one or more of the junior priority ground water users will be able to get a mitigation plan approved is not relevant to whether the Director's Order finding material injury should be enforced.

B. Granting the stay will result in irreparable harm to Senior Surface Water Users

As outlined in the Director's Final Order, he held that "The surface water users, therefore, carried their burden of providing evidence to support an initial determination that during the 2021 irrigation season, the surface water users have been and will continue to be injured by a shortage of water resulting, in part, from ground water pumping in the Bellevue Triangle under junior priority water rights. *Final Order*, pg. 23. Furthermore, as of the date of the hearing in this proceeding, the 1885 priority rights were already shut off and the 1884's were expected to be curtailed sometime before the end of June. *See, e.g.*, Tr. pp. 771-72 788-89 (Lakey test.); Rigby Ex. 2 (Lakey memorandum). As of the date of this response, even the 9/1/1883 priority rights have been cut. Granting a stay would further injure senior surface water users while allowing junior groundwater users to pump unfettered. *See Declaration of Jerry R. Rigby*, filed contemporaneously with this Response and it's attached Exhibits and reference to the Directors findings of injury for the Senior water users.

Furthermore, as testified in the hearing and as contained in the senior surface water users injury table exhibits and noted by the Director in his *Final Order* "The surface water users also testified to the steps they have taken in 2021, and in earlier drought years, to conserve and extend their water supplies, such as securing supplemental water, planting less water intensive crops, and minimizing losses by selecting which fields and crops to continue watering and which to dry out." *Final Order* pg. 19. Staying the curtailment will continue to irreparably harm senior

surface water users to the benefit of any junior ground water users and is not in line with prior appropriation doctrine and the Supreme Courts holdings that there be “no unnecessary delays in the delivery of water.” *AFRD2 v. IDWR*, 143 Idaho 862, at 874, 153 P.3d 433, at 445 (2007).

C. Groundwater users could have mitigated their injuries but chose not to.

The Groundwater users cannot claim surprise that a curtailment order was issued as part of the *Final Order*. At the start of the Administrative proceeding and as contained in the *Notice*, the Director advised all parties that curtailment was a possible result of the hearing. *See Notice*. Additionally, at the April 7th, 2021 advisory committee meeting, (Noting the Advisory Committee was initiated in Nov. 2020) the Director stated that he was “ready to act” and warned groundwater users that they may be required “to reduce pumping much more than the amounts identified by the groundwater districts.” *SVGWD and GGWD’s Exhibit 19 April 7th Advisory Meeting Minutes*. The Director further put ground water users on notice by explaining the following:

Director Spackman weighed in during this discussion and reminded the group that he formed the committee after receiving groundwater management proposals that lacked detail and quantification. He formed the committee to present opportunities for participants to learn about surface water and ground water resource interactions and use in the Wood River basin so that they can quantify the impacts of various water management proposals. He further emphasized that approving a management plan for the Big Wood River Groundwater Management Area is not his only authority or duty; he has some responsibility during times of shortage to deliver water by priority in accordance with Idaho law. The Director suggested that due to the high probability of surface water shortages during the 2021 irrigation season, which will begin soon, ground water users need to propose specific remedial actions in the next two to three weeks.

SVGWD and GGWD’s Exhibit 19, March 24th Advisory Meeting Minutes.

These advisory committee hearings were held to help foster mitigation of injury to senior surface water users but were ultimately rejected by the groundwater users. Considering these

advisory meetings and the discussions held, where both the ground water user's representative injured parties, as listed in their *Memorandum in Support of Petitioners' Motion to Stay*, and their attorneys were present, it is disingenuous to claim the Director initiated this proceeding in the middle of the irrigation season after crops were planted. Junior-priority groundwater pumpers have had ample opportunity to prepare for this curtailment, even prior to the planting for this 2021 season. Furthermore, the risk of curtailment of a junior-priority ground water right during a time of shortage is a risk that Idaho water users knowingly undertake and for which they should always plan. The impact of curtailment and the considerations of the public interest concerning junior priority water rights, as listed in the *Memorandum in Support of Petitioners' Motion to Stay*, is not a basis to avoid enforcement of the Director's Order finding material injury.

D. A Temporary Restraining Order should not be granted as no security was provided for Senior Surface Water User's material injuries.

As required by Rule 65(c) Security is required for a Temporary Restraining Order to be granted. The dispute in this case is over the Director's predicted demand shortfall and curtailment of all of the groundwater user's in the Bellevue Triangle for this 2021 irrigation season. For purposes of requiring security this Court would have to require the Petitioners secure the predicted 2021 shortfall of water used on roughly 23,000 acres of land irrigated from wells that would be curtailed for the 2021 irrigation season as Ordered by the Director to be the scope of the injury to surface water users, plus a bond for attorneys' fees and costs. *See Order Denying Request for Temporary Restraining Order and Application for Stay* filed in Surface Water Coalition Delivery Call filed in CV-2010-550. However, if Petitioners were able to secure

that quantity of water they would not need to be before this Court seeking a stay. A determination that less security in the form of water is needed puts the Court in the middle of deciding the merits and ultimately usurping the duties of the Director. For these reasons, BWCC & BWLWWU, ask the Court not to grant the Temporary Restraining Order.

CONCLUSION

Based upon the above, BWCC & BWLWWU oppose and ask the Court to not to grant the Petitioners' *Motion to Stay During Consideration of Petition for Judicial Review* nor while the *Proposed Mitigation Plan* is considered by the Director. BWCC & BWLWWU also ask the Court not to grant a preliminary injunction or temporary restraining order for the reasoning set forth above.

Dated this 1st day of July, 2021.


JERRY R. RIGBY

_____/s/
JOSEPH F. JAMES

*Attorneys for Big Wood & Little Wood Water
Users Association*

_____/s/
W. KENT FLETCHER

Attorney for Big Wood Canal Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of July, 2021, the above and foregoing was served on the following by the method(s) indicated below:

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