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**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES**

IN THE MATTER OF BASIN 37  
ADMINISTRATIVE PROCEEDING

DOCKET No. AA-WRA-2021-001

**SOUTH VALLEY GROUND  
WATER DISTRICT’S AND  
GALENA GROUND WATER  
DISTRICT’S PETITION TO STAY  
CURTAILMENT / REQUEST FOR  
EXPEDITED DECISION /  
REQUEST FOR HEARING ON  
PROPOSED MITIGATION PLAN**

COME NOW, the SOUTH VALLEY GROUND WATER DISTRICT (“SVGWD”) by and through its attorneys of record, BARKER ROSHOLT & SIMPSON LLP and THE GALENA

GROUND WATER DISTRICT (“Galena GWD”) by and through its attorneys of record, LAWSON LASKI CLARK, PLLC, (collectively hereinafter the “Districts”), pursuant to Rule 780 of the Rules of Procedure of the Idaho Department of Water Resources (“IDWR”), and hereby petition the Director to stay implementation of the *Final Order* (“Curtailment Order”) issued on June 28, 2021 until a decision is made on the Districts’ *Proposed Mitigation Plan* filed with IDWR on June 23, 2021.

### LEGAL STANDARD

The Director has authority to stay an agency order pursuant to IDAPA 37.01.01.780. Rule 780 provides:

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.

IDAPA 37.01.01.780.

Idaho’s APA provides that an agency “may grant, or the reviewing court may order, a stay upon appropriate terms.” I.C. § 67-5274. The decision to grant a stay is within the hearing officer’s discretion. *See Platz v. State*, 154 Idaho 960, 969 (2013). For the reasons set forth below the Director should grant the Districts’ petition to stay the Curtailment Order.

### ARGUMENT

#### **I. Due Process Requires Consideration and a Hearing on the Districts’ Mitigation Plan Before Implementing the Curtailment Order.**

Conjunctive administration allows for mitigation in lieu of curtailment. *See generally*, CM Rules 40, 43. The Director’s Curtailment Order rejected IGWA’s assertion that the right to mitigation does not exist in this proceeding. Curtailment Order p. 35 n. 21. The Director also stated that “it may take time to secure mitigation.” *Id.* at 35. The Districts filed a mitigation plan on June 23, 2021, proposing to fully mitigate any potential injury to the three affected 1883 senior

surface water rights (37-344A, 37-323, and 37-49). Even though the Groundwater Districts' mitigation plan was submitted prior to issuance of the Curtailment Order, their mitigation plan was not considered in the Curtailment Order. Principles of due process require adequate time to hear and obtain approval of the mitigation prior to implementing the proposed curtailment set to begin on July 1, 2021.

In the context of a mitigation plan in the Surface Water Coalition delivery call case, Judge John Melanson found the following with respect to a mitigation plan procedure:

The Hearing Officer determined that: “[t]he replacement water plan approved by the former Director in the May 2, 2005, Order and Supplemental Orders is in effect a mitigation plan. However, it does not appear that the procedural steps for approving a mitigation plan were followed.” R. Vol. 37 at 7112.

This Court agrees. . . The Court sees no distinction between the “replacement water plans” ordered in this case and a mitigation plan. . . . *Once a mitigation plan has been proposed*, the Director must hold a hearing as determined necessary and follow the procedural guidelines for transfer, as set out in I.C. § 42-222. . . . The Director did not follow this process.

*Order on Petition for Judicial Review*, at 28-30 (Gooding County Dist. Ct., Fifth Jud. Dist., Case No. 2008-551, July 24, 2009) (emphasis in original).

At a minimum, the Districts are entitled to a hearing on the mitigation plan to avoid curtailment of 23,000 acres for the rest of the 2021 irrigation season that is now set to begin in less than three (3) days. *See* Curtailment Order at 38 (curtailment “starting on July 1, 2021, at 12:01 a.m. . . .”). Whereas the senior surface water rights can be fully mitigated, the Director should stay the Curtailment Order and provide the necessary due process to consider and approve the Districts' mitigation plan. Such a process would follow the guidance provided by Judge Melanson in the Springs Users' delivery call case as well. *See Order on Petitions for Judicial Review*, at 51 (Gooding County Dist. Ct., Fifth Jud. Dist., Case No. 2008-444) (“Under the CMR, a more appropriate course of action for the Director to follow would have been to issue the initial

curtailment order, provide the junior Ground Water Users time to submit a mitigation plan before making the order final, and then hold a hearing on the order of curtailment and material injury”).

The Director can follow the process outlined by Judge Melanson by granting a stay of the Curtailment Order pending a decision on the Districts’ mitigation plan. This would provide due process and ensure no unnecessary curtailment during the 2021 irrigation season.

## **II. The Districts Will Suffer Irreparable Harm if the Stay is Not Granted**

The South Valley Groundwater District encompasses approximately 22,000 - 23,000 acres of irrigated crop land served by ground water. Hearing Tr. Vol. V, 1158:22-1159:4. The primary crops grown in the Bellevue Triangle are barley/grains, alfalfa, pasture and cattle, with some potatoes, and other miscellaneous crops. Hearing Tr. Vol. V, 1159:13-25. Most of the land in the South Valley District has both surface and ground water, with some lands on the Bellevue Triangle exclusively supplied by surface water and some exclusively by ground water. In 2021 the Big Wood surface water supplies are expected to be completely out of water by early July. *See e.g.*, Hearing Tr. Vol. IV, 1076:12-14. By the time the present matter commenced in May 2021, the crops were in the ground and contracts were executed. Water was being delivered at the time of discussions of the advisory committee in March, and early April water supplies were predicted to be available well into July when the barley crops would no longer need to pump groundwater. Given what was known at the time, planting crops in April was a reasonable decision.

### **A. Damage to Districts’ Members**

Mark Johnson is a potato farmer operating as Silver Creek Seeds. He grows seed potatoes for a variety of commercial growers on 750 acres in the Bellevue Triangle. He entered into contracts with his customers, and with landowners to rent the fields last fall. The fields were all planted before this proceeding began. Potatoes must have water until the first of September to

survive, then a little water at harvest time at the end of September. Implementing the Curtailment Order would kill his crops. He would go out of business. Thirty-five years in the potato business would be over. His customers would leave him, looking for a more reliable supplier. Hearing Tr. Vol. V, 1055-56.

Stuart Taylor has been the ranch manager at Wood River Ranch since 2012, he testified about the impact of curtailment on the pasture land used to raise cattle on the Wood River Ranch. Hearing Tr. Vol. V, 1077-80. If ground water is not available, the pastures will not be able to support the cattle on the ranch for the remainder of the season through the time when he moves the cattle herd to winter pasture in October/November. Rather than sell the cattle and lose the valuable genetic makeup of the herd, he would choose to buy hay which would cost \$250,000-\$300,000 just in 2021. Hearing Tr. Vol. V, 1079:15-17 If he used feed hay, he would lose calves to disease and would lose 40% of the reproduction from the cows, over the next season.

Gary Beck has been the Ranch Manager for Hillside Ranch for twenty-two years. Mr. Beck explained the consequences of a July 1 curtailment on the barley crop. Hearing Tr. Vol. V, 1128:12-13 (“So if we’re shut off on July 1<sup>st</sup>, the crop will not make grade at all”). The last two weeks of water are critical to allow the kernels to plump up to meet Coors and Anheuser-Busch standards. Hearing Tr. Vol. V, 1128:12-25; 1129:1-23. The brewers’ field men have advised that a water curtailment will mean that the crop will not be acceptable under the contracts and will be rejected. *See Id.* Mr. Beck’s experience with the barley crop bears out that assessment. If the crop is rejected, the cost of harvesting for feed barley would not justify the revenue and the entire crop would be lost at a revenue loss of \$2 Million. *See Id.* Guest workers on the ranch from Mexico would have to be laid off and required to return home. Hearing Tr. Vol. V, 1131:22-25; 1132:1-5. Long term consequences would be severe. Long term contracts would likely not be renewed in

previous quantities, or at all, if the customer cannot depend on Hillside Ranch to reliably produce a crop on a regular basis.

The injury to the crops described by Mr. Johnson (potatoes), Mr. Taylor (pasture and cattle), and Mr. Beck (barley) apply across the entire Bellevue Triangle and the 22,000 – 23,000 acres of land irrigated from wells, and are representative of the losses the Districts' member will incur as a result of the Curtailment Order. South Valley members alone anticipate losses from a July 1 curtailment, occurring in the middle of the irrigation season, well in excess of \$12 Million. Hearing Tr. Vol. V, 1129:2-9, 1163:9-10.

### **III. Given the Timing of the Curtailment Order Granting a Stay is in the Public Interest in this Case.**

The Director initiated this proceeding in the middle of the irrigation season, well after the water users facing curtailment had already planted their crops. In general, the Director is proposing to curtail approximately 23,000 acres in the Bellevue Triangle in order to support the temporary irrigation of 615 acres located downstream (i.e., Barbara Farms LLC = 217.5; Taber = 229; Ritter = 168). As a comparison, the administrative action would be the equivalent of curtailing ninety-eight (98) acres in order to supply water to two (2) acres ( $23,000/615 = 0.02$ ). Idaho law provides the following policy considerations when evaluating conjunctive administration in this context.

First, Idaho Code § 42-101 charges the Director with the following concerning irrigation rights:

Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, providing for its use, shall equally guard all the various interests involved.

I.C. § 42-101 (emphasis added).

While the prior appropriation doctrine controls distribution of water to the various rights, this provision has important consideration in the context of this proceeding where the Director did not initiate the matter until May 4, 2021, well after the irrigation season began. Faced with a decision as to how to administer for the balance of the irrigation season, the Director must “equally guard all the various interests” of the seniors and juniors and make a decision in the best interest of the State at this late date. Curtailing 98% of the acres involved in order to supply water to a mere 2% is not “economical” and does not lend itself to the continued industrial prosperity of the state for the rest of the 2021 irrigation season.<sup>1</sup>

Next, the Ground Water Act specifically requires consideration of the following:

The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of “first in time is first in right” is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.

I.C. § 42-226.

The Idaho Supreme Court addressed the Ground Water Act’s concepts of “reasonable use,” “beneficial use, and “full economic development” or “optimum development of water resources” in *IGWA v. IDWR*, 160 Idaho 119, 369 P.3d 897 (2016) (hereinafter “*Rangen*” case). In *Rangen*, the Court held the following:

The Court has previously held that hydrologically connected surface and ground waters must be managed conjunctively. . . . “While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception . . . the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost.” . . . As we recently stated in *Clear Springs*, the policy of securing the maximum use and benefit, and least wasteful use of Idaho’s water resources, has long been the policy in Idaho. . . . This policy limits the prior appropriation doctrine by excluding

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<sup>1</sup> There are approximately 23,615 acres at issue (23,000 in the Bellevue Triangle, 615 in the Little Wood), of which the potential injury to rights in the Little Wood only comprises about 2.6%.

from its purview water that is not being put to beneficial use. . . . Necessarily, not all of the water collected due to the curtailment will accrue to the senior water right holder; some will remain in the aquifer and some will flow to other tributary springs. This complexity can make it very difficult to balance a senior right holder's interest in receiving additional water against the State's interest in securing the maximum use and benefit, and least wasteful use, of its water resources. In light of this challenging balancing requirement, it is necessary that the Director have some discretion to determine in an delivery call proceeding whether there is a point where curtailment is unjustified because vast amounts of land would be curtailed to produce a very small amount of water to the caller. As discussed, Idaho law contemplates a balance between the "bedrock principles" of priority of right and beneficial use. . . . The Director is authorized to undertake this balancing act, subject, as he acknowledged here, to the limitations of Idaho law.

369 P.3d at 908-910.

The Director's discretion and "balancing requirement" in conjunctive administration in this proceeding is further tempered by the timing. This is a case where crops had been planted before the administrative proceeding began, and are currently receiving irrigation water. The optimum use of water resources in 2021 must take into consideration the best use of available water in the public interest. Curtailing 23,000 acres to supply a limited quantity of water to 615 acres is not "securing the maximum use and benefit, and least wasteful use" of water supplies in the Bellevue Triangle and Silver Creek/Little Wood area for the balance of the 2021 irrigation season.

Whereas IDWR's own staff report shows that 67% of the curtailed water would remain in the aquifer and not be put to beneficial use by anyone, senior or junior, that waste of resources tips the scale in the favor of the juniors at this point in time. Stated another way, this state policy does not condone curtailing 23,000 acres in order to save 650 for the balance of this season.<sup>2</sup>

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<sup>2</sup> Moreover, any of the drought induced losses suffered by Mr. Taber are covered by a multi-peril drought insurance policy. Hearing Tr. Vol. III, 706:1-5; 708:7-9; 712:2-7. Given that remedy, the disparity is even greater as the Director would be curtailing 23,000 acres to supply limited water to Barbara Farms' 217.5 acres, less than 1% of the acres curtailed ( $23,000/217.5 = 0.09$ ). The effect of curtailment is even further unwarranted if Barbara can be supplied water for the rest of 2021 through the Milner-Gooding Canal.



Curtailling groundwater acres at this point in the irrigation season would basically preclude the beneficial use of 67% of the available groundwater and curtail 98 acres of groundwater irrigated land in order to supply water for 2 acres of surface irrigated land. Staying the Curtailment Order will support the public interest in optimum use of water in that it will prevent the disproportionate loss of water to 23,000 acres in lieu of 615, and it will allow the Director time to review and approve the proposed mitigation plan, which is expected to offset the potential benefits to senior right holders from curtailment.

#### **IV. Curtailment is Unnecessary as the Mitigation Plan Should be Heard and Approved.**

As argued above, the Director has a duty to consider a proposed mitigation plan, “once a mitigation plan has been proposed, **the Director must hold a hearing.**” *Order on Petition for Judicial Review*, at 28-30 (Gooding County Dist. Ct., Fifth Jud. Dist., Case No. 2008-551, July 24, 2009) (emphasis added). In fact, when the Director has issued an order such as this, and a mitigation plan has been proposed, the procedure is clear, “a more appropriate course of action for the Director to follow would have been to issue the initial curtailment order, provide the junior Ground Water Users time to submit a mitigation plan before making the order final, and then hold a hearing on the order of curtailment and material injury.” *Id.*, at 51.

On June 23, 2021, the Districts submitted their proposed mitigation plan with IDWR. The mitigation plan more than offsets any hypothetical benefits that might accrue from 100% curtailment of ground water withdrawals in the Bellevue Triangle. *See generally Districts’ Proposed Mitigation Plan*. Approval of this plan by the Director will avoid injury in excess of ten million dollars to the producers in the Bellevue Triangle that would otherwise result from the proposed 100% curtailment. The Director has a duty to consider the Districts’ proposed mitigation plan, one which should offset any potential benefits from the Curtailment Order.

### **REQUEST FOR EXPEDITED DECISION**

Time is of the essence for adequate resolution of the issues discussed herein. Granting Districts' *Petition to Stay* will prevent unnecessary and irreparable damage to the Districts, it will provide the Director necessary time to hold a hearing, review and approve the plan and satisfy the Idaho public policy of optimum use, and it will help avoid future litigation on these issues before the District Court. As such, the Districts request an expedited decision on this *Petition to Stay Curtailment*.

### **REQUEST FOR HEARING ON MITIGATION PLAN**

The Districts request a hearing on the *Proposed Mitigation Plan* filed with IDWR on June 23, 2021.

### **CONCLUSION**

In addition to the *Petition to Stay*, the Districts' reassert the importance and necessity of the Director's timely review of the proposed mitigation plan. The mitigation plan, if approved, will render moot the potential injuries to senior water holders in the Bellevue Triangle and will remove the need for the Curtailment Order. Staying the Curtailment Order prevents injury while the Director is afforded adequate time to approve the mitigation plan, which will replace all of the benefits of curtailment of Districts' ground water rights. As such, the Districts' request the Director grant this *Petition to Stay and Curtailment Request for Expedited Decision*, as well as take appropriate steps to begin review and approval of the Districts' proposed mitigation plan

Dated this 28<sup>th</sup> day of June, 2021.

BARKER ROSHOLT & SIMPSON LLP

/s/ ALBERT BARKER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28<sup>th</sup> day of June, 2021, the foregoing was filed, served, and copied as shown below.

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