

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF)	
WATER TO WATER RIGHT NOS. 36-02551)	CM-DC-2011-004
AND 36-07694)	
(RANGEN, INC.))	ORDER GRANTING IGWA'S
)	SECOND PETITION TO
)	STAY CURTAILMENT
)	
)	

BACKGROUND

On January 29, 2014, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued a *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“Curtailment Order”) in this proceeding. The Curtailment Order recognizes that holders of junior-priority groundwater rights may avoid curtailment if they participate in a mitigation plan which provides “simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen.” *Curtailment Order* at 42. The Curtailment Order explains that mitigation provided by direct flow to Rangen, Inc. (“Rangen”) “may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year.” *Id.*

On February 11, 2014, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed with the Department *IGWA’s Mitigation Plan and Request for Hearing* (“Mitigation Plan”) to avoid curtailment imposed by the Curtailment Order. The Mitigation Plan set forth nine proposals for junior-priority groundwater pumpers to meet mitigation obligations: 1) credit for current and ongoing mitigation activities; 2) mitigation via the Sandy Pipe; 3) assignment of water right no. 36-16976; 4) fish replacement; 5) monetary compensation; 6) improvements to the Curren Tunnel diversion; 7) drilling a horizontal well in the vicinity of the Curren Tunnel; 8) drilling new groundwater wells or utilizing existing wells with delivery over-the-rim; and 9) construction of a direct pump-back and aeration system within the Rangen facility.

On February 12, 2014, IGWA filed *IGWA's Petition to Stay Curtailment, and Request for Expedited Decision*.

On February 21, 2014, the Director issued an *Order Granting IGWA's Petition to Stay Curtailment* which stayed enforcement of the Curtailment Order for members of IGWA and the non-member participants in IGWA's Mitigation Plan until a decision was issued on the Mitigation Plan.

On March 10, 2014, IGWA filed *IGWA's Second Mitigation Plan and Request for Hearing* ("Second Mitigation Plan"). IGWA asserts the Second Mitigation Plan, referred to as the "Tucker Springs Project," is capable of meeting the full 9.1 cfs mitigation obligation on a year-round basis. *Second Mitigation Plan* at 2.

A hearing was held on IGWA's Mitigation Plan on March 17-19, 2014 at the Department's State office in Boise, Idaho.

On April 11, 2014, the Director issued an *Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* ("Mitigation Plan Order"). The Mitigation Plan Order recognized credit for only two components of IGWA's Mitigation Plan: (1) IGWA's ongoing aquifer enhancement activities, and (2) exchange of irrigation water diverted from the Curren Tunnel with operational spill water from the North Side Canal Company. *Mitigation Plan Order* at 4.

On April 17, 2014, IGWA filed *IGWA's Second Petition to Stay Curtailment, and Request for Expedited Decision* ("Petition"). The Petition asks the Director to stay implementation of the Curtailment Order¹, and a *Notice of Violation and Cease and Desist Order* ("Cease & Desist Order") issued to Rangen on January 31, 2014, "until the judiciary completes its review of the Curtailment Order in *IGWA v. IDWR*, Gooding County Case No. CV-2014-179, and *Rangen v. IDWR*, Twin Falls County Case No. CV-2014-1338." *Petition* at 1.

IGWA asserts:

The Curtailment Order and the Cease & Desist Order should be stayed during judicial review because a stay will (1) provide more water to Rangen than enforcing the Orders, (2) avoid severe and irreparable harm to the curtailed groundwater users and the economies of the Magic Valley and the State of Idaho, (3) allow judicial review of critical issues of first impression, avoiding mistaken curtailment, and (4) serve the public interest.

Petition at 5.

¹ The Department will treat IGWA's request as a petition to stay the Amended Curtailment Order set forth in the April 11, 2014 Mitigation Plan Order.

On April 25, 2014, Rangen filed *Rangen, Inc.'s Response in Opposition to IGWA's Second Petition to Stay Curtailment* ("Response"). Rangen argues that IGWA's request should be denied because:

(1) an unapproved mitigation plan cannot be used to allow out-of-priority diversions and IGWA is not likely to obtain approval for its Tucker Springs Mitigation Plan; (2) IGWA's application for a permit to use the talus slope water cannot be used as the basis for the issuance of a stay; (3) junior-priority ground water pumpers have had ample opportunity to prepare for this curtailment; (4) 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 (5) the injury to Rangen caused by junior-priority ground water pumping is ongoing and cumulative and the Director's revised curtailment order has been narrowly crafted to address the amount of water that would accrue to Rangen during the 2014-2015 season.

Response at 3.

No other parties filed responses to the Petition.

LEGAL STANDARD FOR A STAY

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").

The authority to stay a final order is also reflected in I.C. § 67-5274 and I.R.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).

Neither the statute nor the rule define what constitutes "appropriate terms" or establish a clear test for determining when a stay is appropriate. There are no reported judicial opinions in Idaho discussing what qualifies as "appropriate terms" or that describe when a stay is appropriate pursuant to Rule 780, I.C. § 67-5274 or I.R.C.P. 84(m). Consequently, the Director must consult other authorities to determine when a stay is appropriate.

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 I.R.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 I.R.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.*

ANALYSIS

Equity Justifies a Stay of the Curtailment Order as Amended in the April 11, 2014 Mitigation Plan Order.

A stay may be granted when refusal to grant the stay would injuriously affect one party and when granting the stay would not seriously injure the other party. *McHan v. McHan*, 59 Idaho 41, 46, 80 P.2d 29, 31 (1938). The Eastern Snake Plain Aquifer Model Version 2.1 predicted an average first-year accrual of 3.4 cfs of additional flow to the Curren Tunnel. In the Mitigation Plan Order, the Director clarified that the first annual period would start on April 1, 2014, with each subsequent year starting on the anniversary of the first year. *Mitigation Plan Order* at 5.

Curtailment of diversions of ground water for irrigation in April and May would provide little benefit to Rangen because significant irrigation with ground water does not normally intensify until late May or June. In contrast, curtailment of the irrigation of 25,000 acres during the period of reduced ground water use is significant. IGWA’s Second Mitigation Plan has been published and a pre-hearing status conference is scheduled for April 30, 2014. The Second Mitigation Plan proposes direct delivery of water from Tucker Springs to Rangen. The plan is conceptually viable, and given the disparity in impact to the ground water users if curtailment is enforced versus the impact to Rangen if curtailment is stayed, the ground water users should have an opportunity to present evidence at an expedited hearing for their second mitigation plan. All of the standards of the conjunctive management rules will apply at the hearing.

A status conference regarding IGWA’s Second Mitigation Plan is set for April 30, 2014. The Director will ensure that the hearing is expedited. The Director will revisit the stay at the time a decision on IGWA’s Second Mitigation Plan is issued.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that IGWA's Second Petition to Stay Curtailment is GRANTED.

Dated this 28th day of April, 2014.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of April, 2014, the above and foregoing document was served on the following by providing a copy in the manner selected:

J. JUSTIN MAY
MAY BROWNING
1419 W WASHINGTON
BOISE, ID 83702
jmay@maybrowning.com

(x) U.S. Mail, Postage Prepaid
() Hand Delivery
(x) E-mail

ROBYN BRODY
BRODY LAW OFFICE
P.O. BOX 554
RUPERT, ID 83350
robynbrody@hotmail.com

(x) U.S. Mail, Postage Prepaid
() Hand Delivery
(x) E-mail

FRITZ HAEMMERLE
HAEMMERLE HAEMMERLE
P.O. BOX 1800
HAILEY, ID 83333
fxh@hamlaw.com

(x) U.S. Mail, Postage Prepaid
() Hand Delivery
(x) E-mail

RANDY BUDGE
TJ BUDGE
RACINE OLSON
P.O. BOX 1391
POCATELLO, ID 83204-1391
rcb@racinelaw.net
tjb@racinelaw.net

(x) U.S. Mail, Postage Prepaid
() Hand Delivery
(x) E-mail

SARAH KLAHN
MITRA PEMBERTON
WHITE & JANKOWSKI
511 16TH ST. STE. 500
DENVER, CO 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com

(x) U.S. Mail, Postage Prepaid
() Hand Delivery
(x) E-mail

JOHN K. SIMPSON
TRAVIS L. THOMPSON
PAUL L. ARRINGTON
BARKER ROSHOLT & SIMPSON
195 RIVER VISTA PLACE, STE. 204
TWIN FALLS, ID 83301-3029
tlt@idahowaters.com
jks@idahowaters.com
pla@idahowaters.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 E-mail

W KENT FLETCHER
FLETCHER LAW OFFICE
P.O. BOX 248
BURLEY, ID 83318
wkf@pmt.org

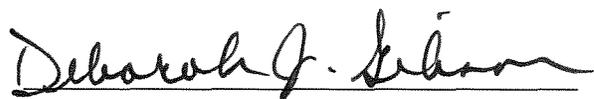
U.S. Mail, Postage Prepaid
 Hand Delivery
 E-mail

JERRY R. RIGBY
HYRUM ERICKSON
ROBERT H. WOOD
RIGBY ANDRUS & RIGBY, CHTD
25 NORTH SECOND EAST
REXBURG, ID 83440
jrigby@rex-law.com
herickson@rex-law.com
rwood@rex-law.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 E-mail

A. DEAN TRANMER
CITY OF POCA TELLO
P.O. BOX 4169
POCA TELLO, ID 83205
dtranmer@pocatello.us

U.S. Mail, Postage Prepaid
 Hand Delivery
 E-mail



Deborah Gibson
Assistant to the Director
Idaho Department of Water Resources

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) The petition for reconsideration is disposed of; or
 - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.
- (8) The provisions of this section do not preclude an agency from taking immediate

action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.