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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE**

**THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

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| NORTH SNAKE GROUND WATER DISTRICT, and MAGIC VALLEY GROUND WATER DISTRICT,<br><br>Petitioners,<br><br>vs.<br><br>GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources; and the IDAHO DEPARTMENT OF WATER RESOURCES,<br>Respondents.<br><br>vs.<br><br>CLEAR SPRINGS FOODS, INC. | Case No.<br><br>**GROUND WATER USERS' MEMORANDUM IN SUPPORT OF MOTION FOR STAY** |
| IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-04103A, 36-04013B AND 36-7148 (Snake River Farm)<br><br>(Water District Nos. 130 and 140) | |

NORTH SNAKE GROUND WATER DISTRICT, and MAGIC VALLEY GROUND WATER DISTRICT, submit this *Memorandum in Support of Motion for Stay* filed contemporaneously herewith. The question presented to this Court by this motion is straight forward and urgent: whether to stay further enforcement of the Directors' 2009 Curtailment Orders.

An expedited resolution of this matter is important because enforcement of the 2009 Curtailment Orders will dry up 4,154 acres. The irrigators that are now subject to curtailment planted their crops in reliance on the *Department's Order Approving Ground Water Districts' Replacement Water Plan for 2009* dated March 26, 2009. ("Approval Order"). (Ex. 3 to Aff. of Budge). The focus of the approved *2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District* ("2009 Plan") was to provide an over-the-rim pipeline to deliver groundwater directly to Clear Springs at its Snake River Farms' facility in order to offset any material injury Clear Springs was suffering. Also included in the plan were incidental benefits of conversion and CREP acres which increase spring discharge to Clear Springs. (Ex. 1 Aff. of Budge).

On April 27, 2009 Clear Springs Foods, Inc. ("Clear Springs") filed *Clear Springs Foods, Inc.'s Motion for Partial Stay of Implementation of Director's March 26, 2009 Order Approving Ground Water Districts' Replacement Water Plan for 2009*. ("Stay Order") On May 15, 2009, IDWR issued an *Order Granting Partial Stay of Ground Water Districts' Replacement Water Plan for 2009* ("Stay Order"). (Ex. 6 Aff. of Budge). The Stay Order granted a two year stay and suspended the Ground Water Districts' proposal "so as not to require construction and

installation of the authorized 'over-the-rim' pipeline project". Id. at 2. Hence, the irrigation season began and farmers planted their crops in reliance on the Department's Approval Order approving the 2009 Plan and the Stay Order. The understanding between the parties was that in the event that the Ground Water Districts' could not meet the conditions of the Stay Order, that they would be provided additional time to construct their over-the-rim pipeline as approved by the Approval Order. Aff. of R. Lynn Carlquist contains a detailed chronology of the relevant events relating to this matter and request for stay.

## I. INTRODUCTION

The appeal pending in this case is taken from final orders issued by the Idaho Department of Water Resources ("IDWR" or "Department") under Idaho Code § 67-5243 *Order Curtailing Ground Water Rights in Water District Nos. 130 and 140 Junior to January 8, 1981* dated July 22, and the *Order Regarding Ground Water Districts' Plan of Action* dated July 29, 2009 and the *Amended Curtailment Order* dated August 7, 2009. These orders are collectively referred to as the "2009 Curtailment Orders." The 2009 Curtailment Orders are a result of the Department's Final Order dated July 8, 2005 Order in *The Matter of Distribution of Water to Water Rights Nos. 36-04013A, 36-04013B, and 36-07148* (Snake River Farm), the July 11, 2008 *Final Order on Spring Users' Delivery Call* which found that water right nos. 36-04013B, 36-07148 owned by Clear Springs Foods, Inc. ("Clear Springs") had been materially injured by junior ground water pumpers. The matter giving rise to these orders are referred to herein as the "Delivery Call Case." The Delivery Call Case is currently pending on appeal before this same court in *Clear Springs Foods, Inc. v. Tuthill*, Case No. 2008-444, (Fifth Jud.

Dist., Gooding Co). The Court issued an Order on Petition for Judicial Review on June 19, 2009. Rehearing has been granted in that matter and a new briefing schedule set.

The consequence of the finding of material injury in the Delivery Call Case has been that junior ground water pumpers have been required to provide replacement water and mitigation in order to avoid involuntary curtailment. The replacement water and mitigation have been provided since 2005 by filing "Replacement Water Plans" that were approved by the Director of IDWR after he determined that the proposals by the Ground Water Districts would meet the expected benefit that involuntary curtailment would bring to Clear Springs at its Snake River Farms facility.

Sometime in late June 2009, the Ground Water Districts became aware that some 17 ground water users had chosen to no longer convert their ground water acres to surface water and there was a shortfall of roughly 5,000 to be converted. See Aff. of Carlquist. The Ground Water Districts immediately tried to investigate the reasons and talked to many of these ground water users. Also, in an effort to be upfront and candid with IDWR and Clear Springs, the Ground Water Districts told IDWR that they had a problem with the "old" conversion acres but were actively seeking other acres to convert. (Ex. 10 and 12 Aff. of Budge; Aff. of Carlquist). While the Ground Water Districts waited for a response from Clear Springs to its filings in response to the Director's requests relating to the conversion issues and without any forewarning, IDWR Interim Director issued the July 22 Order curtailing nearly 9,000 acres as of July 31, 2009 and gave the Ground Water Districts six days to respond. (Ex. 14 Aff. of Budge). On July 28, 2009, the Ground Water Districts submitted *Ground Water Districts' Plan of Action and Petition for*

*Reconsideration and Request for Hearing*. ("Plan of Action") (Ex. 16 Aff. of Budge). That Plan of Action proposed to proceed with the over-the-rim pipeline construction as the stay could no longer be fully complied with since it was impossible to restore the full 9,300 acres of conversions which the Director declared mandatory. The Director rejected that Plan of Action in his July 29 Order and indicated that the only acceptable response by the Ground Water Districts was to get their conversion acres back up to the "9,300" acres as was done in years past. The curtailment on the nearly 9,000 acres became effective July 31, 2009.

On August 3, 2009, the Ground Water Districts submitted *Ground Water Districts' Second Plan of Action, Petition for Reconsideration and Request for Status Conference* ("Second Plan of Action") in response to the July 22 Order and the July 29 Order. (Ex. 18 Aff. of Budge) In the Second Plan of Action, the Ground Water Districts indicated that they now had increased their "old" conversion acres to 7,745 acres with all but 2 of the prior converters participating and added one new converter. In addition, the Ground Water Districts proposed to perform late season ground water recharge by delivering 10,000 af through the North Side Canal Company canal system in order to address Clear Springs' material injury and to forestall curtailment of the 4,145 acres. (Id. and Aff. of Carlquist)

The Ground Water Districts' Second Plan of Action also proposed to include late-season recharge in response to conversion acreage shortfall. The late season recharge would result in a total of 27,500 af of water put on the ground, the same amount as would have otherwise been provide to the full 9,300 of conversion acres. Furthermore, that would eliminate most if not all of the remaining 0.17 cfs shortfall to Clear Springs. (Par. 3-5, Aff. of Brendecke)

However, in the *Amended Curtailment Order*, the Director specifically stated that

> The Director informed the parties at the status conference that he would consider the reinstatement of formally converted acres for purposes of revising the curtailment date in the Curtailment Order. The Director stated that he would not consider proposed actions that were not part of the previous agreement[1] between Clear Springs and the Ground Water Districts, as accepted by the Director in his May 15 Partial Stay Order.

Ex. 20 Aff. of Budge at 2 ¶6. In other words, the Director disregarded the Ground Water Districts' proposal for late-season recharge without any analysis, just as he rejected the previously approved over-the-rim delivery plan. In the *Order on Petition for Judicial Review* in the Delivery Call case, the Honorable John Melanson found that the Director abused his discretion when he approved the replacement water plans without a hearing. *Order on Petition for Judicial Review* at 47-55. The Honorable John Melanson reiterated this view in his July 24, 2009 Order on Petition for Judicial Review in *A&B Irrigation District et. al. v. Spackman*, Case No. 2008-551, at 27-30 (Fifth Jud. Dist., Gooding Co., July 24, 2009). Because the District Court found that the Director exceeded his authority by approving replacement water plans without a hearing, the Ground Water Districts are no longer left with the option to provide direct replacement water to Clear Springs in order to avoid involuntary curtailment until the procedures

[1] The Director uses the term "agreement" as if the parties had a meeting of the minds on what was to occur in response to Clear Springs' request for stay. However, the parties never agreed and the Director issued an order that approved a two year stay and denied Clear Springs' request for an immediate hearing in 2009. Former Director Tuthill may have assumed that the parties had a solid agreement with specific number of acres for conversions, but the recording of the May 4, 2009 status conference makes it clear that the parties did not have any such agreement with specific old conversion acres never discussed by them. The Stay Order reiterated what was expected from the parties, it in no way withdrew the Director's approval of the Ground Water Districts' 2009 Replacement Water Plan that would have provided water to Clear Springs directly through over-the-rim delivery. To now enforce the "conversions" part of the approved plan, absent a clear agreement between the parties, yet refuse to allow the Ground Water Districts to provide direct replacement water to Clear Springs via the over-the-rim proposal is entirely inconsistent, changed the rules in the middle of the game and effectively pulled the rug out from under the ground water users that relied upon the approved mitigation plan and stay orders. See generally Aff. of Carlquist.

in CM Rule 43, including a notice and protest period and a hearing, have been completed. Nor is there any option to obtain new approval of late season recharge or any other plan in a timely manner in the middle of the irrigation season. Thus, the latest order by IDWR requires the drying up of roughly 4,150 acres in order to provide Clear Springs with .17 cfs. Yet, the Ground Water Districts had an approved Replacement Water Plan for 2009 and the junior ground water users relied on that approved plan by planting their crops for the 2009 irrigation season.

This stay is being requested in order to avoid the irreparable harm that would be suffered by the junior ground water users and the public. Because of the District Courts' Order on the Petition for Judicial review found that that replacement water plans are not allowed without a hearing or unless Clear Springs agrees to the Second Plan of Action, the Director is proceeding with curtailment because he believes he has no option. The Director perceives he is without any authority to approve the proposal for late-season recharge because there has been no advertisement of the late-season recharge as a formal mitigation plan and because there has been no hearing on this proposal, notwithstanding the fact that 10,000 af late season recharge in response to the 2005 Order was approved in the 2007 Order. (Ex.21 aff. Budge) This is entirely contrary to clear state policy to give "maximum support" to "water projects" designed to promote ground water recharge. I.C. § 42-234(1). Furthermore, it is entirely contrary to the benefit that the Stay Order would have provided to Clear Springs. The point of the conversion acres (and CREP) is that surface water gets applied and what is not taken up by the crop, seeps into the aquifer and that ground water is no longer pumped on those acres. However, late season recharge can provide a similar benefit, apply the full amount to the ground and eliminate the .17

cfs shortage that is projected due to "fewer" conversion acres being continued. (See Par. 3-5, Aff. of Brendecke.) This fact has already been confirmed by the Director's in 2007 In the Order *Approving Dairymen's and IGWA's 2007 Replacement Water Plans, Rescinding 2007 Curtailment, and Setting Hearing and Prehearing Schedule (Clear Springs, Snake River Farm)* dated July 5, 2007, the Director analyzed what benefit to the Buhl to Thousand Springs reach an additional 10,000 feet of late-season recharge in the NSCC system would be. (Ex. 21 Aff. of Budge). He concluded on page 5 that the benefit would be 1.9 cfs to the reach and would be .13 cfs to Clear Springs. Id. Brendecke's affidavit confirms that the 10,000 af of late season recharge would further reduce the .17 cfs shortage to Clear Springs to a mere .04 cfs., about two garden hoses or nine gallons per minute that would be so small it could not be detectable by measurements. Id. Further, as indicated in Brendecke's affidavit, if properly targeted the recharge could fully eliminate the remaining .04 cfs shortfall. Id.

The Ground Water Districts are now in the situation that until there is a hearing on the Ground Water Districts' Third Mitigation Plan that proposes the over-the-rim delivery or a hearing on their late season recharge proposal they must be curtailed. This new process the interim Director is implementing is in direct conflict with the District Court's order that says: "after the initial order is issued and pursuant to the constitution requirements of due process, the parties pursuant to notice and upon request <u>are entitled to a hearing before the junior rights are curtailed</u> and before the senior rights are injured further." *Order on Petition for Judicial* review at 49, Gooding County Civil Case No. 2008-444 (June 19, 2009). The Ground Water Districts propose as security for the Court granting their request for stay is what they proposed in the

Second Plan of Action. Ex. 18 Aff. of Budge. The Second Plan of Action consists of 7,745 conversion acres, plus approximately 900 acres for the new conversions and the additional 10,000 acre-feet of late season recharge and will provide more benefit to Clear Springs this year, than the curtailment of the 4,154 acres as proposed in the August 7, 2009 Amended Curtailment Order. Aff. of Brendecke. The purpose of the May 15, 2009 Stay Order was to allow the parties time to discuss long-term solutions. The Ground Water Districts' mitigation activities thereunder was to provide benefit to the aquifer and hence Clear Springs with above the rim activities which would mean pumping less water and supplying surface water which would grow crops in part and seep into the ground in part.

Hence, a reasonable solution would be a stay of the enforcement of the Director's orders in order to avoid irreparable harm to the junior ground water users and the communities that depend on irrigated agriculture and provide Clear Springs with the same benefit it could have expected from all acres being converted. for its lost profits and to save everyone, including the State and IDWR the necessity of holding hearing after hearing on proposed mitigation plans that will then result in further legal proceedings and appeals. On the other hand, there is no evidence that Clear Springs needs, can use or will be provide any immediate benefit from the 0.17 cfs. The fact that Clear Springs is now refusing the offered 10,000 af of late season recharge clearly establishes that this small amount of water is not wanted, needed or important to them. This Court has the discretion to grant the stay which should be exercised without delay.

## II. ARGUMENT

This Court may issue a stay in its discretion, under Idaho Appellate Rule 13(b)(14)

> Stay execution or enforcement of any judgment, order or decree appealed from, other than a monetary judgment, upon the posting of such security and upon such conditions as the district court shall determine.

Thus, Rule 13(b)(14) provides for *de novo* consideration in this Court of an application for stay pending appeal and commits the decision to this Court's discretion. No reported Idaho case explains "the legal standards applicable to" such a motion for a discretionary stay under I.A.R. 13(b)(14). But, when exercising its discretion the Court must act consistently with "the legal standards applicable to the specific choices available to it" and must "reach[] its decision by an exercise of reason." *Craig Johnson Const., 1.1.* C. v. *Floyd Town Architects, P.A.,* 142 Idaho 797, 800 (2006). In Idaho, I.A.R. 13(b)(14) and I.R.C.P. 84(m) both state that the Court may stay the enforcement of an agency action "upon such conditions as the district court shall determine" or "upon appropriate terms" hence, issuing a stay is within the sound discretion of the Court.

Unless stayed, the continuing enforcement of the Director's 2009 Curtailment Orders will cause irreparable harm because it requires the junior ground water users to suffer their ultimate fate, complete curtailment, personal economic damage and harsh economic consequence to the region, even though issues are pending on appeal in this matter in the underlying delivery call and even though there has not been a hearing on the proposed mitigation options which will address the injury to Clear Springs. Aff. of Carlquist. Yet, with the security offered by the Ground Water Districts in the form of water via the conversion of the nearly 8,600 acres above

the rim, financial support of the CREP program and late-season recharge that will use up any remaining "conversion" water, Clear Springs receives the benefit that it would have expected to receive had all the water been delivered to the conversion acres. Further, the financial impact and loss to the junior ground water users who relied upon the March approval of the Ground Water Districts' 2009 Replacement Water Plan and the May 15 Stay Order can be minimized.

### A. MAINTAING STATUS QUO IS EQUITABLE AND PROTECTS THE JUNIOR GROUND WATER USERS' WHO RELIED ON THE MARCH APPROVAL ORDER AND PLANTED CROPS ACCORDINGLY.

The Court must keep in mind that we are talking about people, schools, cities and businesses that relied on having a full season worth of water because IDWR accepted the 2009 Plan proposed by the Ground Water Districts. Maintaining the status quo, while the legal issues are worked out, is simply the right thing to do. "An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant." *Washington Metropolitan Area Transit Commission,* 559 F.2d at 844. The amount of water that may accrue to Clear Springs this year is tiny, but the impact to the junior users who will be shut off is dramatic and will cause millions of dollars in agricultural and business losses. Aff. of Carlquist.

While the parties may have significantly different views of the law, they have the common objective of working on long-term solutions and expeditiously resolving the issues pending on appeal in a manner that minimizes uncertainty and unnecessary economic

dislocation. A stay will advance this common objective and the public interest by reducing all the collateral litigation.

### B. THE PUBLIC INTEREST WEIGHS STRONGLY IN FAVOR OF GRANTING A STAY

A stay pending the resolution of these issues on appeal is not only in the interests of the junior ground water users but is also in the interests of the public and the State as whole, which also results in positive community and financial benefits to Clear Springs as well. The regional impact that would result from the enforcement of the Director's 2009 Curtailment Orders is obvious and far reaching, especially in light of current economic times.

The public interest is best served by minimizing the disruption of the day-to-day conduct of business and uses of water for agricultural, municipal, domestic, industrial and commercial purposes while issues of critical importance to these sectors are resolved. Furthermore, the public interest is served by allowing all the parties to focus on the long-term solutions that are presented in the CAMP process and by on-going dialogue between the parties. The fear of loss and the economic consequences does not aid in this endeavor. The public interest therefore weighs in favor of maintaining the status quo with compensation to Clear Springs for its loss net profit while the appeal is pending.

### C. THE COURT HAS GREAT LATITUDE TO GRANT STAY WHILE STILL PROTECTING ALL PARTIES' INTERESTS

This Court has the authority to grant the stay and protect all the parties' best interests. In the *Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (2002) the 9th Circuit affirmed the District Court's decision to provide injunctive relief. Many of the facts of that case are analogous here

and the case is provided to demonstrate that Courts have the ability to provide an equitable solution for all parties by granting relief and approving the security such as that offered by the Ground Water Districts. In the *Idaho Watersheds Project* case, the 9th Circuit affirmed the district court's grant of an injunction because the "interim measures . . . are to be in place only so long as it takes for the BLM to conduct the environmental studies required by law so that it can properly determined . .. what measure should be implemented permanently." Id. at 823.

> The District Court considered the hardship of a complete halt on grazing and concluded that such a remedy would be too drastic . . . . the district court adopted a middle ground approach and was mindful of the equities on all sides, imposing the interim measures in order to avoid the harsh consequences to the Ranches of stopping all grazing. . . . District Judge Winmill has done an admirable job of ensuring an equitable result in a difficult situation.

Id. at 833-34.

In this case, a stay with the proposed security should be granted in order to avoid the harsh result of potentially bankrupting some of the ground water users and permanently impacting private property and at the same time provide the ongoing described protections to Clear Springs. Most importantly, the fact the Clear Springs will not consent to the 10,000 af of late season recharge confirms that they have no immediate need or desire for the .17 of additional water and will not suffer any loss or injury if they do not receive it. Clear Springs' obvious motivation is to take advantage of the District Court's order and the subsequent 2009 Curtailment Orders of the Director invalidating the Ground Water Districts previously approved 2009 Plan and hold the Ground Water Districts hostage. The motivations are obvious and the equities weigh heavily in favor of the requested stay.

### D. THE NEED FOR A STAY IS URGENT

The need for a stay of the Judgment is urgent because the Director is currently enforcing the physically curtailment of 153 water rights, which is drying up 4,154 acres of irrigated agriculture in the peak of the irrigation season, not to mention the loss of water for municipal users and schools and may force the closure of dairies and other businesses. Such consequences are costly; but even more costly is the missed opportunity for the parties to work cooperatively on the long-term solutions because of the curtailment and the havoc it wrecks on positive relationship resulting in a building of resentment on both sides because of the large loss to the economy but with on a small amount if any water actually realized from the curtailment action.

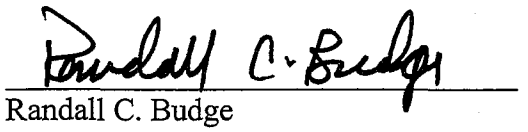
## III. CONCLUSION

For the reasons stated above, the Ground Water Districts request that the Court stay the enforcement of the Director's 2009 Curtailment Order and order the security to Clear Springs as proposed in the Ground Water Districts' Second Plan of Action sufficient until a hearing can be held on the Ground Water Districts' proposed mitigation.

RESPECTFULLY SUBMITTED.

DATED this 11th day of August, 2009.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED



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