

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

NORTH SNAKE GROUND WATER DISTRICT and MAGIC VALLEY GROUND WATER DISTRICT,

Petitioners,

vs.

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

Respondents.

vs.

CLEAR SPRINGS FOODS, INC.

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-0413A, 36-04013B, and 36-07148.

(Clear Springs Delivery Call)

Filed Pursuant to I.R.C.P. 5(e)(1) August 24, 2009, 4:28 p.m. [Signature] John Melanson, District Judge

Case No. 2009-0000431

ORDER CONDITIONALLY GRANTING MOTION FOR STAY UPON COMPLIANCE WITH PROPOSED ALTERNATIVE

1. Procedural Background.

On August 11, 2009, North Snake Ground Water District and Magic Valley Ground Water District ("Districts") filed a Motion for Stay pursuant to I.A.R. 13(b)(14) and I.R.C.P. 84(m). The Motion sought a temporary ex parte stay and a permanent stay of the watermaster's curtailment of junior groundwater rights in Water District Nos. 130 and

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140 and enforcement of 2009 curtailment orders issued by the interim director of the Idaho Department of Water Resources, Gary Spackman ("Director"). The *Motion* sought a permanent stay of the curtailment orders to remain in effect until the Court decides issues on appeal in Gooding County Case No. 2008-000444.

The Court issued an *Order Denying Motion for Temporary Ex Parte Stay and Order Setting Expedited Hearing on Motion to Stay* on August 12, 2009. The Court denied the Ground Water Districts' *Motion* for a temporary *ex parte* stay due in part to the Ground Water Districts' non-compliance with the Director's March 26, 2009 order. The March 26, 2009 order was based upon the Districts' own mitigation plan.

On August 21, 2009, this Court held an expedited hearing on the Ground Water Districts' *Motion* for permanent stay. At the hearing, Mr. Randall Budge appeared on behalf of the Ground Water Districts, Mr. Phil Rassier, Deputy Attorney General, appeared on behalf of the Director, and Mr. John Simpson appeared on behalf of Clear Springs Food, Inc.

2. Applicable Law.

I.R.C.P. 84(m) provides that pending consideration of a petition for judicial review, a reviewing court may grant a stay of the proceedings and enforcement of an agency action "upon appropriate terms." There does not appear to be any case law dealing specifically with the grant or denial of a stay under I.R.C.P. 84(m). It is plain that the question of whether to grant a stay, and the terms or conditions of the stay, are matters committed to the discretion of the court. The court views the decision in this case to be somewhat similar to the grant of a preliminary injunction pursuant to 65(e), I.R.C.P. where the court must consider whether the plaintiff is entitled to the relief demanded and whether the defendant's actions during the litigation will produce waste or great and irreparable injury to the plaintiff.

3. Decision.

As this court noted in the *Order Denying Motion for Temporary Ex Parte Stay and Order Setting Expedited Hearing on Motion to Stay*, curtailment is the result of the

petitioner's failure to comply with their own mitigation plan. This is not a situation in which the director has approved a plan of his own or another party's devising without a hearing. The Districts 2009 Replacement Water Plan and Third Mitigation Plan (Over the Rim), provided in part:

Approximately 9,300 acres within the North Snake Ground Water District have been converted from ground water irrigation to surface water irrigation to increase incidental recharge to the aquifer. The Ground Water Districts plan to continue to deliver 35,000 acre feet of water to the existing 9,300 acres of conversions as they have done for the past several years.

Conversion of an additional 1,060 was proposed by the same agreement as was an "over the rim" plan which would have provided water from wells near the canyon rim by way of a pipeline. It was later determined that the "over the rim" proposal would not proceed. The Districts did not object to that decision. The *Ground Water User's Memorandum in Support of Motion for Stay Under I.A.R. 13(b)(14)* states as follows:

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 acres to be converted.

To their credit, the Districts promptly notified the Director of the shortfall. The curtailment orders which are the subject of this proceeding followed. The Districts now assert that they are entitled to a hearing on their alternate mitigation plan proposed after the curtailment order, and they propose, as security for the issuance of a stay, that they be permitted to provide water under their alternate mitigation plan. The alternate mitigation plan provides for 7,745 conversion acres, plus 900 acres of new conversions and an additional 10,000 AF of late season recharge.

The Court finds as follows:

1. Injury to Clear Springs has already been determined. If the Court stays enforcement of the curtailment orders injury will continue. The injury, however, in the immediate short term (that is to say during the time pending a decision in

this case) will not be great, at least as to the quantity of water.¹ Some support for this finding can be found in Clear Spring's proposal (represented at the hearing) to allow any shortfalls resulting in 2009 to be made up by the District's in 2010 in lieu of curtailment.

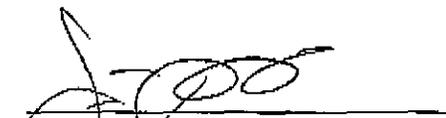
2. If the Court does not stay enforcement of the curtailment orders, great harm may result to the District's members. This harm, however, is the result of their own failure, without excuse, to provide conversion acres under their own plan.
3. The proposed security for the stay does not provide what the Districts agreed to provide and it does not provide for timely mitigation. It does, however, provide for *some* mitigation. The Affidavit of Charles M. Brendecke states that consistent with the findings of the former Director in the July 5, 2007, *Order, Approving Dairyman's and IGWA's 2007 Replacement Water Plans, Rescinding 2007 Curtailment and Setting hearing and Prehearing Schedule (Clear Springs, Snake River farm Delivery Call)*, that the District's proposed 10,000 AF of late season recharge through the North Side Canal Company system would result in an increase to the Clear Springs facility of approximately .13 cfs of the .17 cfs shortfall. Further, that direct targeting of the recharge would further reduce if not eliminate the remaining .04 cfs shortfall.
4. Application of the Conjunctive Management Rules is not yet well developed and the Court should be cautious in permitting curtailment under the application of the rules until they are fully tested. At least four cases on judicial review are before the courts dealing with application of the conjunctive management rules.

ORDER

¹ The Court recognizes that this assertion probably does not ring true to Clear Springs, particularly when it is recognized that Clear Springs has been experiencing deficiencies in water deliveries for a long time while junior ground water rights are filled. The Court cannot ignore, however, that the deficiency caused by the Districts is .17 cfs. In the long run, however, this or any shortfall must necessarily impact the production capacity of Clear Springs.

Based upon the foregoing, it is hereby ORDERED that enforcement of the Director's 2009 curtailment orders in this matter are stayed pending further order of the court contingent upon the District's providing security as described in their "Second Plan of Action" attached to Mr. Budge's Affidavit as "Exhibit 18," with additional requirement that the recharge be "targeted" to the area of the rim immediately above Clear Spring's facility in accordance with the representations made in the Brendecke Affidavit.

Dated August 24, 2009


JOHN M. MELANSON
District Judge