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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) CASE NO. CV07-21-00243
DISTRICT,)
) **MEMORANDUM IN SUPPORT OF**
Petitioners,) **PETITIONERS’ MOTION TO STAY**
)
)
vs.)
)
THE IDAHO DEPARTMENT OF WATER)
RESOURCES and GARY SPACKMAN in his)
official capacity as Director of the Idaho)
Department of Water Resources,)

Respondents.

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)

COME NOW, the Petitioners, SOUTH VALLEY GROUND WATER DISTRICT, on behalf of its members, by and through counsel of record, BARKER ROSHOLT & SIMPSON LLP and GALENA GROUND WATER DISTRICT, on behalf of its members, by and through counsel of record, LAWSON LASKI CLARK, PLLC (collectively “Petitioners”), pursuant to I.R.C.P. 84(m), and hereby submits this *Memorandum in Support of Petitioners’ Motion to Stay*.

INTRODUCTION

Idaho Rule of Civil Procedure 84(m) authorizes the Court to order a stay of the enforcement of an agency action. Beginning on May 4, 2021, with the issuance of a *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* by the Director of the Idaho Department of Water Resources (“Director”), the Petitioners have participated in an administrative contested case aimed at determining whether curtailment of ground water users in the Bellevue Triangle area of Water Basin 37 is necessary to protect senior water user rights during the 2021 irrigation season. The administrative proceeding has concluded, and on June 28, 2021, the Director issued a final order (“*Curtailment Order*”) *See Declaration of Michael A. Short (“Short Decl.”)*, ¶ 15. The *Curtailment Order* requires the total curtailment of Petitioners’ junior priority ground water rights in the Bellevue Triangle for the remainder of the 2021 irrigation season. *See Short Decl.* at Ex. S.

Concomitant with this motion, Petitioners’ have filed a motion to amend its original Petition and Complaint, as well as its *Amended Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition* (“Amended Petition”). The Amended Petition requests, *inter alia*, judicial

review of the *Curtailment Order*, and judicial review of the due process violations arising from the Director's contested case proceedings.

For the reasons discussed more fully below, Petitioners' request this Court stay enforcement of the *Curtailment Order* pending approval of the mitigation plan, and alternatively, during the consideration of Petitioners' request for judicial review.

ARGUMENT

I. The Court Should Stay Enforcement of the *Curtailment Order* Pending Approval of Petitioners' Mitigation Plan.

On June 23, 2021, Petitioners submitted a *Proposed Mitigation Plan* to the Director. *See Short Decl.*, ¶ 16. The purpose of the Mitigation Plan, and its impact if effectuated, would be the total mitigation of the potential injury to senior right holders which the *Curtailment Order* sought to avoid. *See Short Decl.* at Ex. T (hereinafter "*Mitigation Plan*").

A. Due Process Requires Consideration of the Petitioners' Mitigation Plan Before Implementing the *Curtailment Order*.

Conjunctive administration allows for mitigation in lieu of curtailment. *See generally*, CM Rules 40, 43. The Petitioners 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). *See Mitigation Plan*. Principles of due process require adequate time to hear and obtain approval of the mitigation prior to implementing the proposed curtailment.

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.

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

At a minimum, the Petitioners are entitled to a hearing on the mitigation plan to avoid curtailment of 23,000 acres for the rest of the 2021 irrigation season. 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 Petitioners’ mitigation plan. Such a process would follow the guidance provided by Judge Melanson in the Springs Users’ delivery call case as well. *Gooding County Judicial Review Order*, at 51 (“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 should follow the process outlined by Judge Melanson. Granting the present motion pending a decision by the Director on the Petitioners’ mitigation plan will provide due process and ensure no unnecessary curtailment during the 2021 irrigation season.

B. The Petitioners Will Suffer Irreparable Harm to Petitioners 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. *Short Decl.* Ex. E, at 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. *Id.*, at 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., Id.*; and *Short Decl. Ex. D*, at 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.

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. 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. *Short Decl. Ex. E*, at 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. *Id.*, at 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. *Id.*, at 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. *Id.*, at 1128:12-13 (“So if we’re shut off on July 1st, the crop will not make grade at all”). The last two weeks of water are critical to allow the kennels to plump up to meet Coors and Anheuser-Busch standards. *Id.*, at 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. *Id.*, at 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 injuries 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 injuries representative of the losses the Petitioners’ will incur as a result of the *Curtailment Order*. South Valley members alone anticipate losses from the *Curtailment Order*, occurring in the middle of the irrigation season, well in excess of \$12 Million. *Id.*, at 1129:2-9, 1163:9-10.

C. 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 (97.4) acres in order to supply water to two (2.6) acres.¹ 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 97.4% of the acres involved in order to supply water to a mere 2.6% is not “economical” and does not lend itself to the continued industrial prosperity of the state for the rest of the 2021 irrigation season.

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.

¹ 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%.

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 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 have already been planted 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. CITE? Stated another way, this state policy does not condone curtailing 23,000 acres in order to save 615 for the balance of this season.²

Curtailling groundwater acres at this point in the irrigation season would basically preclude the beneficial use of 67% of the available groundwater and curtail 23,000 acres of groundwater irrigated land in order to supply water a mere 615 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, 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.

D. Curtailment is Unnecessary as the Mitigation Plan Should be 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." *Gooding County Judicial Review Order*, at 28-30. 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

² Moreover, any of the drought induced losses suffered by Mr. Taber are covered by a multi-peril drought insurance policy. *Short Decl. Ex. C*, at 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.

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 Petitioners submitted their proposed mitigation plan. 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* Mitigation Plan. Approval of this plan by the Director will avoid injury in excess of twelve million dollars to the producers in the Bellevue Triangle that would otherwise result from the proposed curtailment. The Director has a duty to consider the Petitioners’ proposed mitigation plan, one which should offset any potential benefits from the *Curtailment Order*.

E. Conclusion.

As discussed, the Director has a duty to review the Mitigation Plan, and that Mitigation Plan will fully mitigate the expected losses the *Curtailment Order* seeks to guard against. Staying enforcement of the *Curtailment Order* will prevent irreparable harm to Petitioners’, protect their due process rights, support Idaho’s public policy for optimum development and use of water, and provide the Director adequate time to review and approve the Mitigation Plan, a plan which will obviate the need for curtailment. As such, the Court should grant Petitioners’ present motion, and stay enforcement of the *Curtailment Order* pending the review and approval of Petitioners’ Mitigation Plan.

II. The Court Should Stay Enforcement of the *Curtailment Order* Pending a Ruling on Petition for Judicial Review.

The Idaho Administrative Procedures Act (APA) provides for judicial review of agency actions. I.C. § 67-5270. On July 1, 2021, the Director issued the *Curtailment Order*, a final order in the matter with an effective date of July 1, 2021 at 12:01 a.m. As such, Petitioners are entitled to judicial review of the *Curtailment Order* as a matter of right. Given the irreparable damage that

would result from curtailment, it is essential to protect Petitioners' rights by staying the enforcement order during the pendency of judicial review.

CONCLUSION

Granting Petitioners' *Petition to Stay* will prevent unnecessary and irreparable damage to the Petitioners, it will provide the Director necessary time to review and approve the plan and satisfy the Idaho public policy of optimum use, and it will help avoid future litigation in this Court. 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 Petitioners' ground water rights. Similarly, staying the enforcement of the *Curtailment Order* pending judicial review will protect against irreparable damage to the Petitioners. As such, the Petitioners' request the Court grant this *Motion to Stay*.

DATED this 29th day of June, 2021.

BARKER ROSHOLT & SIMPSON LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2021, the foregoing was filed, served, and copied as shown below.

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