

determined that the spring flows feeding Alpheus Creek account for approximately 20% of the total spring flow in the Devil's Washbowl to Buhl Reach.

The May 2005 Order determined that ground water users holding water rights junior to December 28, 1973 must be curtailed to satisfy Blue Lakes' delivery call, or, alternatively, the ground water users must (a) initiate actions providing simulated steady state reach gains of 51 cubic feet per second ("cfs") to the Devil's Washbowl to Buhl reach, or (b) provide 10.0 cfs directly to Blue Lakes (multiplying 51 cfs by 20% equals approximately 10 cfs).

In 2009, with the inclusion of Water District 140 in the delivery call and to account for ground water rights junior to December 28, 1973 located within Water District 140, the Director increased the simulated steady state obligation in the Devil's Washbowl to Buhl reach to 59.31 cfs. Therefore, the direct delivery requirement to Blue Lakes' facility was increased to 11.9 cfs (20% of 59.31 cfs).

On July 2, 2009, North Snake Ground Water District ("North Snake") and Magic Valley Ground Water District ("Magic Valley") filed a mitigation plan for the Blue Lakes delivery call under CM Rule 43. North Snake and Magic Valley will be referred to hereafter as North Snake/Magic Valley. On January 11, 2010, North Snake/Magic Valley amended the mitigation plan. The amendment will be discussed later in this text.

On August 18, 2009, A&B Irrigation District ("A&B") filed a CM Rule 43 mitigation plan for the Blue Lakes call.

On October 20, 2009, Southwest Irrigation District ("Southwest") and Goose Creek Irrigation District ("Goose Creek") filed a joint CM Rule 43 mitigation plan for both the Blue Lakes call and a separate call by Clear Springs Foods, Inc. ("Clear Springs"). Southwest and Goose Creek will be jointly referred to hereafter as Southwest/Goose Creek.

FINDINGS OF FACT

DESCRIPTION OF THE PLANS

North Snake/Magic Valley Plan

1. On January 11, 2010, North Snake/Magic Valley filed *Groundwater Districts' Statement Regarding Mitigation Activities under Mitigation Plan for Blue Lakes*. The statement amends the original mitigation plan, and establishes that “the groundwater districts intend to provide only direct delivery of water to Blue Lakes Trout Company, Inc. . . . to mitigate for material injury to Blue Lakes water rights.” North Snake/Magic Valley can deliver water directly to Blue Lakes because North Snake/Magic Valley acquired a portion of water rights equal to 10.0 cfs of water flowing in Alpheus Creek.

A&B Mitigation Plan

2. A&B irrigates 2,063 enlargement acres with ground water authorized by ground water enlargement rights that are subordinated to a priority date of 1994. These 2,063 enlargement acres are subject to curtailment under the Blue Lakes call. Alternatively, A&B could mitigate for the depletions caused by the ground water diversions to irrigate the 2,063 enlargement acres.

3. To compensate for the depletions, A&B converted the irrigation of 1,378 acres originally irrigated with ground water authorized by a 1948 priority water right to surface water irrigation. The surface water delivered to the 1,378 conversion acres is storage water held by A&B under contract with the United States Bureau of Reclamation (“USBR”). In addition, A&B enrolled 121 acres in the federal CREP program, labeled in the mitigation plan as voluntary curtailment.

Southwest /Goose Creek Plan

4. The Southwest/Goose Creek mitigation plan consists primarily of conversion of irrigation with ground water to irrigation with surface water. In addition there is some voluntary curtailment under the federal CREP program or other miscellaneous voluntary curtailment.

PROCEDURAL FACTS

5. The North Snake/Magic Valley mitigation plan was protested by Blue Lakes and Clear Springs. North Snake/Magic Valley's petition to strike Clear Springs' protest was denied by the interim director. *Order Granting Motion to Limit Scope of Hearing; Denying Motion to Strike Clear Springs' Protest and Scheduling Order* at 4-5 (December 22, 2009).

6. The A&B mitigation plan was protested by Blue Lakes, North Snake/Magic Valley, the City of Pocatello ("Pocatello"), and the Unit A Association ("Unit Association"), a group of surface water irrigators within Unit A of A&B. The Unit A Association receives surface storage water for irrigation under contracts with the USBR.

7. The Southwest/Goose Creek mitigation plan was protested by Clear Springs. Clear Springs protested only the portion of the plan proposing mitigation for a delivery call by Clear Springs.

8. On December 22, 2009, the interim director issued an *Order Granting Motion to Limit Scope of Hearing; Denying Motion to Strike Clear Springs' Protest and Scheduling Order*. In his order, the interim director prohibited Blue Lakes from presenting evidence in these proceedings regarding the extent of injury previously determined in the May 2005 Order. The interim director stated that the "hearing on the three mitigation plans that have been filed with the Department shall be limited to the ability of the plans, either individually or collectively, to satisfy the mitigation requirement of 59.3 cfs to the Devil's Washbowl to Buhl Gage spring reach

or 11.9 cfs to Blue Lakes” Furthermore, the interim director stated: “Protestants to the mitigation plans are precluded from addressing, in these proceedings, those issues that are on appeal, particularly: model uncertainty, the trimline, spring apportionment, the amount of material injury found, the amount of mitigation owed, and injury to water right 36-7210.”

9. The Unit A Association’s protest to A&B’s mitigation plan asserted that the use of surface storage water to lands previously irrigated with ground water would reduce the surface water supply to Unit A Association members, and alleged that this reduction would cause injury to its members. The Unit A Association filed a motion for summary judgment on the issue of injury. On March 31, 2010, the interim director issued an *Order Denying Unit A Association’s Motion for Summary Judgment*. In the order, the interim director concluded that A&B holds the water rights in trust for its patrons who beneficially use the water. The order concluded that the trust relationship establishes a fiduciary duty in the irrigation district. Whether or not there is a breach of the fiduciary duty is not an injury question before the Department. The interim director further held that, “IDWR is not authorized to determine whether an individual patron within an irrigation district is receiving the patron’s entitlement under the trust relationship with the irrigation district.”

10. In a subsequent order issued April 6, 2010, the interim director stated that the *Order Denying Unit A Association’s Motion for Summary Judgment* further limits the scope of evidence by prohibiting Unit A Association from presenting evidence whether ““an individual patron within an irrigation district is receiving the patron’s entitlement under the trust relationship with the district.”” The interim director further stated that he would “prohibit presentation of information on the subject at the April 7-8, 2010 hearing.”

ANALYSIS OF MITIGATION PLANS

11. The Department's technical staff input the information submitted with the mitigation plans and, using the ESPA Model ("ESPAM"), simulated the reach gains resulting from the proposed mitigation. A summary table of the simulations is attached to this order as Attachment A. The attached table was distributed to the parties on February 19, 2010.

POSITIONS/AGREEMENTS OF THE PARTIES

12. Based on the ESPAM simulations, the parties determined that each of the mitigation plans filed by North Snake/Magic Valley, A&B, and Southwest/Goose Creek satisfied the mitigation requirements of the May 2005 Order, as amended. Based on the ESPAM simulations, the parties executed various stipulations regarding the adequacy of the submitted plans. Blue Lakes recognized these quantities satisfied the requirements of the May 2005 Order. In recognizing the adequacy of the plans to address the requirements of the May 2005 Order, Blue Lakes did not waive any possible issues regarding increased mitigation that may be associated with challenges to the determination of the mitigation quantities in the May 2005 Order. The May 2005 Order has been appealed and is before the Idaho Supreme Court.

13. With the above recognized mitigation, the only issue remaining for the April 7-8, 2010 hearing was the dispute between the Unit A Association and A&B regarding the delivery of surface water to lands previously irrigated by ground water.

14. A&B is delivering surface water derived from storage and reservoirs constructed on the Snake River to irrigate approximately 1,378 Unit B acres that were once irrigated with ground water.

15. The lands once irrigated with ground water are also described as a place of use for storage water from the Snake River.

16. A&B can physically deliver the storage water for irrigation to the acres previously irrigated with ground water.

CONCLUSIONS OF LAW

1. CM Rule 43 states as follows:

01. Submission of Mitigation Plans. A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information: (10-7-94)

a. The name and mailing address of the person or persons submitting the plan. (10-7-94)

b. Identification of the water rights for which benefit the mitigation plan is proposed. (10-7-94)

c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies. (10-7-94)

d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03. (10-7-94)

02. Notice and Hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights. (10-7-94)

03. Factors to Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: (10-7-94)

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law. (10-7-94)

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods. (10-7-94)

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The

mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan. (10-7-94)

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. (10-7-94)

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. (10-7-94)

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use. (10-7-94)

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (10-7-94)

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan. (10-7-94)

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge. (10-7-94)

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury. (10-7-94)

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. (10-7-94)

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan. (10-7-94)

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies. (10-7-94)

o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions. (10-7-94)

2. The three mitigation plans submitted to the Director contained sufficient

information “to evaluate the factors set forth in Rule Subsection 043.03.” CM Rule 43.01.d.

The three mitigation plans were published and subsequently protested. CM Rule 43.01.02. A hearing occurred on April 7, 2010. *Id.*

3. The mitigation obligations established in the May 2005 Order, as amended, and simulated by ESPAM (*see* Attachment A), comply with CM Rule 43.03.e, .f, and .g. Blue Lakes stipulated that the mitigation plan submitted by North Snake/Magic Valley will deliver up to 10.0 cfs of water from Alpheus Creek directly to Blue Lakes, thereby complying with CM Rule 43.03.a and .b. Blue Lakes stipulated that the mitigation plan submitted by A&B will increase reach gains through conversions and CREP participation by 1.27 cfs, and add an additional flow of 0.4 cfs to the flows of Alpheus Creek, thereby complying with A&B's obligation under the May 2005 Order, as amended, and CM Rule 43.03.a, .b, and .d-g. The mitigation plan submitted by Southwest/Goose Creek will increase reach gains by 10.20 cfs and add 2.4 cfs to the flows of Alpheus Creek through conversions, CREP participation, or other miscellaneous voluntary curtailment, thereby complying with CM Rule 43.03.a, .b, and .d-g.

5. The mitigation plans submitted by North Snake/Magic Valley, A&B, and Southwest/Goose Creek satisfy the mitigation requirements of the May 2005 Order, as amended. The mitigation plans and the use of water for mitigation are in accordance with the factors set forth in CM Rule 43.03 and approval of the mitigation plans will not injure other water users, CM Rule 43.02.

6. Clear Springs' protest to the North Snake/Magic Valley mitigation plan raised issues about the magnitude of injury and the method by which injury was calculated. The interim director refused to allow evidence, in these proceedings, regarding those issues. *Order Granting Motion to Limit Scope of Hearing; Denying Motion to Strike Clear Springs' Protest*

and Scheduling Order. Clear Springs did not attend the hearing, and no evidence was presented by Clear Springs at the hearing regarding its issues.

7. Pocatello and North Snake/Magic Valley argue that any mitigation offered in excess of the quantity required should be recognized by the Department as mitigation credits. The Department will not institute a bookkeeping accounting for mitigation in excess of what was required. If additional mitigation is required in the future, or other ground water users must provide mitigation, any junior ground water right holder may propose to the Department that previous activities resulting in simulated reach gains in excess of the mitigation obligation be considered.

8. A&B argued that springs discharging to Alpheus Creek are used for calibration in ESPAM, and that, as an alternative to the method employed in the May 2005 Order for simulating the mitigation benefits, the Department should accept the higher calibration numbers as the benefits of the mitigation plan. The interim director declines to adopt this alternative at the present time, and concludes that the A&B and North Snake/Magic Valley plans satisfy their obligations under the May 2005 Order, as amended.

ORDER

IT IS HEREBY ORDERED that the mitigation plans filed by the North Snake Ground Water District and Magic Valley Ground Water District, A&B Irrigation District, and Southwest Irrigation District and Goose Creek Irrigation District, filed to mitigate for the Blue Lakes call are approved by the interim director, subject to further refinement if there is a determination of further injury.

IT IS FURTHER ORDERED that this is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the issuance of this

order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter 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 a hearing was held, the final agency action was taken, the party seeking review of the order resides, or 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 issuance of the final order; (b) 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* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 7th day of May, 2010.



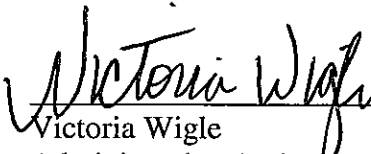
GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of May, 2010, the above and foregoing document was served to the following by the method indicated:

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Victoria Wigle
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Idaho Department of Water Resources

Table of computed obligation and mitigation for Blue Lakes Call

entity	acres	Impact to reach (cfs)	Obligation to spring (cfs)	Mitigation plan benefit (cfs)
N.Snake	23,397	25.59	5.1	^
Magic V*	29,659	17.37	3.5	^
Carey V	1,970	0.97	0.2	^
non-member participants~	3,149	3.91	0.8	^
IGWA Subtotal	58175.2	47.8	9.6	10
A&B	2,063	1.27	0.3	0.40
Southwest+Goose Cr#	13,641	10.20	2.1	2.4
Total	73,879	59.3	11.9	12.8

^ N Snake + Magic V + Carey V = 10 cfs Pristine Spg
 ~ all non-member participants may not be in either N Snake, Magic V, or Carey V
 * About 2,000 junior acres within Magic Valley are in WD 140
 # Includes 0.1 cfs benefit from CREP lands within SWID as evaluated by Department's CREP shapefile (733 ac).
 No evaluation of benefit from voluntary reductions.