

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

IN THE MATTER OF DISTRIBUTION OF WATER)
TO WATER RIGHTS NOS. 36-02356A, 36-07210,)
AND 36-07427)

(Blue Lakes Delivery Call))
_____)

IN THE MATTER OF DISTRIBUTION OF WATER)
TO WATER RIGHTS NOS. 36-04013A, 36-04013B,)
AND 36-07148 (SNAKE RIVER FARM))

**(Clear Springs, Snake River)
Farm Delivery Call)**)
_____)

**ORDER DENYING
DAIRYMEN'S PETITION
FOR RECONSIDERATION**

On July 5, 2007, the Director of the Department of Water Resources ("Director" or "Department") issued separate orders in the above-entitled matters approving the replacement water plan of the Idaho Dairymen's Association ("IDA"). *Order Approving Dairymen's and IGWA's 2007 Replacement Water Plans, Rescinding 2007 Curtailment, and Setting Hearing and Prehearing Schedule* for the Blue Lakes Delivery Call and the Clear Springs, Snake River Farm Delivery Call (hereinafter "July 5 Orders"). The July 5 Orders were final orders of the Department. Because the July 5 Orders were issued before an opportunity for hearing, the orders provided that all aspects of the orders shall be subject to review at the Department hearing in these matters (now scheduled for November 28, 2007). *See July 5 Orders* at 12.

IDA filed a timely petition for reconsideration of the July 5 Orders on July 19, 2007. *Petition for Reconsideration of Order Approving Dairymen's and IGWA's 2007 Replacement Water Plans, Rescinding 2007 Curtailment, and Setting Hearing and Prehearing Schedule* ("Petition"). IDA asserts that the July 5 Orders "misapprehend the nature and extent of mitigation proposed by the Dairymen and contemplated by the parties to the Mitigation Agreement ("Agreement") submitted for the Department's approval on April 13, 2007." *Petition* at 1-2. IDA further asserts that the July 5 Orders "do not appear to incorporate the mitigation obligations or contributions of ground water users other than the Dairymen and Idaho Ground Water Appropriators, Inc.[] ("IGWA") in analyzing the sufficiency of mitigation for 2007." *Id.* at 2. IDA requests clarification "to confirm whether, and to what extent, the mitigation of other ground water users ... are incorporated into the total mitigation/replacement water supply for 2007 so as not to impose a disproportionate obligation on the Dairymen." *Id.* Finally, IDA concludes, "the Order purports to require from the Dairymen replacement water in 2007 that will exceed their mitigation under existing law and the Agreement." *Id.*

On August 8, 2007, the Director issued an order granting IGWA's Petition to allow the Department additional time to review the merits of the Petition. *Order Granting Dairymen's Petition for Reconsideration to Allow Time for Further Review*. Otherwise, the Petition would have been deemed denied by operation of law after twenty-one (21) days of its receipt. IDAPA 37.01.01.740.02.a. The remainder of this order discusses the issues raised in IDA's Petition.

Mitigation Offered by IDA

IDA asserts that "[t]o the extent the July 5 Orders conclude that the Dairymen's proposed mitigation is a pledge of 9,500 acre-feet of water in 2007, they mischaracterize the terms of the Agreement and the Statement of Participation submitted to the Department, and they should be modified accordingly." *Petition* at 6. IDA filed its Mitigation Agreement ("IDA Agreement") with the Department on April 13, 2007. The agreement states that, "The Mitigating Dairymen shall provide mitigation for their aggregate annual depletion of the spring and spring fed surface water supplies which are hydraulically connected to the ESPA." *IDA Agreement* at 4. The agreement anticipates that the aggregate annual depletion of water caused by the dairies will be based on a consumption of 29.1 gallons per day per cow. The agreement provides that "if further analysis shows that the depletion to the ESPA per cow changes" following approval by the Department, then "there will be a corresponding, proportional change to the mitigation provided under this Agreement." *Id.*

On June 15, 2007, the Director issued orders curtailing junior priority ground water rights effective July 6, 2007 in portions of Water District Nos. 34 and 130 unless acceptable mitigation was provided by June 29, 2007. *Order Curtailing Junior Priority Ground Water Rights (Blue Lakes Delivery Call)* and *Order Curtailing Junior Priority Ground Water Rights (Clear Springs, Snake River Farm Delivery Call)* ("June 2007 Orders"). The orders provided:

[T]he Mitigation Plan submitted by the Idaho Dairymen's Association, the Thousand Spring Water Users Association and signing members, Clear Springs Foods, Inc., and members of the Surface Water Coalition, is conditionally approved. Members of the Idaho Dairymen's Association who sign the Mitigation Plan on or before July 6, 2007 shall not be subject to curtailment unless the Director determines—after consideration of requested information that must be submitted to the Director no later than July 3, 2007—that the Mitigation Plan is insufficient to mitigate for depletions to the Eastern Snake Plain Aquifer caused by the Idaho Dairymen's Association in the third year of the five-year phased-in substitute curtailment period.

June 2007 Orders at 16.

In addressing the Mitigation Plan, the June 2007 Orders at Finding of Fact 21 state: "Initial review of the IDA Agreement by Department staff indicates that the depletion to the ESPA caused by dairy uses associated with one mature cow is 74 gallons of water per day. The Department has requested and is currently awaiting additional information from IDA regarding its Agreement. [Citation omitted]. The deadline for submittal of additional information is July 3, 2007." *Id.* at 10, 11.

The Director's July 5 Orders rescinding the June 2007 Orders found that, "[t]he IDA has pledged 9,500 acre-feet of water to be run through the North Side Canal and associated laterals for purposes of recharge after irrigation of lands serviced by the North Side Canal Company is complete." *July 5 Orders* at 4. Based on the acceptance of "IDA's pledge for 9,500 acre-feet of water to be used for recharge purposes in 2007 and IGWA's Replacement Plan and Supplemental Plan for 2007," the Director determined to rescind his June 2007 Orders. *July 5 Orders* at 10. This determination was based upon the Director's understanding of the provisions of the IDA Mitigation Agreement and the additional information submitted to the Director by IDA on July 3, 2007, consisting of a letter from Jack Davis, President of IDA, and an additional letter and information packet submitted by legal counsel for IDA ("IDA July 3 Information").

The IDA July 3 Information confirmed participation in the Mitigation Agreement by each IDA member "whose water rights may be subject to curtailment under the Department's pending Orders." *Letter from Jack Davis to David R. Tuthill, Jr.* (July 3, 2007). The letter further stated, "IDA's intent is to obtain sufficient water in 2007 to satisfy the requirements of the Agreement with respect to these members' rights for 2007." *Id.* In addition, IDA submitted documentation confirming "IDA's request to rent 9,500 acre-feet of water from the WD 01 rental pool for 2007 mitigation purposes, and a Resolution of the North Side Canal Company Board of Directors approving rental and carriage of 9,500 acre-feet of water for IDA in 2007." *Letter from Michael C. Creamer to David R. Tuthill, Jr.* at 1 (July 3, 2007).

The remainder of the IDA July 3 Information concerned IDA's justification for use of 29.1 gallons per day ("gpd") per mature cow as "a reasonably accurate estimate of depletions to the ESPA attributable to dairy operations by IDA's members." *Id.* After reviewing the IDA July 3 Information, the Department considers the 29.1 gpd estimate a more reasonable estimate of the average drinking water requirements of mature dairy cows rather than the total average daily consumptive use of water that takes place on Eastern Snake Plain dairy facilities. The rights that IDA seeks to protect include all consumptive uses of water at dairy facilities. Although IDA argues that the 29.1 gpd estimate is supported by relevant published data, it acknowledges that there may only be one relevant study available that supports this estimate. IDA deems other studies that support higher estimates closer to the Department's facility volume sample estimate as either outdated or "driven by non-drinking water use of the facilities."

It is apparent from a review of the IDA July 3 Information that IDA and the Department currently are rather far apart in their respective approaches for determining Eastern Snake Plain Aquifer ("ESPA") depletions resulting from dairies. The Department is prepared to work with IDA and other parties in determining the most "reasonably accurate estimate of depletions to the ESPA attributable to dairy operations." The immediate focus of this order, however, is to address IDA's objection to the quantity of mitigation water that IDA is required to provide in 2007 to compensate for depletions caused by its members. IDA also recognized that the immediate focus had to be on ensuring protection for its members for 2007:

IDA believes the 29.1 gpd quantity is representative of average water use for its dairies in Water Districts 120 and 130 and should be accepted by the Department. Nevertheless, provided the Mitigation Agreement can be approved for 2007 and IDA and its members can avoid potential curtailment and the

attendant legal and economic consequences and focus on implementing the Mitigation Agreement, IDA would propose that it would prepare and undertake a study to obtain at least a full year's worth of data from an appropriately sized and constituted sample of dairies in Water Districts 120 and 130 to document this number. This study also would include an evaluation of the consumptive use associated with dairy diversions.

Letter from Michael C. Creamer to David R. Tuthill, Jr. at 3. The Director relied upon this statement and IDA's statements that it had rented and arranged for the conveyance of 9,500 acre-feet of replacement water in 2007 as the basis for his determination that "[t]he IDA has pledged 9,500 acre-feet of water to be run through the North Side Canal and associated laterals for purposes of recharge after irrigation of lands serviced by the North Side Canal Company is complete." *July 5 Orders* at 4.

Despite the above statements suggesting a commitment to provide 9,500 acre-feet of replacement water in 2007, IDA now asserts that the July 5 Orders "mischaracterize the Dairymen's commitments under the Agreement." *Petition* at 2. In support of its position, IDA states:

[T]he Dairymen's member[s] who received curtailment notices hold 122,505 mature dairy cows. The Dairymen's president, Jack Davis, has effectively elected participation for all of these members at the 29.1 gpd level by his July 3 letter to the Department. This will require 3,993.20 acre-feet of replacement water to be provided under the Agreement for 2007. Based on the total signatures obtained by the Dairymen as of July 6th (i.e. including members who did not receive a curtailment notice) and Idaho State Department [of] Agriculture 2007 data, the total number of mature dairy cows implicated by the signed Statements of Participation is 174,310. At 29.1 gpd, this would equate to a total aggregate depletion (and 2007 replacement water requirement) of 5,681.85 acre-feet.

Petition at 5-6. It thus appears that based on the 29.1 gpd per mature cow level of mitigation urged by IDA, it would be responsible for providing only 3,993.20 acre-feet of replacement water to cover those members that received curtailment notices under the July 5 Orders. IDA further suggests that if the Director approves of the 29.1 gpd level of mitigation, its members who signed the Mitigation Agreement but are not subject to curtailment under the July 5 Orders would continue to participate, thus resulting in IDA providing a total of 5,681.85 acre-feet of replacement water.

The Director is not in a position to agree for 2007 that 29.1 gpd per mature dairy cow represents a "reasonably accurate estimate of depletions to the ESPA attributable to dairy operations by IDA's members." Information available to the Department suggests that when accounting for all of the water uses associated with the operation of a dairy, the total water usage is closer to 70 gpd per mature cow. In order to resolve the issue for 2007 only, the Director determines that it is appropriate to continue use of the 9,500 acre-foot number relied upon in the July 5 Orders to rescind the curtailment orders. This is consistent with the Director's understanding of the statement in the IDA July 3

Information submittal that “provided the Mitigation Agreement can be approved for 2007 and IDA and its members can avoid potential curtailment and the attendant legal and economic consequences and focus on implementing the Mitigation Agreement,” then IDA would participate in further studies to quantify total water use at dairy facilities in Water Districts 120 and 130.

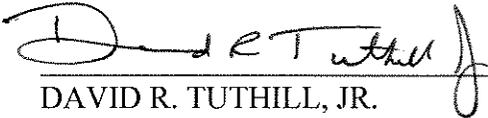
Mitigation by Others

In addition, IDA expresses a concern that the July 5 Orders do not address whether the Dairymen are “being called on to provide mitigation for persons or entities who are not participating in or contributing to mitigation efforts but that are subject to curtailment orders.” *Petition* at 6. In response to this concern, the Director represents that IDA and its members have not been called upon to mitigate for depletions caused by other water users subject to curtailment under the June 2007 Orders. Other water users subject to curtailment under those orders are understood either to be members of ground water districts covered by the 2007 Replacement Water Plan of the Idaho Ground Water Appropriators, Inc., or if not they have been sent letters by the Department pursuant to H.B. 737, 2006 Idaho Sess. Laws 1089, informing them of the obligation to participate in an approved mitigation plan or be subject to appropriate enforcement.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the *Petition for Reconsideration of Order Approving Dairymen’s and IGWA’s 2007 Replacement Water Plans, Rescinding 2007 Curtailment, and Setting Hearing and Prehearing Schedule* filed by the Idaho Dairymen’s Association is denied.

Dated this 17th day of August, 2007.



DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of August 2007, the above and foregoing, was served by the method indicated below, and addressed to the following:

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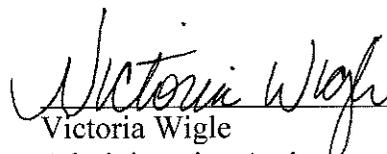
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