

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER) Docket No. CM-MP-2012-002
TO WATER RIGHT NO. 36-07071)
) **FINAL ORDER APPROVING**
(JOHN W. JONES, JR., and DELORIS D. JONES)) **MITIGATION PLAN**
_____)

On May 4, 2012, the Director of the Department of Water Resources (“Director” or “Department”) received a *Stipulated Mitigation Plan and Request for Order* (“Mitigation Plan”) filed jointly by counsel for John W. and Deloris D. Jones (the “Jones”), the North Snake Ground Water District, Magic Valley Ground Water District, Southwest Irrigation District (the “Ground Water Districts”) and the Idaho Ground Water Appropriators, Inc. (“IGWA”). The Mitigation Plan was filed pursuant to Rule 43.03.o of the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”). IDAPA 37.03.11 *et seq.*

FINDINGS OF FACT

1. On July 12, 2011, the Department received a letter from the Jones alleging that their water right no. 36-7071 was being materially injured by junior ground water pumping. The letter requested the curtailment of junior ground water rights pursuant to Idaho Code and the CM Rules.
2. The Department treated the letter as a delivery call under the CM Rules and a petition to initiate a contested case proceeding under the Department’s administrative rules. CM Rule 30. The Department assigned the case docket number CM-DC-2011-002.
3. On July 25, 2011, IGWA moved to be designated as a respondent or alternatively to intervene in the proceeding. The Department granted IGWA’s petition to intervene on August 3, 2011.
4. A prehearing conference was held on August 8, 2011. The parties agreed to a schedule for the hearing and a scheduling order was issued by the Department.
5. On November 9, 2011, a stipulation was submitted to the Department requesting that the scheduling order be vacated while settlement discussions take place between the parties. The Department granted the request.

6. On May 4, 2012, the Jones, the Ground Water Districts and IGWA filed the Mitigation Plan with the Department. The Mitigation Plan stems from negotiations between the parties. The mitigation plan is made up of a Settlement Agreement and Lease. The Mitigation Plan provides:

The parties agree that the Settlement Agreement together with the Lease are intended to be a mitigation plan as defined in the Conjunctive Management Rules and request the Director of IDWR issue an Order confirming the Settlement Agreement as a Final Mitigation Plan for the duration of the Lease and dismissing the underlying proceeding pursuant to paragraph 5.8 of the Settlement Agreement,

Mitigation Plan at 2.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.”

2. Idaho Code § 42-603 grants the Director authority to adopt rules governing water distribution. In accordance with chapter 52, title 67, Idaho Code, the Department adopted rules regarding the conjunctive management of surface and ground water effective October 7, 1994. CM Rule O. The CM Rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against junior-priority ground water rights in an area having a common ground water supply. CM Rule 1.

3. CM Rule 42.02 states as follows: “The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.”

4. CM Rule 43.01 sets forth the criteria for submission of a mitigation plan to the

Director.

5. CM Rule 43.03 establishes the factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights. CM Rule 43.03.o states as follows: “Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not be fully in compliance with these provisions.”

6. The Mitigation Plan is entered into between the Jones, the Ground Water Districts and IGWA in accordance with CM Rule 43.03.o. *Mitigation Plan* at 1. The purpose of the Mitigation Plan is to “fully and completely” mitigate the hydraulic impact of the Ground Water Districts’ and IGWA’s members for the duration of the lease. *Id.* at 2. “[T]he parties request that the Director enter an order without further notice or hearing accepting the Agreement as a complete and final Stipulated Mitigation Plan ... on the terms of their stipulated settlement” *Id.* at 3.

7. Having reviewed the Mitigation Plan, the CM Rules, and the proceedings herein, the Director approves the Mitigation Plan. CM Rule 43.03.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

The Mitigation Plan entered into between the Jones, the Ground Water Districts and IGWA is APPROVED.


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 service 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 unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the Director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the Director to contest the action. The person shall file with the Director, within fifteen (15) days after receipt of written notice of the action issued by the Director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the Director and requesting a hearing. *See* Idaho Code § 42-1701A(3).

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 the service date of the final order; (b) of an order denying a 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 18th day of May, 2012.


GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of May, 2012, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>Geoffrey Wardle HAWLEY TROXELL P.O. Box 1617 Boise, ID 83702-1617 gwardle@hawleytroxell.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Randall C. Budge Candice M. McHugh T.J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net cmm@racinelaw.net</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>



Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources