

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

IN THE MATTER OF DISTRIBUTION OF)
WATER TO WATER RIGHTS NOS. 36-04013A,)
36-04013B, AND 36-07148 (SNAKE RIVER) **ORDER REGARDING**
FARM)) **GROUND WATER DISTRICTS'**
) **PLAN OF ACTION**
)
(Water District Nos. 130 and 140))
_____)

On July 22, 2009, the Director of the Department of Water Resources (“Director” or “Department”) issued his *Order Curtailing Ground Water Rights In Water District Nos. 130 and 140 Junior to January 8, 1981* (“Curtailment Order”). The Curtailment Order informed the Magic Valley and North Snake Ground Water Districts (“Ground Water Districts”) that they were no longer in compliance with the terms of their *2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District* (“2009 Plan”), as approved by the Director’s *Order Approving Ground Water Districts’ Replacement Water Plan for 2009* (March 26, 2009) (“March 26 Order”), and subsequently modified by the Director’s *Order Granting Partial Stay of Ground Water Districts’ Replacement Water Plan for 2009* (May 15, 2009) (“May 15 Partial Stay Order”).

In order to comply with the terms of the 2009 Plan, as approved by the March 26 Order, the Ground Water Districts were required to: (1) construct the over-the-rim pipeline; (2) convert approximately 1,060 new conversion acres; (3) continue conversion of approximately 9,300 acres; and (4) continue enrollment of acres in the Conservation Reserve Enhancement Program (“CREP”).

Of the four requirements from the March 26 Order, only the over-the-rim pipeline was stayed. Therefore, “satisfaction of the remainder of the 2009 Plan, approved by the March 26, 2009 Order of the Director, shall constitute acceptable and sufficient replacement water or mitigation by the Ground Water Districts for the 2009 and 2010 calendar years.” *May 15 Partial Stay Order* at 2 (emphasis added). As stated in the Curtailment Order, the deficiency that exists in implementation of the 2009 Plan, as modified by the May 15 Partial Stay Order, is full conversion of the existing 9,300 conversion acres. The deficiency is not minor—fewer than half of the acres proposed for conversion have or will receive surface water delivery for the 2009 irrigation season.

On July 28, 2009, the Department received the *Ground Water Districts' Plan of Action and Petition for Reconsideration and Request for Hearing* ("Plan of Action"). The Plan of Action does not state that the Ground Water Districts intend to convert the existing 9,300 conversion acres, as required by the Director's previous orders and agreed to by the parties. Instead, the Ground Water Districts request that the Director remove the May 15 partial stay and require construction of the over-the-rim pipeline to satisfy Clear Springs. Citing Judge Melanson's recent *Order on Petition for Judicial Review* (June 19, 2009), the Ground Water Districts request that the Director suspend the Curtailment Order until a hearing has occurred.

The 2009 Plan was proposed by the Ground Water Districts as a replacement water plan and a mitigation plan. The Director approved the 2009 Plan as a replacement water plan, but also published notice of the Plan in accordance with Rule 43 of the Department's Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"), IDAPA 37.03.11.043. The 2009 Plan was published in the Twin Falls *Times News* on April 2 and 9, 2009, with a protest end date of April 20, 2009. A timely protest to the 2009 Plan was filed by Clear Springs. A petition to intervene was filed by the Idaho Dairymen's Association. On May 15, 2009, Gerald F. Schroeder was appointed by the Director to serve as independent hearing officer in the mitigation plan hearing. It is the Department's intention that a hearing on the 2009 Plan will have occurred and a decision will be in place prior to the start of the 2010 irrigation season.

When the March 26 Order that approved the 2009 Plan as a replacement water plan was issued, the Director and the parties did not have the guidance of Judge Melanson's June 19, 2009 decision. Based on Judge Melanson's decision, the Director should not have approved the Ground Water Districts' 2009 Plan as a replacement water plan. The 2009 Plan was published as a mitigation plan in accordance with CM Rule 43. Based on guidance from Judge Melanson, the Ground Water Districts may not construct the pipeline to satisfy the mitigation obligation to Clear Springs until it has been approved as a CM Rule 43 mitigation plan. If the 2009 Plan is approved as a CM Rule 43 mitigation plan, the mitigation obligation of the Ground Water Districts would then be satisfied and the Curtailment Order rescinded.

After the 2009 Plan was published and the protest deadline expired on the mitigation plan, the Director entered the May 15 Partial Stay Order. The May 15 Partial Stay Order accepted the agreement of Clear Springs and the Ground Water Districts that, for 2009 and 2010, acceptable "mitigation" would consist of: (1) continued conversion of approximately 9,300 acres; (2) conversion of approximately 1,060 new acres; and (3) continued enrollment of acres in CREP. The May 15 Partial Stay Order is consistent with CM Rule 43.03.o,¹ which allows the Director to approve a mitigation plan if it is agreed to by the parties. The Curtailment Order was entered to enforce the terms of the agreement. If the Ground Water Districts can demonstrate conversion of the 9,300 existing conversion acres, the 2009 mitigation obligation could be satisfied and the Curtailment Order rescinded.

¹ "Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include . . . [w]hether 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." CM Rule 43.

Based upon the contents of the Ground Water Districts' Plan of Action, the Director determines that the Ground Water Districts are not complying with the terms of the May 15 Partial Stay Order. Based on the response of the Ground Water Districts, the Director will not alter the requirement that ground water rights junior to January 8, 1981, must curtail on July 31, 2009, starting at 12:01 a.m.

Dated this 29th day of July, 2009.

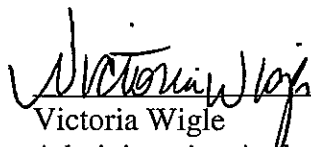


GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of July 2009, the above and foregoing, was served by first class U.S. Mail and electronic mail to the following:

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