

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF SOUTHWEST AND
GOOSE CREEK IRRIGATION DISTRICTS
MITIGATION PLAN FOR THE SURFACE
WATER COALITION DELIVERY CALL

Docket No. CM-MP-2010-01

**FINAL ORDER APPROVING SWID'S
INTERIM MITIGATION PLAN FOR
2017**

FINDINGS OF FACT

1. On June 15, 2010, Southwest Irrigation District and Goose Creek Irrigation District (collectively, "SWID") filed an *Amended Mitigation Plan* with the Director ("Director") of the Idaho Department of Water Resources ("Department") in response to a delivery call made by A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively, "SWC"). The Department published notice of the *Amended Mitigation Plan*. The SWC filed a protest.

2. On November 22, 2013, SWID and the SWC filed a *Joint Motion for Approval of Interim Mitigation Agreement* ("Motion"). Attached to the Motion was an *Interim Mitigation Agreement* ("Mitigation Plan").

3. SWID and the SWC submitted the Mitigation Plan 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.* The Mitigation Plan "provides for certain aquifer mitigation actions to be undertaken by [SWID] on an annual basis, including groundwater recharge, conversions, and voluntary curtailment." *Motion* at 2. "In exchange, the [SWC] agrees that the [SWID]'s members' junior priority ground water rights shall not be subject to curtailment in response to the SWC's water delivery call or any order issued by [the Department] during the term of the agreement." *Id.* at 2-3. The term of the Mitigation Plan was from January 1, 2013, to December 31, 2015. *Mitigation Plan* at 4.

4. On November 25, 2013, the Director issued a *Final Order Approving Interim Mitigation Plan*, approving the Mitigation Plan upon certain conditions. *Final Order Approving Interim Mitigation Plan* at 3. Specifically, the Director ordered that "[a]ll activities required pursuant to the Mitigation Plan, such as monitoring, reporting, and verification of data, are the responsibility of the parties to the Mitigation Plan." *Id.* The Director ordered that "[t]he goals set forth in Covenants 7 and 8 are applicable only to the parties to the Mitigation Plan. The

Department is not responsible for monitoring, reporting, or any other activity related to the goals.” *Id.* The Director also ordered that “[t]he Mitigation Plan shall be in effect until December 31, 2015, or until otherwise notified by SWID and the SWC.” *Id.* The Director stayed the contested case on the *Amended Mitigation Plan* “until December 31, 2015, until otherwise notified in writing by SWID and the SWC.” *Id.*

5. On February 9, 2016, SWID and the SWC filed a *Joint Motion for Approval of Interim Mitigation Agreement for 2016* (“Joint Motion”). Attached to the Joint Motion were the Mitigation Plan and a *First Amendment to Interim Mitigation Agreement* (“Amendment”). The Amendment simply extended the term of the Mitigation Plan “for one (1) year from January 1, 2016 to December 31, 2016.” *Amendment* at 1.

6. On March 29, 2016, the Director issued a *Final Order Approving Mitigation Plan for 2016*, approving the Mitigation Plan as amended upon the same conditions described in Finding of Fact 4. *Final Order Approving Mitigation Plan for 2016* at 3-4. The Director ordered that “the Mitigation Plan shall be in effect until December 31, 2016, or until otherwise notified in writing by SWID and the SWC.” *Id.* at 4. The Director also stayed the contested case on the *Amended Mitigation Plan* “until December 31, 2016, or until otherwise notified in writing by SWID and the SWC.” *Id.*

7. On December 21, 2016, SWID and the SWC filed a *Stipulation and Joint Motion for Approval of Interim Mitigation Agreement for 2017* (“SWID’s Interim Mitigation Plan for 2017”). SWID and the SWC request that the Director extend the term of the Mitigation Plan for an additional year, from January 1, 2017, to December 31, 2017. *SWID’s Interim Mitigation Plan for 2017* at 3. SWID and the SWC also request that the Director stay the contested case on the *Amended Mitigation Plan* “until December 31, 2017, or until otherwise notified in writing by the Parties.” *Id.*

8. The Director published notice of SWID’s Interim Mitigation Plan for 2017 as required by the CM Rules. IDAPA 37.03.11.043.02. No protests were filed.

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 the CM Rules effective October 7, 1994. 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. IDAPA 37.03.11.001.

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.” IDAPA 37.03.11.042.02.

4. CM Rule 43.01 sets forth the criteria for submission of a mitigation plan to the Director. IDAPA 37.03.11.043.01.

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.” IDAPA 37.03.11.03(o).

6. Again, SWID and the SWC submitted the Mitigation Plan pursuant to CM Rule 43.03.o. *Mitigation Plan* at 3. The Mitigation Plan “provides for certain aquifer mitigation actions to be undertaken by [SWID] on an annual basis, including groundwater recharge, conversions, and voluntary curtailment.” *Motion* at 2. “In exchange, the [SWC] agrees that the [SWID]’s members’ junior priority ground water rights shall not be subject to curtailment in response to the SWC’s water delivery call or any order issued by [the Department] during the term of the agreement.” *Id.* at 2-3. The Director conditionally approved the Mitigation Plan pursuant to CM Rule 43.03.0.

7. SWID and the SWC request that the Director extend the term of the Mitigation Plan for an additional year, from January 1, 2017, to December 31, 2017. *SWID’s Interim Mitigation Plan for 2017* at 3.

8. Having reviewed the Mitigation Plan, SWID’s Interim Mitigation Plan for 2017, the CM Rules, and the proceedings herein, SWID’s Interim Mitigation Plan for 2017 should be approved.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that SWID's Interim Mitigation Plan for 2017 is APPROVED, effective until December 31, 2017.¹ The conditions of approval imposed by the Director's *Final Order Approving Interim Mitigation Plan* shall remain in effect.

IT IS FURTHER ORDERED that the contested case on the *Amended Mitigation Plan* is STAYED until December 31, 2017.

DATED this 8th day of February 2017.


GARY SPACKMAN
Director

¹ On January 17, 2017, the Director issued a *Final Order Curtailing Ground Water Rights Junior to June 20, 1989* ("Curtailment Order") in Docket No. CM-DC-2010-001. The Director ordered that, while SWID's water rights listed in Attachment B are subject to curtailment pursuant to the order, "curtailment of SWID's rights is STAYED pending completion of administrative proceedings related to SWID's Interim Mitigation Plan for 2017 or until further order of the Director." *Curtailment Order* at 6-7. The Director stated that, if SWID's Interim Mitigation Plan for 2017 is approved, "the watermaster shall allow participants operating in conformance with the mitigation plan to continue ground water use out of priority." *Id.* at 7. This order completes administrative proceedings related to SWID's Interim Mitigation Plan for 2017. While SWID's water rights listed in Attachment B to the Curtailment Order are subject to curtailment, the watermaster shall allow participants operating in conformance with SWID's Interim Mitigation Plan for 2017 to continue ground water use out of priority for the term of the plan.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of February 2017, the above and foregoing, was served by the method indicated below, and addressed to the following:

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Deborah Gibson
Admin. Assistant for the Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

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 section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department 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:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. 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 of: a) the service date of the final order, b) the service date 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 section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.