

**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
MITIGATION PLAN AND
DISMISSING CONTESTED CASE**

FINDINGS OF FACT

1. On January 4, 2018, Southwest Irrigation District and Goose Creek Irrigation District (collectively, “SWID”) and 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”) filed with the Idaho Department of Water Resources (“Department”) a *Joint Motion for Approval of Mitigation Agreement* (“Motion”). Attached to the Motion is a *Mitigation Agreement* (“Mitigation Plan”)¹ executed by SWID and the SWC.

2. In the Mitigation Plan, SWID agrees to, among other things, undertake “aquifer mitigation actions during the years 2018-2026 to meet the groundwater level benchmarks and the groundwater level goal set forth” in covenant seven of the agreement. *Mitigation Plan* at 2. In exchange, “and provided SWID implements the” Mitigation Plan, the SWC “agrees that junior priority ground water rights held by SWID members (located within the project boundaries of [SWID] and in good standing with each irrigation district) shall not be subject to curtailment in response to” the SWC delivery call “during the term of” the Mitigation Plan. *Id.* at 3.

3. SWID and the SWC ask the Director of the Department (“Director”) to approve the Mitigation Plan and “recognize that [SWID’s] members’ junior priority ground water rights are not subject to curtailment or any further mitigation requirements in response to” the SWC delivery call “during the term of the” Mitigation Plan. *Motion* at 3. SWID and the SWC also ask the Director to “enter a final order concluding the contested case” which began in this matter because the SWC protested SWID’s June 10, 2010, *Amended Mitigation Plan*. *Id.*²

¹ Because SWID and the SWC seek to have the *Mitigation Agreement* approved as a mitigation plan pursuant to Rule 43.03.o of the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11) (“CM Rules”), this order will refer to the agreement as a mitigation plan.

² SWID and the SWC also ask the Director to “lift the stay of the contested case.” *Motion* at 3. However the stay was only effective until December 31, 2017. See *Final Order Approving SWID’s Interim Mitigation Plan for 2017* at 4. There is no stay in place to lift.

4. The Director published notice of the Motion and Mitigation Plan 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, states:

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) authorizes the Director to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.”

2. Idaho Code § 42-603 authorizes the Director 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 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: “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 factors the Director may consider in determining whether a proposed mitigation plan will prevent injury to senior rights. One of those factors is: “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. SWID and the SWC submitted the Motion and Mitigation Plan pursuant to CM Rule 43.03.o. *Motion at 2; Mitigation Plan at 3.* SWID agrees to undertake groundwater recharge, conversions, and voluntary curtailment during the years 2018-2026 “to meet the

groundwater level benchmarks and the groundwater level goal set forth” in paragraph seven of the agreement.³ *Mitigation Plan* at 2. In addition, landowners within SWID will not irrigate with ground water “prior to April 1 or after October 31 within a given irrigation season.” *Id.* “As an alternative to providing mitigation water directly to the SWC, SWID” agrees to annually deposit money “into a trust account held for the benefit of SWC to be used for projects or actions to stabilize and/or enhance groundwater levels in the ESPA and benefit reach gains to the Snake River.”⁴ *Id.* In exchange, “and provided SWID implements the” *Mitigation Plan*, the SWC “agrees that junior priority ground water rights held by SWID members (located within the project boundaries of [SWID] and in good standing with each irrigation district) shall not be subject to curtailment in response to” the SWC delivery call “during the term of” the *Mitigation Plan*. *Id.* at 3.

7. SWID and the SWC ask the Director to approve the *Mitigation Plan* and “recognize that [SWID’s] members’ junior priority ground water rights are not subject to curtailment or any further mitigation requirements in response to” the SWC delivery call “during the term of the” *Mitigation Plan*. *Motion* at 3. SWID and the SWC also ask the Director to “enter a final order concluding the contested case.” *Id.*

8. Having reviewed the *Motion*, the *Mitigation Plan*, the *CM Rules*, and the proceedings herein, the Director concludes the *Mitigation Plan* should be approved with conditions and the contested case regarding the *Amended Mitigation Plan* should be dismissed.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the *Mitigation Plan* is APPROVED with the following conditions:

- a. All 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*.
- b. SWID shall track ground water recharge for the *Mitigation Plan* separately from the recharge Southwest Irrigation District currently undertakes for the Idaho Water Resource Board.
- c. The goals set forth in covenant seven of the *Mitigation Plan* 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. Furthermore, approval of the

³ SWID and the SWC “seek to stabilize and ultimately reverse the trend of declining groundwater levels in the SWID boundary and return ground water levels in that area to a level equal to the average of the groundwater levels from 1991-2001.” *Mitigation Plan* at 3. The *Mitigation Plan* states that if the “benchmarks or the groundwater level goal is not met, additional recharge, conversions, consumptive use reductions, or other measures . . . shall be implemented by SWID to meet the benchmarks or the groundwater level goal.” *Id.*

⁴ The *Mitigation Plan* also states that SWID and the SWC “will establish a steering committee to meet at least once annually” to “review progress” and “develop an adaptive management plan for responding to changes in groundwater levels in the SWID boundary and reach gain trends in the American Falls reach (Near Blackfoot to Milner) of the Snake River.” *Mitigation Plan* at 4.

Mitigation Plan does not affect the Department's ability to analyze a different set of wells with respect to administration of any critical ground water area or ground water management area.

IT IS FURTHER ORDERED that the Director will not curtail junior priority ground water rights held by SWID members in response to the SWC delivery call if the SWID members are participating in and operating in conformance with the Mitigation Plan. *See* IDAPA 37.03.11.040.02.c.

IT IS FURTHER ORDERED that the contested case regarding the *Amended Mitigation Plan* is dismissed.

DATED this 26th day of March 2018.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of March 2018, the above and foregoing, was served by the methods indicated below, and addressed to the following:

William Parsons
Parsons Smith Stone Loveland
& Shirley LLP
P.O. Box 910
137 W. 13th Street
Burley, Idaho 83318
wparsons@pmt.org

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

John K. Simpson
Travis L. Thompson
Paul L. Arrington
Barker Rosholt & Simpson, LLP
P.O. Box 63
Twin Falls, Idaho 83303-0063
jks@idahowaters.com
tlt@idahowaters.com
pla@idahowaters.com

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

W. Kent Fletcher
Fletcher Law Office
P.O. Box 248
Burley, Idaho 83318
wkf@pmt.org

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email



Kimi White

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.