

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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| IN THE MATTER OF THE GROUND |) | |
| WATER DISTRICTS' AND SOUTHWEST |) | CM-MP-2012-001 |
| IRRIGATION DISTRICT'S MITIGATION |) | CM-DC-2010-002 |
| PLAN FOR BLUE LAKES TROUT FARM, INC. |) | |
| _____ |) | FINAL ORDER APPROVING |
| |) | GROUND WATER DISTRICTS' |
| IN THE MATTER OF DISTRIBUTION OF |) | AND SOUTHWEST IRRIGATION |
| WATER TO WATER RIGHT NOS. 36-02356A, |) | DISTRICT'S MITIGATION |
| 36-07210, AND 36-07427 |) | PLAN FOR BLUE LAKES |
| |) | TROUT FARM, INC. |
| (Blue Lakes Delivery Call) |) | |
| _____ |) | |

FINDINGS OF FACT

1. On December 5, 2012, the Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, their associated members and mitigation only members (collectively referred to herein as "Ground Water Districts"), and Southwest Irrigation District, filed a *Mitigation Plan for Blue Lakes* ("Plan") in the above-captioned proceedings with the Idaho Department of Water Resources ("Director" or "Department").

2. The Plan, along with attached documentation, states that the Ground Water Districts "purchased Blue Lakes Trout Farm and water right nos. 36-02356A, 36-07210, and 36-07427, which are the water rights that are the subject of this pending delivery call. See Exhibit A, Warrant Deed Instrument Number 2120827 attached hereto." *Plan* at 2. "On July 26, 2012, Southwest Irrigation District also became part owner in Blue Lakes Trout Farm, Inc. and its water rights. See Exhibit B, Warrant Deeds Instrument Number 2123299 (Jerome County) and 241874 (Gooding County) attached hereto." *Id.* "The purchase of Blue Lakes Trout Farm and its associated water rights settles the matter between the parties in the above-captioned matter and serves as a Mitigation Plan for the pending Delivery Call for Water Right Nos. 36-02356A, 36-07210, [and] 36-07427." *Id.*

3. The Ground Water Districts moved the Director to approve the Plan without a hearing, "and finding that the Blue Lakes Delivery Call is fully mitigated by the Ground Water Districts and Southwest Irrigation District's purchase of the Blue Lakes Trout Farm's water rights." *Id.*

4. According to the Department's water right records, a *Notice of Change in Water Right Ownership* pertaining to the above-captioned water rights was received by the Department on March 5, 2012, changing ownership from Blue Lakes to the Ground Water Districts.

CONCLUSIONS OF LAW

1. Rule 43 of the Department's *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 ("CM Rules") provides as follows:

01. Submission of Mitigation Plans. A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information: (10-7-94)

a. The name and mailing address of the person or persons submitting the plan. (10-7-94)

b. Identification of the water rights for which benefit the mitigation plan is proposed. (10-7-94)

c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies. (10-7-94)

d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03. (10-7-94)

02. Notice and Hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights. (10-7-94)

03. Factors to Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: (10-7-94)

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law. (10-7-94)

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods. (10-7-94)

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may

allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan. (10-7-94)

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. (10-7-94)

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. (10-7-94)

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use. (10-7-94)

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (10-7-94)

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan. (10-7-94)

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge. (10-7-94)

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury. (10-7-94)

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. (10-7-94)

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan. (10-7-94)

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies. (10-7-94)

o. Whether 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. (10-7-94)

IDAPA 37.03.11.043.

2. The Plan meets the requirements of IDAPA 37.03.11.043.01. First, the Plan contains the names and addresses of the Plan's proponents. Second, the Plan identifies the water rights for which the benefit of mitigation is proposed. Third, the Plan describes that the calling water rights have been purchased by the Ground Water Districts and Southwest Irrigation District. Thus, there is sufficient information for the Director to review the Plan.

3. The Plan meets the requirements of IDAPA 37.03.11.043.02. The Blue Lakes delivery call has been on-going since 2005. Parties to the delivery call have participated in administrative proceedings before the Department, on judicial review before the district court, and on appeal to the Idaho Supreme Court. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). The Ground Water Districts have filed two separate CM Rule 43 mitigation plans with the Department to mitigate material injury to Blue Lakes that were separately published, with protests filed, and final orders issued. *Order Approving Mitigation Plan [for Conversions, Dry-Ups, and Recharge]*, CM-MP-2009-006 (May 14, 2010); *Final Order Approving Mitigation Plans (Blue Lakes Delivery Call)*, CM-MP-2009-001 (May 7, 2010). Similarly, Southwest Irrigation District filed a CM Rule 43 mitigation plan with the Department to mitigate material injury to Blue Lakes that was separately published, with a protest filed, and a final order issued. *Final Order Approving Mitigation Plans (Blue Lakes Delivery Call)*, CM-MP-2009-003 (May 7, 2010). Notice of the Plan was provided to the parties to the Blue Lakes delivery call, CM-DC-2010-02. *Plan* at 3 (certificate of mailing showing service to parties). Thus, notice has been provided and the Director deems no hearing is necessary.

4. Lastly, the Plan provides sufficient information for the Director to consider whether the Plan will prevent material injury to the above-captioned water rights. IDAPA 37.03.11.043.03. While the Plan does not propose a reduction in ground water pumping or forms of replacement water, the Plan shows that the above-captioned water rights were purchased by the Ground Water Districts and Southwest Irrigation District. By owning the calling water rights, the Plan mitigates against any material injury caused by the Ground Water Districts and Southwest Irrigation District.

ORDER


Based on the foregoing, it is HEREBY ORDERED as follows:

The CM Rule 43 Mitigation Plan filed by the Ground Water Districts and Southwest Irrigation District is APPROVED.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order may appeal the final order 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 petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration,

whichever is later. 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 12th day of March, 2013.



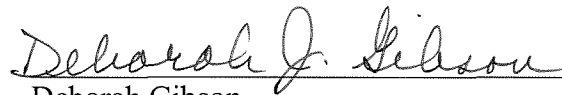
GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of March 2013, the above and foregoing document was served to the following by electronic mail:

| | |
|---|--|
| Randall C. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net | <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 |
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Deborah Gibson
Administrative Assistant to the Director
Idaho Department of Water Resources

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.