

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

IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY

Docket No. CM-MP-2016-001

**FINAL ORDER APPROVING
AMENDMENT TO STIPULATED
MITIGATION PLAN**

IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN

The Director ("Director") of the Idaho Department of Water Resources ("Department") finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On March 9, 2016, the Idaho Ground Water Appropriator's Inc. ("IGWA"), 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 referred to herein as "Surface Water Coalition" or "SWC"), submitted to the Department the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* ("Request for Order").

2. Attached to the Request for Order as Exhibits B and C respectively are the *Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriator's, Inc.*, and the *Addendum to Settlement Agreement* (collectively the "SWC-IGWA Settlement Agreement"). Attached to the Request for Order as Exhibit D is the October 7, 2015, *Agreement* between A&B Irrigation District and the IGWA members who entered into the SWC-IGWA Settlement Agreement (the "A&B-IGWA Agreement"). The SWC and IGWA submitted the SWC-IGWA Settlement Agreement and the A&B-IGWA Agreement (collectively, the "Mitigation Plan") as a stipulated mitigation plan in response to the SWC delivery call. *Request for Order* at 3.

3. The SWC “stipulates that the mitigation provided by participating IGWA members under the [Mitigation Plan] is, provided the [Mitigation Plan is] implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member.” *Request for Order* at 3. The SWC and IGWA agree that “[n]o ground water user participating in the [Mitigation Plan] will be subject to a delivery call by the SWC members as long as the provisions of the [Mitigation Plan] are being implemented.” *Mitigation Plan* at Exhibit B, p. 5.

4. Through the Mitigation Plan, the SWC and IGWA members agree to: (1) a total ground water diversion reduction of 240,000 acre-feet annually, (2) annual delivery of 50,000 acre-feet “of storage water through private lease(s) of water from the Upper Snake Reservoir system, delivered to the SWC 21 days after the date of allocation,” (3) IGWA using “its best efforts to continue existing conversions in Water Districts 130 and 140,” (4) ground water users not irrigating sooner than April 1 or later than October 31, (5) installation of approved closed conduit flow meters on all remaining unmeasured and power consumption coefficient measured ground water diversions by the beginning of the 2018 irrigation season, (6) establishment of a certain ground water level goal and benchmarks to “[s]tabilize and ultimately reverse the trend of declining ground water levels,” (7) development of a method “to measure reach gain trends in the Blackfoot to Milner reach,” (8) contributions by the SWC and IGWA to the State sponsored managed recharge program, (9) support by the SWC and IGWA of “NRCS funded permanent water conservation programs,” (10) IGWA undertaking “additional targeted ground water to surface water conversions and/or fallow land projects above American Falls,” and (11) “[i]f any of the benchmarks or ground water level goal is not met, additional recharge, consumptive use reductions, or other measures as recommended by” a steering committee established by the SWC and IGWA. *Mitigation Plan* at Exhibit B, p. 2-5.

5. On May 2, 2016, the Department issued the *Final Order Approving Stipulated Mitigation Plan* (“Final Order”). The Final Order approved the Mitigation Plan upon the following conditions:

a. All ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan.

b. The ground water level goal and benchmarks referenced in the Mitigation Plan are applicable only to the parties to the Mitigation Plan.

c. Approval of the Mitigation Plan does not create a ground water management area pursuant to Idaho Code § 42-233b.

Final Order at 4.

6. On February 7, 2017, the SWC and IGWA submitted to the Department the *Surface Water Coalition’s and IGWA’s Stipulated Amended Mitigation Plan and Request for Order* (“Second Request for Order”).

7. Attached to the Second Request for Order as Exhibit A is the *Second Addendum to Settlement Agreement* entered into on December 14, 2016, between the SWC and IGWA (“Second Addendum”).

8. The Second Addendum amends the Mitigation Plan by providing “further details concerning implementation of the [Mitigation Plan] addressing Sections 3.a (Consumptive Use Volume Reduction); 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a. (Adaptive Water Management).” *Second Request for Order* at 2. The SWC and IGWA request the Director issue an order approving the Second Addendum as an amendment to the Mitigation Plan. *Id.*

9. The Department published notice of the Second Request for Order and Second Addendum in the Idaho Mountain Express and Mountain Home News on February 22 and March 1, 2017; the Times News, Idaho Statesman, Post Register, and Idaho State Journal on February 23 and March 2, 2017; and the Standard Journal on February 24 and March 3, 2017. 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.

2. 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.”

3. Idaho Code § 42-603 grants the Director authority to adopt rules governing water distribution.

4. Pursuant to Chapter 52, Title 67, Idaho Code, and Sections 42-603 & 42-1805(8), Idaho Code, the Department promulgated the Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”), effective October 7, 1994. IDAPA 37.03.11.000-001.

5. 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 the holder of a junior-priority ground water right in an area having a common ground water supply.” IDAPA 37.03.11.001.

6. 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.

7. CM Rule 43.03 establishes factors the Director may consider “in determining whether a proposed mitigation plan will prevent injury to senior rights.” IDAPA 37.03.11.043.03(a-o).

8. CM Rule 43.03(o) states: “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.” IDAPA 37.03.11.043.03(o).

9. The Mitigation Plan was entered into between the SWC and IGWA in accordance with CM Rule 43.03(o). Again, the SWC “stipulates that the mitigation provided by participating IGWA members under the [Mitigation Plan] is, provided the [Mitigation Plan] is implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member.” *Request for Order* at 3. The SWC and IGWA agree that “[n]o ground water user participating in the [Mitigation Plan] will be subject to a delivery call by the SWC members as long as the provisions of the [Mitigation Plan] are being implemented.” *Mitigation Plan* at Exhibit B, p. 5.

10. As discussed above, the Mitigation Plan requires numerous ongoing activities, such as annual ground water diversion reductions and storage water deliveries, irrigation season reduction, installation of measurement devices, support of the State sponsored managed recharge program and NRCS funded permanent water conservation programs, efforts to continue existing conversions, additional conversions and/or fallow land projects, and establishment and operation of a steering committee and technical work group. *Mitigation Plan* at Exhibit B, p. 2-5. The Mitigation Plan also includes reference to a certain ground water level goal and benchmarks, development of a method “to measure reach gain trends in the Blackfoot to Milner reach,” and additional recharge, consumptive use reductions, or other measures should any of the benchmarks or the ground water level goal not be met. *Id.* at Exhibit B, p. 3-5. The parties to the Mitigation Plan should be responsible for these activities and the ground water level goal and benchmarks are only applicable to the parties to the Mitigation Plan as specified in the Mitigation Plan.

11. The Second Addendum “provides further details concerning implementation of the [Mitigation Plan] addressing Sections 3.a (Consumptive Use Volume Reduction); 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a. (Adaptive Water Management).” *Second Request for Order* at 2.

12. The Second Addendum references the Department and requests the Department undertake specific actions in support of the Mitigation Plan and Second Addendum. The Department will exert its best efforts to support the activities of IGWA and the SWC. However, the Department is not a signatory to the Mitigation Plan or Second Addendum, and approval of the Second Addendum should not be construed to obligate the Department to undertake any

particular action. Furthermore, approval of the Second Addendum does not limit the Director's enforcement discretion or otherwise commit the Director to a particular enforcement approach.

13. Having reviewed the Second Request for Order, Second Addendum, Mitigation Plan, CM Rules, and the proceedings herein, the Director will approve the Second Addendum as an amendment to the Mitigation Plan.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Second Addendum is APPROVED as an amendment to the Mitigation Plan with the following conditions:

- a. While the Department will exert its best efforts to support the activities of IGWA and the SWC, approval of the Second Addendum does not obligate the Department to undertake any particular action.
- b. Approval of the Second Addendum does not limit the Director's enforcement discretion or otherwise commit the Director to a particular enforcement approach.

DATED this 9th day of May 2017.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of May 2017, the above and foregoing was served on the following by the method(s) indicated below:

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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.