

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

IN THE MATTER OF THE MITIGATION  
PLAN FILED BY THE CITY OF  
POCATELLO, THE COALITION OF  
CITIES, AND THE CITY OF IDAHO  
FALLS FOR THE DISTRIBUTION OF  
WATER TO WATER RIGHTS HELD BY  
THE SURFACE WATER COALITION

Docket No. CM-MP-2016-002

**FINAL ORDER APPROVING CITIES'  
INTERIM MITIGATION PLAN FOR  
2017**

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

**FINDINGS OF FACT**

1. On March 15, 2016, the City of Pocatello (“Pocatello”); the Coalition of Cities; and the City of Idaho Falls (“Idaho Falls”), (collectively, “Cities”), 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”) submitted to the Department a *Joint Motion for Order Entering Settlement Between Pocatello, Coalition of Cities, Idaho Falls, and Surface Water Coalition* (“Motion”). Attached to the Motion was the *Interim Mitigation Agreement* (“Mitigation Plan”) executed by the Cities and SWC.

2. The Motion and the Mitigation Plan were submitted to the Department captioned under individual mitigation plans previously filed by Pocatello, the Coalition of Cities, and Idaho Falls bearing docket numbers CM-MP-2015-001, CM-MP-2015-004, and CM-MP-2015-005, respectively. Because the Mitigation Plan was a new plan, the Department assigned the Mitigation Plan its own docket number: CM-MP-2016-002.

3. The term of the Mitigation Plan was from March 15, 2016, to December 31, 2016. *Mitigation Plan* at 4.

4. The Cities and SWC agreed “that delivery of the mitigation actions” described in the Mitigation Plan “shall mitigate for any of the Cities’ injury to the SWC’s water rights, and that the Cities’ water rights shall not be subject to curtailment during the term” of the Mitigation Plan. *Mitigation Plan* at 2. Further, “[t]he SWC expressly agree[d] that the compensation to be

provided” under the Mitigation Plan “shall constitute full mitigation for any injury in 2016 associated with the Cities’ ground water pumping.” *Id.*

5. The Mitigation Plan proposed two “mitigation actions”: 1) delivery of “2,600 acre-feet of water to the storage accounts selected by the SWC within twenty-one (21) days of Water District 01’s ‘date of allocation’ for purposes of storage fill in the Upper Snake River Reservoir system above Milner Dam,” and 2) previously performed “recharge activities that are estimated to benefit the Near Blackfoot to Neeley and Neeley to Minidoka Reaches of the Snake River in the amount of 515 acre-feet of water during the 2016 irrigation season.” *Mitigation Plan* at 2.

6. On April 18, 2016, the Idaho Ground Water Appropriators, Inc. (“IGWA”), filed a protest to the Mitigation Plan. On April 22, 2016, the Cities, SWC, and IGWA filed a *Motion for Order Approving Stipulation to Conditionally Withdraw Protest*. On April 26, 2016, IGWA filed a withdrawal of its protest.

7. On April 27, 2016, the Director issued a *Final Order Approving Mitigation Plan for 2016*, approving the Mitigation Plan, effective until December 31, 2016.

8. On December 21, 2016, the Cities and SWC filed a *Joint Motion for Order Extending Settlement Between Pocatello, Coalition of Cities, Idaho Falls and Surface Water Coalition* (“Cities’ Interim Mitigation Plan for 2017”), requesting that the Director extend the term of the Mitigation Plan until December 31, 2017. *Cities’ Interim Mitigation Plan for 2017* at 3. In addition, the “SWC agrees to accept 2,600 acre-feet of storage water from the Cities and to recognize a 488 acre-feet recharge benefit in 2017 attributable to the Cities[’] past recharge activities as stipulated mitigation for any injury caused by the Cities’ pumping under junior priority ground water rights in 2017.” *Id.*

9. The Director published notice of the Cities’ Interim Mitigation Plan for 2017 as required by the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources (“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.

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 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 Cities and SWC submitted the Mitigation Plan pursuant to CM Rule 43.03(o). Again, the Cities and SWC agreed “that delivery of the mitigation actions” described in the Mitigation Plan “shall mitigate for any of the Cities’ injury to the [Surface Water Coalition’s] water rights, and that the Cities’ water rights shall not be subject to curtailment during the term” of the Mitigation Plan. *Mitigation Plan* at 2. Further, “[t]he SWC expressly agree[d] that the compensation to be provided” under the Mitigation Plan “shall constitute full mitigation for any injury in 2016 associated with the Cities’ ground water pumping.” *Id.*

10. The Cities and SWC request that the Director extend the term of the Mitigation Plan until December 31, 2017. *Cities’ Interim Mitigation Plan for 2017* at 3.<sup>1</sup> Again, the “SWC agrees to accept 2,600 acre-feet of storage water from the Cities and to recognize a 488 acre-foot recharge benefit in 2017 attributable to the Cities[’] past recharge activities as stipulated

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<sup>1</sup> The Cities and SWC stipulated in the Mitigation Plan “to entry of an order staying the contested cases” on the Cities’ individual mitigation plans bearing docket numbers CM-MP-2015-001, CM-MP-2015-004, and CM-MP-2015-005 during the term of the Mitigation Plan. *Mitigation Plan* at 4. The Cities and SWC stated they “shall request the Department enter an order in each proceeding and stay any further action on the motion to consolidate.” *Id.* As of the date of this final order, the Cities and SWC have not filed any request for stay in docket numbers CM-MP-2015-001, CM-MP-2015-004, and CM-MP-2015-005.

mitigation for any injury caused by the Cities' pumping under junior priority ground water rights in 2017." *Id.*<sup>2</sup>

11. Having reviewed the Mitigation Plan, the Cities' Interim Mitigation Plan for 2017, the CM Rules, and the proceedings herein, the Director will approve the Cities' Interim Mitigation Plan for 2017.

### ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Cities' Interim Mitigation Plan for 2017 is APPROVED, effective until December 31, 2017.<sup>3</sup>

DATED this 8<sup>th</sup> day of February 2017.



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GARY SPACKMAN  
Director

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<sup>2</sup>The Department has not verified that delivery of 2,600 acre-feet and the Cities' past recharge activities will actually mitigate injury to the SWC caused by junior pumping by the Cities' pumping under junior-priority ground water rights in 2017. Approval of the Cities' Interim Mitigation Plan for 2017 does not constitute approval of the 2,600 acre-feet or 488 acre-feet calculations.

<sup>3</sup> 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 the Cities' water rights listed in Attachment B are subject to curtailment pursuant to the order, "curtailment of the Cities' rights is STAYED pending completion of administrative proceedings related to the Cities' Interim Mitigation Plan for 2017 or until further order of the Director." *Curtailment Order* at 7. The Director stated that, if the Cities' 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.* This order completes administrative proceedings related to the Cities' Interim Mitigation Plan for 2017. While the Cities' water rights listed in Attachment B to the Curtailment Order are subject to curtailment, the watermaster shall allow participants operating in conformance with the Cities' 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 8<sup>th</sup> day of February 2017, the above and foregoing was served on the following by the method(s) indicated below:

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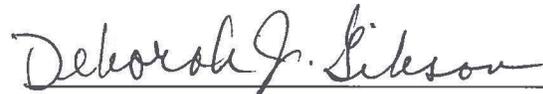
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Deborah Gibson  
Admin. Assistant for the Director

## **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.