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DEPARTMENT OF
WATER RESOURCES

Randall C. Budge (ISB# 1949)
Thomas J. Budge (ISB# 7465)
RACINE OLSON NYE & BUDGE, CHARTERED
201 E. Center St. / P.O. Box 1391
Pocatello, Idaho 83204-1391
(208) 232-6101 – phone
(208) 232-6109 – fax
rcb@racinelaw.net
tjb@racinelaw.net
Attorneys for Big Lost River Ground Water District

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE UPPER BIG
LOST RIVER GROUND WATER
ASSOCIATION 2017 MITIGATION
PLAN

Docket No. CM-MP-2017-001

**BIG LOST RIVER GROUND WATER
DISTRICT'S NOTICE OF PROTEST**

Big Lost River Ground Water District (the "GWD"), by and through counsel, files this Notice of Protest of the *Mitigation and Aquifer Enhancement Plan of the Upper Big Lost River Ground Water Association Users* ("Mitigation Plan" or "Plan") filed with the Idaho Department of Water Resources ("IDWR" or "Department") on October 13, 2017.

INTRODUCTION

The Mitigation Plan was submitted pursuant to both the Water Distribution Rules for Water District 34 ("Water District 34 Rules") and the Rules for Conjunctive Management of Surface and Ground Water Sources ("CM Rules"). This protest is filed because the Mitigation Plan (i) does not comply with the Water District 34 Rules, and (ii) does not contain the minimum informational requirements of the CM Rules.

BACKGROUND

Basin 34 groundwater users have for several years put forth effort to develop a plan to stabilize groundwater levels and mitigate injury to senior-priority water rights in the Basin in accordance with Rule 50 of the Water District 34 Rules. Several mitigation plans have been proposed by individuals or small groups of groundwater users. Each time the Director has encouraged the water users to develop a basin-wide mitigation plan. The Director further urged the water users to organize a ground water district to enable them to effectively develop and implement a basin-wide mitigation plan.

In March of 2016 several water users commenced the arduous task of forming a ground water district. After several months of labor, hearings and a public election, the Butte County Commissioners entered an Order forming the GWD. The GWD has since that time been actively collecting data, collaborating with IDWR and other local entities, and working to develop a basin-wide groundwater management plan that will satisfy both Rule 50 of the Water District 34 Rules and sustainably manage the Basin 34 aquifer.

The Upper Big Lost River Ground Water Association (the “Association”) consists of several groundwater users who have declined to participate in the GWD. Some of these users have asserted that the hydrology in the basin above or immediately below Mackay Dam make them different than other groundwater users in Basin 34. However, the Association does not represent all groundwater users above or immediately below Mackay Dam. Most of the water users in these areas belong to the GWD and support a basin-wide groundwater management plan.

As explained below, the GWD opposes the Mitigation Plan for both substantive and practical reasons. Substantively, the Plan does not achieve the objectives of the Water District 34 Rules or the CM Rules. Practically, the Plan cannot be effectively administered by the Department because it represents only a small fraction of Basin 34 groundwater users. Moreover, the Plan promotes divisiveness and conflict by fragmenting Basin 34 groundwater users.

The GWD requests that that the Director deny the Mitigation Plan and admonish Association members to join the duly organized GWD and participate in a basin-wide groundwater management plan. The GWD is confident the Director will find that its forthcoming plan will manage water supplies comprehensively in a way that protects both senior surface-water rights and junior groundwater rights throughout Basin 34.

PROTEST

As set forth below, the Mitigation Plan should be denied because (i) it does not satisfy the Water District 34 Rules, and (ii) it does not meet the minimum informational requirements of CM Rule 43.

I. The Mitigation Plan does not satisfy the Water District 34 Rules.

The Mitigation Plan is submitted partially under Rule 50.04 of the Water District 34 Rules. Rule 50.04 allows holders of senior surface rights from the Big Lost River with points of diversion downstream of Mackay Dam to require mitigation from groundwater users in Basin 34. The Mitigation Plan presents strategies for providing required mitigation, for which the Association should be commended. However, the Mitigation Plan falls short because it does not operate on behalf of all groundwater users basin-wide.

Rule 50 is predicated on basin-wide water use data, and it contemplates mitigation by Basin 34 groundwater users on a basin-wide basis. Rule 50.01 states: “All ground water rights shall be administered conjunctively.” (Emphasis added.) Accordingly, Rule 50.04.c calculates mitigation obligations based on basin-wide groundwater diversion data, and Rule 50.04.c.iv allows “ground water users” (plural) to seek a revision of their collective mitigation obligation.

Similarly, Rule 50.04.e anticipates that any alternate mitigation plan that may be submitted would be proposed by “junior ground water users” (plural) collectively. The clear inference is that the all groundwater mitigation obligation will be calculated on a basin-wide basis and satisfied on a basin-wide basis.

The only means for evading participation in basin-wide mitigation under Rule 50 is by proving that a particular groundwater right is not subject to administration pursuant to Rule 50.01 or Rule 50.02. All other water rights must participate in the basin-wide mitigation formula and process set forth in Rule 50.04.c. In the event any groundwater user refuses to participate in a basin-wide mitigation plan, Rule 50.04.d requires the watermaster to provide mitigation on their behalf and assess them the cost.

Indeed, there is no reason for allowing individual mitigation plans since the annual mitigation obligation is calculated on a basin-wide basis. The Association cannot justify a separate plan for its members without also demonstrating that the mitigation formula prescribed in Rule 50.04.c does not apply to them. Yet, nothing in the Mitigation Plan suggests this. Instead, the Association proposes to mitigate on the same basis as every other water user in Basin 34, but to do so separately in competition with other groundwater users. This would be anathema to the very purpose of Rule 50 which is to provide a mechanism for all Basin 34 groundwater users to mitigation effectively and efficiently as a unified group.

In sum, the Water District 34 Rules recognize the reality that administering a host of different mitigation plans from separate individuals or groups of individuals is neither practical nor desirable. The Rules provide groundwater users with two options: participate in an approved basin-wide mitigation plan or pay an additional assessment for the cost of mitigation provided by the watermaster. Individual mitigation plans are not part of the program.

Therefore, the GWD respectfully protests and requests that the Mitigation Plan as filed under the Basin 34 Rules be dismissed with an instruction that Association members participate in a basin-wide groundwater management plan through the GWD.

II. The Mitigation Plan does not meet the minimum requirements of CM Rule 43.

The Mitigation Plan is also submitted partially under the CM Rules. 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.” (CM Rule 1.) The central feature of the Rules is a determination of whether or to what extent the holder of a senior-priority right is suffering material injury. (CM Rule 42.) A finding of injury may result in curtailment unless “use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.” (CM Rule 42.02.)

The submission of the Mitigation Plan under the CM Rules calls upon the Director to determine whether it will effectively mitigate injury to senior rights. CM Rule 43 prescribes several factors that may be considered. (CM Rule 43.03.) It further requires that the plan include

such information as is necessary to enable the Director to properly evaluate these factors. (CM Rule 43.01.d.)

In this case the Mitigation Plan does not contain information necessary to enable either the Director or the GWD to evaluate, even at a precursory level, whether the Plan will prevent injury to senior rights.

First and foremost, the Plan does not identify the senior water rights that it proposes to benefit as required by CM Rule 43.01.b. Without this information, it is impossible to evaluate whether it will prevent injury.

In addition, the Plan does not identify the nature or extent of the injury or anticipated injury it proposes to mitigate. This is particularly important because the Plan was not submitted in response to a delivery call but to an anticipated delivery call. Without knowing what injury is intended to be mitigated, it is impossible for holders of senior rights to evaluate or effectively defend against the Plan.

For these reasons, the GWD respectfully protests and requests that the Director dismiss the Mitigation Plan as filed under the CM Rules for failing to contain the minimum informational requirements of CM Rule 43.01.d.

CONCLUSION

The GWD protests the Mitigation Plan for the reasons set forth above, and reserves the right to protest the Plan for other reasons based on information that may be discovered in this matter.

DATED this 1st day of December, 2017.

RACINE OLSON NYE & BUDGE,
CHARTERED

By: 
Thomas J. Budge

CERTIFICATE OF SERVICE

I certify that on this the 1st day of December, 2017, the foregoing document was served on the following persons in the manner indicated.


Signature of person mailing form

Gary Spackman, Director
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, Idaho 83720-0098
kimi.white@idwr.idaho.gov

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-mail

Upper Big Lost River Ground Water Association
P.O. Box 122
Mackay, Idaho 83251
UBLRGWA@gmail.com

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-mail