

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR) FINAL ORDER DENYING
TRANSFER NO. 78255 IN THE NAME) EXCEPTION
OF THE VALLEY CLUB, INC.)
_____)

This matter is before the Director (“Director”) of the Idaho Department of Water Resources (“Department”) as a result of the exception filed by The Valley Club, Inc. (“TVC”), to the May 20, 2014, preliminary order approving application for transfer no. 78255. The Director finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On March 28, 2013, TVC filed application for transfer no. 78255 (“Application”), seeking to convert a 10.8 acre portion of water right nos. 37-494, 37-495, 37-577BU, 37-577BV, and 37-833K to groundwater recharge use. The Application also proposed creating a common permissible place of use for the irrigation portions of water right nos. 37-494, 37-495, 37-577BU, 37-577BV, and 37-833K, 37-2623, and 37-657B.
2. Notice of the Application was published in the Mountain Express on June 5 and 12, 2013 (“Notice”). The Notice provides:

NOTICE OF PROPOSED CHANGE OF WATER RIGHT TRANSFER NO. 78255

THE VALLEY CLUB INC, PO BOX 252 SUN VALLEY, ID 83353; has filed Application No. 78255 for changes to the following water rights within BLAINE County(s): Right No(s) 37-2623, 37-494, 37-495, 37-577BU, 37-577BV, 37-657B, 37-833K; to see a full description of these rights and the proposed transfer, please see www.idwr.idaho.gov/apps/ExtSearch/WRFiling.asp. The purpose of the transfer is to change a portion of the above rights as follow: Application proposes to convert 10.8 acres (12.8 AFA) of irrigation from Big Wood River water rights 37-494, 37-495, 37-577BU, 37-577BV, and 37-833K to groundwater recharge use. The groundwater recharge use is proposed by the applicant to provide mitigation as necessary for supplemental irrigation occurring under water right 37-2623. Application also proposes creating a common permissible place of use (PPU) for the remaining irrigation portions of rights 37-494, 37-495, 37-577BU, 37-577BV, 37-833K, along with right 37-657B and groundwater right 37-2623. Application will also correctly identify the place of use (POU) to reflect actual locations of use for the recreation portions of rights 37-494, 37-495, 37-

577BV, 37-833K, and 37-2623. Rights 37-494, 37-495, 37-577BU, 37-577BV, 37-833K, and 37-2623 are currently authorized to divert up to 8.44 CFS to provide recreation and irrigation uses (143.8 acres) on a golf course located approximately 2.4 to 4.2 mi. N & 0.4 to 1.3 mi. W of Hailey. Right 37-657B is currently authorized to provide up to 1.65 CFS for irrigation (75.3 acres) and recreation use on an adjacent portion of the golf course, located approximately 2.5 to 3.5 mi. N & 0.8 to 1.2 mi. W of Hailey. The proposed PPU will incorporate portions of the current authorized POU for the included rights along with adjacent ground for a total of 276.7 acres, and will be located approximately 2.3 to 4.1 mi. N & 0.24 to 1.3 mi. W of Hailey. After the proposed changes, rights 37-494, 37-495, 37-577BU, 37-577BV, 37-833K, and 37-2623 will be limited to 133 acres of irrigation and right 37-657B will be limited to 75.3 acre, for a total of 208.3 acres of irrigation within a 276.7-acre PPU.

3. The Department approved transfer no. 78255 as a preliminary order on May 20, 2014 (“Preliminary Order”).

4. On June 9, 2014, TVC filed *The Valley Club, Inc’s Exception to Preliminary Order Approving Application for Transfer with Conditions* (“Exception”).

5. TVC challenges and seeks revision of the following condition of approval imposed in the Preliminary Order with respect to transferred water right nos. 37-494, 37-495, 37-577BU, 37-577BV, and 37-833K, and 37-2623 (“Condition”):

The amount of ground water recharge under rights 37-494, 37-495, 37-577BU, 37-577BV, and 37-833K, as modified by Transfer 78255, is intended to offset the annual out-of-priority consumptive use of water pursuant to Right 37-2623 in the event of a delivery call. Based on scientific information available at the time of this approval, the ground water recharge may be sufficient to mitigate for a delivery call that would otherwise result in the curtailment of Right 37-2623, but the sufficiency of this recharge effort to prevent injury will not be determined unless there has been a delivery call, a determination of injury, and an analysis of the adequacy of this recharge as a mitigation plan to prevent injury.

6. TVC claims the Department’s Conjunctive Management (“CM”) Rules “specifically contemplate that an application for approval of a mitigation plan may be filed with, and approved by, the Department in advance of a delivery call and/or a determination that a senior surface water user is suffering material injury as a result of a junior-priority ground water diversion.” *Exception* at 2.

CONCLUSIONS OF LAW

1. The CM Rules define a “mitigation plan” as:

A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and

measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply.

IDAPA 37.03.11.010.15.

2. CM Rule 43 requires that a mitigation plan submitted to the Director in writing include the name and mailing address of the person(s) submitting the plan, *identification of the water rights for which benefit the mitigation plan is proposed*, a description of the plan setting forth the water supplies proposed to be used for mitigation and information regarding the availability of such supplies, and information to allow the Director to evaluate factors set forth in Rule Subsection 043.03(a-o). IDAPA 37.03.11.043.01(a-d) (emphasis added).

3. Upon receipt of a mitigation plan, the Director is to provide notice, hold a hearing if necessary, and otherwise consider the plan under the procedures of Idaho Code § 42-222. IDAPA 37.03.11.043.02.

4. CM Rule 20.07 identifies that CM Rule 40 “provides procedures for responding to delivery calls within water districts” such as the newly-enlarged Water District 37.

5. CM Rule 40 states:

.01 Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director through the watermaster, shall:

....

b. allow out-of priority diversion of water by junior-priority ground water users pursuant to a mitigation plan *that has been approved* by the Director.

IDAPA 37.03.11.040.01 (emphasis added).

6. CM Rule 40 also states:

c. Where a call is made by the holder of a senior-priority water right against the holder of a junior-priority ground water right in the water district the watermaster shall *first determine whether a mitigation plan has been approved* by the Director.

IDAPA 37.03.11.040.02(c) (emphasis added).

7. TVC asserts the above-quoted and emphasized language from CM Rule 40 clearly indicates that, when a delivery call is made under the CM Rules, there will be mitigation plans already approved and operating such that junior ground water users may avoid mandatory and immediate curtailment by the watermaster. *Exception at 7.*

8. TVC asserts that, in approving previous applications involving ground water rights that also included a mitigation plan, the Department has not indicated it was deferring any approval or determination of sufficiency of the plan until a delivery call had been made and material injury had been determined. *Exception at 9-10.* TVC cites to the Department's approval of Transfer No. 74449 as an example. *Id.* Transfer 74449 is distinguishable from the transfer at issue in this matter. Transfer 74449 is a mitigation plan associated with an application to appropriate water in a moratorium area. The application to appropriate water could not be approved without the mitigation plan, as required in the moratorium order. *See Amended Moratorium Order, In the Matter of Applications for Permits for the Diversion and Use of Surface and Ground Water Within the Eastern Snake River Plain Area and the Boise River Drainage Area (April 30, 1993).* The transfer and mitigation plan in 74449 were intended to offset depletion due to the new ground water appropriation, not a delivery call under the CM Rules.

9. The CM Rules do not specifically preclude approval of mitigation plans that have been properly submitted to the Director pursuant to the CM Rules. The Director agrees with the general proposition argued by TVC that mitigation plans may be processed and approved prior to a delivery call and determination that the calling party is being materially injured. The mitigation plan must be properly filed and noticed as required by the CM Rules.

10. TVC asserts its mitigation plan was properly filed and noticed as required by the CM Rules and should be approved now. *Exception at 3.* The Director disagrees. In its Application, TVC did not specifically identify "the water rights for which benefit the mitigation plan is proposed" as required by Rule 43. IDAPA 37.03.11.043.01(b). TVC did not properly submit its mitigation plan pursuant to the CM Rules. Because TVC did not identify the water rights that would receive the benefits of mitigation, the Director could not notify the holders of the water rights that TVC was seeking to mitigate against prospective delivery calls that might be filed by the water right holders in the future. The requirements of water right identification and notice ensure that water users are apprised of the applicant's intent to employ the mitigation plan as a defense to a delivery call. In this case, where a mitigation plan is a necessary component of an application for transfer, but the applicant also seeks approval of a CM Rule 43 mitigation plan prior to the filing of a delivery call, due process requires that water users against whom the mitigation plan may be used as a defense to a delivery call are adequately notified.

11. The Notice in this proceeding did not adequately notify water right holders whose rights might be affected that TVC sought approval of a mitigation plan pursuant to CM Rule 43. The caption of the Notice states "Notice of Proposed Change of Water Right Transfer No. 78255." The Notice does not list or describe the water rights which will benefit from mitigation activities intended to compensate for depletions caused by uses of water by the proponent of the mitigation plan. While the Notice includes the term "mitigation," the single reference is buried

deep in the Notice and does not sufficiently notify other water users that the Application was intended to also be considered a Rule 43 mitigation plan.

12. TVC asserts the Department must revise the Condition and offers two proposed revisions. *Exception* at 12. Neither revision proposed by TVC would be acceptable to the Department because both attempt to determine the sufficiency of the recharge activity for out-of-priority diversion or depletion prior to proper submission of a mitigation plan to the Director and notice to water right holders pursuant to the CM Rules.

13. TVC asserts if the Condition is not revised as it proposes, the Department must apply the same policy to all prior applications including mitigation plans that were approved without the Condition. *Exception* at 11. If the Department has approved mitigation plans for unknown future delivery calls in other matters, such decisions are not before the Department at this time and will not be specifically addressed

14. The Director agrees the Condition requires revision. As described above, the Condition imposed in the Preliminary Order with respect to transferred water right nos. 37-494, 37-495, 37-577BU, 37-577BV, and 37-833K, and 37-2623 reads verbatim as follows:

The amount of ground water recharge under rights 37-494, 37-495, 37-577BU, 37-577BV, and 37-833K, as modified by Transfer 78255, is intended to offset the annual out-of-priority consumptive use of water pursuant to Right 37-2623 in the event of a delivery call. Based on scientific information available at the time of this approval, the ground water recharge may be sufficient to mitigate for a delivery call that would otherwise result in the curtailment of Right 37-2623, but the sufficiency of this recharge effort to prevent injury will not be determined unless there has been a delivery call, a determination of injury, and an analysis of the adequacy of this recharge as a mitigation plan to prevent injury.

15. The Condition shall be revised to read as follows:

The amount of ground water recharge under rights 37-494, 37-495, 37-577BU, 37-577BV, and 37-833K, as modified by Transfer 78255, is intended to offset the annual out-of-priority consumptive use of water pursuant to Right 37-2623 in the event of a delivery call. Based on scientific information available at the time of this approval, the ground water recharge may be sufficient to mitigate for a delivery call that would otherwise result in the curtailment of Right 37-2623. The sufficiency of this recharge effort to prevent injury may be determined upon proper submission of a mitigation plan pursuant to the Department's Rules of Conjunctive Management of Surface and Ground Water Resources.

ORDER

Based on and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

1. TVC's Exception is DENIED.

2. Transfer No. 78255 is APPROVED as described in the Preliminary Order except the previous Condition imposed in the Preliminary Order with respect to transferred water right nos. 37-494, 37-495, 37-577BU, 37-577BV, and 37-833K, and 37-2623 shall be modified to read verbatim as follows:

The amount of ground water recharge under rights 37-494, 37-495, 37-577BU, 37-577BV, and 37-833K, as modified by Transfer 78255, is intended to offset the annual out-of-priority consumptive use of water pursuant to Right 37-2623 in the event of a delivery call. Based on scientific information available at the time of this approval, the ground water recharge may be sufficient to mitigate for a delivery call that would otherwise result in the curtailment of Right 37-2623. The sufficiency of this recharge effort to prevent injury may be determined upon proper submission of a mitigation plan pursuant to the Department's Rules of Conjunctive Management of Surface and Ground Water Resources.

Dated this 28th day of July 2014.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of July, 2014, a true and correct copy of the above and foregoing document was served on the following by the method indicated below:

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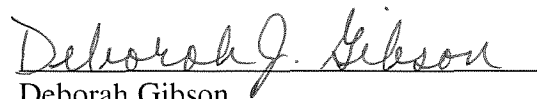
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Deborah Gibson
Admin. Assistant for the Director

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.