BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT HELD BY ARK FISHERIES, INC., WATER RIGHT NO. 32-07278	)	Docket No. CM-DC-2014-002
	)	**FINAL ORDER APPROVING MITIGATION PLAN AND DISMISSING DELIVERY CALL; ORDER VACATING STATUS CONFERENCE**

On February 25, 2015, the Director ("Director") of the Idaho Department of Water Resources ("Department") received a *Stipulated Mitigation Plan and Request for Order* ("Mitigation Plan") filed jointly by Lynn J. Babington and Kathy L. Babington, husband and wife, d/b/a ARK Fisheries, Inc. (collectively "ARK"); North Snake Ground Water District, Magic Valley Ground Water District, and Southwest Irrigation District ("Districts"); and the Idaho Ground Water Appropriators, Inc. ("IGWA").

FINDINGS OF FACT

1. On May 28, 2014, ARK requested delivery of water by administration of water right no. 36-7278. The Department assigned this delivery call docket no. CM-DC-2014-002 ("Delivery Call").

2. The Director held a status conference on July 22, 2014. At the status conference, the parties agreed the status conference should be continued to August 11, 2014, to allow the parties to meet in person to share information and discuss possible resolution of the Delivery Call. The Director issued an *Order Continuing Status Conference* on July 23, 2014, continuing the status conference to August 11, 2014.

3. On July 23, 2014, the Director entered an order granting IGWA's petition to intervene and an order designating the City of Pocatello as a respondent.

4. At the August 11, 2014, status conference, the parties requested a delay of formal proceedings and agreed to schedule the status conference in January 2015. The formal proceedings were delayed to obtain water modeling information and attempt to resolve the Delivery Call. The Director issued an *Order Continuing Status Conference* on August 26, 2014, scheduling a status conference for January 8, 2015.

5. At the January 8, 2015, status conference, the parties requested additional time for settlement discussions. The Director issued a *Notice of Second Status Conference* on January 15, 2015, notifying the parties a status conference would be held February 27, 2015.

6. On February 25, 2015, ARK, the Districts, and IGWA filed the Mitigation Plan with the Department. The Mitigation Plan states it is filed pursuant to IDAPA 37.01.11.043.03(o) ("CM Rule 43.03(o)") and references a settlement agreement attached to the Mitigation Plan as Exhibit A ("Settlement Agreement"). *Mitigation Plan* at 1.

7. The Districts have agreed to pay monetary compensation "to ARK as mitigation for depletions caused to ARK's water right [no. 36-7278] by junior ground water pumpers." *Settlement Agreement* at 2.

8. In consideration for the compensation paid and the Settlement Agreement, ARK has agreed to dismiss its Delivery Call and limit future calls or requests for administration of water right no. 36-7278 as set forth in the Settlement Agreement. *Settlement Agreement* at 1.

9. The parties agree the Settlement Agreement "is intended to be a mitigation plan as defined in the Conjunctive Management Rules." *Mitigation Plan* at 2.

10. Paragraph 3.5 of the Settlement Agreement states:

> Memorialization of Settlement and Mitigation Plan. The Parties do hereby acknowledge that this Agreement is intended to be a "Mitigation Plan" as such term is defined by the Conjunctive Management Rules. A copy of this Agreement shall be filed with [the Department] in conjunction with the dismissal of the underlying proceeding. The Parties will request the Director of [the Department] issue a final order in conjunction with the dismissal of the underlying proceeding confirming this Agreement as a final Mitigation Plan pursuant to the provisions of the Conjunctive Management Rules.

Settlement Agreement at 3.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, states as follows:

> 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 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. In addition, Idaho Code § 42-1805(8) vests the Director with authority 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. In accordance with chapter 52, title 67, Idaho Code, the Department adopted rules regarding the conjunctive management of surface and ground water effective October 7, 1994. CM Rule 0. 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 junior-priority ground water rights in an area having a common ground water supply. CM Rule 1.

4. CM Rule 42.02 states as follows: "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."

5. CM Rule 43.01 sets forth the criteria for submittal of a mitigation plan to the Director.

6. CM Rule 43.03 establishes factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights. CM Rule 43.03.o states as follows: "Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not be fully in compliance with these provisions."

11. ARK, the Districts, and IGWA executed the Mitigation Plan in accordance with CM Rule 43.03(o). *Mitigation Plan* at 1. A purpose of the Mitigation Plan is to "fully compromise and settle all present and future delivery calls and any and all claims of ARK as against the Water Rights of District Members" for the duration of the Settlement Agreement. *Settlement Agreement* at 2.

12. The parties request that the Director issue "an order without further notice or hearing accepting the [Settlement] Agreement as a complete and final Stipulated Mitigation Plan" and "[d]ismissing the [Delivery Call] with prejudice in accordance with the parties' provisions as contained in the [Settlement] Agreement." *Mitigation Plan* at 2.

13. Having reviewed the Mitigation Plan, Settlement Agreement, CM Rules, and proceedings herein, the Director approves the Mitigation Plan and agrees this matter should be dismissed. The Director will vacate the status conference scheduled for February 27, 2015.

ORDER

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

The Mitigation Plan executed by ARK, the Districts, and IGWA is APPROVED, and this matter is DISMISSED with prejudice in accordance with the parties' provisions contained in the Settlement Agreement.

IT IS FURTHER ORDERED that the status conference set for February 27, 2015, is hereby VACATED. Because no further action is necessary with regard to the Delivery Call, the Department will incorporate the Mitigation Plan into the file for water right no. 36-7278. The Department will also add the Mitigation Plan to the Delivery Call file and will close the file.

IT IS FURTHER ORDERED that this is a FINAL ORDER of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that 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* Idaho Code § 42-1701A(3).

IT IS FURTHER ORDERED that, pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter 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 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 a petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* 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 26th day of February 2015.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of February 2015, a true and correct copy of the above and foregoing document described below were served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Final Order Approving Mitigation Plan and Dismissing Delivery Call; Order Vacating Status Conference.

ARK FISHERIES
ATTN: LYNN BABINGTON
2825 SOUTH 1050 EAST
HAGERMAN, IDAHO 83332

(x) U.S. Mail, Postage Prepaid
( ) Hand Delivery
(x) E-mail

RANDY BUDGE
TJ BUDGE
RACINE OLSON
P.O. BOX 1391
POCATELLO, ID 83204-1391
rcb@racinelaw.net
tjb@racinelaw.net

(x) U.S. Mail, Postage Prepaid
( ) Hand Delivery
(x) E-mail

SARAH KLAHN
MITRA PEMBERTON
WHITE & JANKOWSKI
511 16TH ST., STE. 500
DENVER, CO 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com

(x) U.S. Mail, Postage Prepaid
( ) Hand Delivery
(x) E-mail

A. DEAN TRANMER
CITY OF POCATELLO
P.O. BOX 4169
POCATELLO, ID 83205
dtranmer@pocatello.us

(x) U.S. Mail, Postage Prepaid
( ) Hand Delivery
(x) E-mail

Deborah J. Gibson

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.