

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE MITIGATION
PLAN FILED ON BEHALF OF THE
WATER MITIGATION COALITION FOR
THE DISTRIBUTION OF WATER TO
VARIOUS WATER RIGHTS HELD BY
MEMBERS OF THE SENIOR WATER
USERS' COALITION

Docket Nos. CM-MP-2007-001
CM-DC-2010-001
CM-DC-2010-003

**FINAL ORDER APPROVING
MITIGATION PLAN**

BACKGROUND

On April 13, 2007, J.R. Simplot Company, Basic American Foods, and ConAgra Foods Packaged Foods Company, Inc., d/b/a Lamb-Weston (collectively, the “Water Mitigation Coalition” or “WMC”) together with A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, Northside Canal Company, Twin Falls Canal Company, and Clear Springs Foods, Inc. (collectively, the “Senior Water Users’ Coalition” or “SWUC”),¹ jointly submitted their *Stipulation Regarding Mitigation and Motion for Approval* (“Mitigation Plan”) to the Department.

A list detailing the members of the WMC was attached to the Mitigation Plan as Exhibit A, and Exhibit B identifies the SWUC members. Exhibit C consists of a cover letter dated March 26, 2007, and final documents generated by Brockway Engineering evaluating the impact of ground water use by the WMC on the Eastern Snake River Plain Aquifer.

A copy of the WMC and Minidoka Irrigation District’s (“MID”) Water Rental Agreement (“Rental Agreement”), dated February 6, 2007, was also included as an attachment to the Mitigation Plan when it was submitted to the Department in 2007, but is not formally identified as an exhibit or attachment within the Mitigation Plan. The parties entered into the Rental Agreement “for the purpose of mitigating depletions caused by WMC’s groundwater diversions to water supplies of certain surface right holders” in the SWUC. *Rental Agreement* at 1.

Following the submission of the Mitigation Plan, former counsel for the WMC asked the Department to wait to process it. The Department did not process the Mitigation Plan at that time. On August 26, 2021, the Department received a second submission of the Mitigation Plan

¹ A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, Northside Canal Company, and Twin Falls Canal Company collectively make up what is commonly referred to as the Surface Water Coalition (“SWC”). The SWC filed a delivery call in 2010. The SWC delivery call was docketed as Docket No. CM-DC-2010-001. Clear Springs Foods, Inc. (“Clear Springs”), also filed a delivery call in 2010. The Clear Springs delivery call was docketed as Docket No. CM-DC-2010-003. Because this plan provides mitigation to the SWC and Clear Springs, this order will be entered in both Docket No. CM-DC-2010-001 and Docket No. CM-DC-2010-003.

(without the Rental Agreement attachment) along with a request from current counsel for the WMC to process the Mitigation Plan.

The Department published notice of the Mitigation Plan in the Post Register, the Idaho State Journal, and The Power County Press on September 15 and 22, 2021; the Times News and the Idaho Statesman on September 16 and 23, 2021; and the Standard Journal on September 17 and 24, 2021. The Department did not receive protests to the Mitigation Plan.

FINDINGS OF FACT

1. In the Mitigation Plan, the parties stipulate that for a minimum of twenty years, the WMC will acquire and annually deliver 10,000 acre feet of MID stored water to the SWUC for the purposes of mitigating the stipulated depletion amount of 10,000 acre feet per annum. *Mitigation Plan* ¶ 7–8.
2. Should the WMC be unable to annually deliver 10,000 acre feet of MID stored water to the SWUC, the parties stipulate that the WMC’s mitigation obligation for any such year or years shall be satisfied by the payment of the yearly water rental fees for said 10,000 acre feet of storage water to the SWUC. *Id.* ¶ 8.
3. The parties stipulate that the SWUC agrees to “fully subordinate any surface water Delivery Call to WMC’s water rights listed on Exhibit A.” *Id.*
4. The parties stipulate that they intend the Delivery Call subordination to remain in effect indefinitely with no additional obligations by the WMC provided certain provisions of the Mitigation Plan are satisfied and there are no additional parties or water rights in the Delivery Call subordination. *Id.*
5. The parties stipulate that they agree that the WMC will pay for yearly water rental fees for 10,000 acre feet of mitigation storage should the WMC be unable to deliver the 10,000 acre feet of storage water from MID. *Id.*

GOVERNING STATUTES AND RULES

1. Idaho Code § 42-602 grants authority to the Director of the Department to supervise water distribution within water districts:

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 the authority to adopt rules governing water distribution.
4. Pursuant to Chapter 52, Title 67, Idaho Code, and Idaho Code §§ 42-603 and 42-1805(8), 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. A mitigation plan is:

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 ground 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 supply.

IDAPA 37.03.11.010.15.
7. 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.
8. 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).
9. 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).

CONCLUSIONS OF LAW

1. The Director concludes that the SWUC and WMC “have entered into an agreement on an acceptable mitigation plan” in accordance with CM Rule 43.03.(o). The Mitigation Agreement relies on ongoing, annual actions. First, the WMC must provide 10,000 acre feet of stored water to the SWUC from MID. If WMC cannot provide this 10,000 acre feet, it must pay monetary compensation to the SWUC. In return, SWUC agrees to continue to subordinate their rights to the WMC. For the Mitigation Agreement to remain in effect, no other parties or water rights may be joined.
2. Having reviewed the Stipulation Regarding Mitigation and Motion for Approval, Exhibits A-C, the Director should approve the Mitigation Plan with certain conditions.

ORDER

Based on and consistent with the foregoing, IT IS HEREBY ORDERED that the Mitigation Agreement is APPROVED with the following condition: approval of the Mitigation Plan does not obligate the Department or the Watermaster to undertake an accounting of any spaceholder contracts as outlined in paragraph 11 of the Mitigation Plan.

DATED this 25th day of October 2021.

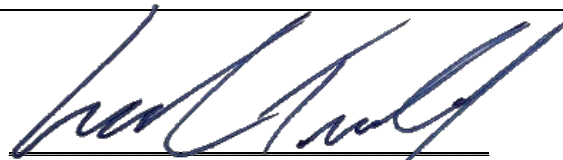


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of October 2021, I caused to be served a true and correct copy of the foregoing, *Final Order Approving Mitigation Plan*, via email and U.S. Mail, upon the following:

<p>Albert P. Barker BARKER ROSHOLT & SIMPSON LLP P.O. Box 2139 Boise, ID 83701-2139 apb@idahowaters.com</p> <p><i>For Water Mitigation Coalition</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Travis Thompson BARKER ROSHOLT & SIMPSON LLP P.O. Box 63 Twin Falls, ID 83303-0063 flt@idahowaters.com</p> <p><i>For A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>John Simpson BARKER ROSHOLT & SIMPSON LLP P.O. Box 2139 Boise, ID 83701-2139 jks@idahowaters.com</p> <p><i>For Clear Springs Food, Inc.</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org</p> <p><i>For Minidoka Irrigation District and American Falls Reservoir District #2</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>



Sarah Tschohl
Legal Assistant

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.