

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE IDAHO GROUND WATER APPROPRIATORS, INC.'S MITIGATION PLAN FOR CONVERSIONS, DRY-UPS, AND RECHARGE) Docket No: CM-MP-2009-006)) FINAL ORDER APPROVING) MITIGATION CREDITS) REGARDING SWC) DELIVERY CALL)
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FINDINGS OF FACT

1. On October 6, 2009, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed with the Director of the Department of Water Resources (“Director” or “Department”) a *Mitigation Plan for Conversions, Dry-Ups and Recharge* (“Plan”) in accordance with the Conjunctive Management Rules (“CM Rules”). IDAPA 37.03.11.043. The Plan was filed broadly, “on behalf of [IGWA’s] Ground Water District Members and other water user members for and on behalf of their respective members and those ground water users who are non-member participants in their mitigation activities” *Plan* at 1.

2. In accordance with CM Rule 43 and Idaho Code § 42-222, IGWA’s Plan was published. The Plan was not protested. On May 14, 2010, the Director approved the Plan. *Order Approving Mitigation Plan*. In the Order Approving Mitigation Plan, the Director stated: “In the future, if mitigation credit is sought by IGWA, the Director shall determine the appropriate credit, if any, to provide.”

3. On May 12, 2010, the Department received *IGWA’s Request for Mitigation Credit* (“Credit Request”). The Credit Request was filed in order to provide IGWA with mitigation credit for material injury that was predicted by the Director to occur to certain members of the SWC during the 2010 irrigation season. The Credit Request sought approximately 15,306 acre-feet of mitigation credit for conversions, enrollment in the Conservation Reserve Enhanced Program (“CREP”), and recharge activities. According to the Request, these activities “enhance the water supply in the ESPA and to the Snake River” *Request* at 2.

4. On May 17, 2010, the Director issued an *Order Approving Mitigation Credits Regarding SWC Delivery Call* (“Mitigation Credit Order”). The Mitigation Credit Order approved the following credits for conversions, CREP, and recharge activities:

W.D. 130 Conversions	CREP	2007 & 2009 Recharge	Total
220	5,390	97	5,707

5. Because water should be provided during the time in which it can be put to beneficial use, which for the SWC is the irrigation season (April through October), the Director calculated transient mitigation credit for these activities.

6. On May 28, 2010, the SWC requested a hearing regarding the Mitigation Credit Order. On June 29, 2010, the Director conducted a hearing regarding the Mitigation Credit Order.

7. At hearing, it was established that the Department had incorrectly simulated the benefits for IGWA's 2007 and 2009 recharge activities, which resulted in a correction from 97 acre-feet to 11 acre-feet. Exhibits 2 and 3. It was also established that, for purposes of the 2009 recharge effort, the Department considered not only water leased by IGWA, but also water leased by the Idaho Dairymen's Association, Inc. ("IDA").¹

8. The model simulations established the following corrected transient (April through October) credits for conversions, CREP enrollment, and recharge:

W.D. 130 Conversions	CREP	2007 & 2009 Recharge	Total
220	5,390	11	5,621

See Exhibit 3.

9. Without the inclusion of the IDA recharge water, the simulated benefit of recharge remains 11 acre-feet.

10. CREP is a federal program that compensates landowners, primarily with federal dollars, for discontinuing the cropping of farmland and growing a cover crop to protect the lands for conservation purposes. The program is "enhanced" when idling the lands will result in significant additional benefits that are identified by the U.S Department of Agriculture. When lands are set aside under CREP, the owner of the lands receives compensation from the base purposes of the conservation reserved program and additional compensation for the "enhanced" purpose of the set aside. Lands within portions of the Eastern Snake River Basin are eligible for the enhanced compensation provided by CREP because of the ground water savings when the lands are no longer irrigated following enrollment.

11. IGWA offered and continues to offer a signing bonus of \$30 per acre to landowners who enroll in CREP within the eligible area of the ESPA.

¹ In 2009, IDA leased 3,687 acre-feet of storage water for purposes of late season recharge. See Exhibit A to *Third Affidavit of Phillip J. Rassier* (February 18, 2010), Gooding County Case No. CV-2009-431.

12. The Idaho CREP contract called for a maximum CREP enrollment of 100,000 acres. Approximately 17,000 acres are enrolled in CREP. The total authorized federal expenditure for CREP in the state of Idaho is \$183,000,000. The total authorized state of Idaho and private contribution from cash and in-kind services is \$75,041,883. Of this total state contribution, IGWA agreed to contribute a total of \$3,000,000 in cash to enrollees as a signing bonus at the rate of \$30 per acre. In addition, ground water districts, which are underlying members of IGWA, agreed to contribute \$375,000 of in-kind services in the form of water measurement.

13. The total project enrollment cost is \$258,041,883. IGWA's contribution of \$3,375,000 is approximately 1.3 % of the total cost of the CREP authorized budget.

14. At hearing, the SWC argued IGWA should only be entitled to mitigation credit in the same proportion as its proportionate contribution to the entire CREP payment.

15. The Department computations assume IGWA should receive the mitigation credit for the full measure of the CREP simulated benefits.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602 states that, "The director of the department of water resources shall have discretion and control of the distribution of water from all natural sources . . . The director of the department of water resources shall distribute water . . . in accordance with the prior appropriation doctrine." The Idaho Supreme Court has recently stated, "Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director." *American Falls Res. Dist. No. 2 v. Idaho Dept. Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007). The CM Rules incorporate all principles of the prior appropriation doctrine as established by Idaho law. CM Rule 20.03.

2. CM Rule 43.03 states as follows:

03. Factors to Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: (10-7-94)

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law. (10-7-94)

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require

replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods. (10-7-94)

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan. (10-7-94)

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. (10-7-94)

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. (10-7-94)

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use. (10-7-94)

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (10-7-94)

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan. (10-7-94)

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge. (10-7-94)

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury. (10-7-94)

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. (10-7-94)

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan. (10-7-94)

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies. (10-7-94)

o. 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. (10-7-94)

3. The Credit Request requires the utilization of the ESPA Model to simulate the benefits that will accrue to the near Blackfoot to Minidoka reach. CM Rule 43.03.e and .f. The ESPA Model represents the best available science for determining the effects of ground water diversions and surface water users on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. There is currently no other technical basis as reliable as the simulations from the ESPA Model that can be used to determine the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. The degree of uncertainty associated with application of the ESPA Model is 10 percent.

4. In order to ensure that mitigation credit is provided during the time of need, which for the SWC is the irrigation season (April through October), the Director calculates transient mitigation credit for the above-identified mitigation activities. Based upon ESPA Model simulations, the Director determines that, for the 2010 irrigation season, the benefit of these activities will increase gains between the near Blackfoot to Minidoka reach by 5,621 acre-feet.

5. In various farm assistance programs, the federal government pays farmers to influence their behavior to accomplish a federal goal. The state may also pay farmers for activities that benefit a state goal. In the farm assistance programs, the participating farmer derives the entire monetary benefits from enrollment even though the farmer contributes a fractional share of the cost if there is a cost share at all.

6. CREP accomplishes a goal of demand reduction in the Eastern Snake River Basin. The federal government and the state of Idaho are not requesting a proportionate share of the benefits derived from enrollment in CREP. The Department will assign credit for mitigation to the entity contributing privately to enrollment. If there is more than one private contributor, the credit will be assigned to each contributor based on the proportion of the private contributions.² If there is no private contribution, the Department will assign credit for mitigation as designated by the enrollee, if the enrollee determines that credit should be assigned. A contributor may assign his or her credit.

7. The Department will similarly apportion the benefits for simulated recharge. The Department will not credit IGWA for IDA's 2009 recharge.

8. The 5,621 acre-feet mitigation credit established herein may be applied by IGWA to its 2010 in-season demand shortfall to the SWC, if any.

² The Department has previously granted a mitigation credit in a CM Rule 43 proceeding to Southwest Irrigation District for its enrollment of acres in CREP. See *Final Order Approving Mitigation Plans (Blue Lakes Delivery Call)* (May 7, 2010).

ORDER


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

IGWA's *Request for Mitigation Credit* is GRANTED for the 2010 irrigation season, in response to the SWC delivery call. The mitigation credit for the 2010 irrigation season is 5,621 acre-feet. Upon request of the Director, IGWA may apply the 5,621 acre-feet mitigation credit to its 2010 in-season demand shortfall to the SWC, if any.

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 issuance 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 pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order in this matter may appeal the final order 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 issuance of the final order; (b) 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* 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 19th day of July, 2010


GARY STACKMAN
Interim Director

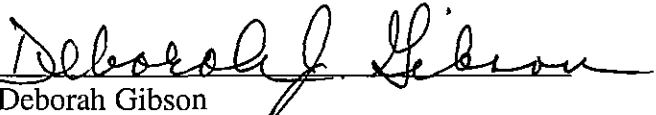
CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on the 19th day of July, 2010.

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