

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

IN THE MATTER OF THE IDAHO GROUND )	CM-MP-2009-007
WATER APPROPRIATORS, INC.'S )	
MITIGATION PLAN IN RESPONSE TO THE )	<b>ORDER APPROVING</b>
SURFACE WATER COALITION'S WATER )	<b>MITIGATION PLAN</b>
DELIVERY CALL )	
_____ )	

**PROCEDURAL HISTORY**

This matter came before the Director of the Department of Water Resources (“Director” or “Department”) on January 14, 2005 with the filing of a letter (“Letter”) and petition (“Petition”) by members of the Surface Water Coalition (“SWC”).<sup>1</sup> The Letter and Petition sought administration and curtailment of junior ground water rights. The Director of the Department considered the Letter and Petition as a delivery call under the Department’s Conjunctive Management Rules (“CM Rules”), IDAPA 37.03.11 *et seq.*

On February 14, 2005, the former Director entered the first of a series of orders (“February 2005 Order”) in this matter, which provided an initial response to the Letter and Petition. The February 2005 Order was followed by an order issued on May 2, 2005 (“May 2005 Order”), which superseded an order issued on April 19, 2005. Based on forecasting from the United States Bureau of Reclamation (“USBR”) and the United States Army Corp of Engineers for the unregulated inflow into the Upper Snake River Basin at the Heise Gage, the May 2005 Order predicted that some members of the SWC would be materially injured by junior ground water pumping and ordered curtailment of junior users in lieu of acceptable replacement water being provided to mitigate for the depletions causing the injury. During the 2005, 2006, and 2007 irrigation seasons, the Director issued seven supplemental orders regarding material injury predictions to the SWC. Under these orders, the Idaho Ground Water Appropriators, Inc.

---

<sup>1</sup> The Surface Water Coalition is made up of the A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

(“IGWA”)<sup>2</sup> was authorized by the Director to mitigate for material injury to the SWC with replacement water plans.

On September 5, 2008, following a recommended order (“Recommended Order”) from hearing officer Gerald F. Schroeder, the Director issued a final order in this matter (“2008 Final Order”), in which he ruled on all issues raised at hearing, with the exception of stating his methodology for determining material injury to the SWC’s reasonable in-season demand and reasonable carryover

On July 24, 2009, the Honorable John M. Melanson issued his *Order on Judicial Review*, which found that the Director’s decision to bifurcate his orders was unlawful under the IDAPA. Judge Melanson also determined that the replacement water plans previously approved by the Director did not satisfy the requirements of Rule 43 of the Conjunctive Management Rules, and that, in order for a junior ground water user to derive the benefits of providing replacement or mitigation for depletions causing injury to senior water right users, the junior water right holder must propose a mitigation plan, and the Department must approve the plan under CM Rule 43.

On November 9, 2010, IGWA filed its *Mitigation Plan for the Surface Water Coalition Delivery Call* (“the mitigation plan”). The Department published notice of the mitigation plan. The mitigation plan was protested by the SWC and by the USBR.

On April 7, 2010, upon an order of remand from Judge Melanson, the Director issued his *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). The Methodology Order sets out the process by which the Director will determine material injury, if any, to members of the SWC.

On May 25-26, 2010, the interim director of the Department conducted a hearing for protests against the mitigation plan. At the hearing, the USBR withdrew its protest on the record.

## DESCRIPTION OF THE MITIGATION PLAN

The mitigation plan generally proposes supplying water stored in Snake River reservoirs to the SWC “that will be available on an annual basis for delivery to SWC entities as may be required by the Director’s orders.” The storage water supply for use under the mitigation plan will be “secured by agreements entered into between IGWA and storage space holders in the Upper Snake Reservoir System.” IGWA represented it controls 68,000 acre-feet of storage water. The mitigation plan recognizes that the “exact amount of water required to be delivered to SWC entities under this Mitigation Plan cannot be known in advance but can be expected to vary annually based upon the forecasted water supply and reasonable irrigation requirements which are used to determine the amount of water needed for the irrigation season and reasonable carryover storage.” Finally the mitigation plan seeks express limitations or prohibitions on

---

<sup>2</sup> IGWA is comprised of ground water districts, irrigation districts, municipal providers, and commercial and industrial water users. A list of members is attached as the last page of IGWA’s Mitigation Plan.

requiring mitigation if the SWC fails to comply with very strict conditions that will be discussed later in this order.

### **REQUIREMENTS OF A MITIGATION PLAN**

CM Rule 43.a requires the following components be included in a plan:

#### 043. MITIGATION PLANS (RULE 43).

01. Submission of Mitigation Plans A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information:

- a. The name and mailing address of the person or persons submitting the plan.
- b. Identification of the water rights for which benefit the mitigation plan is proposed.
- c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies.
- d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03.

The mitigation plan contained IGWA's name and mailing address.

The mitigation plan did not specifically identify "the water rights for which benefit the mitigation is proposed." Nonetheless, the mitigation plan is filed to address a specific petition for delivery call that identifies the senior water rights (natural flow and storage) that may be injured by depletions to Snake River flows caused by ground water pumping. The rights have been expressly identified in the previous litigation in the larger contested case and need not be expressly repeated in the mitigation plan. *See May 2005 Order* at 11-16.

Finally, information about the Snake River reservoirs was also presented in the larger contested case. The volume capacity of the reservoirs and the frequency of fill need not be repeated in the mitigation plan. *See Recommended Order* at 13-17; 34-36.

The Director has sufficient information to evaluate the factors set form in CM Rule 43.03.

### **FACTORS CONSIDERED**

CM Rule 43 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)

Rule 43 does not require the Director to apply each of the factors to the mitigation plan. Nonetheless, the rule requires that the Director review the mitigation plan against a sufficient number of factors to assure adequate breadth of review.

### **ANALYSIS OF THE MITIGATION PLAN**

The closing arguments of parties define their respective and mutually extreme positions.

IGWA stated that the mitigation plan proposes providing storage water at the times and quantities required by the Director. In the details of its presented testimony, however, IGWA suggested that the mitigation water should be supplied after the irrigation season is over through an adjustment of the Water District 01 accounting of deliveries of storage water and natural flow. At a minimum, IGWA argued it should not be required to show it has contractually secured its obligation for delivery of storage water until the day when the storage in the Snake River

reservoirs is allocated to the various space holders. This “day of allocation” often falls in late June or early July, well into the irrigation season.

IGWA’s argument adopts the theory that if water is diverted, a supply will be provided. Underlying the argument is a presumption that there is always sufficient storage to make the SWC users whole. Yet, IGWA argues that these always available supplies of water cannot be acquired prior to the irrigation season.

IGWA’s position places an unreasonable burden upon the SWC senior water right holders that the water supply will be available at the time of need. The SWC must have an assurance at the beginning of the irrigation season that water can be provided when the water is needed. The proposals by IGWA do not provide these assurances.

In contrast, the SWC argued that storage water rented from willing lessors through the Idaho Water Resources Board’s Upper Snake River Rental Pool should not be a source of mitigation water for IGWA because IGWA is proposing to use the same source of water for mitigation that ground water pumping is depleting, causing a double negative impact to surface water supplies.

The SWC argument fails because the Snake River reservoirs fill in many years despite ground water pumping. When there is sufficient water in the reservoirs to provide the demand shortfall to SWC members caused by ground water pumping, the ground water users should not be prohibited from supplying the mitigation water to the SWC from rented storage water.

IGWA can rent storage water or acquire options to rent water prior to the irrigation season. These contracts may be more expensive prior to the lessor or potential lessor knowing the water supply that will be available. Nonetheless, as junior water users, IGWA cannot shift this risk of uncertainty upon the SWC.

IGWA should provide sufficient evidence of preseason commitment of water rights to provide any demand shortfalls projected by the Director in steps three and four of the Methodology Order.

### **IGWA’S PROPOSED CONDITIONS**

IGWA proposed ten limitations on its obligation to mitigate for material injury to the SWC. Some of these limitations would apply only to the Twin Falls Canal Company water obligation, used by IGWA as an example for application of the mitigation plan. Each of these proposed limitations will be addressed immediately following quotation of the proposed limitation.

- (1) If Twin Falls Canal Company does not divert 1,009,100 acre-feet no mitigation requirement shall exist if Twin Falls Canal Company has carry-over storage remaining when the final Water District 01 Water Right Accounting is complete for the mitigation year.

This proposed limitation ignores the requirement that the Director consider reasonable storage water carryover in determining the obligation of IGWA. The proposed limitation assumes an after season accounting before mitigation is required. Finally the condition attempts to establish demand water volume not consistent with the Methodology Order. The entire proposed limitation should be rejected.

(2) All water spilled at the end of the Twin Falls Canal Company canal system shall be measured and accounted for by the Watermaster. Unreasonable waste shall be accounted for and deducted from any obligation of the Ground Water Districts.

Measurement of spill at the end of the SWC delivery systems is not the job of the Water District 01 watermaster. Furthermore, the interim director recognizes that water deliveries through long and complex conveyance systems cannot always immediately respond to changes in weather and water user behaviors. The interim director rejects this limitation, but agrees that IGWA should not be responsible for waste by the SWC. In the future, it may be possible to measure spill at the end of the SWC's conveyance systems. The Director reserves the right to re-examine measurement of spill.

(3) Any water leased to others by Twin Falls Canal Company shall be considered a delivery to Twin Falls Canal Company for the purpose of calculating any obligation of the ground water users.

This proposed method of calculating obligation at the time of need is appropriate.

(4) Only water diverted and used by Twin Falls Canal Company for beneficial purposes of providing irrigation water to its shareholders for irrigation of lands within the service area during the mitigation year shall be included in calculating the obligation of the Ground Water Districts.

This proposed method of calculating obligation at the time of need is appropriate.

(5) Existing accounting procedures employed by Water District 01 should not be modified and the accounting will be the final year-end accounting by the Water District 01 Watermaster.

Accounting procedures may change as to employ better methods of accounting or interpretations of the law. This proposed limitation also requests year-end determination of mitigation obligation. The interim director entirely rejects the proposed limitation.

(6) Any water released past Milner Dam during the mitigation year for hydropower generation or related to Endangered Species Act requirements shall be accounted for by the Water District 01 Watermaster and shall not increase the mitigation obligation of the Ground Water Users.

This proposed limitation too broadly proposes that **any** “water released past Milner Dam during the mitigation year for hydropower generation or related to Endangered Species Act requirements . . . shall not increase the mitigation obligation . . .” If a specific SWC entity leases water for hydropower or flow augmentation, either through a direct lease or as a participant in the rental pool, the water provided for this purpose by the SWC entity must be added into the total supply available to the SWC member to determine the adequacy of supply to the SWC member. Leases of water by other water right holders for hydropower or flow augmentation should not reduce the quantity of water needed for reasonable in season demand for the SWC members not participating in the specific lease.

(7) The Department of Water Resources shall examine the diversion and climate-based water requirements of the mitigation year and adjust mitigation obligations downward if sufficient precipitation or other circumstances indicate that a full water supply was available to Twin Falls with a diversion less than 1,009,100 acre-feet.

This proposed limitation again implies an end-of-year determination of obligation. The interim director rejects the proposed limitation except as it is inconsistent with the mid-irrigation season adjustments set forth in the Methodology Order.

(8) If on any day the Twin Falls Canal Company diverts less than the natural flow that is available to its water rights in priority, such foregone amount of natural flow diversion will be deducted from any obligation of the Ground Water Users.

This proposed condition ignores core principles of delivery of water in the arid West. A SWC member might have to divert its full authorized flow rate on the hottest day of the year and may not have to divert its full natural flow rate water on a cooler, rainy day. The SWC should not be penalized for simply using water as needed. The interim director rejects this proposed limitation in its entirety.

(9) In no event will any actual shortfall be made up by the Ground Water Users as determined by the Watermaster which exceeds the actual current shortfall to Twin Falls Canal Company as determined by the Director of the Department.

This proposed limitation is confusing and ambiguous and the interim director rejects the limitation in its entirety.

(10) The calculated amount of the Minidoka Dam Return Flow Credit shall be deducted from any obligation of the Ground Water Users.

Twin Falls Canal Company and North Side Canal Company are required to provide the Minidoka Dam Return Flow Credit to upstream SWC members. The return flow credit is part of the historical water supply, and is implicitly included in the Director’s determination of obligation in the Methodology Order. The interim director rejects this limitation in its entirety.



## **FINDINGS OF FACT**

The mitigation plan contains sufficient information, as augmented by the information presented in the contested case for the delivery call and the hearing on the mitigation plan, to allow the interim director to evaluate the mitigation plan to determine its adequacy.

During many irrigation seasons, IGWA can rent or acquire options to rent storage water in the Snake River Reservoirs to supply mitigation or replacement water to the SWC.

IGWA can rent or acquire options to rent storage water prior to or at the beginning of the irrigation season.

Rental or acquisition of an option to rent storage water prior to or at the beginning of the irrigation season will assure the SWC of an adequate quantity of water for the upcoming irrigation season.

The rental of storage water by IGWA will not diminish the supply of water available to the SWC.

Storage water must also be provided for reasonable storage carryover at the end of the irrigation season.

## **CONCLUSIONS OF LAW**

IGWA's proposed rental of storage water and delivery of the storage water and use of water pursuant to the mitigation plan is in compliance with Idaho law.

The mitigation plan will provide replacement water at the time and place required by the senior-priority water right. During many years, there will be sufficient storage water to offset the depletive effect of ground water withdrawal on the water available in the Snake River at such time and place as necessary to satisfy the rights of diversion from the Snake River.

The mitigation plan provides replacement water supplies to the senior-priority water right when needed during a time of shortage even though the effect of pumping is spread over many years.

Approval of the mitigation plan requires pre-irrigation season commitment of rented storage water to the SWC. This commitment must be proven by executed contract documents and obligation to the Upper Snake River Rental Pool of the storage for mitigation.

A contingency of the mitigation plan approval is that, if insufficient water is committed to assure protection of the senior-priority water rights, junior-priority ground water rights will be curtailed.

Storage in the Snake River reservoirs is a reliable source of replacement water.

The mitigation plan does not propose enlargement of the rate of diversion, seasonal quantity, or time of diversion under any water right being proposed for use in the mitigation plan.

The mitigation plan will maximize the beneficial use of water in the State of Idaho and promote conservation of water resources.

Use of storage water for mitigation is in the public interest and will not injure other water rights.

The mitigation plan, with flexibility for determining annual and seasonal requirements as set for in the Methodology Order, provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury.

## **ORDER**

IT IS HEREBY ORDERED that *IGWA'S Mitigation Plan for the Surface Water Coalition Delivery Call* is **Approved**, subject to the following conditions:

IGWA's obligation to provide storage water shall be determined as set forth in the Methodology Order. The obligation includes mitigation for material injury to the SWC's reasonable in-season demand and reasonable carryover.

IGWA must provide proof of rental or an option to rent storage water and of a commitment of the storage water to the SWC within the deadlines provided by the Methodology Order and any order of the Director implementing the Methodology Order for a given year. Proof of rental or an option to rent storage water shall consist of fully executed and irrevocable contracts with holders of Snake River storage (fully disclosed in the contracts). Storage shall be committed to the SWC by IGWA submitting the storage rental or storage option contracts to the Upper Snake River Rental Pool and the Director with a written instruction to the Watermaster of Water District 01 that the underlying storage water is committed solely for mitigation to the SWC and that the contracts or options may only be released back to IGWA or the storage water lessors by directive to the Watermaster by the Director of the Department.

Waste by a SWC member will be subtracted from the storage water mitigation requirement for the SWC member.

Water rented to another water user by a SWC member will be subtracted from the storage water mitigation requirement for the SWC member. In addition, water placed in the rental pool by a SWC member and used for any purpose, including hydropower and flow augmentation below Milner Dam, shall be subtracted from IGWA's obligation to the SWC member.

IT IS FURTHER ORDERED that IGWA's obligation for mitigation shall be determined as set forth in the Methodology Order. When the obligations for reasonable in-season demand and reasonable carryover are established, the determination of obligation shall be subject to a

hearing but the obligation will not be stayed during the pendency of hearing preparation and response by the Director to the request for hearing.

IT IS FURTHER ORDERED that, if IGWA does not provide proof of acquisition of storage water and commitment of storage water as set forth above, ground water rights pumping from the Eastern Snake Plain Aquifer will be curtailed according to the Methodology Order to provide water to the SWC.

DATED this 3<sup>rd</sup> day of June, 2010.



GARY SPACKMAN  
Interim Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3<sup>rd</sup> day of June, 2010, the above and foregoing, was served by the method indicated below, and addressed to the following:

RANDY BUDGE  
CANDICE MCHUGH  
THOMAS BUDGE  
RACINE OLSON  
PO BOX 1391  
POCATELLO ID 83204-1391  
[rcb@racinelaw.net](mailto:rcb@racinelaw.net)  
[cmm@racinelaw.net](mailto:cmm@racinelaw.net)  
[tjb@racinelaw.net](mailto:tjb@racinelaw.net)

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

JOHN SIMPSON  
BARKER ROSHOLT  
PO BOX 2139  
BOISE ID 83701-2139  
[jks@idahowaters.com](mailto:jks@idahowaters.com)

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

TRAVIS THOMPSON  
PAUL ARRINGTON  
BARKER ROSHOLT  
113 MAIN AVE WEST STE 303  
TWIN FALLS ID 83301-6167  
[tlt@idahowaters.com](mailto:tlt@idahowaters.com)  
[pla@idahowaters.com](mailto:pla@idahowaters.com)

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

TOM ARKOOSH  
CAPITOL LAW GROUP  
PO BOX 32  
GOODING ID 83330  
[tarkoosh@capitollawgroup.net](mailto:tarkoosh@capitollawgroup.net)

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

W. KENT FLETCHER  
FLETCHER LAW OFFICE  
PO BOX 248  
BURLEY ID 83318-0248  
[wkf@pmt.org](mailto:wkf@pmt.org)

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

KATHLEEN CARR  
U.S. DEPT INTERIOR  
960 BROADWAY STE 400  
BOISE ID 83706  
[KathleenMarion.Carr@sol.doi.gov](mailto:KathleenMarion.Carr@sol.doi.gov)

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

MATT HOWARD  
US BUREAU OF RECLAMATION  
1150 N CURTIS ROAD  
BOISE ID 83706-1234  
[mhoward@pn.usbr.gov](mailto:mhoward@pn.usbr.gov)


U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

LYLE SWANK  
IDWR  
900 N SKYLINE DR  
IDAHO FALLS ID 83402-6105  
(208) 525-7177  
[lyle.swank@idwr.idaho.gov](mailto:lyle.swank@idwr.idaho.gov)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

ALLEN MERRITT  
CINDY YENTER  
IDWR  
1341 FILLMORE ST STE 200  
TWIN FALLS ID 83301-3033  
(208) 736-3037  
[allen.merritt@idwr.idaho.gov](mailto:allen.merritt@idwr.idaho.gov)  
[cindy.yenter@idwr.idaho.gov](mailto:cindy.yenter@idwr.idaho.gov)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

  
for Victoria Wigle  
Administrative Assistant to the Director  
Idaho Department of Water Resources