

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

IN THE MATTER OF SOUTHWEST AND
GOOSE CREEK IRRIGATION DISTRICTS
MITIGATION PLAN FOR THE SURFACE
WATER COALITION DELIVERY CALL

Docket No. CM-MP-2010-01

**FINAL ORDER APPROVING
INTERIM MITIGATION PLAN**

On November 22, 2013, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) received a *Joint Motion for Approval of Interim Mitigation Agreement* (“Motion”). Attached as an exhibit to the Motion was an *Interim Mitigation Agreement* (“Mitigation Plan”). The Motion was filed jointly by counsel for Southwest Irrigation District and Goose Creek Irrigation District (collectively referred to as “SWID”), and 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 (collectively referred to as the “SWC”). The Mitigation Plan was submitted pursuant to Rule 43.03.o of the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”). IDAPA 37.03.11 *et seq.*

FINDINGS OF FACT

1. On June 15, 2010, SWID filed an *Amended Mitigation Plan* with the Department in response to a delivery call made by the SWC. The Department published notice of the plan and the SWC protested the plan on July 9, 2010. Since that time, the SWID and the SWC have been in negotiations to resolve the protest.

2. On November 22, 2013, SWID and the SWC filed the Mitigation Plan with the Department. The Mitigation Plan stems from the negotiations between the parties. The SWID and SWC:

[J]ointly move the Director to approve the [Mitigation Plan] for a term of three years (2013-2015) as set forth in the agreement. The agreement provides for certain aquifer mitigation actions to be undertaken by [SWID] on an annual basis, including groundwater recharge, conversions, and voluntary curtailment. In exchange, the [SWC] agrees that the [SWID]’s members’ junior priority ground water rights shall not be subject to curtailment in response to the SWC’s water delivery call or any order issued by IDWR during the term of the agreement.

Motion at 2.

CONCLUSIONS OF LAW

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

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.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.”

2. 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 O. 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.

3. 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.”

4. CM Rule 43.01 sets forth the criteria for submission of a mitigation plan to the Director.

5. CM Rule 43.03 establishes the 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.”

6. The Mitigation Plan is entered into between the SWID and the SWC in accordance with CM Rule 43.03.o. *Mitigation Plan* at 3. The Mitigation Plan “provides for certain aquifer mitigation actions to be undertaken by [SWID] on an annual basis, including groundwater recharge, conversions, and voluntary curtailment.” *Motion* at 2. SWID and the SWC request that the Director enter an order without further notice or hearing approving the

Mitigation Plan and staying the contested case on SWID's amended mitigation plan until December 31, 2015, or until otherwise notified in writing by SWID and SWC. *Id.* at 3.

7. The Mitigation Plan requires numerous on-going activities, such as monitoring, reporting and verification of data. The parties to the Mitigation Plan should be responsible for these activities.

8. Covenants 7 and 8 of the Mitigation Plan include reference to certain hydrologic goals. In response to questions from the Department, counsel for the SWC and SWID stated that the goals are applicable only to the parties to the Mitigation Plan.

9. Having reviewed the Mitigation Plan, the CM Rules, and the proceedings herein, the Mitigation Plan should be approved pursuant to CM Rule 43.03 with the following conditions:

- a. All activities required pursuant to the Mitigation Plan, such as monitoring, reporting and verification of data, are the responsibility of the parties to the Mitigation Plan.
- b. The goals set forth in Covenants 7 and 8 are applicable only to the parties to the Mitigation Plan. The Department is not responsible for monitoring, reporting, or any other activity related to the goals.

ORDER

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

The Mitigation Plan entered into between SWID and the SWC is APPROVED with the following conditions:

- a. All activities required pursuant to the Mitigation Plan, such as monitoring, reporting and verification of data, are the responsibility of the parties to the Mitigation Plan.
- b. The goals set forth in Covenants 7 and 8 are applicable only to the parties to the Mitigation Plan. The Department is not responsible for monitoring, reporting, or any other activity related to the goals.

The Mitigation Plan shall be in effect until December 31, 2015, or until otherwise notified in writing by SWID and the SWC.

IT IS FURTHER ORDERED that the contested case on SWID's amended mitigation plan is STAYED until December 31, 2015, or until otherwise notified in writing by SWID and the SWC.

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 25th day of November, 2013.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of November, 2013, the above and foregoing, was served by the method indicated below, and addressed to the following:

William Parsons
Parsons Smith Stone Loveland
& Shirley LLP
P.O. Box 910
137 W. 13th Street
Burley, Idaho 83318
wparsons@pmt.org

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

John K. Simpson
Travis L. Thompson
Paul L. Arrington
Barker Rosholt & Simpson, LLP
195 River Vista Place, Suite 204
Twin Falls, Idaho 83301-3029
jks@idahowaters.com
tlt@idahowaters.com
pla@idahowaters.com

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

W. Kent Fletcher
Fletcher Law Office
P.O. Box 248
Burley, Idaho 83318
wkf@pmt.org

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email



Deborah Gibson
Idaho Department of Water Resources

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.