

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
MITIGATION PLAN FOR 2016**

FINDINGS OF FACT

1. On June 15, 2010, Southwest Irrigation District and Goose Creek Irrigation District (collectively referred to as "SWID") filed an *Amended Mitigation Plan* with the Director ("Director") of the Idaho Department of Water Resources ("Department") in response to a delivery call made by 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 Department published notice of the *Amended Mitigation Plan*. The SWC filed a protest.

2. On November 22, 2013, the Director received a *Joint Motion for Approval of Interim Mitigation Agreement* ("Motion") filed by counsel for SWID and the SWC. Attached as an exhibit to the Motion was an *Interim Mitigation Agreement* ("Mitigation Plan").

3. 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.* 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. "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 [the Department] during the term of the agreement." *Id.* The term of the Mitigation Plan was from January 1, 2013, to December 31, 2015. *Mitigation Plan* at 4.

4. On November 25, 2013, the Director issued a *Final Order Approving Interim Mitigation Plan* ("Final Order"), approving the Mitigation Plan upon certain conditions. *Final Order* at 3. The Director ordered that "[t]he Mitigation Plan shall be in effect until December 31, 2015, or until otherwise notified by SWID and the SWC." *Id.* The Director also stayed the contested case on the *Amended Mitigation Plan* "until December 31, 2015, until otherwise notified in writing by SWID and the SWC." *Id.*

5. On February 9, 2016, the Director received a *Joint Motion for Approval of Interim Mitigation Agreement for 2016* (“Joint Motion”). Attached as exhibits to the Joint Motion are the Mitigation Plan and a *First Amendment to Interim Mitigation Agreement* (“Amendment”). The Amendment simply extends the term of the Mitigation Plan “for one (1) year from January 1, 2016 to December 31, 2016.” *Amendment* at 1.

6. SWID and the SWC request that the Director enter an order without further notice or hearing approving the Mitigation Plan for the extended term as set forth in the Amendment. *Joint Motion* at 2-3. SWID and the SWC also request the Director stay the contested case on the *Amended Mitigation Plan* “until December 31, 2016, or until otherwise notified in writing by the Parties.” *Id.* at 3.

7. The Director published notice of the Mitigation Plan as required by the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”). IDAPA 37.03.11.043.02. No protests to the Mitigation Plan were filed.

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 the CM Rules effective October 7, 1994. 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. IDAPA 37.03.11.001.

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.” IDAPA 37.03.11.042.02.

4. CM Rule 43.01 sets forth the criteria for submission of a mitigation plan to the Director. IDAPA 37.03.11.043.01.

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.” IDAPA 37.03.11.03(o).

6. The Mitigation Plan is entered into between 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.

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. The goals are applicable only to the parties to the Mitigation Plan.

9. Having reviewed the Mitigation Plan, the Amendment, 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.

IT IS FURTHER ORDERED that, consistent with the Amendment, the Mitigation Plan shall be in effect until December 31, 2016, or until otherwise notified in writing by SWID and the SWC.

IT IS FURTHER ORDERED that the contested case on the *Amended Mitigation Plan* is STAYED until December 31, 2016, 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 29th day of March 2016.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of March 2016, the above and foregoing, was served by the method indicated below, and addressed to the following:

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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.