

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

IN THE MATTER OF THE MITIGATION PLAN
FILED BY A&B IRRIGATION DISTRICT FOR
THE DISTRIBUTION OF WATER TO WATER
RIGHTS HELD BY THE SURFACE WATER
COALITION

Docket No. CM-MP-2015-003

**ORDER DENYING REQUESTS
FOR APPROVAL TO
PARTICIPATE IN THE A&B
MITIGATION PLAN**

BACKGROUND

On July 19, 2023, the Idaho Department of Water Resources (“Department”) issued its *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Methodology Order*”) in the underlying delivery call matter, No. CM-DC-2010-001. The *Methodology Order* established nine steps for determining material injury to members of the Surface Water Coalition (“SWC”).¹

On April 18, 2024, the Director issued the *Final Order Regarding April 2024 Forecast Supply (Methodology Steps 1-3)* (“*As-Applied Order*”), which applied steps 1, 2, and 3 of the *Methodology Order*. The Director predicted an April in-season demand shortfall (“IDS”) of 74,100 acre-feet. *As-Applied Order*, at 3, No. CM-DC-2010-001. The Director ordered that, by May 2, 2024, ground water users with consumptive water rights “bearing priority dates junior to March 31, 1954, within the Eastern Snake Plain Aquifer area of common ground water supply [(“ESPA ACGWS”)] shall establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted April IDS of 74,100 acre-feet in accordance with an approved mitigation plan.” *Id.* at 6. The Director also ordered that, if such a junior ground water user cannot establish that they can mitigate “in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user.” *Id.*

There are currently seven approved mitigation plans in place responding to the SWC delivery call, including Docket No. CM-MP-2015-003 for the benefit of the A&B Irrigation District (“A&B”). On May 21, 2015, the Department received *A&B Irrigation District's Amended Rule 43 Mitigation Plan* (“*A&B Mitigation Plan*”). The *A&B Mitigation Plan* serves to satisfy A&B’s mitigation obligations for the SWC water delivery call. *See Final Order Approving Plan*, at 3. The *A&B Mitigation Plan* was submitted pursuant to Rule 43 of the Department's Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”). *See* IDAPA 37.03.11.043. Notice of the *A&B Mitigation Plan* was advertised in

¹ The SWC is comprised of 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.

accordance with Idaho Code § 42-222, and no protests were received by the Department. The Department issued a *Final Order Approving Mitigation Plan* on December 16, 2015.²

On May 30, 2024, the Director issued a *Final Order Curtailing Ground Water Rights Junior to March 31, 1954* (“*Curtailment Order*”). The *Curtailment Order* requires ground water users within the ESPA ACGWS, whose rights have a priority date after March 31, 1954, and who have not already established to the satisfaction of the Director that they are operating in accordance with a Department-approved mitigation plan, to cease diverting ground water under those rights as of May 30, 2024.³ *Curtailment Order*, at 9, CM-DC-2010-001. The *Curtailment Order* subjects certain water rights to curtailment that are owned by junior ground water users who are members of Falls Irrigation District and Bingham Ground Water District (“BGWD”). See *Curtailment Order* Attach. A, B.

Also, on May 30, 2024, A&B and Falls Irrigation District (“Falls”) filed a *Joint Notice of Participation in Mitigation Plan and Request for Approval* (“*Falls Request for Approval*”). Falls seeks to prevent curtailment of its water rights by “joining” the *A&B Mitigation Plan*. *Falls Request for Approval*, at 2. A&B and Falls argue that the *As-Applied Order* “did not identify limitations or process in the opportunity to join existing mitigation plans,” therefore, the *Falls Request for Approval* “attempts to provide a summary of the intent of Falls to comply with the storage water component of the A&B plan.” *Id.* at 1. Falls states that it “holds storage water rights in the Upper Snake River reservoir system” that it can mitigate with and that it will “execute a lease” for the water and will “pay the respective administrative fees” if the Director approves the request. *Id.* at 2. “A&B consents to Falls joining its approved mitigation plan in this matter in order to mitigate certain junior priority ground water rights held by Falls for the 2024 irrigation season” *Id.*

On June 3, 2024, BGWD filed *BGWD Notice of Participation in Mitigation Plan and Request for Approval* (“*BGWD Request for Approval*”). Like the *Falls Request for Approval*, BGWD makes a verbatim argument that the *As-Applied Order* “did not identify limitations or process in the opportunity to join existing mitigation plans,” therefore, the *BGWD Request for Approval* “attempts to provide a summary of the intent of BGWD to comply with the storage water component of the A&B plan.” *BGWD Request for Approval*, at 1. BGWD states it has “executed lease forms and payed [sic] the respective fees” *Id.* at 2. However, the *BGWD Request for Approval* does note that, “A&B has not consented to BGWD joining its approved

² On December 27, 2023, the SWC and A&B submitted a *Stipulation Regarding A&B Irrigation District’s Amended Rule 43 Mitigation Plan* (“*Stipulated Mitigation Plan*”). The *Stipulated Mitigation Plan* proposes that A&B will continue to mitigate injury to all the SWC members by curtailing ground water diversions and delivering storage water. *Stipulated Mitigation Plan*, at 2–3. Notice of the *Stipulated Mitigation Plan* was advertised in accordance with the CM Rules, and a protest was filed in response by the Coalition of Cities. On May 9, 2024, the Department received a *Stipulated Withdrawal of Protest* from A&B and the Coalition of Cities. The Director has appointed an independent hearing officer, Gerald F. Schroeder, to hear the contested case on behalf of the Department. The *Stipulated Mitigation Plan* proceedings are ongoing, and no final order has been issued.

³ Attachments A and B to the *Curtailment Order* list the water rights subject to curtailment at the time the order was issued.

mitigation plan in this matter in order to mitigate certain junior priority ground water rights held by BGWD for the 2024 irrigation season.” *Id.*

Also on June 3, 2024, A&B filed an *Objection to BGWD Notice of Participation* (“*A&B Objection*”). A&B objects to the *BGWD Request for Approval* on the grounds that BGWD did not seek or obtain the consent of A&B to participate in the *A&B Mitigation Plan* for the 2024 irrigation season. *A&B Objection*, at 1–2.

On June 4, 2024, the Department received *IGWA’s Response to A&B’s and FID’s Joint Notice of Participation in Mitigation Plan and Request for Approval* (“*IGWA Response*”). In its response, IGWA takes seemingly conflicting positions on the issue. First, IGWA argues that the *Falls Irrigation Request* does not actually seek to “comply” with the *A&B Mitigation Plan*, but really “it proposes that FID be allowed to mitigate on terms that mirror the storage water component of the A&B plan.” *IGWA Response*, at 1. IGWA notes that “[d]etermining whether a mitigation plan complies with [CM] Rule 43 is the prerogative of the Department, not A&B or the SWC.” *Id.* IGWA requests the Director “deny” the *Falls Request for Approval* on the grounds that it requests an amendment to the *A&B Mitigation Plan* “without complying with [CM Rule] 43.” *Id.* at 2. But IGWA also states that it “does not object to [Falls] using storage water to mitigate for material injury caused by its own ground water rights” because the Director has already “determined that the use of storage water to mitigate material injury caused by junior’s own groundwater use satisfies [CM] Rule 43” *Id.* at 2. IGWA suggests the Director “has no legal basis for preventing any other junior groundwater user from using storage water to mitigate for material injury caused by its own groundwater use. To do so violates the equal protection clause of the United States Constitution” *Id.* IGWA asks the Director to deny *Falls Request for Approval*, but to “issue an order allowing all groundwater users to use storage water to mitigate for material injury caused by their own ground water use.” *Id.*

ANALYSIS

I. Neither Falls nor BGWD are entitled to “join” the *A&B Mitigation Plan* because the plan was proposed and approved specifically for the protection of A&B’s water rights.

CM Rule 43 sets out the criteria for submission and approval of mitigation plans and states in relevant part:

A proposed mitigation plan shall be submitted to the Director in writing and contain the following information:

. . . .

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.

IDAPA 37.03.11.043.01.

The *A&B Mitigation Plan* is clear—it is for the benefit of A&B’s water rights, and it proposes to mitigate using A&B’s storage water supplies. The plan states that A&B “submits this [*A&B Mitigation Plan*] . . . for A&B’s ground water rights: 36-2080, 36-15192, 36-16749, 36-15127A, 36-15193A, 36-15194A, 36-15195A, 36-15196A, 36-15127B, 36-15193B, 36-15194B, 36-15195B, and 36-15196B.” *A&B Mitigation Plan*, at 1 (emphasis added). Under the subheading “Water Rights to be Mitigated By Plan,” A&B again lists the same 13 water rights identified above. *Id.* at 2. A&B states it “holds rights to storage water” and plans to use its storage water “to mitigate for any shortfalls caused by the District’s junior priority ground water that are subject to curtailment.” *Id.* at 3 (emphasis added).

In evaluating the plan, the Director considered whether A&B’s specific mitigation proposal would be able to mitigate for A&B’s junior ground water rights:

[T]he mitigation activities proposed by A&B are the type of activities that can provide replacement water at the time and place required by the senior priority water rights. The plan should be approved but conditioned upon confirmation that A&B’s mitigation activities fully mitigate for depletions caused by A&B’s junior-priority ground water diversions in each year that a curtailment order is issued.

Final Order Approving Mitigation Plan, at 3 (emphasis added).

Ultimately, the director approved the use of A&B’s storage supplies to mitigate for A&B’s junior ground water rights:

The Amended Mitigation Plan submitted by A&B is APPROVED conditioned upon confirmation that A&B’s mitigation activities fully mitigate for depletions caused by A&B’s junior-priority ground water diversions in each year that a curtailment order is issued.

Id.

The plain language of the plan submitted by A&B sought to use A&B’s storage water supplies to mitigate A&B’s junior ground water rights. The order approving the plan specifically approved the use of A&B’s storage water supplies to mitigate for A&B’s junior ground water rights.

Falls seeks to “join” the *A&B Mitigation Plan* to receive protection from curtailment. *Falls Request for Approval*, at 1. Falls does not cite specific authority to “join” in the plan but suggests that because the Director “did not identify limitations or process in the opportunity to join existing mitigation plans,” they should be able to join in the *A&B Mitigation Plan*. *Id.* Allowing Falls (or anyone else) to receive protection under the *A&B Mitigation Plan* is contrary to the plain language of the plan and the order approving the plan and must be rejected. As discussed above, the *A&B Mitigation Plan* sought and received approval to mitigate for A&B’s water rights using A&B’s storage water. Nowhere in the *A&B Mitigation Plan* does it mention Falls water rights or its storage supplies. IGWA is correct in its characterization of Falls’ request.

The request is not a request to join in the *A&B Mitigation Plan*, but to mitigate on terms that mirror the *A&B Mitigation Plan*. This characterization applies equally to BGWD’s request. Falls and BGWD are asking the Director to approve new mitigation plans that mirror the *A&B Mitigation Plan* without going through the procedures outlined in CM Rule 43. This is something the Director cannot do. The Director must strictly follow the notice requirements of the CM Rules. *Order on Pet. for Jud. Rev.*, at 48, *Clear Springs Foods, Inc. v. Blue Lakes Trout Farm, Inc.*, No. 2008-444 (Gooding Cnty. Dist. Ct. Idaho June 19, 2009).

The only water rights that have been identified “for which benefit the mitigation plan is proposed” are A&B’s water rights. The only “water supplies proposed to be used for mitigation” are A&B’s storage water supply. Furthermore, the *A&B Mitigation Plan* does not have a mechanism for other junior ground water users to join in the plan, unlike, for example, the Coalition of Cities’ mitigation plan, No. CM-MP-2019-001. While the Director understands Falls’ and BGWD’s desire to join the *A&B Mitigation Plan*, the Director cannot approve their requests because their requests are not in compliance with an approved mitigation plan. Accordingly, neither Falls nor BGWD are entitled to claim protection for their water rights under the *A&B Mitigation Plan* and their requests must be denied.

II. The Director’s actions do not violate the equal protection clause of the United States Constitution.

In its response brief, IGWA argues the Director should deny Falls’ request but also argues that the Director should “issue an order allowing all groundwater users to use storage water to mitigate for material injury caused by their own groundwater use.” *IGWA Response*, at 2. IGWA argues that because the Director has approved the *A&B Mitigation Plan*, “the Department has no legal basis for preventing any other junior groundwater user from using storage water to mitigate for material injury caused by its own groundwater use.” *Id.* IGWA states that if the Director does not issue an order allowing all ground water users to mitigate for their own material injury, this would “violate the equal protection clause of the United States Constitution, which ‘is essentially a mandate or direction that all persons similarly situated should be treated alike.’” *Id.* (citation omitted).

In this order, the Director is rejecting Falls’ and BGWD’s requests because allowing them to join the *A&B Mitigation Plan* is contrary to the plain language of the plan and thus would not comply with an approved mitigation plan. What they are really asking for is for the Director to approve new mitigation plans without going through the procedures outlined in CM Rule 43. The Director requiring compliance with the CM Rules for the processing and approval of a mitigation plan does not violate the equal protection clause of the U.S. Constitution. Requiring all water users to comply with the CM Rules is treating all water users equally. In accordance with the CM Rules, IGWA has sought and received approval for its own mitigation plans. *See* Nos. CM-MP-2016-001, CM-MP-2009-006. Since December 2023, several individual ground water districts, including BGWD, have petitioned for approval of their own mitigation plans, all filed pursuant to Rule 43.⁴ *See* Nos. CM-MP-2023-001, CM-MP-2023-002, CM-MP-

⁴ Those have been protested and are involved in contested case proceedings before Hearing Officer Gerald F. Schroeder.

2023-003, CM-MP-2023-004, CM-MP-2023-005, CM-MP-2024-001. Falls has even submitted its own independent mitigation plan, which is still in the public notice stage. *See* No. CM-MP-2024-002. The Director's refusal to approve a mitigation proposal that is not in compliance with the CM Rules is not contrary to the U.S. Constitution.

ORDER

Based on and consistent with the foregoing, IT IS HEREBY ORDERED that the (1) *Joint Notice of Participation in Mitigation Plan and Request for Approval* is DENIED; and the (2) *BGWD Notice of Participation in Mitigation Plan and Request for Approval* is DENIED.

Dated this 5th day of June 2024.



MATHEW WEAVER
Director

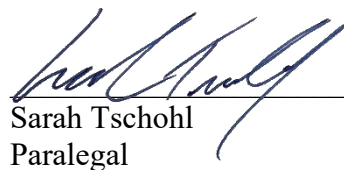
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of June 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

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Sarah Tschohl
Paralegal

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.