

**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

**FINAL ORDER APPROVING  
AMENDED MITIGATION PLAN**

The Director of the Idaho Department of Water Resources (“Department”) finds, concludes, and orders as follows:

**FINDINGS OF FACT**

1. On May 12, 2005, the Department received A&B Irrigation District’s (“A&B”) *Request for Approval of Mitigation Plan of A&B Irrigation District* filed in the underlying Surface Water Coalition (“SWC”) <sup>1</sup> delivery call case, No. CM-DC-2010-001. This mitigation plan was not published by the Department and no order was issued approving the plan.

2. 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* was submitted pursuant to Rule 43 of the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”). IDAPA 37.03.11.043. The plan was not stipulated to by the SWC.

3. The *A&B Mitigation Plan* “mitigate[s] for any shortfalls caused by [A&B’s] junior priority ground water that are subject to curtailment.” *A&B Mitigation Plan*, at 3. The components of the plan are: (1) conversion of approximately 1,378 acres from ground water irrigation to surface water irrigation; (2) enrolling 121 acres in the federal Conservation Reserve Enhancement Program; (3) development of a future ground water to surface water conversion pumping plant and pipeline project; and (4) delivering available storage water to injured SWC members, if necessary, from A&B’s storage water rights held in American Falls Reservoir and Palisades Reservoir or renting storage water through Water District 01’s Rental Pool (“storage water component”). *Id.*

4. Notice of the proposed *A&B Mitigation Plan* was advertised in the Idaho Mountain Express, Mountain Home News, and Times News in accordance with Idaho Code § 42-222(1) and CM Rule 43. No protests were received.

5. On December 16, 2015, the Director issued a *Final Order Approving Mitigation Plan*, approving the *A&B Mitigation Plan*, “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.

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<sup>1</sup> The SWC members include American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

6. If, during the irrigation season, the Director determines that junior ground water users' diversions will result in injury to the SWC and that a shortfall obligation is owed to the SWC, junior ground water users are given no less than 14 days to establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the obligation in accordance with an approved mitigation plan. *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* ¶ 13, at 3–4, No. CM-DC-2010-001 (April 21, 2023) (citing *Methodology Order* ¶ 4, at 40). The exception to this is if their mitigation plan is of a nature such that they do not need to mitigate for their proportionate share. *See id.* at 5 n.5. A&B is required to submit documentation to the Department for the Director to determine whether A&B will fully mitigate for its proportionate share of any shortfall obligation. *E.g., id.* at 5 n.5, at 6; *see Final Order Approving Mitigation Plan*, at 3.

7. On December 27, 2023, A&B and the SWC filed a *Stipulation Regarding A&B Irrigation District's Amended Rule 43 Mitigation Plan* (“*Stipulated Mitigation Plan*”) with the Department, pursuant to CM Rule 43.

8. A&B and the SWC filed the *Stipulated Mitigation Plan* “so that A&B does not have to submit new documentation every year showing that it can mitigate for its proportionate share of a predicted demand shortfall.” *Stipulated Mitigation Plan*, at 2. A&B explains that historically it has mitigated injury to the SWC members through its practice of curtailing ground water diversions to approximately 3,574 acres within Unit B of A&B's irrigation service area and replacing the ground water with surface water (i.e., soft conversions). *Id.* A&B states that it holds rights to storage water in American Falls Reservoir (46,826 acre-feet) and Palisades Reservoir (90,800 acre-feet) and can provide storage water to injured SWC members “if the benefits of the [soft] conversions do not satisfy the injury caused by A&B's ground water rights that are found to be subject to curtailment in any given year.” *Id.* at 2–3.<sup>2</sup>

9. In January 2024 notice of the proposed *Stipulated Mitigation Plan* was advertised in the Idaho Statesman, Mountain Home News, Idaho Mountain Express, Post Register, Idaho State Journal, Times News, Lewiston Tribune, and Rexburg Standard Journal in accordance with Idaho Code § 42-222(1) and CM Rule 43.

10. The *Stipulated Mitigation Plan* was timely protested by the Coalition of Cities.<sup>3</sup> However, on May 9, 2024, the Department received a conditional *Stipulated Withdrawal of Protest* from A&B and the Coalition of Cities.<sup>4</sup> The withdrawal of the Coalition of Cities' protest is conditioned upon the Department approving the *Stipulated Mitigation Plan* and including the following findings:

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<sup>2</sup> Although not discussed in the *Stipulated Mitigation Plan*, it is the Department's understanding that there are a total of 61.6 acres within A&B that are currently enrolled in the federal Conservation Reserve Enhancement Program.

<sup>3</sup> The Coalition of Cities consists of the cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell.

<sup>4</sup> After receiving the Coalition of Cities' protest, the Director authorized Gerald F. Schroeder to hear the contested case in this matter. *Notice of Prehr'g; Order Appointing Hr'g Officer*, at 2. Given the requested amendment was filed as a stipulation and the Coalition of Cities conditionally withdrew its protest, the Director has determined the assistance of a hearing officer is no longer needed to resolve the contested case. The Director hereby withdraws the order of appointment and issues this final order as the presiding officer.

- The Stipulation addresses a procedural issue pertaining to its December 16, 2015 approved Mitigation Plan and the Stipulation does not affect any mitigation obligations of the Coalition of Cities.
- The Stipulation does not impact or shift any calculated proportionate impact of any injury finding to the Coalition of Cities that may be attributed to A&B's junior priority groundwater rights for purposes of the SWC delivery call.

*Stipulated Withdrawal of Protest, at 2.*

11. The Director finds that the *Stipulated Mitigation Plan* does not affect any mitigation obligations of the Coalition of Cities. Further, it does not impact or shift any calculated proportionate impact of any injury finding to the Coalition of Cities that may be attributed to A&B's junior priority ground water rights for purposes of the SWC delivery call.

### **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.

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

3. 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 that were last updated on March 18, 2022. IDAPA 37.03.11.000. “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 the holder of a junior-priority ground water right in an area having a common ground water supply.” IDAPA 37.03.11.001.

4. CM Rule 42.02 states: “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.

5. CM Rule 43.01 (a–d) sets forth the criteria for submission of a mitigation plan to the Director.

6. CM Rule 43.03 establishes the “[f]actors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights . . . .” IDAPA 37.03.11.043.03. Factors that may be considered by the Director include:

- b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right . . . .
- 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 . . . .  
. . . .
- o. Where 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.

*Id.*

7. The *Stipulated Mitigation Plan* does not fundamentally change the components of the *A&B Mitigation Plan*. Instead, the *Stipulated Mitigation Plan* addresses what A&B has referred to as “a procedural issue.” *Stipulated Withdrawal of Protest*, at 2. A&B states “[t]he parties are filing the current stipulation consistent with other stipulated mitigation plans (i.e., [Southwest Irrigation District and Goose Creek Irrigation District (collectively, “SWID”)], [Idaho Ground Water Appropriators, Inc.], Coalition of Cities) so that A&B does not have to submit new documentation every year showing that it can mitigate for its proportionate share of a predicted demand shortfall.” *Stipulated Mitigation Plan*, at 2. The problem with A&B’s statement is that the other stipulated mitigation plans are fundamentally different from A&B’s plan. In those other stipulated mitigation plans, the SWC stipulated to junior ground water users providing aquifer mitigation actions every year during the term of the plans, regardless of any annual mitigation obligation. And in return, the junior ground water users get safe harbor from the SWC delivery call. For example, in its mitigation plan,<sup>5</sup> SWID agrees to undertake recharge, conversions, voluntary curtailment, and limit their season of use as mitigation activities. *SWID Mitigation Plan*, at 2. And in return, the SWC stipulated that SWID’s junior ground water users would not be subject to curtailment “[i]n exchange for the mitigation activities identified” in the plan. *Id.* at 3. Unlike the *SWID Mitigation Plan*, the *A&B Mitigation Plan* does not provide safe harbor for specific activities. Instead, A&B’s plan requires that A&B “mitigate for any shortfalls caused by” A&B’s junior ground water diversions. *A&B Mitigation Plan*, at 3. Under its plan, A&B may undertake a series of different mitigation activities, and if those activities do not offset

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<sup>5</sup> The SWID-SWC mitigation agreement (“*SWID Mitigation Plan*”) was submitted to the Department as Exhibit A to the parties’ January 4, 2018 *Joint Motion for Approval of Mitigation Agreement, In re SWID Mitigation Plan for the SWC Delivery Call*, No. CM-MP-2010-01.

their depletive effect on the SWC, A&B has committed to provide storage water to make up the difference. *Id.* This has not changed in the *Stipulated Mitigation Plan. Stipulated Mitigation Plan*, at 2.

8. In the SWC delivery call, the mitigation obligation owed by ground water users can vary from year to year and within an irrigation season depending on current water supply and crop need requirements. Only by applying current water supply and crop need requirements and the methodology order process can the Department determine A&B's proportionate share of any obligation, and whether A&B must provide storage water to offset the depletive effects of its pumping on the SWC. Accordingly, when an injury determination is made, A&B will still be required to submit documentation to the Department regarding its execution of the storage water component of its mitigation activities.

9. If the Director determines that A&B's ground water rights are subject to curtailment and A&B seeks to have its junior priority water rights removed from any curtailment list, A&B cannot simply state that it has storage water available to mitigate for its proportionate share of any predicted shortfall. Instead, A&B must submit legally enforceable contracts, options, or similar documentation to the Director to establish that it has secured the water necessary to mitigate for its obligation. Similar documentation includes any written commitments between A&B and the watermaster for storage water to be deducted from A&B's annual storage allocation and to be controlled, assigned, and delivered by the watermaster to mitigate injury to other members of the SWC.

10. While the new *Stipulated Mitigation Plan* does not fundamentally change the components of the *A&B Mitigation Plan* and will not allow A&B to avoid providing documentation showing that it can mitigate for its proportionate share of a predicted demand shortfall, the Director recognizes that the *A&B Mitigation Plan* was not stipulated to by the SWC and this new plan is stipulated to by the SWC. The Director should approve the plan in recognition that the SWC has now stipulated to it.

## ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the *Stipulation Regarding A&B Irrigation District's Amended Rule 43 Mitigation Plan* submitted by A&B and SWC is APPROVED as an amendment to the *A&B Irrigation District's Amended Rule 43 Mitigation Plan*.

IT IS FURTHER ORDERED that when required by the Department, A&B must submit adequate documentation to the Department establishing it has secured the water necessary to mitigate for its proportionate share of any predicted shortfall or otherwise be subject to curtailment.

DATED this 10th day of January 2025.

  
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MATHEW WEAVER  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of January 2025, the above and foregoing was served on the following by the method(s) indicated below:

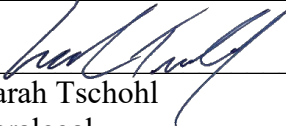
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<sup>6</sup> Through informal means and the receipt of undelivered mail, the Department has been made aware that the mailing address for counsel of McHugh Bromley, PLLC has changed from the service address the Department has on record in this matter: 380 South 4th Street, Suite 103, Boise, ID 83702. To avoid additional unnecessary expense, the Department has updated the mailing address for McHugh Bromley, PLLC in this matter. However, this update does not remove any duty that counsel of McHugh Bromley, PLLC may have to formally notify the Department and the parties of their change of mailing address for service in this matter.

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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)

The accompanying document is a "Final Order" issued by the Idaho Department of Water Resources ("Department") pursuant to Idaho Code § 67-5246.

**PETITION FOR RECONSIDERATION**

*(See Idaho Code § 67-5246(4))*

Any party may file a petition for reconsideration of this 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 presiding officer 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.

**REQUEST FOR HEARING**

*(See Idaho Code § 42-1701A(3))*

Unless the right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director, and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to Idaho Code § 42-1701A(3). A written petition to the Director contesting this final order and requesting a hearing must be filed with the Department by any aggrieved person **within fifteen (15) days after service of this final order.**

**CERTIFICATE OF SERVICE**

*(See IDAPA 37.01.01.053, 37.01.01.202)*

All documents filed with the Department in connection with a petition for reconsideration or a request for hearing of this final order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 53 and 202.