

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

IN THE MATTER OF THE MITIGATION
PLAN FILED BY THE CITY OF
POCATELLO, THE COALITION OF
CITIES, AND THE CITY OF IDAHO FALLS
FOR THE DISTRIBUTION OF WATER
TO WATER RIGHTS HELD BY THE
SURFACE WATER COALITION

Docket No. CM-MP-2016-002

**FINAL ORDER APPROVING
MITIGATION PLAN FOR 2016**

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

FINDINGS OF FACT

1. On March 15, 2016, the City of Pocatello ("Pocatello"); the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell ("Coalition of Cities"); and the City of Idaho Falls ("Idaho Falls"), (collectively referred to herein as "Cities"), and A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to herein as "Surface Water Coalition") submitted to the Department a *Joint Motion for Order Entering Settlement Between Pocatello, Coalition of Cities, Idaho Falls, and Surface Water Coalition* ("Motion"). Attached to the Motion was the *Interim Mitigation Agreement* ("Mitigation Plan") executed by the Cities and Surface Water Coalition.
2. The Motion and the Mitigation Plan were submitted to the Department captioned under individual mitigation plans previously filed by Pocatello, the Coalition of Cities, and Idaho Falls bearing docket numbers CM-MP-2015-001, CM-MP-2015-004, and CM-MP-2015-005, respectively. Because the Mitigation Plan was a new plan, the Department assigned the Mitigation Plan its own docket number CM-MP-2016-002.
3. The Department published notice of the Mitigation Plan in the Mountain Home News, Idaho Mountain Express, and Power County Press on March 30, 2016 and April 6, 2016. Notice was also published in the Times News, Post Register, Idaho Statesman, Lewiston Tribune, and Idaho State Journal on March 31, 2016 and April 7, 2016.

4. The term of the Mitigation Plan is from March 15, 2016, to December 31, 2016. *Mitigation Plan* at 4.

5. The Cities and Surface Water Coalition “agree that delivery of the mitigation actions” described in the Mitigation Plan “shall mitigate for any of the Cities’ injury to the [Surface Water Coalition’s] water rights, and that the Cities’ water rights shall not be subject to curtailment during the term” of the Mitigation Plan. *Mitigation Plan* at 2. Further, “[t]he [Surface Water Coalition] expressly agrees that the compensation to be provided” under the Mitigation Plan “shall constitute full mitigation for any injury in 2016 associated with the Cities’ ground water pumping.” *Id.*

6. The Mitigation Plan proposes two “mitigation actions”: 1) delivery of “2,600 acre-feet of water to the storage accounts selected by the [Surface Water Coalition] within twenty-one (21) days of Water District 01’s ‘date of allocation’ for purposes of storage fill in the Upper Snake River Reservoir system above Milner Dam,” and 2) previously performed “recharge activities that are estimated to benefit the Near Blackfoot to Neeley and Neeley to Minidoka Reaches of the Snake River in the amount of 515 acre-feet of water during the 2016 irrigation season.” *Mitigation Plan* at 2.¹

7. On April 18, 2016, the Idaho Ground Water Appropriators, Inc. (“IGWA”), filed a protest to the Mitigation Plan.

8. On April 22, 2016, the Cities, Surface Water Coalition, and IGWA filed a *Motion for Order Approving Stipulation to Conditionally Withdraw Protest*.

9. On April 26, 2016, IGWA filed a withdrawal of its protest to the Mitigation Plan.

CONCLUSIONS OF LAW

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

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

¹ The Surface Water Coalition and Cities agree that delivery of 2,600 acre-feet “will mitigate injury to the [Surface Water Coalition] caused by the pumping under junior ground water rights by all municipal corporations with wells that are located within the current boundary of the ESPA Area of Common Ground Water Supply, as defined in Rule 50 of the Rules for Conjunctive Management of Surface and Ground Water Resources . . . as of February 25, 2016.” *Mitigation Plan* at 2. The Department has not verified that delivery of 2,600 acre-feet will actually mitigate injury to the Surface Water Coalition caused by junior pumping by all municipal corporations with wells located within the ESPA area of common ground water supply. The Department has also not verified that the recharge activities referred to by the Cities and Surface Water Coalition will benefit the Near Blackfoot to Neeley and Neeley to Minidoka Reaches of the Snake River in the amount of 515 acre-feet during the 2016 irrigation season. Approval of the Mitigation Plan does not constitute approval of the 2,600 acre-feet or 515 acre-feet calculations.

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. Idaho Code § 42-1805(8) authorizes the Director to “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.

4. Pursuant to Chapter 52, Title 67, Idaho Code, and Sections 42-603 & 42-1805(8), Idaho Code, the Department promulgated the Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”), effective October 7, 1994. IDAPA 37.03.11.000-001.

5. 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.

6. 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.

7. CM Rule 43.03 establishes factors the Director may consider “in determining whether a proposed mitigation plan will prevent injury to senior rights.” IDAPA 37.03.11.043.03(a-o).

8. CM Rule 43.03(o) states: “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.” IDAPA 37.03.11.043.03(o).

9. The Mitigation Plan is entered into between the Cities and Surface Water Coalition in accordance with CM Rule 43.03(o). Again, the Cities and Surface Water Coalition “agree that delivery of the mitigation actions” described in the Mitigation Plan “shall mitigate for any of the Cities’ injury to the [Surface Water Coalition’s] water rights, and that the Cities’ water rights shall not be subject to curtailment during the term” of the Mitigation Plan. *Mitigation Plan* at 2. Further, “[t]he [Surface Water Coalition] expressly agrees that the compensation to be provided” under the Mitigation Plan “shall constitute full mitigation for any injury in 2016 associated with the Cities’ ground water pumping.” *Id.*

10. The Cities and Surface Water Coalition request that the Director enter an order approving the Mitigation Plan, effective until December 31, 2016. *Motion* at 2.²

² The Cities and Surface Water Coalition “stipulate to entry of an order staying the contested cases” on the Cities’ individual mitigation plans bearing docket numbers CM-MP-2015-001, CM-MP-2015-004, and CM-MP-2015-005

11. Having reviewed the Mitigation Plan, the CM Rules, and the proceedings herein, the Director will approve the Mitigation Plan.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Mitigation Plan submitted by the Cities and Surface Water Coalition is APPROVED, effective until December 31, 2016.

DATED this 27th day of April 2016.



GARY SPACKMAN
Director

during the term of the Mitigation Plan. *Mitigation Plan* at 4. The Cities and Surface Water Coalition state they “shall request the Department enter an order in each proceeding and stay any further action on the motion to consolidate.” *Id.* As of the date of this final order, the Cities and Surface Water Coalition have not filed any request for stay in docket numbers CM-MP-2015-001, CM-MP-2015-004, and CM-MP-2015-005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of April 2016, the above and foregoing was served on the following by the method(s) indicated below:

Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello, ID 83201
dtranmer@pocatello.us

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

Sarah A. Klahn
Mitra M. Pemberton
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com

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

Candice M McHugh
Chris Bromley
380 S 4th Street, Suite 103
Boise, ID 83702
cmchugh@mchughbromley.com
cbromley@mchughbromley.com

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

Robert E. Williams
WILLIAMS, MESERVY &
LOTHSPEICH LLP
P.O. Box 168
Jerome, ID 83338
rewilliams@cableone.net

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

Robert L. Harris
Holden, Kidwell, Hahn & Crapo, PLLC
P.O. Box 50130
1000 Riverwalk Drive, Ste. 200
Idaho Falls, ID 83405
rharris@holdenlegal.com

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

Randall D. Fife
City Attorney
City of Idaho Falls
P.O. Box 50220
Idaho Falls, ID 83405
rfife@idahofallsidaho.gov

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

Jerry Rigby
Rigby, Andrus & Rigby Law PLLC
P.O. Box 250
Rexburg, ID 83440-0250
jrigby@rex-law.com

- ☒ 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, ID 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, ID 83318
wkf@pmt.org


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

Randall C. Budge
Thomas J. Budge
Racine Olson Nye Budge & Bailey, Chtd.
P.O. Box 1391
Pocatello, ID 83204
rcb@racinelaw.net
tjb@racinelaw.net

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

New Sweden Irrigation District
2350 West 1700 South
Idaho Falls, ID 83402

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


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.