

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

IN THE MATTER OF THE JOINT MITIGATION
PLAN FILED BY BUCKEYE FARMS AND
AMERICAN FALLS-ABERDEEN GROUND
WATER DISTRICT, BINGHAM GROUND
WATER DISTRICT, BONNEVILLE-
JEFFERSON GROUND WATER DISTRICT,
CAREY VALLEY GROUND WATER
DISTRICT, FREMONT-MADISON
IRRIGATION DISTRICT, JEFFERSON-CLARK
GROUNDWATER DISTRICT, MADISON
GROUND WATER DISTRICT, MAGIC
VALLEY GROUND WATER DISTRICT,
NORTH SNAKE GROUND WATER DISTRICT,
SOUTHWEST IRRIGATION DISTRICT, AND
THE IDAHO GROUND WATER
APPROPRIATORS, INC.

Docket No. CM-MP-2020-001

**FINAL ORDER APPROVING
SECOND AMENDED
STIPULATED MITIGATION
PLAN**

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

FINDINGS OF FACT

1. On April 29, 2020, Buckeye Farms, Inc. (“Buckeye”), and American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Fremont-Madison Irrigation District, Jefferson-Clark Groundwater District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, Southwest Irrigation District (collectively referred to as the “Districts”) and the Idaho Ground Water Appropriators, Inc. (“IGWA”), collectively (“Parties”), submitted to the Department their *Second Amended Stipulated Mitigation Plan and Request for Order* (“Mitigation Plan”) with the following exhibits: Exhibit A: *Settlement Agreement* between the Parties, dated September 22, 2017; Exhibit B: *Buckeye Operating Plan for 36-17121 and 36-17122 and Addendum to Buckeye Operating Plan for 36-17121 and 36-17122 – Using EPAM2.1 to Quantify Mitigation to the Snake River Between Kimberly and King Hill*, dated May 15, 2019; and Exhibit C: *Expert Report of the Idaho Ground Water Appropriators, Inc. (IGWA), Regarding Buckeye Application for Permit Nos. 36-17121 and 36-17122*, dated February 7, 2020.

2. The Mitigation Plan states that Buckeye and the Districts have entered into a Settlement Agreement (“Settlement”), a copy of which is attached to the Mitigation Plan as Exhibit A, to resolve any and all prospective delivery calls by Buckeye. *Mitigation Plan* at 1. Pursuant to paragraph 3.5 of the Settlement, the Parties agree that the Settlement is intended to be part of a mitigation plan as defined in the Department’s *Rules for Conjunctive Management of Surface and Ground Water Resources* and request the Director issue an Order confirming the Settlement as a mitigation plan. *Id.* at 2.

3. The Settlement consists of two main components. First, the Settlement states Buckeye will (a) appropriate ground water to augment Buckeye’s water supply,¹ and (b) the Districts will monetarily compensate Buckeye for costs Buckeye will incur to construct, operate and maintain one or more ground water wells to develop ground water rights. Exhibit A at 2. Second, the Districts agree to assign mitigation credit from their ESPA aquifer enhancement activities to Buckeye to mitigate up to 7.5 cfs of the actual consumptive use mitigation requirement of new ground water rights developed by Buckeye. *Id.* at 3. The Settlement outlines the Parties’ prospective actions to verify the 7.5 cfs of mitigation. Exhibit B at 1-2.

4. In consideration for the monetary compensation paid and agreement by the Districts to assign mitigation credit to Buckeye, Buckeye agrees to limit future delivery calls or requests for administration of Buckeye’s water rights. Exhibit A at 1.

5. The Department published notice of the Mitigation Plan in the Idaho Mountain Express, Idaho State Journal and Post Register on September 9 and 16, 2020; in the Twin Falls Times-News and Idaho Statesman on September 10 and 17, 2020; and the in the Rexburg Standard Journal on September 11 and 18, 2020. The notice stated any protest against approval of the Mitigation Plan must be filed with the Department on or before September 28, 2020. No protest was filed in this matter.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602 authorizes the Director to supervise water distribution within water districts:

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.

¹ Buckeye filed applications for permit nos. 36-17121 and 36-17122 “to effectuate the terms of the Settlement.” *Mitigation Plan* at 2. The Parties also request that the Director, upon the issuance of permits nos. 36-17121 and 36-17122, enter an order approving the Mitigation Plan. *Mitigation Plan* at 1. The applications were approved by the Department on July 24, 2020.

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.

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. Having reviewed the Mitigation Plan and the CM Rules, the Director concludes the Mitigation Plan should be approved pursuant to CM Rule 43.03.(o).

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Mitigation Plan submitted by Buckeye, the Districts and IGWA, is APPROVED with the following conditions:

- a. All ongoing activities required pursuant to the Stipulated Mitigation Plan are the responsibility of the parties thereto.
- b. Failure to provide the Department the annual report required by Condition 12 in the approved applications for permit nos. 36-17121 and 36-17122 is cause for the Director to void the Mitigation Plan.

DATED this 2nd day of November 2020.



Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 2020, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

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