

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

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT 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

Docket No. CM-MP-2024-003

**AMENDED FINAL ORDER
APPROVING STIPULATED
MITIGATION PLAN**

IN THE MATTER OF THE SURFACE WATER COALITIONS' AND THE GROUND WATER DISTRICTS' 2024 STIPULATED MITIGATION PLAN

This order amends and replaces the *Final Order Approving Stipulated Mitigation Plan* (“*Approval Order*”) issued on January 3, 2025, under the above caption.

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

FINDINGS OF FACT

1. On November 15, 2024, 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, the “Surface Water Coalition” or “SWC”), and Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Henry’s Fork Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District (collectively, the “Districts”) fully executed the *2024 Stipulated Mitigation Plan* (“*Mitigation Plan*”). The previously listed entities are collectively known as the “Stipulating Parties.”

2. On November 19, 2024, the Stipulating Parties filed the *Mitigation Plan* with the Department as Appendix A of their *Joint Motion for Order Approving 2024 Stipulated Mitigation Plan* (“*Joint Motion*”). The *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.

3. The *Mitigation Plan* is designed to mitigate material injury to water rights held by members of the SWC and is intended to satisfy the Districts' obligations under the ongoing SWC delivery call case, No. CM-DC-2010-001. See *Joint Motion*, at 3.

4. The initial term of the *Mitigation Plan* is four years, beginning January 1, 2024, and ending December 31, 2027. *Mitigation Plan*, § 3.1. The plan automatically renews for successive four-year terms unless terminated as described in the plan. *Id.* § 3.2

5. Through the *Mitigation Plan*, the SWC and the Districts agree that:

- (a) during the term of the plan, “each District will conserve, at a minimum, the volume of groundwater set forth in the ‘Conservation Obligation’ column in Appendix A” of the *Mitigation Plan*, *id.* § 4, on an average annual basis over four-year periods known as compliance periods, *id.* §§ 4–4.1;
- (b) as of November 15, 2024, the Districts’ conservation obligations collectively total 205,000 acre-feet annually, which equates to a total annual divertible volume of 1,590,034 acre-feet, *id.* § 4.2;
- (c) “[a]t the beginning of each compliance period, each District will be allocated a volume of water that may be diverted during that four-year period, calculated by multiplying the District’s annual divertible volume by four, plus surplus allocation carried over from the prior compliance period,” if allowed, *id.* § 4.3;
- (d) each District’s “four-year compliance period allocations are set forth in Appendix A” of the *Mitigation Plan*, *id.* § 4.3, which “will be updated annually by the Districts to reflect additions and removals of groundwater rights participating in [the *Mitigation Plan*] through the Districts,” *id.* § 4.2;
- (e) “[e]ach District will apportion its compliance period allocation to the District’s patrons in the form of a diversion allocation in accordance with Idaho Code § 42-5244A,” *id.* § 4.4;
- (f) the “Districts may supplement their compliance period allocation by performing managed aquifer recharge” in accordance with certain standards set forth in the *Mitigation Plan*, *id.* § 4.5;
- (g) the “[m]easurement and reporting of non-irrigation diversions will occur on an annual basis” and “[t]he Districts will develop and implement methods to read irrigation diversions monthly” as set forth in the *Mitigation Plan*, *id.* § 4.6.1;
- (h) “[r]each gains to the Near Blackfoot to Minidoka reach of the Snake River shall be measured based on calendar year reach gains from the ESPA as reported by the Department to the Idaho Water Resource Board,” *id.* § 4.6.3;
- (i) “[b]y February 15 annually, the Districts will submit a report to the SWC and the Department documenting the Districts’ compliance with section 4 [(concerning groundwater conservation)] during the previous calendar year,” *id.* § 4.8 (emphasis omitted);

- (j) “[b]eginning in 2035, the Districts will collectively deposit \$250,000 annually into a bank account maintained by the Districts to fund development and implementation of projects designed to further increase reach gains to the Near Blackfoot to Minidoka reach of the Snake River” and this amount may increase under certain circumstances described in the plan, *id.* § 5;
- (k) “[t]he Districts will collectively secure the volume of storage water required by section 6.1 to meet irrigation needs and carryover storage of the SWC in accordance with section 6.4” of the *Mitigation Plan*, *id.* § 6 (emphasis omitted);
- (l) “[t]he Districts may take alternative actions to deliver water to the SWC, including but not limited to acquiring natural flow, in lieu of securing and delivering storage water,” *id.* § 6.7;
- (m) “[t]here will be an oversight committee [] established to review implementation of [the *Mitigation Plan*],” *id.* § 7;
- (n) the “Districts and their patrons that comply with [the *Mitigation Plan*] shall receive safe harbor from the SWC delivery call” during the term of the plan, *id.* § 8;
- (o) “[e]ach District is independently responsible for complying with its proportionate obligations under sections 4, 5 and 6” of the *Mitigation Plan*, and “[i]f a District does not comply, such non-compliance shall not adversely affect any other District that is in compliance with its proportionate obligations” under the plan, *id.* § 9 (emphasis omitted); and
- (p) “[g]round water districts or other entities representing groundwater users brought into the area of common ground water supply through the passage of Senate Bill 1341 (2024) or brought in through expansion of the area of common ground water supply as allowed by Senate Bill 1341 (2024) may seek to join [the *Mitigation Plan*],” *id.* § 10.

6. The *Mitigation Plan* will supersede and replace previously approved mitigation plans in Department Docket Nos. CM-MP-2009-006, CM-MP-2009-007, and CM-MP-2016-001. *Id.* § 11.

7. Notice of the proposed *Mitigation Plan* was advertised in the Idaho Statesman, Mountain Home News, Idaho Mountain Express, Post Register, and Idaho State Journal on December 4 and 11, 2024; the Times News and Lewiston Tribune on December 5 and 12, 2024; and the Rexburg Standard Journal on December 6 and 13, 2024, in accordance with Idaho Code § 42-222(1) and CM Rule 43. No protests were received.

8. On January 3, 2025, the Director issued a final order approving the *Mitigation Plan*. However, the Director concluded that sections 4.6.1 and 4.6.3 of the *Mitigation Plan* should be revised to avoid future misunderstandings. *Approval Order* ¶¶ 10–12. Accordingly, the *Approval Order* was issued with certain alterations to sections 4.6.1 and 4.6.3. *Id.* at 5.

9. On January 17, 2025, pursuant to Idaho Code § 67-5246(4), the SWC filed for reconsideration of the *Approval Order*. *Pet. for Recons./Req. for Hr’g*, at 1–2 [hereinafter *SWC Petition*]. No responses to the *SWC Petition* were filed with the Department.

10. On reconsideration, the Director found the SWC’s argument for an alternate revision of section 4.6.3 reasonable. *Order Granting Pet. for Recons. & Den. Req. for Hr’g*, at 3 [hereinafter *Order Granting Reconsideration*]. Therefore, exercising his discretion, the Director granted the SWC’s petition for reconsideration and now amends Conclusion of Law 11 and the order below to be consistent with the concurrently issued *Order Granting Reconsideration*. *See id.*

CONCLUSIONS OF LAW

1. Idaho Code § 42-602 grants authority to 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.

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

4. 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 31, 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.

5. 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.

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

7. 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(a)–(o). One such factor the Director may consider is “[w]hether 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).

8. The SWC and the Districts have entered into an agreement on a mitigation plan in accordance with CM Rule 43.03(o). The SWC stipulates that the *Mitigation Plan* “is designed to mitigate material injury to water rights held by members of the Surface Water Coalition.” *Joint Motion*, at 3. The SWC and the Districts agree that “Districts and their patrons that comply with [the *Mitigation Plan*] shall receive safe harbor from the SWC delivery call” during the term of the plan. *Mitigation Plan*, § 8.

9. The *Mitigation Plan* describes numerous ongoing activities including: (a) setting conservation obligations and compliance periods; (b) setting individual patron level allocation and compliance requirements; (c) allowing aquifer recharge to supplement the Districts’ compliance period allocation; (d) requiring measurement and reporting obligations; (e) allowing conservation carryover; (f) establishing a reach gain mitigation fund; (g) securing and assigning storage water; (h) permitting alternative mitigation actions; (i) establishing an oversight committee; (j) providing safe harbor; and (k) establishing enforcement procedures. *Id.* §§ 4–10.

10. Section 4.6.1 of the *Mitigation Plan* uses more precise language to describe the measurement actions required for non-irrigation diversions than irrigation diversions. It states that non-irrigation diversions shall be “measure[d] and report[ed]” but that irrigation diversions shall be “read.” To avoid ambiguity and the potential for future misunderstanding, the need to measure and report all ground water diversions should be clarified and the term “read” should be replaced with “measure,” “report,” or both in section 4.6.1.

11. Section 4.6.3 of the *Mitigation Plan* states that “[r]each gains to the Near Blackfoot to Minidoka reach of the Snake River shall be measured based on calendar year reach gains from the ESPA as reported by the Department to the Idaho Water Resource Board.” The problem with this statement is that it is inaccurate. In fact, the Department measures and reports Near Blackfoot to Minidoka reach gains to the Idaho Water Resource Board based on a water year schedule, not a calendar year schedule. To ensure accuracy and avoid the potential for future misunderstanding, while still preserving the intent of the stipulating parties, “as reported by the Department to the Idaho Water Resource Board” should be stricken from section 4.6.3.

12. Having reviewed the *Mitigation Plan* and the CM Rules, the Director will approve the *Mitigation Plan* with alterations to sections 4.6.1 and 4.6.3, consistent with paragraphs 10 and 11 above.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the *2024 Stipulated Mitigation Plan* is APPROVED with the following alterations in ~~strikeout~~/underline:

- (a) **4.6.1 Groundwater.** Measurement and reporting of non-irrigation diversions will occur on an annual basis. The Districts will develop and implement methods to ~~read~~ measure irrigation diversions monthly. Irrigation diversions shall be ~~read~~ measured and reported from June to October, with the June ~~reading~~ reporting including diversions from the start of the irrigation season. The Districts will have functioning measurement and reporting programs by the start of the 2026 irrigation season to ~~read~~ measure and report irrigation diversions monthly. The Districts' methods may include telemetry, self-reporting with photo evidence, or other reliable techniques to report water diversions. Measurements shall be ~~made available~~ reported to the appropriate watermaster and the watermaster will make the measurement data publicly available upon request.
- (b) **4.6.3 Reach Gains.** Reach gains to the Near Blackfoot to Minidoka reach of the Snake River shall be measured based on calendar year reach gains from the ESPA ~~as reported by the Department to the Idaho Water Resource Board.~~

Dated this 7th day of February 2025.



MATHEW WEAVER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February 2025, the above and foregoing, was served by the method indicated below, and addressed to the following:

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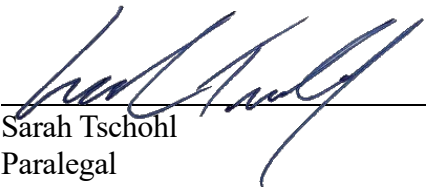
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¹ Through informal means and the receipt of undelivered mail, the Department has been made aware that the mailing address for counsel of McHugh Bromley, PLLC has changed from the service address the Department has on record in this matter: 380 South 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
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**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.