

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

IN THE MATTER OF BASIN 37
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**FINAL ORDER DENYING
MITIGATION PLAN**

BACKGROUND

This proceeding was initiated by the Director of the Idaho Department of Water Resources,¹ pursuant to Idaho Code § 42-237a.g. and IDAPA 37.01.01.104, to determine whether water is available to fill the ground water rights within an area of the Wood River Valley south of Bellevue known as the “Bellevue Triangle.” *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* (May 4, 2021) (“*Notice*”). The *Notice* stated “[i]f the Director concludes that water is not available to fill the ground water rights, the Director may order the ground water rights curtailed for the 2021 irrigation seasons.” *Id.* The *Notice* scheduled a hearing for June 7-11, 2021. The hearing was extended by one day, and concluded on June 12, 2021. Post-hearing briefs were filed on June 21, 2021.

On June 23, 2021, South Valley Ground Water District and Galena Ground Water District (“Ground Water Districts”) submitted *South Valley Ground Water District and Galena Ground Water District’s Proposed Mitigation Plan* (“*Proposed Plan*”). The *Proposed Plan* was submitted pursuant to Rule 43 of the Rules for the Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.011.000—.051 (“CM Rules”), “in response to the delivery call and demands for conjunctive administration of surface and ground water use . . . asserted by certain surface water users.” *Proposed Plan* at 1-2. The Ground Water District submitted the *Proposed Plan* in advance of an order of curtailment, anticipating a curtailment order may be forthcoming. *Id.* at 3. The Big Wood & Little Wood Water Users Association (“BWLWWUA”) and the Big Wood Canal Company (“BWCC”) submitted a *Response to SVGWD and GGWD’s Proposed Mitigation Plan* on June 25, 2021 (“*Response*”).

On June 28, 2021, the Director issued a *Final Order* that orders curtailment of certain junior priority ground water rights within the Bellevue Triangle during the 2021 irrigation season, starting July 1, 2021.

DISCUSSION

¹ In this order, “Department” refers to the Idaho Department of Water Resources, and “Director” refers to the Director of the Department.

The *Proposed Plan* characterizes this contested case as a response to delivery calls made by the holders of certain senior surface water rights and the CM Rules. This contested case, however, does not address or involve delivery calls, and is not a proceeding under the CM Rules. It is a proceeding initiated by the Director pursuant to Idaho Code § 42-237a.g. and IDAPA 37.01.01.104.

As BWLWWUA and BWCC point out, Idaho Code § 42-237a.g. does not expressly authorize “mitigation” in lieu of curtailment. *Response* at 2. The Director’s authority to prohibit or limit ground water use under Idaho Code § 42-237a.g. is expressly “discretionary,” however, and also “broad.” *Stevenson v. Steele*, 93 Idaho 4, 11-12, 453 P.2d 819, 826-27 (1969). The Director agrees that providing mitigation to address the adverse effects of ground water pumping in the Bellevue Triangle on the present or future use of senior surface water rights diverting from Silver Creek and the Little Wood River can be an alternative to curtailment pursuant to Idaho Code § 42-237a.g. The Director will therefore consider the *Proposed Plan*.

The *Proposed Plan* assumes that the mitigation obligation of the junior water right holders is limited to protecting three senior surface water rights bearing 1883 priority dates. *Proposed Plan* at 3. This assumption is based on the Ground Water Districts’ interpretation of testimony presented at the contested case hearing conducted on June 7-12, 2021. The Ground Water Districts have combined an analysis by Tim Luke, an IDWR employee, and Kevin Lakey, Watermaster for Water District 37, to narrowly limit the mitigation obligation.

The record shows that the ground water rights in the Bellevue Triangle are junior in priority to virtually all of the surface water rights for Silver Creek and the Little Wood River. The *Final Order* did not determine that the only surface water rights on Silver Creek and the Little Wood River that must be protected are those bearing priority dates equal to or earlier than 1883. The *Final Order* determined that consumptive ground water pumping in the Bellevue Triangle should be curtailed as soon as possible in order to protect all senior surface water rights diverting from Silver Creek and the Little Wood River.

There are many surface water rights on Silver Creek and the Little Wood River junior in priority to 1883 but senior to ground water pumping in the Bellevue Triangle. Many of these water rights have been curtailed but will be entitled to divert, within the limits of their priorities, any additional water provided by curtailment of ground water pumping in the Bellevue Triangle. Tr. 898. The *Proposed Plan* does not take this into account, and appears to provide considerably less water than would result from curtailment. *See, e.g., Response* at 2-3. The *Proposed Plan* also would allow all ground water pumping to continue until August 15, and would allow pumping for approximately 4,000 acres of pasture and potatoes to continue after August 15. *Proposed Plan* at 6. Thus, even assuming that the *Proposed Plan* provides sufficient detail and assurances to conclude that the proposed mitigation will actually materialize—which it does not, as discussed below—the *Proposed Plan* is not sufficient to offset depletions resulting from ground water pumping in the Bellevue Triangle, and is not equivalent to the “the best-case scenario” for senior surface water users. *Proposed Plan* at 3.

In addition, the *Proposed Plan* does not provide sufficient detail and assurances to support a conclusion that the mitigation proposed will actually be provided:

- there is no evidence that the Ground Water Districts have, or will be able to, secure storage water from Water District 1;

- there is no written verification from American Falls Reservoir District No. 2 that the mitigation storage water can be delivered through the Milner-Gooding Canal in time of need;
- the proposal to rely upon new ground water pumping to mitigate for the depletion effects of existing ground water pumping appears circular, and raises the question of whether mitigation can be achieved by pumping ground water that is hydraulically connected to the source for the surface water rights to be protected;
- the proposal to rely upon new ground water pumping to mitigate for the depletion effects of existing ground water pumping depends on so many interdependent assumptions and components that it is difficult to understand or predict the actual effect that the proposal will have on flows in Silver Creek and the Little Wood River;
- the Temporary Change Applications were not accompanied by the required filing fees;
- the materials submitted in connection with the proposed Temporary Change Applications lack sufficient detail and information to process;² and
- the *Proposed Plan* does not include any contingency provisions that would protect senior surface water users on Silver Creek and the Little Wood River in the event that the proposed mitigation is not or cannot be provided at the seniors' points of diversion when needed, in the quantities needed.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that *South Valley Ground Water District and Galena Ground Water District's Proposed Mitigation Plan* is DENIED.

DATED this 29th day of June, 2021.

GARY SPACKMAN
Director

² Pursuant to Idaho Code § 42-222A(3), the Director must determine that a proposed temporary change “can be properly administered and there is no information that the change will injure any other water right.” As drafted the proposed temporary changes lack the information necessary for the Director to determine whether they meet the statutory requirements. The additional information needed includes, but may not be limited to, the following: the locations where water will be injected into Silver Creek and rediverted from the Little Wood River, the locations where the water will be used for irrigation purposes, the location of the lands that will be idled, the consent of the water rights owners to the proposed temporary changes, the appropriate beneficial use (other than irrigation) for the proposal to inject water into Silver Creek to augment the water supply of the Little Wood River in general, and the historic consumptive use of the water rights proposed to be changed to a new beneficial use.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 29th day of June, 2021, the above and foregoing FINAL ORDER DENYING MITIGATION PLAN was served by the method indicated below, and address to the following:

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Megan Jenkins
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) The petition for reconsideration is disposed of; or
 - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, 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.

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: a) of 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.