

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

IN THE MATTER OF A REQUEST FOR)
RECOGNITION OF GROUND WATER)
RECHARGE CREDITS IN THE NAME) **FINAL ORDER DENYING REQUEST**
OF THE EASTERN SNAKE PLAIN) **FOR MITIGATION CREDITS**
RECHARGE ALLIANCE)
_____)

FINDINGS OF FACT

1. On February 21, 2012, the Idaho Department of Water Resources (“Department” or “Director”) received a *Request for Recognition of Recharge Credits* (“Request”), filed by Upper Snake Mitigation Solutions, LLC (on behalf of the Eastern Snake Plain Recharge Alliance), Alliance Member Irrigation Districts and Companies, and Idaho Ground Water Appropriators, Inc. (the entities will be collectively referred to hereafter as the “Alliance”).

2. The Request seeks Department approval for “recognition of credit for recharge made to the Eastern Snake Plain Aquifer (“ESPA”) during Fall 2011 through the efforts of its members” *Request* at 2. “The purpose of the Alliance is to develop, implement and maintain privately funded and managed programs to deliver recharge water to the ESPA from the Snake River to enhance aquifer levels and discharge at strategic locations and to develop a market for the resulting mitigation credits.” *Id.* The Request discusses recharge activities performed during the Fall of 2011, the method in which credits would be calculated, and the percent assignment of calculated credits amongst the Alliance.

3. As understood by the Department, the Request seeks approval of modeled recharge credits in the following three instances: (1) for use by the Idaho Ground Water Appropriators, Inc. (“IGWA”) under its conjunctive management rule 43 mitigation plans, IDAPA 37.03.043 (“CM Rules”); (2) for use by the Alliance under IGWA’s CM Rule 43 mitigation plans; (3) for use by Alliance members related to existing or newly-approved water uses. *Id.* at 2, 8-9.

CONCLUSIONS OF LAW

A. IGWA’s CM Rule 43 Mitigation Plans

1. In response to senior-priority delivery calls, and in accordance with CM Rule 43, IGWA has previously filed mitigation plans. Some of IGWA’s CM Rule 43 mitigation plans have been approved by the Department. Pertinent to the questions raised in the Request, the Department has approved a mitigation plan that authorizes IGWA to obtain mitigation credit for conversions, dry-ups, and recharge. *Order Approving Mitigation Plan*, CM-MP-2009-006 (May

14, 2010). The Order Approving Mitigation Plan stated, if, in the future, “mitigation credit is sought by IGWA, the Director shall determine the appropriate credit, if any, to provide.” *Order Approving Mitigation Plan* at 4 (emphasis added). On May 14, 2010, in response to a finding of material injury to the Surface Water Coalition (“SWC”), IGWA filed a *Request for Mitigation Credit* with the Department. On July 19, 2010, the Director entered a *Final Order Approving Mitigation Credits Regarding SWC Delivery Call*. The Final Order was appealed by the SWC and affirmed by the district court on judicial review. *Memorandum Decision and Order on Petition for Judicial Review*, CV-2010-3822 (Fifth Jud. Dist., Twin Falls County, April 22, 2011).

2. The Director views the first part of the Request as a request by IGWA for mitigation credit, and will process the first part of the Request separately. The Director will independently consider the request for mitigation credit for IGWA under docket no. CM-MP-2009-006.

B. Alliance Use of IGWA’s CM Rule 43 Mitigation Plans

3. As stated above, the Department has previously approved CM Rule 43 mitigation plans filed by IGWA. The Request makes specific reference to two of IGWA’s CM Rule 43 Mitigation Plans: “IGWA’s Mitigation Plan for Conversions, Dry-Ups and Recharge” and “IGWA’s Mitigation Plan for the Surface Water Coalition Delivery Call.” *Request* at 5-6.¹ The Request then states as follows: “Through IGWA’s participation as a member of the Eastern Snake Plain Recharge Alliance, the Alliance is in a position to rely upon IGWA’s approved mitigation plans to request credit for its fall 2011 recharge to the ESPA.” *Id.* at 6 (emphasis added).

4. The mitigation plans referenced by the Alliance were filed by IGWA for the benefit of its member ground water districts, published by the Department, and approved by the Director in accordance with the requirements of CM Rule 43. To the extent the Alliance seeks mitigation credit for conjunctive management delivery calls, it should file a mitigation plan in accordance with CM Rule 43.01. The plan will then be subject to notice and consideration in accordance with CM Rule 43.02 and CM Rule 43.03.

5. The Director cannot authorize the Alliance to sidestep the procedural requirements of CM Rule 43 by seeking mitigation benefits under the auspices of IGWA’s previously approved mitigation plans.

C. Recharge Credits for Existing or Newly-Approved Water Uses

6. Lastly, the Request seeks mitigation credit that is not associated with the CM Rules. The Alliance asks the Department to:

¹ Under the storage water plan, IGWA is authorized to mitigate material injury to the SWC by providing the SWC with a certain volume of storage water. Even if the Alliance had an interest in the storage plan—which it does not—it is unclear how the storage plan would apply to the Alliance’s request for modeled recharge credits. As stated above, the Director will independently consider IGWA’s request for mitigation credit under CM-MP-2009-006.

Recognize the potential use of Alliance recharge credits for other mitigation uses related to existing or newly-approved water uses, in accordance with Idaho law, for which the Alliance or its members may subsequently seek approval from IDWR, or for which they may consent to others seeking such approval to mitigate for the effects of ground water depletions.

Request at 9 (emphasis added).

7. Other than CM Rule 43, which applies only in conjunctive management delivery calls, CM Rule 1, there is no provision in Idaho law that allows the Director to authorize, much less approve, mitigation credits for applications for new water rights or transfers of existing water rights that have not yet been filed.

8. The Director supports the parties' efforts at recharging the ESPA, and would support the parties' efforts in advancing legislation or formal rulemaking on the subject. Without, however, a procedural mechanism to authorize mitigation credits, the Director cannot approve the Request.

ORDER


Consistent with the foregoing, the Director DENIES the Alliances' Request for mitigation credits.

IT IS FURTHER ORDERED that the Director will separately address IGWA's request for mitigation credit associated with CM-MP-2009-006.

IT IS FURTHER ORDERED that this is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency shall dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the director to contest the action taken provided the person files 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. Idaho Code § 42-1701A(3). Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01.

DATED this 23rd day of March, 2012.

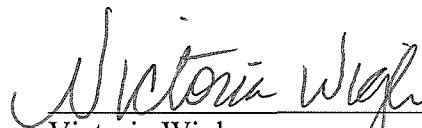

Gary Spackman
Interim Director

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on the 23rd day of March, 2012.

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