BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND 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-2019-001 **FINAL ORDER APPROVING STIPULATED MITIGATION PLAN**
IN THE MATTER OF THE JOINT MITIGATION PLAN FILED BY THE COALITION OF CITIES, THE CITY OF IDAHO FALLS, AND THE CITY OF POCATELLO IN RESPONSE TO THE SURFACE WATER COALITION DELIVERY CALL	

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

FINDINGS OF FACT

1. On February 25, 2019, the cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (collectively referred to herein as "Coalition of Cities"), submitted to the Department the *Coalition of Cities, City of Idaho Falls, and City of Pocatello Joint Mitigation Plan* ("Joint Mitigation Plan") with an attached Settlement Agreement between the Surface Water Coalition ("SWC"), Participating Members of Idaho Ground Water Appropriators, Inc. ("IGWA"), and Signatory Cities (collectively, "Joint Mitigation Plan").

2. The Coalition of Cities, Idaho Falls, and Pocatello (collectively hereinafter "Cities") have filed four mitigation plans under the Department's Rule 43, the Rules for Conjunctive Management of Surface and Ground Water Resources to satisfy their mitigation obligations in response to the SWC delivery call. *See* IDAPA 37.03.11.043. These are: CM-MP-2015-001, CM-MP-2015-004, CM-MP-2015-005, and CM-MP-2016-002. *See generally* Docket No. CM-DC-2010-001. The Joint Mitigation Plan supplants these previously filed plans.

3. The Cities assert the Joint Mitigation Plan "resolves the Cities' collective mitigation obligation under the SWC delivery call." Joint Mitigation Plan at 2. The Cities also assert that the SWC and IGWA "stipulate to the Joint Mitigation Plan with the Cities, agreeing that the Plan shall be deemed to fully mitigate all impacts caused by the Cities' out-of-priority ground water pumping in CM-DC-2010-001 for the term of the mitigation plan." *Id.* at 4-5. The term of the Joint Mitigation Plan "shall be until the average annual ESPA pumping of the cities referenced in the Agreement reaches 120,000 acre-feet per year as determined by a five-year rolling average, or December 31, 2053, whichever is earlier . . . ." *Id.* at 4.

4. The terms of the Joint Mitigation Plan are attached as Exhibit 1: *Settlement Agreement Between the Surface Water Coalition, Participating Members of the Idaho Ground Water Appropriators, Inc., and Signatory Cities*. They include, in summary: (a) the Cities' specific mitigation obligation(s) and options; (b) reporting and information sharing requirement(s); (c) agreement to withdraw opposition to creation of the ESPA Ground Water Management Area and potential incorporation of the Agreement into the ESPA ground water management plan; (d) a safe harbor from a delivery call by any participating city based on IGWA's spring water rights; (e) approval by the Department; (e) effect on ground water district assessments; and (f) legislative approval and participating city support of state-sponsored managed aquifer recharge of the ESPA. *Id.* Exhibit 1 at 3-6.

5. The Department published notice of the Joint Mitigation Plan in the Idaho Mountain Express, Mountain Home News, and Power County Press on March 13 and 20, 2019; and the Times News, Post Register, Idaho State Journal, Lewiston Tribune, and Idaho Statesman on March 14 and 21, 2019. The notice stated any protest against approval of the Joint Mitigation Plan must be filed with the Department on or before April 1, 2019. 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.

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. *See* IDAPA 37.03.11.000 *et seq.*

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 Cities desire "to implement a long-term resolution to mitigation obligations under both the SWC Delivery Call and the ESPA-GWMA that allows for cities to continue to grow and develop and use additional water." Joint Mitigation Plan Exhibit 1 at 2. Therefore, the Cities, SWC, and IGWA stipulate and "[t]o the extent the Director finds the SWC to suffer material injury under the Methodology provided for in CM-DC-2010-001 . . . agree[] that the [Stipulated Mitigation Plan] shall be deemed to fully mitigate all impacts caused by the Cities' out-of-priority ground water pumping in CM-DC-2010-001 for the term of the mitigation plan." *Id.* at 4-5.

10. As discussed above, the Joint Mitigation Plan includes, in summary, (a) the Cities' specific mitigation obligation(s) and options; (b) reporting and information sharing requirement(s); (c) agreement to withdraw opposition to creation of the ESPA Ground Water Management Area and potential incorporation of the Agreement into the ESPA ground water management plan; (d) a safe harbor from a delivery call by any participating city based on IGWA's spring water rights; (e) approval by the Department; (e) effect on ground water district assessments; and (f) legislative approval and participating city support of state-sponsored managed aquifer recharge of the ESPA. *Id.* Exhibit 1 at 3-6.

11. The term of the Joint Mitigation Plan is until the average annual ESPA pumping of the Cities reaches 120,000 AF/year as determined by a five-year rolling average, or December 31, 2053, whichever is earlier.

12. Having reviewed the Mitigation Plan, the CM Rules, and the proceedings herein, the Director approves the Mitigation Plan.

ORDER

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

a. All ongoing activities required pursuant to the Joint Mitigation Plan are the responsibility of the parties thereto.

b. Approval of the Joint Mitigation Plan does not constitute approval of the Joint Mitigation Plan as a ground water management plan. The Cities, SWC, and IGWA may submit the Joint Mitigation Plan to the Department for consideration at the time an ESPA-GWMA ground water management plan is considered.

DATED this 9th day of April 2019.

Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of April, 2019, I served a true and correct copy of the foregoing document on the parson(s) whose names and addresses appear below by the method indicated:

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Kimberle English

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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.