BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE IDAHO GROUND WATER APPROPRIATORS, INC.'S MITIGATION PLAN FOR CONVERSIONS, DRY-UPS, AND RECHARGE	))))))	Docket No: CM-MP-2009-006 **ORDER APPROVING MITIGATION PLAN**

FINDINGS OF FACT

1. On October 6, 2009, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed with the Director of the Department of Water Resources ("Director" or "Department") a *Mitigation Plan for Conversions, Dry-Ups and Recharge* ("Plan") in accordance with the Conjunctive Management Rules ("CM Rules"). IDAPA 37.03.11.043. IGWA filed the Plan "on behalf of its Ground Water District Members and other water user members for and on behalf of their respective members and those ground water users who are non-member participants in their mitigation activities . . . ." *Plan* at 1.

2. In accordance with CM Rule 43 and Idaho Code § 42-222, IGWA's Plan was published. The Plan was not protested.

3. IGWA's Plan proposes that the Director authorize any or all of the following mitigation activities: "1) existing and future conversions of acres irrigated from groundwater to surface water irrigation; 2) dried up acres through the Conservation Reserve Enhancement Program (CREP); AWEP or other voluntary program[s] resulting in the dry-ups of groundwater irrigated acres; and 3) groundwater recharge." *Plan* at 1-2.

4. The Plan "is proposed to provide IGWA and its members with the right to obtain mitigation credit for the Mitigation Activities that will then be applied in response to a finding of material injury to senior water rights under the CM Rules." *Id.* at 2. The Plan recognizes, "in response to a delivery call or order from the Director, the exact amount of mitigation credit obtained from a specific Mitigation Activity would be subject to analysis and calculation by the Director based upon the ESPA Model or other methodologies determined by the Department or the Courts." *Id.* at 2-3. Moreover, IGWA recognizes that the proposed mitigation activities "should be evaluated when implemented at which time any dispute concerning the calculation of the mitigation credit, but not the Mitigation Activity itself could be subject to hearing." *Id.* at 9.

5. Presently, the Plan is designed to "obtain mitigation credit in response to findings of material injury in the existing and any future delivery calls placed by Clear Springs Foods, Inc. (Clear Springs), Blue Lakes Trout Farm, Inc. (Blue Lakes), [and] the Surface Water Coalition (SWC) . . . ." *Id* at 3. In addition, IGWA seeks authorization to seek credit for the proposed mitigation activities "where a determination of material injury to a senior water right holder has been determined for which junior groundwater rights must provide mitigation to avoid curtailment." *Id.*

CONCLUSIONS OF LAW

1. CM Rule 43 states as follows:

01. Submission of Mitigation Plans. A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information: (10-7-94)

a. The name and mailing address of the person or persons submitting the plan. (10-7-94)

b. Identification of the water rights for which benefit the mitigation plan is proposed. (10-7-94)

c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies. (10-7-94)

d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03. (10-7-94)

02. Notice and Hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights. (10-7-94)

03. Factors to Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: (10-7-94)

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law. (10-7-94)

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods. (10-7-94)

c. Whether the mitigation plan provides replacement water supplies or

other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan. (10-7-94)

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. (10-7-94)

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. (10-7-94)

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use. (10-7-94)

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (10-7-94)

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan. (10-7-94)

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge. (10-7-94)

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury. (10-7-94)

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. (10-7-94)

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan. (10-7-94)

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies. (10-7-94)

o. 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. (10-7-94)

2. The Plan, filed by IGWA, complies with CM Rule 43.01 by identifying the current conjunctive management delivery calls filed by Blue Lakes, Clear Springs, and the SWC. The Plan describes the water supplies for purposes of conversion and recharge.[1] The Plan requests that the Director use the ESPA Model to determine mitigation credits. *See* CM Rule 43.03.e. On its face, the Director is able to consider the factors in CM Rule 43.03.

3. Regarding CM Rule 43.02, the Plan was submitted, published, and no protests were filed. A hearing is not necessary on the Plan itself. In the future, if mitigation credit is sought by IGWA, the Director shall determine the appropriate credit, if any, to provide.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED as follows:

IGWA's *Mitigation Plan for Conversions, Dry-Ups and Recharge* is GRANTED. If mitigation credit is sought by IGWA, the Director shall determine the appropriate credit, if any, to provide.

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 issuance of this order. The agency will 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 pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter 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 a hearing was held, the final agency action was taken, the party seeking review of the order resides, or 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) 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* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 14th day of May, 2010.

Gary Spackman

GARY SPACKMAN
Interim Director

[1] The Plan states that IGWA has utilized the North Side Canal Company's ("NSCC") canal system for recharge. Approval of this Plan in no way authorizes IGWA's use of NSCC's system for recharge. IGWA must receive approval from NSCC to conduct recharge through NSCC's system.

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 14th day of May, 2010.

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