

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

IN THE MATTER OF THE DISTRIBUTION
OF WATER TO WATER RIGHTS HELD
BY AQUARIUS AQUACULTURE, WATER
RIGHT NOS. 36-07092B, 36-07159,
AND 36-07160

Docket No. CM-DC-2014-001

**FINAL ORDER APPROVING
MITIGATION PLAN AND
DISMISSING DELIVERY CALL**

On November 12, 2014, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) received a *Stipulated Mitigation Plan and Request for Order* (“Mitigation Plan”) and a *Stipulation for Dismissal* (“Stipulation for Dismissal”) filed jointly by Aquarius Aquaculture, Inc. (“Aquarius”), the North Snake Ground Water District, Magic Valley Ground Water District, Southwest Irrigation District (the “Ground Water Districts”) and the Idaho Ground Water Appropriators, Inc. (“IGWA”). The cover letter accompanying the documents states:

The above referenced delivery call of Aquarius Aquaculture, Inc. has been settled pursuant to a Settlement Agreement entered into effective November 4, 2014 with [the Ground Water Districts] and IGWA. The Settlement Agreement is intended to be a mitigation plan as defined by the [Department’s Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”)] and is filed as a Stipulated Mitigation Plan with request that the Director issue a final order confirming the Settlement Agreement as a mitigation plan and dismissing the action.

Letter from Randy C. Budge to Gary Spackman at 1 (Nov. 11, 2014).

FINDINGS OF FACT

1. On February 14, 2014, the Department received a letter from Aquarius requesting a delivery call alleging it is receiving less than fifty percent of the water it is entitled to from Hidden Springs for fish propagation pursuant to water right nos. 36-07092B, 36-07159, and 36-07160. The letter demanded that the watermaster administer the water rights according to Idaho Code § 42-607.

2. The Department treated the letter as a delivery call under the CM Rules and as a petition to initiate a contested case proceeding under the Department's administrative rules. The Department assigned the case docket number CM-DC-2014-001.

3. On July 17, 2014, IGWA filed a petition to intervene in the proceeding. The Department granted IGWA's petition to intervene on July 23, 2014.

4. A status conference was held on July 22, 2014. The parties agreed to continue the status conference to August 11, 2014, to allow them time to meet in person to share information and to discuss a possible resolution of the delivery call.

5. On August 11, 2014, the Director held a status conference. The parties requested a delay of formal proceedings in this matter and stipulated to the setting of a continued status conference in January 2015. The parties asked for the delay to model depletions to the Aquarius water rights and to negotiate settlement. On August 26, 2014, the Department issued an order continuing the status conference to January 8, 2015.

6. On November 12, 2014, Aquarius, the Ground Water Districts and IGWA filed the Mitigation Plan with the Department. The Mitigation Plan stems from negotiations between the parties. The Mitigation Plan references a settlement agreement and provides:

The Parties do hereby acknowledge that this Agreement is intended to be a "Mitigation Plan" as such term is defined by the Conjunctive Management Rules. ... The Parties will request the Director of IDWR issue a final order in conjunction with the dismissal of the underlying proceeding confirming this Agreement as a final Mitigation Plan pursuant to the provisions of the Conjunctive Management Rules.

Mitigation Plan, Exhibit A at 3.

7. On November 12, 2014 the Director also received the Stipulation for Dismissal. The Stipulation for Dismissal is signed by Aquarius and counsel for the Ground Water Districts and IGWA. The Stipulation for Dismissal provides:

The parties, Aquarius Aquaculture, Inc., the Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, Magic Valley Ground Water District and Southwest Irrigation District, hereby stipulate that for the reason that a compromised resolution has been reached by the parties, that they do hereby stipulate to the dismissal of this matter as to IGWA, its members and member ground water and irrigation districts, on the terms of their stipulated settlement.

Stipulation for Dismissal at 1.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

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 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. In addition, Idaho Code § 42-1805(8) vests the Director with authority 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. In accordance with chapter 52, title 67, Idaho Code, the Department adopted rules regarding the conjunctive management of surface and ground water effective October 7, 1994. CM Rule 0. 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 junior-priority ground water rights in an area having a common ground water supply. CM Rule 1.

4. CM Rule 42.02 states as follows: “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”

5. CM Rule 43.01 sets forth the criteria for submittal of a mitigation plan to the Director.

6. CM Rule 43.03 establishes the factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights. CM Rule 43.03.o states as follows: “Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not be fully in compliance with these provisions.”

7. Aquarius, the Ground Water Districts, and IGWA executed the Mitigation Plan in accordance with CM Rule 43.03.o. *Mitigation Plan* at 1. The purpose of the Mitigation Plan is to “fully and completely” mitigate the hydraulic impact of the Ground Water Districts’ and IGWA’s members for the duration of the Agreement. *Id.* at 1. “[T]he parties request that the Director enter an order without further notice or hearing accepting the Agreement as a complete and final Stipulated Mitigation Plan and dismissing the above-referenced delivery calls matters

[sic] of Aquarius with prejudice in accordance with the parties' provisions as contained in this Agreement." *Id.* at 2.

8. Having reviewed the Mitigation Plan, the CM Rules, and the proceedings herein, the Director approves the Mitigation Plan and agrees that this matter should be dismissed. CM Rule 43.03.

ORDER

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

The Mitigation Plan entered into between Aquarius, the Ground Water Districts and IGWA is APPROVED, and that this matter is DISMISSED with prejudice as to IGWA, its members and member ground water and irrigation districts.

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 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 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* Idaho Code § 42-1701A(3).

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 a 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 21st day of November, 2014.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

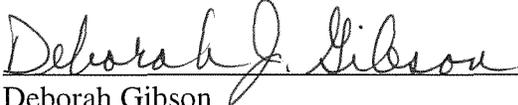
I HEREBY CERTIFY that on this 24th day of November, 2014, a true and correct copy of the foregoing document was served on the following by the methods indicated below:

AQUARIUS AQUACULTURE, INC. (x) U.S. Mail, Postage Prepaid
C/O DAVID HUFF, VICE PRESIDENT () Hand Delivery
2674 NORWOOD ROAD (x) E-mail
HAGERMAN, ID 83332
ozzie@q.com

RANDY BUDGE (x) U.S. Mail, Postage Prepaid
TJ BUDGE () Hand Delivery
RACINE OLSON (x) E-mail
P.O. BOX 1391
POCATELLO, ID 83204-1391
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511 16TH ST., STE. 500
DENVER, CO 80202
sarahk@white-jankowski.com
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A. DEAN TRANMER (x) U.S. Mail, Postage Prepaid
CITY OF POCATELLO () Hand Delivery
P.O. BOX 4169 (x) E-mail
POCATELLO, ID 83205
dtranmer@pocatello.us


Deborah Gibson
Admin. Assistant for the Director

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is an **Order Denying Petition for Reconsideration** of the "final order" or "amended final order" issued previously in this proceeding by the Idaho Department of Water Resources ("department") pursuant to section 67-5246, 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.