

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

IN THE MATTER OF THE IDAHO GROUND) Docket No: CM-MP-2009-006
WATER APPROPRIATORS, INC.'S)
MITIGATION PLAN FOR CONVERSIONS,) **ORDER DENYING SWC REQUEST**
DRY-UPS, AND RECHARGE) **FOR HEARING REGARDING**
) **ORDER APPROVING MITIGATION**
) **PLAN; and SCHEDULING ORDER**
)
_____)

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* (“Mitigation Plan”) in accordance with the Conjunctive Management Rules (“CM Rules”). IDAPA 37.03.11.043. The Mitigation Plan was filed broadly, “on behalf of [IGWA’s] 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” *Mitigation Plan* at 1.

2. In accordance with CM Rule 43 and Idaho Code § 42-222, IGWA’s Mitigation Plan was published. The Mitigation Plan was not protested. On May 14, 2010, the Director approved the Mitigation Plan. *Order Approving Mitigation Plan*. In the Order Approving Mitigation Plan, the Director stated: “In the future, if mitigation credit is sought by IGWA, the Director shall determine the appropriate credit, if any, to provide.”

3. On May 12, 2010, the Department received *IGWA’s Request for Mitigation Credit* (“Credit Request”). The Credit Request was filed in order to provide IGWA with mitigation credit for material injury that was predicted by the Director to occur to certain members of the Surface Water Coalition (“SWC”) during the 2010 irrigation season. The Credit Request sought approximately 15,306 acre-feet of mitigation credit for conversions, CREP, and recharge activities. According to the Request, these activities “enhance the water supply in the ESPA and to the Snake River” *Request* at 2.

4. On May 17, 2010, the Director issued his *Order Approving Mitigation Credits Regarding SWC Delivery Call* (“Credit Order”). Using the ESPA Model to simulating transient

reach gain benefits for conversions, CREP, and recharge, the Director approved a 5,707 acre-foot mitigation credit for the 2010 irrigation season.

5. On May 28, 2010, SWC filed two documents entitled *Petition Requesting Hearing on Order Approving Mitigation Credits/Motion to Authorize Discovery*. The first document (“Mitigation Plan Petition”) seeks hearing on the Order Approving Mitigation Credit and discovery. The Mitigation Plan Petition alleges that the Director erred in application of CM Rule 43. Citing Idaho Code § 42-1701A(3), the Mitigation Plan Petition seeks hearing on the Order Approving Mitigation Plan.

6. The second document (“Credit Order Petition”) seeks hearing on the Credit Order and discovery. On June 1, 2010, the Director authorized discovery in the Credit Order proceedings. On June 29, 2010, hearing will commence in the Credit Order proceedings.

CONCLUSIONS OF LAW

1. On May 14, 2010, the Director approved the Mitigation Plan, subject to additional proceedings when a mitigation credit was sought by IGWA. On May 17, 2010, the Director approved IGWA’s Credit Request. Starting June 29, 2010, a hearing will commence in the Credit Order proceedings. The SWC, as the calling entity, is a proper party to the Credit Order proceeding.

2. The SWC is not, however, party to the Order Approving Mitigation Plan. Consistent with Idaho Code § 42-222, CM Rule 43.02 requires notice and opportunity to be heard regarding a proposed mitigation plan. In accordance with CM Rule 43.02 and Idaho Code § 42-222, the Department published notice of the Mitigation Plan. The Mitigation Plan was not protested.

3. The SWC argues that Idaho Code § 42-1701A(3) allows it to have a hearing on the Order Approving Mitigation Plan. Idaho Code § 42-1701A(3) provides as follows:

Unless the right to a hearing before the director . . . is otherwise provided by statute, any person aggrieved by any 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.

Emphasis added.

4. As stated above, the Mitigation Plan was filed and published. Hearing was afforded in CM Rule 43.02 and Idaho Code § 42-222(1). However, because no protests were filed, the Director, in reviewing the Mitigation Plan and in exercise of his discretion, determined that a hearing was not necessary. *Order Approving Mitigation Plan* at 4; CM Rule 43.02. Therefore, the SWC had an opportunity for hearing in the Mitigation Plan proceeding when the Mitigation Plan was published. Because the SWC failed to exercise its opportunity for hearing, Idaho Code § 42-1701A(3) does not provide the SWC an opportunity to now seek a hearing on the Order Approving Mitigation Plan.

ORDER

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

The relief requested by the SWC in its Mitigation Plan Petition is DENIED.

IT IS FURTHER ORDERED as follows:

The SWC's request for hearing in its Credit Order Petition is GRANTED. Discovery in the Credit Order proceeding was authorized by the Director on June 1, 2010.

IT IS FURTHER ORDERED as follows:

On June 17, 2010, the Director shall hold a pre-hearing conference at the Department's State Office in Boise. The pre-hearing conference shall begin at 11:00 a.m. Telephonic participation will be available by dialing 215-446-0193 and entering participant code 275568.

The hearing in this matter shall commence on June 29, 2010 at the Department's State Office in Boise. Proceedings shall begin at 9:00 a.m. and continue from day-to-day until completion.

Dated this 8th day of June, 2010.


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 8th day of June, 2010.

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