

Michael C. Creamer, ISB #4030
GIVENS PURSLEY LLP
601 W. Bannock St.
Post Office Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
2096050_1 / 9365-5

RECEIVED
JUN 11 2014
DEPT. OF WATER RESOURCES
SOUTHERN REGION

RECEIVED
JUN 03 2014
DEPARTMENT OF
WATER RESOURCES

Attorneys for Applicant The Valley Club, Inc.

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

**IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 78255 IN THE
NAME OF THE VALLEY CLUB, INC.**

**THE VALLEY CLUB, INC.'S
EXCEPTION TO PRELIMINARY
ORDER APPROVING
APPLICATION FOR TRANSFER
WITH CONDITIONS**

Applicant The Valley Club, Inc. ("TVC"), by and through his attorneys Givens Pursley LLP, and pursuant to Idaho Code § 67-5245 and IDAPA 37.01.01.730, hereby takes exception to the May 20, 2014 Preliminary Order Approving Application for Transfer No. 78255 ("Preliminary Order"). TVC specifically takes exception to the following condition imposed in the Preliminary Order with respect to transferred water right nos. 37-494, 37-495, 37-577BU, 37-577BV, 37-833K and 37-2623 (collectively the "Conditioned Rights"):

The amount of ground water recharge under rights 37-494, 37-495, 37-577BU, 37-577BV, 37-833K, as modified by Transfer 78255, is intended to offset the annual out-of-priority consumptive use of water pursuant to Right 37-2623 in the event of a delivery call. Based on scientific information available at the time of this approval, the ground water recharge may be sufficient to mitigate for a delivery call that would otherwise result in the curtailment of Right 37-2623, but the sufficiency of this recharge effort to prevent injury will not be determined unless there has been a delivery call, a determination of injury, and an analysis of the adequacy of this recharge as a mitigation plan to prevent injury.

The above condition is referred to throughout the remainder of this pleading as the “Sufficiency Condition.”

Oral argument is not requested.

GROUND FOR EXCEPTION

The Sufficiency Condition is improper under existing rules binding on the Department, and is inappropriate in light of the facts related to TVC’s Transfer. TVC has presented the Department with an application to be processed and determined under the statutory procedures of Idaho Code § 42-222 and the Department’s Conjunctive Management Rules, IDAPA 37.01.11 *et seq.* (“CMRs”). TVC’s application seeks *inter alia* approval of a mitigation plan to allow for out-of-priority diversions of ground water in the event of conjunctive administration under the CMRs.

The CMRs specifically contemplate that an application for approval of a mitigation plan may be filed with, and approved by, the Department in advance of a delivery call and/or a determination that a senior surface water user is suffering material injury as a result of a junior-priority ground water diversion. TVC’s application included all of the information required to be included in an application for approval of a mitigation plan, and notice and an opportunity for hearing was provided pursuant to the procedures of I.C. § 42-222 as required by the CMRs.

Moreover, the facts submitted in support of TVC’s application demonstrate that if operated as proposed, TVC’s recharge program will offset impacts to reach gains in the Big Wood River attributable to consumptive ground water withdrawals under 37-2623 at the times and places that those impacts could be expected to occur (i.e., the recharge program *will mitigate* any potential source of injury to senior surface water rights). In sum, on the law and the facts,

the Department should approve TVC's mitigation plan now and remove the Sufficiency Condition.

1. The CMRs specifically contemplate filing and approval of mitigation plans in advance of a delivery call.

A. TVC's mitigation plan complies with the CMRs.

"Mitigation Plans" are defined in the CMRs. So, too, are the requirements and procedures by which the Department is to process them. TVC's Application specifically indicated that TVC sought approval of a mitigation plan and included all of the information required by the CMRs. The published legal notice of Application conformed to the CMRs processing requirements and indicated that TVC's application included a proposed mitigation plan for its ground water right. TVC's mitigation plan was properly filed, supported and noticed as required by the CMRs and should be approved now.

The CMRs define a "mitigation plan" as:

A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply.¹

Rule 043 requires a mitigation plan to be submitted in writing, to identify the water rights that are to benefit from the mitigation plan and the water supplies to be used for mitigation, together with such other information as to allow the Director to evaluate the plan under the factors in Rule 043.03.² Upon receipt, the Director is to provide notice

¹ IDAPA 37.03.011.101.15.

² IDAPA 37.03.011.043.01(a)-(d).

and hold a hearing if necessary, and otherwise consider the plan under the procedures of Idaho Code § 42-222 in the same manner as applications to transfer water rights.³

The CMRs set out fifteen factors that the Director may consider in evaluating the sufficiency of a mitigation plan. Without enumerating all of these factors—for which TVC’s mitigation plan addresses virtually all⁴—TVC calls attention to the fact that its Application was supported with detailed analytical reports from two consultants specifically addressing:

(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;

(d) Whether the mitigation plan proposes artificial recharge as a means of protecting ground water pumping levels, compensating senior priority water rights or providing aquifer storage for exchange or other purposes;

(e) Where the mitigation plan is based on computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrologic formulae;

(f) Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics;

(g) Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use;

(h) The reliability of the source of replacement water;

(k) Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior priority water rights from material injury;

(l) Whether the mitigation plan provides for mitigation of the effects of pumping of existing wells.

TVC’s Application included a January 18, 2012 report from Brockway Engineering entitled *Big Wood Aquifer and River Simulated Response to Proposed Valley*

³ IDAPA 37.03.011.101.043.02.

⁴ TVC’s mitigation plan does not provide for future participation by other ground water users.

Club Recharge and Extraction Using a Big Wood River Aquifer Groundwater Model.

That report analyzed the effects on flows in the Big Wood River from ground water pumping under TVC right no. 37-2623 as proposed in TVC's Application, and from TVC's proposed recharge into constructed recharge galleries on TVC's property. These effects were analyzed using a MODFLOW ground water model for the Big Wood River Aquifer developed by Brockway Engineering in 2009 ("Brockway Model").

The Brockway Model represents the best information currently available for analyzing these effects. The Brockway Model has been previously evaluated by a technical review committee that included personnel from the Department and the Idaho Water Resources Research Institute. It has been used in support of other Department-approved water right applications in the basin, including a mitigation plan proposed to mitigate the effects of ground water withdrawals under a new water right owned by the Valley Club Homeowners Association using the very same facilities TVC will be using.⁵ The Brockway Model was used to evaluate both ground water level impacts upgradient and down gradient of TVC's well and changes in reach gains over six separate river reaches. The Brockway Model indicated that TVC's mitigation plan would result in a small annual net gain to the Big Wood River.

Further, TVC's Application was supported by a detailed report by Dr. Charles Brendecke of AMEC Earth and Environmental entitled *Substantiating Report in Support of Water Rights Transfers and Mitigation Plan for The Valley Club* (October 2012).

That report described the existing water rights and irrigation practices, historical

⁵ In approving that application, the Department included the following condition: "Rights 37-22313, 37-22318 and 37-22323 mitigate for the depletion of water resulting from the diversion and use of water under [ground water] right 37-22252." Final Order Approving Dry Lot, LLC's Application for Transfer 74449 (December 14, 2009).

availability and use of TVC's water rights, a detailed plan to mitigate out-of-priority ground water withdrawals, and described a measurement, monitoring and control plan for the recharge operations, including a template for annual accounting and reporting.

B. TVC's Mitigation Plan has been noticed and processed as required by Rule 043 of the CMRs and Idaho Code § 42-222.

The legal notice, published June 5 and 12, 2013, as required by the CMRs and Idaho Code § 42-222, disclosed that TVC proposed to convert 10.8 acres of irrigation from Big Wood River water rights to ground water recharge use "to provide mitigation as necessary for supplemental irrigation occurring under water right 37-2623." The legal notice drew three protests: one from the U.S. Bureau of Land Management objecting to a place of use that included federal lands; one from the Big Wood Canal Company ("BWCC") and one from the Wood River Irrigation District #45 ("District 45").

BWCC's protest included, as a basis of protest, that the TVC transfer would "injure downstream users by using both ground water and surface water within a PPU without adequately mitigating the ground water withdrawal." BWCC indicated its protest could be resolved if the transfer were denied or a resolution was reached "that guarantees no injury to downstream users." District 45's protest included, as a basis for protest, that it was concerned about potential impacts of TVC's ground water use to interconnected surface water flows and interference with senior surface water rights. District 45 indicated its protest could be resolved by denial of the transfer or conditions designed to protect downstream users from injury.

The BWCC and District 45 protests were resolved by stipulation in which they agreed, among other things, to inclusion of a condition in the transfer/mitigation plan approval stating that "out-of-priority diversion of ground water for irrigation under water

right 37-2623 is mitigated by the ground water recharge authorized under [TVC's surface water rights]".⁶

C. The CMRs contemplate that the sufficiency of a mitigation plan may be approved in advance of a delivery call.

Rule 020.07⁷ indicates that Rule 40 of the CMRs provides the procedures for responding to delivery calls within water districts such as the newly-enlarged Water District 37. Rule 40.01(b) in turn provides that when a delivery call is made, and upon the Director's finding that material injury is occurring to the calling senior, the watermaster shall "allow out of priority diversion of water by junior-priority ground water users pursuant to a mitigation plan *that has been approved* by the Director." Specifically, "[where a delivery call is made] in the water district the watermaster *shall first determine whether a mitigation plan has been approved by the Director* whereby diversion of ground water may be allowed to continue out of priority order. If the [junior ground water user] is a participant in such approved mitigation plan, and is operating in conformance therewith, the watermaster shall allow the ground water use to continue out of priority."⁸ Clearly then, Rule 40 contemplates that when a delivery call is made under the CMRs there will be mitigation plans that already have been approved and are operating such that the junior ground water user may avoid mandatory and immediate curtailment by the watermaster.

⁶ See Stipulation for Withdrawal of Protests, filed November 29, 2013. This mitigation language was intended to essentially mirror that contained in the Department's approval of Transfer No. 74449, which involved use of Dry Lot's Big Wood River 1883 surface water right delivered through the Hiawatha Canal into the same constructed recharge basin as TVC's, and involved the same hydrologic analysis used to support TVC's application.

⁷ IDAPA 37.03.11.020.07 (emphasis added).

⁸ IDAPA 37.03.11.040.02(c) (emphasis added).

It obviously makes sense to encourage ground water right holders to anticipate conjunctive administration and, like TVC, proactively develop a mitigation plan designed to entirely offset the estimated depletive effects associated with diversion and use of their ground water rights. This provides certainty to the ground water right holder *and* to the holders of senior priority water rights who have had notice and the opportunity to review and protest the plan ahead of a delivery call.

To be sure, the holders of senior water rights in Basin 37 should not expect that their rights may not be materially injured by junior-priority ground water use in the basin, or that they may not need to make a delivery call in the future, but they can expect that at least those water rights covered by a previously-approved mitigation plan will not be responsible for that injury. In the same vein, junior ground water right holders who wait until a delivery call is made, material injury is determined and protracted litigation finally determines to what extent a junior water right must offset the depletive effects attributable to their ground water use, cannot expect to avoid the risk of curtailment.

But where, as here, at some significant expense, a junior ground water holder demonstrates that its mitigation plan will offset the entirety of its consumptive ground water use and the entirety of the resulting depletive effects on connected stream reaches when and where they occur, that junior is entitled to have its mitigation plan approved. That junior is entitled to repose from responding to repeated delivery calls and reproving the sufficiency of its mitigation.

In this respect, TVC's mitigation plan is significantly different from the mitigation plans proposed by Ground Water Districts in the ESPA that are annually relitigated and revised in response to varying snowpacks, varying levels of injury and

varying locations of calling seniors. Unlike the TVC mitigation plan, those plans have never proposed to offset the entirety of the 2+ million acre-feet of annual depletions attributable to the participating ground water rights. They are in essence only “partial mitigation plans,” that are continually revised to account for the participating ground water users’ share of a mitigation obligation that changes year to year. Unlike TVC’s plan, those plans are not supported by hydrologic analysis demonstrating that *all effects on reach gains throughout all relevant reaches are fully offset as and when they occur* as a result of mitigation activities. By comparison, TVC’s plan proposes to offset all of its depletions *regardless of a delivery call or determination of injury*.

If the Department is concerned that approving TVC’s mitigation plan in the absence of a delivery call might set a precedent that would preclude its continued re-evaluation of “partial mitigation plans” such as those presented in the ESPA, then it can distinguish them as such. It should not attempt to address this potential issue by reading into the CMRs a limitation on its authority that does not exist. The CMRs contemplate that the Department will exercise its authority to approve a well-constructed and fully-documented mitigation plan such as TVC’s ahead of any delivery call.

2. Declining to approve TVC’s mitigation plan sets a new precedent—and a bad one at that.

To TVC’s knowledge, in approving previous applications involving ground water rights that also included a mitigation plan, the Department has not indicated that it was deferring any approval or determination of sufficiency of the plan until a delivery call had been made and material injury had been determined.

Indeed, in its approval of Transfer No. 74449, which involved the use of the same water delivery facilities, recharge galleries and supporting ground water model analysis,

the Department authorized 56.9 acre-feet per annum of Big Wood surface water rights with the same priority dates as TVC's rights (3/24/1883) to mitigate diversion and use 56.9 acre-feet for irrigation under a 2008-priority ground water right no. 37-22252. That approval specifically states that recharge of the 1883 surface water rights "mitigate for the depletion of water resulting from the diversion and use of water under Right 37-22252." The Sufficiency Condition is entirely inconsistent with its position in Transfer 74449.

As shown in the preceding discussion, it also is neither necessary under applicable law nor appropriate under the facts here. A mitigation plan that proposes to offset all impacts of junior priority pumping as and where they occur, and which has been fully documented and properly noticed should be approved.⁹ The junior water right holder should thereafter be assured that if and when a delivery call is made, the watermaster will honor the mitigation plan to the extent it is being operated in accordance with the approval and the junior right will not be curtailed.

Equally important, the mitigating junior should not be required to re-prove the sufficiency of his mitigation plan each time a delivery call is made. To the extent any calling senior water right holder would have the right to challenge an approved mitigation plan (a plan for which notice and an opportunity for hearing had been provided) and who would seek to challenge the plan's sufficiency should be required to establish a legal basis for their right to challenge the plan and to make their case by clear and convincing evidence. Any other approach simply means that despite incurring significant expense to provide complete mitigation for out-of-priority ground water use, and despite

⁹ Subject to appropriate conditions for monitoring, reporting and adjustments as might be demonstrated by the monitoring to be necessary. IDAPA 37.03.11.043.03.

documenting the sufficiency of a mitigation plan with the best available scientific information, the mitigating junior will be required to continually reprove the plan's sufficiency each time a delivery call is made. That is a highly inefficient use of valuable time and resources and discourages proactive efforts such as TVC's.

3. If the Department maintains the Sufficiency Condition in TVC's Application approval, it must apply the same policy to all prior applications including mitigation plans that were approved without the Sufficiency Condition.

The consequence of the Department's Sufficiency Condition is that applications proposing a mitigation plan submitted to the Department prior to a delivery call being made in a water district under the CMRs will be ineffectual to avoid curtailment under Rule 40. In other words, even though a submitted plan is: 1) accompanied by documentation addressing the Rule 43.03 factors; 2) substantiated by hydrologic analysis using the best available, peer-reviewed scientific information; and 3) subject to the notice and hearing requirements of Rule 43, Idaho Code § 42-222 and contested case procedures of the Administrative Procedure Act, the Department will defer a decision concerning the sufficiency of the mitigation plan. I.e., will defer a decision until a delivery call petition is filed, notice is given to affected water right holders, discovery and pre-trial motion practice has occurred, hearings have been held, administrative remedies have been exhausted, judicial review has been had and any additional hearings on remand have been held. Only at that point under the policy enunciated in the Sufficiency Condition, would a mitigation plan's sufficiency be determined, *at least as to that delivery call, but not necessarily future delivery calls.*

4. The Department should revise the Sufficiency Condition.

Based on the foregoing, the Sufficiency Condition should be revised to state that:

Out-of-priority diversion of ground water for irrigation under water right 37-2623 is mitigated by the ground water recharge authorized using portions water rights 37-494, 37-495, 37-577BU, 37-577BV and 37-833K. See Transfer 78255. The water right holder shall maintain control of rights 37-494, 37-495, 37-577BU, 37-577BV and 37-833K for mitigation purposes.

This condition would be consistent with the facts and law in this case, with the stipulation entered into between TVC, BWCC and District 45 and with Department conditions approving other applications. In the alternative a condition stating substantially as follows also would be appropriate:

The amount of ground water recharge use under this right and the other water rights modified by Transfer 78255, when operated as described herein, will offset the annual out-of-priority depletions to the Big Wood River from use of water pursuant to Right 37-2623.

CONCLUSION

If the policy adopted in the Sufficiency Condition is to apply to TVC's mitigation plan, then the Department must make it clear that the policy applies to all mitigation plans that have not been tested in the fire of a delivery call whether they were previously submitted (and ostensibly "approved") or have yet to be filed. Failing to do so is arbitrary, capricious, in violation of the applicable rules and statutes cited above, and results in unequal treatment of TVC when compared with similarly situated applicants.

If the Department will not revise the condition as requested, then TVC respectfully submits that the Department must affirmatively indicate that the sufficiency of all mitigation plans previously submitted or to be submitted outside of a delivery call

proceeding under the CMRs must be established in the delivery call proceeding before they will provide protection from curtailment.

DATED this 3rd day of June, 2014.

GIVENS PURSLEY LLP

By: 
Michael C. Creamer
Attorneys for Applicant The Valley Club, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 2014, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

Director of IDWR
Idaho Department of Water Resources
322 East Front Street
PO Box 83720
Boise ID 83720-0098

☐ U.S. Mail, postage prepaid
☐ Express Mail
☒ Hand Delivery
☐ Facsimile

Idaho Department of Water Resources
Southern Regional Office
1341 Fillmore Street, Ste 200
Twin Falls ID 83301-3380

☒ U.S. Mail, postage prepaid
☐ Express Mail
☐ Hand Delivery
☐ Facsimile

Fredric Price
Bureau of Land Management
U.S. Department of the Interior
1387 S Vinnell Way
Boise ID 83709-1657

☒ U.S. Mail, postage prepaid
☐ Express Mail
☐ Hand Delivery
☐ Facsimile

Andrew J. Waldera
Moffatt Thomas Barrett Rock & Fields, Chtd.
101 S Capitol Blvd, 10th Floor
PO Box 829
Boise ID 83701-0829

☒ U.S. Mail, postage prepaid
☐ Express Mail
☐ Hand Delivery
☐ Facsimile

Craig D. Hobdey
Hobdey Law Office
125 5th Ave W
PO Box 176
Gooding ID 83330

☒ U.S. Mail, postage prepaid
☐ Express Mail
☐ Hand Delivery
☐ Facsimile


Michael C. Creamer