

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

IN THE MATTER OF DISTRIBUTION OF
WATER TO VARIOUS WATER RIGHTS HELD
BY OR 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-DC-2010-001

**ORDER DETERMINING
DEFICIENCY IN IGWA’S NOTICE
OF SECURED WATER**

BACKGROUND

On April 21, 2023, the Director of the Idaho Department of Water Resources (“Department”) issued his *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). The Methodology Order revised the nine steps used to determine material injury to members of the Surface Water Coalition (“SWC”).

Step 3 of the Methodology Order states that by May 1, or within fourteen days from issuance of a final order predicting a shortfall, “whichever is later in time, junior ground water users with approved mitigation plans for delivery of water must secure, to the satisfaction of the Director, a volume of water equal to their proportionate share” of any predicted shortfall unless the forecast is revised. *Methodology Order* at 40. Step 3 further states that “[t]he secured water will not be required to be delivered to the injured members of the SWC until the Time of Need.” *Id.*

On April 21, 2023, the Director also issued his *Final Order Regarding April 2023 Forecast Supply* (“As-Applied Order”) in which the Director determined the predicted shortfall obligation for junior ground water users for 2023. The Director concluded that Twin Falls Canal Company (“TFCC”) is the only entity with a predicted shortfall for 2023 and the shortfall value is 75,200 acre-feet. The Director ordered:

On or before May 5, 2023, ground water users holding consumptive water rights bearing priority dates junior to December 30, 1953, within the Eastern Snake Plain Aquifer area of common ground water supply shall establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted [demand shortfall] of 75,200 acre-feet in accordance with an approved mitigation plan. If a junior ground water user cannot establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted [demand shortfall] of 75,200 acre-feet in accordance with an approved mitigation

plan, the Director will issue an order curtailing the junior-priority ground water user.

As-Applied Order at 6.

On May 5, 2023, the Idaho Ground Water Appropriators, Inc. (“IGWA”), acting on behalf of certain water districts¹ (collectively “Districts”), filed with the Department a *Notice of Ground Water District Mitigation* (“Notice of Mitigation”). The Notice explains that “IGWA has three approved mitigation plans.” *Notice of Mitigation* at 2. IGWA states the first plan (the “2009 Storage Water Mitigation Plan”) “authorizes the Districts to provide mitigation via the delivery of storage water to the SWC.” *Id.* IGWA states that the second plan “authorizes the Districts to obtain mitigation credit” for various activities. *Id.* IGWA states the third plan (known as the “2015 Settlement Agreement Mitigation Plan”) authorizes the Districts to “obtain mitigation protection by complying with a settlement agreement entered into between the Districts and the SWC in 2015.” *Id.* IGWA recognizes that “[u]nder this plan, the Districts are required to conserve 240,000 acre-feet of water and deliver 50,000 acre-feet of storage annually to the SWC” *Id.*

Since the 2015 Settlement Agreement Mitigation Plan was approved by the Department, IGWA has only mitigated under that plan. This year, IGWA is proposing something new. Certain ground water district members are seeking to mitigate under the 2009 Storage Water Mitigation Plan and other ground water district members are seeking to mitigate under the 2015 Settlement Agreement Mitigation Plan. Instead of relying on one or two mitigation plans for all members, individual ground water districts are seeking to mitigate under different mitigation plans. IGWA states Bingham Ground Water District, Bonneville-Jefferson Ground Water District and Jefferson-Clark Ground Water District will provide mitigation under the 2009 Storage Water Mitigation Plan. *Notice* at 2. IGWA includes the following table to identify what it believes each district’s proportionate share of the shortfall is:

District	Proportionate Share
Bingham GWD	13,384
Bonneville-Jefferson GWD	8,469
Jefferson-Clark GWD	6,939
Total	28,792

Id.

IGWA states “Attached hereto as Appendix A are copies of storage water leases totaling 38,714 acre-feet, submitted on behalf of the above-identified Districts.” *Id.* at 3.

¹ IGWA’s submitted the Notice of Mitigation on behalf of: North Snake Ground Water District, Carey Valley Ground Water District, Magic Valley Ground Water District, Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry’s Fork Ground Water District. *Notice of Mitigation* at 1.

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IGWA includes the following table to identify the districts planning to mitigate under the 2015 Settlement Agreement Mitigation Plan and each district’s proportionate shares of the reduction obligation and the storage water obligation:

District	240,000 AF	50,000 AF
Aberdeen-American Falls GWD	39,395	8,705
Carey Valley GWD	821	173
Henry’s Fork GWD + Madison GWD	6,299	0
Magic Valley GWD	37,931	8,000
North Snake GWD	29,765	6,410
Total	114,211	23,288

Id.

IGWA states:

Each District’s proportionate share of 240,000 is based on the Director’s allocation set forth in the *Amended Final Order Regarding Compliance with Approved Mitigation Plan* issued April 24, 2023, in this matter. Each District’s proportionate share of 50,000 is based on the allocation IGWA has utilized since the Settlement Agreement Plan was implemented in 2016.

Id.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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. The first question that must be answered is whether the ground water districts can mix the mitigation plans in the way they are proposing. IGWA’s “hybridization” of mitigation plans presents serious questions about whether mixing of mitigation plans is allowable.

2009 Storage Water Mitigation Plan

3. The 2009 Storage Water Mitigation Plan was submitted to the Department on November 9, 2010. IGWA's Mitigation Plan for the Surface Water Coalition Delivery Call at 7, *In re Idaho Ground Water Appropriators, Inc.'s Mitigation Plan in Response to the Surface Water Coalition's Water Delivery Call*, No. CM-MP-2009-007 (Idaho Dep't of Water Res. Nov. 9, 2009) [hereinafter "2009 Storage Water Mitigation Plan"]. The plan was submitted by IGWA "on behalf of its Ground Water District Members and its other water user members . . . , for and on behalf of their respective members and those groundwater users who are non-member participants in their mitigation activities. . . ." *2009 Storage Water Mitigation Plan* at 1.

4. The mitigation plan proposes supplying water stored in Snake River reservoirs to the SWC "that will be available on an annual basis for delivery to SWC entities as may be required by the Director's orders." *Id.* at 3. While the plan was submitted for the benefit of IGWA's members and non-member participants, the plan clearly states that IGWA will mitigate for all ground water users, not just its members and non-member participants:

This Mitigation Plan will mitigate *any and all* material injury by guaranteeing and underwriting the senior water user's water supply. If the Director projects material injury for a senior water user, then the Ground Water Users will provide water for mitigation in accordance with this Mitigation Plan for that mitigation year. . . . This Mitigation Plan will *fully mitigate and compensate* the senior water user for material injury by making water available for direct delivery of replacement water by the Water District 1 Watermaster when necessary during the irrigation season.
. . . .

[T]he Ground Water Users will supply sufficient water to eliminate the resulting water debt ("excess use") of Twin Falls Canal Company on the books of Water District 1."

Id. at 3–4 (emphasis added).

5. The *Order Approving Mitigation Plan* issued on June 3, 2010, makes clear that any obligation determined will be set based on the amount of shortfall determined through the methodology order process: "IGWA's obligation to provide storage water shall be determined as set forth in the Methodology Order"; "IGWA's obligation for mitigation shall be determined as set forth in the Methodology Order." *Order Approving Mitigation Plan* at 10, *In re Idaho Ground Water Appropriators, Inc.'s Mitigation Plan in Response to the Surface Water Coalition's Water Delivery Call*, No. CM-MP-2009-007 (Idaho Dep't of Water Res. Nov. 9, 2009).

6. The *Order Approving Mitigation Plan* makes clear that if IGWA does not provide the required storage, all ground water rights are subject to curtailment: "[I]f IGWA does not provide proof of acquisition of storage water and commitment of storage water as set forth above, ground water rights pumping from the Eastern Snake Plain Aquifer will be curtailed according to the Methodology Order to provide water to the SWC." *Id.* at 11.

7. Pursuant to the plain language of the 2009 Storage Water Mitigation Plan and *Order Approving Mitigation Plan*, IGWA cannot pick and choose who gets the benefit of storage water if IGWA is not providing storage water amounts equal to the shortfall obligation. If IGWA submits to the Director adequate contracts to establish it has secured storage water and the amount secured is less than the shortfall obligation, the Director will credit the contracted volume against the overall obligation, thus reducing the overall obligation for all ground water users. This approach is consistent with the plain language of the plan and the order approving the plan.

8. Furthermore, IGWA is required to provide the Director with legally enforceable contracts, options or similar documentation to establish that it has secured the water necessary to meet the carryover obligation. See *Order on Petition for Judicial Review at 19, A&B Irrigation Dist. v. Tuthill*, No. CV-2008-551 (Gooding Cnty. Dist. Ct. Idaho July 24, 2009). The Director concludes that IGWA has failed to provide documentation that satisfies this standard. Before the Notice of Mitigation was filed, the two entities listed on the contracts, Bingham Groundwater District and Bonneville-Jefferson Groundwater District, hired independent counsel. See *Notice of Substitution of Counsel for Bingham Ground Water District* at 1 (May 2, 2023) (“Pursuant to this substitution of counsel, Bingham Ground Water District will forthwith be represented independently of IGWA.”); *Substitution of Counsel* at 1 (Jan. 4, 2023) (“COMES NOW Skyler C. Johns, of Olsen Taggart PLLC, and hereby substitutes as counsel on behalf of Intervenor, Bonneville-Jefferson Ground Water District.”) Because the Notice of Mitigation was filed by counsel for IGWA, it is unclear whether IGWA has the authority to submit the ground water districts contracts to the Director for consideration. Second, even if IGWA had authority to submit the agreements, a review of the Departments records indicate that most of the leases have not been approved by Water District 01 due to a lack of payment of fees. Without payment of the required fees, the Districts have not yet secured the required water.

9. Because IGWA failed to provide appropriate contracts, ground water users are not in compliance with the 2009 Storage Water Mitigation Plan and will not be entitled to curtailment protection under the plan. If IGWA subsequently submits documentation establishing that it has authority to submit contracts on behalf of Bingham and Bonneville-Jefferson Groundwater Districts and pays the required Water District 01 fees, but the amount of water secured is less than the shortfall obligation, then the Director will credit the contracted volume against the overall shortfall obligation, thus reducing the overall obligation for all ground water users.

2015 Settlement Agreement Mitigation Plan

10. In 2015, the SWC and certain members of IGWA² entered into the *Settlement Agreement Entered into June 30, 2015 Between Participating Members of the Surface Water*

² The following eight ground water districts and one irrigation district are signatories to the SWC-IGWA Agreement: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Fremont Madison Irrigation District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc. (“SWC-IGWA Agreement”).

11. In October of 2015, the SWC and IGWA entered into an *Addendum to Settlement Agreement* (“First Addendum”).

12. On March 9, 2016, the SWC and IGWA submitted the *Surface Water Coalition’s and IGWA’s Stipulated Mitigation Plan and Request for Order* (“Request for Order”) to the Director. *In re IGWA’s Settlement Agreement Mitigation Plan*, No. CM-MP-2016-001 (Idaho Dept. of Water Res. Mar. 9, 2016). Attached to the Request for Order as Exhibits B, and C were the SWC-IGWA Agreement, the First Addendum. These documents were submitted as a stipulated mitigation plan in response to the SWC’s delivery call. *Request for Order* at 3.

13. On May 2, 2016, the Director issued the *Final Order Approving Stipulated Mitigation Plan* (“Order Approving Mitigation Plan”), which approved the parties’ mitigation plan subject to conditions. *In re IGWA’s Settlement Agreement Mitigation Plan*, No. CM-MP-2016-001 (Idaho Dept. of Water Res.).

14. On December 14, 2016, the SWC and IGWA entered into the *Second Addendum to Settlement Agreement* (“Second Addendum”). *In re IGWA’s Settlement Agreement Mitigation Plan*, No. CM-MP-2016-001 (Idaho Dept. of Water Res.). The *Second Addendum* amended the *SWC-IGWA Agreement* by providing additional details concerning the implementation of certain sections, most notably sections 3.a (Consumptive Use Volume Reduction); 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a. (Adaptive Water Management). *Compare SWC-IGWA Agreement* §§ 3–4, with *Second Addendum* § 2.

15. On February 7, 2017, the SWC and IGWA submitted the *Surface Water Coalition’s and IGWA’s Stipulated Amended Mitigation Plan and Request for Order* (“Second Request for Order”). *In re IGWA’s Settlement Agreement Mitigation Plan*, No. CM-MP-2016-001 (Idaho Dept. of Water Res.). The SWC and IGWA requested that the Director issue an order approving the Second Addendum as an amendment to the mitigation plan. *Second Request for Order* ¶ 6.

16. On May 9, 2017, the Director issued the *Final Order Approving Amendment to Stipulated Mitigation Plan* (“Order Approving Amendment to Mitigation Plan”), approving the Second Addendum as an amendment to the parties’ mitigation plan subject to conditions. *Order Approving Amendment to Mitigation Plan* at 5, *In re IGWA’s Settlement Agreement Mitigation Plan*, No. CM-MP-2016-001 (Idaho Dept. of Water Res.).

17. In the SWC-IGWA Agreement, the SWC and IGWA members agreed, among other things, that “[t]otal ground water diversion shall be reduced by 240,000 ac-ft annually.” *SWC-IGWA Agreement* § 3.a.i. The SWC and IGWA stipulated that “[e]ach Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity.” *SWC-IGWA Agreement* § 3.a.ii.

18. The parties also agreed that “IGWA will provide 50,000 ac-ft of storage water through private lease(s) of water from the Upper Snake Reservoir system, delivered to the SWC 21 days after the date of allocation, for the use to the extent needed to meet irrigation requirements.” *SWC-IGWA Agreement* § 3.b.i.

19. The SWC and IGWA also stipulated “that the mitigation provided by participating IGWA members under the [2015] Agreements is, provided the [2015] Agreements are implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member.” *Request for Order* ¶ 8. The SWC and IGWA agreed “[n]o ground water user participating in this [SWC-IGWA] Agreement will be subject to a delivery call by the SWC members as long as the provisions of the [SWC-IGWA] Agreement are being implemented.” *SWC-IGWA Agreement* § 5.

20. In the Notice of Mitigation, the ground water districts wanting to mitigate pursuant to the 2015 Settlement Agreement Mitigation Plan have proportionately determined their individual obligations for both reduction obligations and storage obligations. While the 2015 Settlement Agreement Mitigation Plan allows for determining the proportionate share of the reduction obligation of the parties, it does not authorize the 50,000 acre-foot storage volume to be shared proportionately by the parties. To be in compliance with the plan, the entire 50,000 acre-feet must be provided.

21. Moreover, in response to a breach of the mitigation plan in 2021, the Director approved a one-year settlement agreement to remedy the 2021 breach. *Amended Final Order Regarding Compliance with Approved Mitigation Plan at 20, In re IGWA’s Settlement Agreement Mitigation Plan*, No. CM-MP-2016-001 (Idaho Dept. of Water Res. Apr. 24, 2023). In the settlement agreement, the parties agreed that “IGWA will collectively provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year. Such amounts will be in addition to the long-term obligations set forth in section 3 of the Settlement Agreement and approved Mitigation Plan.” *Settlement Agreement* at 2. While we are not yet to the day of allocation, the Director wants to ensure that it is clear to the parties that, as with the 50,000 acre-foot obligation, this additional amount of storage water is not subject to proportional sharing.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that IGWA’s *Notice of Ground Water District Mitigation* is deficient and fails to demonstrate that IGWA is operating in accordance with an approved mitigation plan. If the Director issues an order of curtailment after the June 6–10, 2023 hearing, IGWA’s members and non-member participants will not be entitled to curtailment protection under either the 2009 Storage Water Mitigation Plan or 2015 Settlement Agreement Mitigation Plan.

Dated this 23rd day of May 2023.


GARY SPACKMAN
Director

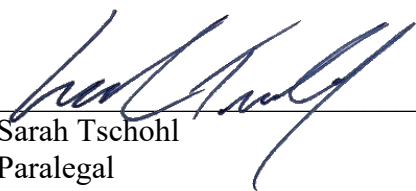
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of May 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>John K. Simpson MARTEN LAW LLP P.O. Box 2139 Boise, ID 83701-2139 jsimpson@martenlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Travis L. Thompson MARTEN LAW LLP P.O. Box 63 Twin Falls, ID 83303-0063 tthompson@martenlaw.com jnielsen@martenlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Thomas J. Budge Elisheva M. Patterson RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 tj@racineolson.com elisheva@racineolson.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202 david.gehlert@usdoj.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@usbr.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Sarah A Klahn Somach Simmons & Dunn 1155 Canyon Blvd, Ste. 110 Boulder, CO 80302 sklahn@somachlaw.com dthompson@somachlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>

<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83205 rdiehl@pocatello.us</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83702 cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Robert E. Williams WILLIAMS, MESERVY, & LOTHSPREICH, LLP P.O. Box 168 Jerome, ID 83338 rewilliams@wmlattys.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 rfife@idahofallsidaho.gov</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC P.O. Box 3005 Idaho Falls, ID 83403 sjohns@olsentaggart.com nolsen@olsentaggart.com staggart@olsentaggart.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, Idaho 83440 dylan@dylanandersonlaw.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Tony Olenichak IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 Tony.Olenichak@idwr.idaho.gov</p>	<input checked="" type="checkbox"/> Email

Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 corey.skinner@idwr.idaho.gov	<input checked="" type="checkbox"/> Email
COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 wparsons@pmt.org	<input checked="" type="checkbox"/> Email



Sarah Tschohl
Paralegal