

**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

**NOTICE THAT QUESTIONS
CONCERNING THE
SUFFICIENCY OF IGWA’S
MITIGATION NOTICES ARE
MOOT**

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”). Step 3 of the Methodology Order states that by May 1, or within fourteen days from issuance of a final order predicting a shortfall, “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. *Methodology Order* at 40.

On April 21, 2023, the Director also issued his *Final Order Regarding April 2023 Forecast Supply* (“April 2023 As-Applied Order”), wherein the Director predicted the Twin Falls Canal Company (“TFCC”) would suffer a 75,200 acre-feet shortfall. *April 2023 As-Applied Order* at 3. To ensure TFCC was protected, the Director ordered that on or before May 5, 2023:

[G]round 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.

April 2023 As-Applied Order at 6.

On May 5, 2023, the Idaho Ground Water Appropriators, Inc. (“IGWA”), acting on behalf of certain water districts¹ (collectively the “Districts”), filed a *Notice of Ground Water District Mitigation* (“Mitigation Notice”).

IGWA’s *Mitigation Notice* explained that “IGWA has three approved mitigation plans.” *Mitigation Notice* at 2. IGWA asserted its first plan (the “2009 Storage Water Mitigation Plan”) authorized the Districts to mitigate by delivering storage water to the Surface Water Coalition (“SWC”). *Id.* IGWA contends its second plan (the “Aquifer Enhancement Plan”) authorized the Districts to “obtain mitigation credit” for various activities, e.g., fallowing acres irrigated by groundwater. *Id.* IGWA asserted its third plan (known as the “2015 Settlement Agreement Mitigation Plan”) authorized the Districts to “obtain mitigation protection by complying with a 2015 settlement agreement between the Districts and the SWC. *Id.*

IGWA then advised that certain districts intended to mitigate under the 2009 Storage Water Mitigation Plan, while other districts intended to mitigate under the 2015 Settlement Agreement Mitigation Plan. *Id.* at 2–3.

On May 23, 2023, the Director issued an *Order Determining Deficiency in IGWA’s Notice of Secure Water* (“Deficiency Order”). Of import here, the Director concluded IGWA’s *Mitigation Notice* was deficient as it was improper for some Districts to mitigate under the 2009 Storage Water Mitigation Plan while others mitigated under the 2015 Settlement Agreement Mitigation Plan. *Deficiency Order* ¶¶ 2, 7, 9, 20, 21. The Director also determined IGWA’s *Mitigation Notice* was deficient given IGWA’s failure to tender fees to Water District 01 along with proof of legally enforceable contracts as required under the 2009 Storage Water Mitigation Plan. *Deficiency Order* ¶¶ 8, 9.

On June 1, 2023, IGWA submitted *IGWA’s Amended Notice of Mitigation* (“Amended Mitigation Notice”), advising that IGWA would mitigate under the 2009 Storage Water Mitigation Plan. *Amended Mitigation Notice* at 3. IGWA also attached “copies of storage lease contracts secured by IGWA’s member ground water districts totaling 77,714 acre-feet.” *Id.*; see also *Amended Mitigation Notice* app. A. IGWA also objected to the Director’s requiring IGWA to pay Water District 01’s fees, but advised it had paid the fees notwithstanding its objection. *Amended Mitigation Notice* at 3.

On June 5, 2023, the SWC submitted *Surface Water Coalition’s Response to IGWA’s Amended Notice of Mitigation* (“SWC’s Response”). The SWC argues IGWA’s *Amended Mitigation Notice* is unclear whether IGWA members are agreeing to mitigate only for their proportionate shares, or instead for all ground water users as mandated under the 2009 Storage Water Mitigation Plan. *SWC’s Response* at 2. The SWC further argues that IGWA’s *Amended Mitigation Notice* fails to “address all of IGWA’s storage water mitigation obligations for 2023”, which include additional requirements beyond those articulated in the 2009 Storage Water Plan. *Id.* at 2–3.

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. *Mitigation Notice* at 1.

On June 6, 2023, IGWA submitted a *Petition for Reconsideration of Order Determining Deficiency in IGWA's Notice of Secured Water* ("Petition for Reconsideration"), wherein IGWA requested that the Director "withdraw the new requirement that Water District 1 fees be paid before the Director will accept signed storage water lease or option contracts as proof of IGWA's ability to provide storage water as mitigation." *Petition for Reconsideration* at 1.

Also on June 6, 2023, IGWA submitted its *Reply to SWC's Response to IGWA's Amended Notice of Mitigation* ("IGWA's Reply"). In its reply, IGWA argued it was not required to mitigate for all ground water users under the 2009 Mitigation Plan, and further argued it was in compliance with all its mitigation obligations. *IGWA's Reply* at 2.

On June 12, 2023, the SWC submitted *Surface Water Coalition's Response to IGWA's Reply* ("SWC's Response to IGWA's Reply"). The SWC reiterated that "[i]f IGWA is relying on the [2009 Mitigation Plan] to mitigate, it must mitigate for all ground water users, not just its members" *SWC Response to IGWA's Reply* at 2. The SWC emphasized that "IGWA cannot ignore the comprehensive terms of the Settlement Agreement Plan and mitigate only with the [2009] Storage Water Mitigation Plan to satisfy its 2023 obligation." *Id.* at 5. The SWC also reiterated that IGWA must supply an additional 30,000 acre-feet in 2023 as a remedy for IGWA's breach in 2021. *Id.* 2–3.

On July 19, 2023, the Director issued the Department's *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*, as well as an *Order Revising April 2023 Forecast Supply (Methodology Steps 5 & 6)* ("July 2023 As-Applied Order"). Of import here, in the *July 2023 As-Applied Order* the Director concluded that members of the SWC will not suffer a demand shortfall in 2023. *July 2023 As-Applied Order* at 9.


ANALYSIS

A matter "is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome." *Goodson v. Nez Perce Cnty. Bd. of Cnty. Comm'rs*, 133 Idaho 851, 853, 993 P.2d 614, 616 (2000). As noted above, the Director recently issued the July 2023 As-Applied Order, which found that no SWC members would suffer a demand shortfall in 2023. Because there is no demand shortfall, ground water users are no longer required to mitigate. Since ground water users are no longer required to mitigate, questions regarding the sufficiency of IGWA's *Mitigation Notice* or *Amended Mitigation Notice* no longer present a justiciable controversy and are therefore moot.

NOTICE

Having concluded that questions concerning the sufficiency of IGWA's mitigation notices are moot, the Director provides notice that the Department will not issue orders responding to *IGWA's Petition for Reconsideration of Order Determining Deficiency in IGWA's Notice of Secured Water* or *IGWA's Amended Notice of Mitigation*.

Dated this 20th day of July 2023.



GARY SPACKMAN
Director

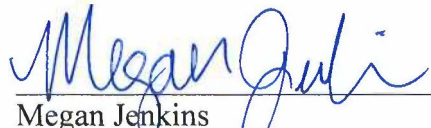
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of July 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

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