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**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

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

**IGWA’s Petition for Reconsideration**

Idaho Ground Water Appropriators, Inc. (“IGWA”), acting on behalf of North Snake Ground Water District, Carey Valley Ground Water District, Magic Valley Ground Water District, Aberdeen-American Falls Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Henry’s Fork Ground Water District, Bonneville-Jefferson Ground Water District, and Bingham Ground Water District, submits this petition for reconsideration of the *Notice that Questions Concerning the Sufficiency of IGWA’s Mitigation Notices are Moot* (“Notice”) issued July 20, 2023, by the Director of the Idaho Department of Water Resources (“Department”).

**Background**

On April 21, 2023, the Director issued the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-season Demand and Reasonable Carryover* (“*Fifth Methodology Order*”), and the *Final Order Regarding April 2023 Forecast Supply* (“*April 2023 As-Applied Order*”). The application of the two required IGWA to establish

that it could mitigate for its proportionate share of the predicted demand shortfall of 75,200 acre-feet in accordance with an approved mitigation plan, or else face curtailment. (*April 2023 As-Applied Order*, p. 6.)

On May 5, 2023, IGWA filed a *Notice of Ground Water District Mitigation* (“*Mitigation Notice*”). On May 23, 2023, the Director issued an *Order Determining Deficiency in IGWA’s Notice of Secured Water* (“*Deficiency Order*”). The *Deficiency Order* concluded that: (1) some of IGWA’s member ground water districts cannot mitigate under the 2009 Storage Water Plan while others mitigate under the 2015 Settlement Agreement Mitigation Plan; and (2) IGWA must tender fees to Water District 01 along with proof of legally enforceable contracts to demonstrate compliance with the 2009 Storage Water Mitigation Plan. (*Deficiency Order*, p. 5, 7.)

On June 1, 2023, IGWA filed *IGWA’s Amended Notice of Mitigation* (“*Amended Mitigation Notice*”) informing the Director that all IGWA districts would mitigate under the 2009 Storage Water Plan, and, while objecting to the new fee requirement, stated it had paid the Water District 01 fees. (*Amended Mitigation Notice*, p. 3.) On June 6, 2023, IGWA filed *IGWA’s Petition for Reconsideration* formally objecting to the new requirement that Water District 01 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.

On July 19, 2023, the Director issued the *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 As-Applied Order*”). The *July As-Applied Order* found no demand shortfall was predicted for the Surface Water Coalition (“SWC”). (*July As-Applied Order*, p. 6.)

On July 20, 2023, the Director issued the *Notice that Questions Concerning the Sufficiency of IGWA’s Mitigation Notices are Moot*, finding that because ground water users are no longer required to mitigate injury to the SWC, there is no longer a present justiciable controversy regarding IGWA’s *Amended Mitigation Notice* or *IGWA’s Petition for Reconsideration* related thereto. (*Notice*, p. 3.)

## **Argument**

Generally, administrative bodies and courts refrain from issuing declaratory judgments where no live actual or justiciable controversy exists; however, there are important exceptions to this doctrine. A ruling on a moot issue may be made when: (1) “there is the possibility of collateral legal consequences imposed on the person raising the issue;” (2) “the challenged conduct is likely to evade judicial review and thus is capable of repetition;” and (3) “an otherwise moot issue raises concerns of substantial public interest.” *Wylie v. State, Idaho Transp. Bd.*, 151 Idaho 26, 31-32, 253 P.3d 700, 705-06 (2011); *Stephen v. Sallaz & Gatewood, Chtd.*, 150 Idaho 521, 528, 248 P.3d 1256, 1263 (2011). Here, all three exceptions are met. This petition addresses exceptions 2 and 3 as they have the most obvious application.

**A. The short period of time between issuance of the As-Applied Orders means challenges to the orders are likely to evade judicial review and repetition is all but assured.**

Under the Methodology Orders, the Director is required to determine whether the SWC faces a demand shortfall during different times in the irrigation season. The Director makes these findings under a series of As-Applied Orders, the first of which is generally issued in April; the second, applying Steps 5 and 6 of the Methodology Order, in July; the third, applying Steps 7 and 8, in August; and, finally, the fourth, applying Step 9, in November. Under each of these As-Applied Orders, if a demand shortfall is predicted then junior ground water users must mitigate their proportionate share of the shortfall according to an approved mitigation plan.

Mitigation obligations may change with each As-Applied Order. For example, in 2023, the April As-Applied Order predicted a Demand Shortfall of 75,200 acre-feet, whereas the July As-Applied Order predicted no Demand Shortfall. This fluctuation in predicted Demand Shortfall, coupled with the short period of time between As-Applied Orders, means that issues concerning mitigation obligations by junior-priority groundwater users may evade judicial review. By the time an issue is raised under an April As-Applied Order, the July As-Applied Order has changed the conditions, potentially rendering the issue moot.

IGWA has a mitigation plan approved June 3, 2010, in IDWR Docket No. CM-MP-2009-007, which allows IGWA to provide mitigation by delivering storage water to the SWC. The order approving this plan allows IGWA to comply by providing “proof of rental or an option to rent storage water” evidenced by “fully executed and irrevocable contracts with holders of Snake River storage.” (*Order Approving Mitigation Plan*, IDWR Docket No. CM-MP-2009-007, June 3, 2010.) Despite this, the Director’s recent *Deficiency Order* requires, for the first time, that IGWA pay Water District 01 fees in addition to fully executed and irrevocable contracts with holders of Snake River storage.

If IGWA’s objection to the new fee payment requirement is rendered moot every time a new As-Applied Order is issued, the objection is likely to evade review.

**B. Compliance with As-Applied Orders is of substantial public interest because non-compliance could result in massive water right curtailments.**

Common in the As-Applied Orders is the following statement: “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] . . . 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*, p. 6.) IGWA’s members irrigate almost one million acres of farmland, all of which are at risk of curtailment unless IGWA complies with an approved mitigation plan. Consequently, it is critical that IGWA understand what is required to demonstrate compliance with the 2009 Storage Water Mitigation Plan.

The Director’s new fee payment requirement is very problematic because it may close the door to option contracts as a tool for securing storage water for mitigation purposes. The *Order Approving Mitigation Plan* issued in 2010 specifically authorizes option contracts as a tool to

demonstrate compliance. Under an option contract, IGWA does not hold an interest in the water until the option is exercised. Requiring IGWA to pay Water District 01 fees before IGWA exercises an option is problematic for obvious reasons. And further, is inconsistent with the *Order Approving Mitigation Plan*. If IGWA is no longer allowed to mitigate under option contracts, IGWA needs to know.

Moreover, requiring IGWA to pay Water District 01 fees in advance is unnecessary. IGWA has historically waited until July or August to pay Water District 01 fees on storage water that is provided to SWC as mitigation, and IGWA has never failed to pay such fees. A bar on option contracts may also have the unintended consequence of causing more harm to the SWC. If option contracts cannot be utilized by IGWA in the future, then that leaves IGWA fewer options to secure storage water and ensure the SWC receives the mitigation it needs.


Therefore, if the Director is adding new requirements to IGWA's approved mitigation plan, then the appropriate changes to the *Order Approving Mitigation Plan* must be made before the next As-Applied Order triggers a mitigation requirement. Given the large number of acres involved, and the magnitude of curtailment, it is of substantial public interest that this compliance issue be resolved.

### CONCLUSION

For the foregoing reasons, IGWA respectfully requests the Director reconsider his *Notice that Questions Concerning the Sufficiency of IGWA's Mitigation Notices are Moot* and find that the 2009 Storage Water Mitigation Plan does not require payment of Water District 01 fees at the time of the notice of mitigation. This issue remains ripe for review because the issue is of substantial public interest and is likely to evade review.

Dated this 3rd day of August, 2023.

RACINE OLSON, PLLP

By:   
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## CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2023, I served the foregoing document on the persons below via email or as otherwise indicated:

  
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