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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
of Final Order Regarding
April 2024 Forecast Supply**

Idaho Ground Water Appropriators, Inc. (“IGWA”), through counsel, submits this petition for reconsideration of the *Final Order Regarding April 2024 Forecast Supply (Methodology Steps 1-3)* (“April 2024 As-Applied Order”) issued April 18, 2024 by the Director of the Idaho Department of Water Resources.

Introduction

The April 2024 As-Applied Order represents the Director’s application of the *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). It predicts that Twin Falls Canal Company (“TFCC”) may possibly experience a water supply shortage (“In-Season Demand Shortfall” or “IDS”) of 74,100 acre-feet. (April 2024 As-Applied Order, p 4.) To avoid this possibility, it states that the Director will curtail all groundwater rights from the Eastern Snake Plain Aquifer bearing priority dates junior to March 31, 1954, unless the holders of such rights “can mitigate for their proportionate share of the predicted April IDS of 74,100 acre-feet in accordance with an approved mitigation plan.” *Id.* at 6.

IGWA respectfully requests reconsideration of two aspects of the April 2024 As-Applied Order. First, the order fails to acknowledge IGWA’s mitigation plan approved in IDWR Docket No. CM-MP-2009-006. Second, the order mistakenly requires IGWA to mitigate for groundwater diversions by non-IGWA members.

Argument

1. IGWA has three approved mitigation plans for the SWC.

There are seven approved mitigation plans in total for the SWC—one for A&B Irrigation District (Docket No. CM-MP-2015-003), one for Southwest Irrigation District and Goose Creek Irrigation District (Docket No. CM-MP-2010-001), one for the Water Mitigation Coalition (Docket No. CM-MP-2007-001), one for the Coalition of Cities (Docket No. CM-MP-2016-002), and three for IGWA (Docket Nos. CM-MP-2009-006, CM-MP-2009-007 and CM-MP-2016-001).

The April 2024 As-Applied Order notes that there are seven approved plans, but it states that IGWA has only “two approved mitigation plans,” citing the IGWA-SWC Settlement Agreement plan (Docket No. CM-MP-2016-001) and IGWA’s 2009 storage water plan (Docket No. CM-MP-2016-007). *Id.* at 5, fn. 8. The order omits, presumably inadvertently, IGWA’s 2009 plan for conversions, dry-ups, and recharge (Docket No. CM-MP-2009-006).

IGWA respectfully requests that the April 2024 As-Applied Order be amended to acknowledge IGWA’s mitigation plan for conversions, dry-ups, and recharge approved in Docket No. CM-MP-2009-006.

2. The April 2024 As-Applied Order mistakenly requires IGWA to mitigate for groundwater use by non-IGWA members.

As noted above, the April 2024 As-Applied Order allows junior-priority groundwater users to avoid curtailment if they can “mitigate for their proportionate share of the predicted April IDS of 74,100 acre-feet in accordance with an approved mitigation plan.” *Id.* at 6. The six entities with approved mitigation plans (A&B Irrigation District, Water Mitigation Coalition, Coalition of Cities, and IGWA) represent different groups of groundwater users, each responsible for a proportionate share of the 74,100 acre-feet. The April 2024 As-Applied Order states that A&B’s proportionate share is 455 acre-feet. *Id.* at 5, fn. 8. It does not identify the proportionate share of the ground water districts represented by IGWA, either individually or collectively. Rather, it requires IGWA to mitigate for the full 74,100 acre-feet of mitigation even though IGWA’s proportionate share is considerably less. *Id.* at 5-6, fn. 8. The order does not identify the proportionate shares of Southwest Irrigation District and Goose Creek Irrigation District, the Water Mitigation Coalition, the Coalition of Cities because their mitigation plans do not involve the delivery of storage water.

By requiring IGWA to mitigate for the full 74,100 acre-feet IDS, the April As-Applied Order effectively requires IGWA to mitigate for groundwater use of non-IGWA members, nearly all of whom are providing mitigation separately under their own mitigation plans. For the reasons that follow, the Director should amend the April 2024 As-Applied Order to hold

IGWA’s members, collectively and individually, responsible only for their proportionate shares of the 74,100 acre-feet.

2.1 Requiring IGWA to mitigate for non-IGWA members would produce a windfall to the SWC in violation of the prior appropriation doctrine.

Requiring IGWA’s members to mitigate for more than their proportionate share of 74,100 acre-feet would produce a windfall to the SWC. A&B’s proportionate share is 455 acre-feet. Assuming the IDS calculation does not change, requiring IGWA to provide 74,100 acre-feet would give 74,555 acre-feet to TFCC even though it needs only 74,100 acre-feet. In addition, TFCC would receive compensation under the mitigation plans of Southwest Irrigation District and Goose Creek Irrigation District, the Water Mitigation Coalition, and the Coalition of Cities.

Requiring junior water users to collectively provide more water in mitigation than the senior needs to accomplish their beneficial use is contrary to the prior appropriation doctrine and the Conjunctive Management Rules, and it would cause unlawful taking of private property if curtailment was ordered on this basis.

2.2 The May 2023 Order did not require IGWA to mitigate for the full IDS, but only for its proportionate share.

The April 2024 As-Applied Order claims that holding IGWA responsible for the full 74,100 acre-feet is “consistent with the rationale identified in the May 23, 2023 *Order Determining Deficiency in IGWA’s Notice of Secured Water*” (“May 2023 Order”). *Id.* This statement is inaccurate.

The May 2023 Order was issued after IGWA provided notice of mitigation in response to the *Final Order Regarding April 2023 Forecast Supply* issued April 21, 2023 (“April 2023 As-Applied Order”). The April 2023 As-Applied predicted a possible water supply shortage to TFCC of 75,200 acre-feet, and stated that if “IGWA seeks to provide mitigation by delivery of storage water as approved in mitigation plan CM-MP-2009-007, IGWA’s proportionate share of the predicted DS of 75,198 acre-feet is 63,645 acre-feet.” April 2023 As-Applied Order, p. 5, fn. 5. IGWA initially provided notice that three of its member ground water districts would mitigate by providing storage water in an amount totaling 28,792 acre-feet, and five of its member ground water districts would mitigate by complying with the IGWA-SWC Settlement Agreement. *Notice of Ground Water District Mitigation*, May 5, 2023. The Director rejected this proposal via the May 2023 Order, after which IGWA submitted an *Amended Notice of Mitigation* on June 1, 2023, stating that IGWA would mitigate with storage water for its 63,645 acre-feet share of the total 75,200 acre-feet IDS. The Director accepted IGWA’s mitigation of its proportionate share of the total IDS.

The May 2023 Order does not claim to abrogate the Director’s ruling in the April 2023 As-Applied Order that IGWA is responsible for its 63,645 acre-feet share of the full 75,200 acre-feet IDS. Thus, the assertion in the April 2024 As-Applied Order that the requiring IGWA to mitigate for the full 74,100 acre-feet is “consistent with” the May 2023 Order is inaccurate.

2.3 The Director’s order approving IGWA’s 2009 Storage Water Plan does not require IGWA to mitigate for the full IDS, and subsequent IDWR orders hold IGWA responsible for its proportionate share of the IDS.

IGWA submitted its petition for IDWR approval of the 2009 Storage Water Plan on “behalf of its Ground Water District Members ... for and on behalf of their respective members and those groundwater users who are non-member participants in their mitigation activities.” *IGWA’s Mitigation Plan for the Surface Water Delivery Call*, IDWR Docket No. CM-MP-2009-007, Nov. 9, 2009, p. 1. The petition states: “Because future obligations for mitigation cannot be determined in advance, this Mitigation Plan is intended to secure advance approval of the mitigation methods and practices that junior groundwater users can rely upon and implement in order to avoid curtailment.” *Id.* at 2. The petition proposed to “mitigate any and all material injury by guaranteeing and underwriting the senior water user’s water supply” and “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.” *Id.* at 3. The petition further requests that IGWA not be required to secure storage water leases at the start of the irrigation season, but rather at the date of allocation, and that TFCC’s mitigation obligation be subject to ten different limitations (discounting carryover storage, accounting of end-spill canal water, discounting diversions TFCC foregoes, etc.).

The Director approved the 2009 Storage Water Plan via the *Order Approving Mitigation Plan* issued June 3, 2010, but not exactly as proposed in IGWA’s petition. The Director rejected the limitations proposed by IGWA, and he rejected any inference that IGWA would need to mitigate for non-IGWA members, ruling instead that IGWA’s mitigation obligation would be “determined as set forth in the Methodology Order.” *Id.* at 10.

The first time the Methodology Order predicted a demand shortfall was April of 2013. At that time, the Director did not have the information needed to calculate IGWA’s proportionate share of the total IDS. *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-3)* p. 7 (Apr. 17, 2013). This was acknowledged again in the April 2016 As-Applied Order. By then, A&B Irrigation District had secured an approved plan to mitigate with storage water. The Director calculated A&B’s proportionate share of the total IDS and left IGWA responsible for the remainder because “the Department does not have sufficient information to determine IGWA’s proportionate share of the remainder because the Department does not have an accurate list of all ground water rights covered under IGWA’s mitigation plan.” *Final Order Regarding April 2016 Forecast Supply (Methodology Steps 1-3)* p. 5, fn. 4 (Apr. 19, 2016).

By April 2023, the Director had the ability to calculate IGWA’s proportionate share of the predicted IDS. As noted above, the April 2023 As-Applied Order states that if “IGWA is in compliance with [the 2016 Plan], IGWA does not need to establish that it can mitigate for its proportionate share of the predicted DS,” and that “IGWA’s proportionate share of the predicted DS of 75,198 acre-feet is 63,645 acre-feet.” April 2023 As-Applied Order, p. 5, fn. 5.

Thus, the Director’s prior orders in the SWC delivery call have consistently held IGWA responsible for its proportionate share of any predicted demand shortfall. Those orders are the “law of the case.” The April 2024 As-Applied Order is an improper departure from the Director’s prior orders in this matter.

2.4 Under Idaho law, junior groundwater users can only be required to mitigate for the impacts of their own diversions.

Under the Conjunctive Management Rules, a mitigation plan is, by definition, intended 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.” IDAPA 37.03.11.010.15 (emphasis added). The Idaho judiciary has held: “Essential to this concept is that an offending junior is only responsible for mitigating that portion of the senior’s material injury attributable to his offending diversion. If successful, the mitigating junior has satisfied his legal obligation to the senior and may avoid curtailment as a matter of law.” *Cities of Bliss, et al. v. Spackman*, Minidoka County Case No. CV-2015-172 (Mem. Decision and Ord., Sept. 8, 2015), p. 10. It is not only unjust, but unlawful to require IGWA to mitigate for groundwater diversions by non-IGWA members.

The Director has not required A&B Irrigation District, the Coalition of Cities, the Water Mitigation Coalition, or Southwest Irrigation District or Goose Creek Irrigation District to mitigate for water usage by persons who are not members of those entities. IGWA must be held to the same standard.

Conclusion

For the reasons set forth above, the April As-Applied Order should be amended to (1) acknowledge IGWA’s approved mitigation plan in Docket No. CM-MP-2009-006, and (2) require IGWA’s members to mitigate only for their proportionate share of the IDS.


DATED May 2, 2024.

RACINE OLSON, PLLP

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2024, I served the foregoing document on the persons below via email or as otherwise indicated:


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