

**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

**FINAL ORDER DENYING IGWA’S
PETITION FOR
RECONSIDERATION OF APRIL
AS-APPLIED ORDER**

BACKGROUND

On July 19, 2023, the Idaho Department of Water Resources (“Department”) issued its *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Methodology Order*”). The *Methodology Order* established nine steps for determining material injury to members of the Surface Water Coalition (“SWC”).

Step 3 of the *Methodology Order* states that by May 1, or within fourteen (14) days from issuance of the 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* ¶ 4 at 42. 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 18, 2024, the Director issued the *Final Order Regarding April 2024 Forecast Supply (Methodology Steps 1–3)* (“*April 2024 As-Applied Order*”), in which the Director predicted an in-season demand shortfall (“IDS”) of 74,100 acre-feet. *April 2024 As-Applied Order*, at 4. The Director ordered that:

On or before May 2, 2024, ground water users holding consumptive water rights bearing priority dates junior to March 31, 1954, 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 April IDS of 74,100 acre-feet in accordance with an approved mitigation plan.

Id. at 6. The Director also ordered that, if such a junior ground water user cannot establish “they can mitigate for their proportionate share of the predicted April IDS in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user.” *Id.*

In the *April 2024 As-Applied Order*, the Director also identified the approved mitigation plans responding to the SWC delivery call and calculated the proportionate shares of the predicted IDS as necessary pursuant to the terms of certain mitigation plans. *Id.* at 5–6. With respect to IGWA’s obligation under its approved 2009 storage water delivery mitigation plan, the Director concluded that IGWA must provide 74,100 acre-feet of storage water if it plans to seek protection under that plan:

Regarding IGWA’s 2009 storage water delivery mitigation plan CM-MP-2009-007, IGWA’s obligation is 74,100 acre-feet, consistent with the rationale identified in the May 23, 2023 *Order Determining Deficiency in IGWA’s Notice of Secured Water*. See *Order Determining Deficiency* at 4 (“[T]he plan clearly states that IGWA will mitigate for all ground water users, not just its members and non-member participants . . .”).

Id. at 6 n.8.

On May 2, 2024, IGWA filed *IGWA’s Petition for Reconsideration of Final Order Regarding April 2024 Forecast Supply* (“*Petition for Reconsideration*”) with the Department. In the *Petition for Reconsideration*, IGWA requests the Director reconsider certain parts of the *April 2024 As-Applied Order*.

ANALYSIS

IGWA’s *Petition for Reconsideration* asks the Director to reconsider two aspects of the *April As-Applied Order*. First, IGWA asks the Director to “acknowledge IGWA’s approved mitigation plan in Docket No. CM-MP-2009-006.” *Petition for Reconsideration*, at 1. Second, IGWA disputes the Director’s conclusion that under IGWA’s 2009 storage water delivery mitigation plan, IGWA must provide the full 74,100 acre-foot obligation. *Id.* at 2. IGWA asks the Director to reconsider requiring IGWA to mitigate ground water diversions by non-IGWA members. *Id.*

1. Questions regarding IGWA’s approved mitigation plan in Docket No. CM-MP-2009-006 will be addressed in a separate order.

To the first issue raised by IGWA, the Director notes that on May 2, 2024, in addition to its *Petition for Reconsideration*, IGWA filed *IGWA’s Request for Mitigation Credit for Aquifer Enhancement Activities (2024)* requesting the Director afford IGWA credit toward the mitigation obligation in accordance with its mitigation credit mitigation plan, CM-MP-2009-006. The Director will address all issues raised regarding CM-MP-2009-006 in a separate order and will not do so here.

2. Under the plain language of IGWA’s approved 2009 storage water delivery mitigation plan, IGWA is required to mitigate for all ground water users.

In the *April As-Applied Order*, the Director predicted an IDS of 74,100 acre-feet. *April 2024 As-Applied Order*, at 4. Due to the predicted IDS, the Director ordered certain junior ground water users to “establish, to the satisfaction of the Director, that they can mitigate for

FINAL ORDER DENYING IGWA’S PETITION FOR RECONSIDERATION OF APRIL AS-APPLIED ORDER—Page 2

their proportionate share of the predicted April IDS of 74,100 acre-feet in accordance with an approved mitigation plan.” *Id.* at 6. In particular, the Director concluded that should IGWA seek protection from curtailment by complying with its 2009 storage water delivery mitigation plan, CM-MP-2009-007, the plain language of the plan requires that IGWA mitigate for all ground water users, not just its members and non-member participants. *Id.* at 5 n.8.

IGWA argues in its *Petition for Reconsideration* that the *April 2024 As-Applied Order* “mistakenly requires IGWA to mitigate for groundwater diversions by non-IGWA members.” *Petition for Reconsideration*, at 2. IGWA requests that the Director reconsider IGWA’s mitigation obligation and “require IGWA’s members to mitigate only for their proportionate share of the IDS.” *Id.* at 5.

As Director Spackman explained in the May 23, 2023 *Order Determining Deficiency in IGWA’s Notice of Secured Water* (“*Order Determining Deficiency*”), IGWA’s 2009 storage water delivery mitigation plan “clearly states that IGWA will mitigate for all ground water users, not just its members and non-member participants[.]” *Order Determining Deficiency*, at 4. For example, IGWA’s storage water delivery mitigation plan provides:

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. (quoting IGWA’s *Mitigation Plan for the Surface Water Coalition Delivery Call*, at 3–4, *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)).

Director Spackman recognized in the *Order Determining Deficiency*, that the June 3, 2010 *Order Approving Mitigation Plan*, “makes clear that if IGWA does not provide the required storage, all ground water rights are subject to curtailment[.]” *Order Determining Deficiency*, at 4. The *Order Approving Mitigation Plan* states:

IGWA's obligation for mitigation shall be determined as set forth in the Methodology Order. . . . [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.

Order Approving Mitigation Plan, at 10–11, *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. June 3, 2010).

Further, Director Spackman stated in the *Order Determining Deficiency* that “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.” *Order Determining Deficiency*, at 5. Director Spackman concluded that “[i]f 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.” *Id.*

The reasoning by Director Spackman in the *Order Determining Deficiency* is supported by the plain language of the 2009 storage water delivery mitigation plan—a plan that IGWA drafted and submitted to the Department. For ground water users to receive protection from curtailment by complying with the 2009 storage water delivery mitigation plan, they must mitigate for all ground water users, not just members and non-member participants. By requiring IGWA to do so, the Department is simply requiring IGWA to comply with the mitigation plan it submitted and which the Department subsequently approved. Requiring that IGWA comply with its mitigation plan if it seeks the protection compliance with an approved mitigation plan provides is not an unreasonable windfall to the SWC and is not otherwise contrary to the prior appropriation doctrine.¹

3. The *Order Determining Deficiency* required IGWA to mitigate for the full IDS.

IGWA also asserts that in 2023 the *Order Determining Deficiency* “did not require IGWA to mitigate for the full IDS, but only for its proportionate share.” *Petition for Reconsideration*, at 3. IGWA’s argument is contrary to the clear statements in the *Order Determining Deficiency*. Director Spackman stated the 2009 storage water delivery mitigation plan “clearly states that IGWA will mitigate for all ground water users, not just its members and non-member participants” and that “any obligation determined will be set based on the amount of shortfall determined through the methodology order process[.]” *Order Determining Deficiency*, at 4.

IGWA is correct that in the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1–3)* (“*April 2023 As-Applied Order*”), which preceded the *Order Determining Deficiency*, Director Spackman indicated that IGWA’s mitigation obligation could be something less than the full obligation. However, the *April 2023 As-Applied Order* was not a

¹ In addition, IGWA argues that it is “not only unjust, but unlawful to require IGWA to mitigate for groundwater diversions by non-IGWA members.” *Petition for Reconsideration*, at 5 (citing IDAPA 37.03.11.010.15; *Mem. Decision and Order*, at 10, *Cities of Bliss, et al. v. Spackman*, No. CV-2015-172 (Minidoka Cnty. Sept. 8, 2015)). IGWA claims that because the Director has not required other junior ground water users to “mitigate for water usage by persons who are not members of those entities[,] IGWA must be held to the same standard.” *Id.* It is neither unjust nor unlawful for the Director to require IGWA to comply with the terms of its own mitigation plan. The Director is holding IGWA to the same standard as the other entities by requiring all to comply with the terms of their approved mitigation plans should they seek safe harbor from curtailment.

“ruling” that the Director was required to expressly “abrogate” to revise his conclusion. When IGWA submitted notice that its member ground water districts would mitigate under a mix of mitigation plans, Director Spackman was required to evaluate the sufficiency of IGWA’s mitigation notice. In doing so, he examined the plain language of IGWA’s mitigation plans, scrutinizing the terms of the 2009 storage water delivery mitigation plan. This caused him to reconsider the amount of IGWA’s mitigation obligation. Director Spackman explained his interpretation of the terms of IGWA’s mitigation plans and his reasoning for concluding that the plain language of the 2009 storage water delivery mitigation plan obligates IGWA to mitigate for the entire IDS in the *Order Determining Deficiency*. In the *Order Determining Deficiency* the Director carefully considered the plain language of the plan and clarified IGWA’s obligation.

Furthermore, in IGWA’s recitation of the history of this issue, IGWA ignores that once Director Spackman issued the mid-season prediction (the *July 2023 As-Applied Order*), which found that there was no demand shortfall, the ground water users were no longer required to mitigate. As a result, on July 20, 2023, Director Spackman determined that “[s]ince ground water users [were] no longer required to mitigate, questions regarding the sufficiency of IGWA’s *Mitigation Notice* or *Amended Mitigation Notice* no longer present[ed] a justiciable controversy and [were] therefore moot.” *Notice that Questions Concerning the Sufficiency of IGWA’s Mitigation Notices are Moot*, at 3. Thus, IGWA’s statement that “[t]he Director accepted IGWA’s mitigation of its proportionate share of the total IDS” is not accurate. *Petition for Reconsideration*, at 3.

Regardless, the details of how the mitigation plan process played out in 2023 do not prevent the Director from reaching the conclusion reflected in the *April 2024 As-Applied Order*, that the plain language of the 2009 storage water delivery mitigation plan requires IGWA to mitigate for all groundwater users, not just its members and non-member participants.²

The rationale underlying Director Spackman’s *Order Determining Deficiency* continues to be the Director’s interpretation of the requirements of the 2009 storage water delivery mitigation plan. Therefore, IGWA’s mitigation obligation in the *April 2024 As-Applied Order* is consistent with the rationale in the *Order Determining Deficiency*.

² IGWA states that “[t]he 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.” *Petition for Reconsideration*, at 4. IGWA then claims that “[b]y April 2023, the Director had the ability to calculate IGWA’s proportionate share of the predicted IDS[,]” reflected by the proportionate share calculation in the *April 2023 April As-Applied Order*. *Id.* IGWA argues that “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.’” *Id.* IGWA concludes that “[t]he April 2024 As-Applied Order is an improper departure from the Director’s prior orders in this matter.” *Id.* As explained above, Director Spackman scrutinized IGWA’s 2009 storage water delivery mitigation plan after issuing the *April 2023 As-Applied Order* and concluded that IGWA is required to mitigate for all ground water users. *See Order Determining Deficiency*. Therefore, the *April 2024 As-Applied Order* is not a departure from the Director’s prior orders but rather it is consistent with the *Order Determining Deficiency* and is consistent with the language of the 2009 storage water delivery mitigation plan as examined by Director Spackman in the *Order Determining Deficiency*.

ORDER

IT IS HEREBY ORDERED that *IGWA's Petition for Reconsideration of Final Order Regarding April 2024 Forecast Supply* is DENIED.

Dated this 10th day of May 2024.



MATHEW WEAVER

Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of May 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

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Sarah Tschohl
Paralegal

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.