

May 14, 2024

DEPARTMENT OF
WATER RESOURCES

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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 Conditional Notice of Mitigation
 Compliance; Petition for Reconsideration;
 and Request for Expedited Decision**

Idaho Ground Water Appropriators, Inc. (“IGWA”), through counsel, submits this filing to (1) provide notice that eight ground water districts have secured storage water leases to fully mitigate their proportionate share of the predicted 74,100 acre-foot demand shortfall, copies of which will be provided upon the Director’s confirmation that he will utilize the storage water in compliance with Idaho Code § 42-5224(11); and (2) petition for reconsideration of the *Order Determining Deficiency in Notices of Secured Water* (“*Order Determining Deficiency*”) and the *Final Order Denying IGWA’s Petition for Reconsideration of April As-Applied Order* (“*Order Denying Reconsideration*”) issued May 10, 2024, to allow these eight districts to provide storage water as mitigation in accordance with Idaho Code § 42-5224(11) and the plain language of the *Order Approving Mitigation Plan* (“*Order Approving Storage Water Plan*”) issued June 3, 2010, in IDWR Docket No. CM-MP-2009-007.

Conditional Notice of Mitigation Compliance

IGWA hereby provides notice that North Snake Ground Water District, Carey Valley Ground Water District, Magic Valley 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 have secured storage water leases to fully mitigate material injury caused by their patrons' groundwater use. IGWA will provide copies of the leases upon the Director's confirmation that he will utilize the storage water in compliance with Idaho Code § 42-5224(11) to mitigate for material injury caused by groundwater within the district only.

Ground water districts are quasi-governmental organizations with powers granted by statute in Idaho Code § 42-5224. Subsection (11) grants them power to "develop, maintain, operate and implement mitigation plans designed to mitigate any material injury caused by ground water use within the district upon senior water uses within and/or without the district." (Emphasis added.) Under Idaho law, "where a constitution or statute specifies certain things, the designation of such things excludes all others." *Poison Creek Pub., Inc. v. Cent. Idaho Pub., Inc.*, 134 Idaho 426, 429 (Ct. App. 2000) (quoting *Local 1494 of the Int'l Ass'n of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 639 (1978)). Thus, the statutory right of ground water districts to mitigate for groundwater use within the district implicitly excludes the right to mitigate for groundwater use outside the district.

The *Order Determining Deficiency* states that if a ground water district provides storage water as mitigation, the Director will utilize their storage to mitigate for all groundwater users, including those who are located outside the district. (*Order Determining Deficiency*, p. 4.) This ruling requires ground water districts to violate Idaho Code § 42-5224(11) in order to provide mitigation under the *Order Approving Storage Water Plan*.

IGWA respectfully requests that the Director either amend or vacate and replace the *Order Determining Deficiency* to allow ground water districts to provide storage water specifically to mitigate for material injury caused by groundwater use within the district in accordance with Idaho Code § 42-5224(11). Upon the Director's confirmation that he will do so, IGWA will provide copies of storage water leases covering the mitigation obligations of the eight ground water districts listed above.

Petition for Reconsideration

The Director's determination to use storage water provided by a ground water districts to mitigate for material injury caused by groundwater use outside the district is predicated on the *Order Denying Reconsideration* which concludes that the *Order Approving Storage Water Plan* requires ground water districts to mitigate for material injury caused by all groundwater users, including those located outside the district. The Director should amend or vacate and replace the *Order Denying Reconsideration* because it violates Idaho Code § 42-5224(11), as explained above, and because it is contrary to the plain language of the *Order Approving Storage Water Plan* and the *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Sixth Methodology Order*").

When IGWA filed its mitigation plan in 2009 seeking authorization to mitigate with storage water on behalf of its members, IGWA offered to provide storage water to mitigate all material injury, whether caused by IGWA members or others. At the time, that proposal was fairly consistent with Idaho Code § 42-5224(11) because IGWA's membership included every ground water district as well as Southwest Irrigation District, Goose Creek Irrigation District,

and many municipalities and industrial users. To the extent IGWA’s mitigation plan as submitted would have caused ground water districts to mitigate for material injury caused by groundwater use outside the district, the proposal was admittedly inconsistent with Idaho Code § 42-5224(11).

However, the Director’s *Order Approving Storage Water Plan* did not adopt IGWA’s mitigation plan wholesale. The *Order Approving Storage Water Plan* contains several changes from what IGWA proposed. Among them, it does not state that IGWA must mitigate for material injury caused by all groundwater use; rather, it states that “IGWA’s obligation to provide storage water shall be determined as set forth in the Methodology Order.” (*Order Approving Storage Water Plan*, p. 10.) It is the language in the Director’s order that controls. *Idaho Ground Water Appropriators, Inc. v. Idaho Dept. of Water Res.*, Ada County Docket No. CV01-23-7893 (Mem. Decision and Ord., Nov. 16, 2023), p. 14-15. Thus, as a matter of law, IGWA’s mitigation obligation is “as set forth in the Methodology Order.”

Shortly before the Director issued the *Order Approving Storage Water Plan* (June 3, 2010), he issued the first Methodology Order (April 7, 2010). Step 4 of the first *Methodology Order* required junior groundwater users to mitigate for the full demand shortfall, as opposed to proportionate shares. This continued with the *Amended Methodology Order* issued June 17, 2010, the *Second Amended Methodology Order* issued June 23, 2010, and the *Third Amended Methodology Order* issued April 16, 2015. The Department did not at this time have sufficient information to split out and calculate the proportionate mitigation obligations of different groups of groundwater users. *Final Order Regarding April 2016 Forecast Supply (Methodology Steps 1-3)*, p. 5, fn. 4 (Apr. 19, 2016).

This changed with the *Fourth Amended Methodology Order* issued April 19, 2016, which was revised to provide that “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 the April DS.” (*Fourth Amended Methodology Order*, p. 36, Step 3; emphasis added.) This language has continued through the *Fifth Amended Methodology Order* and the *Sixth Methodology Order*. Thus, IGWA’s mitigation obligation “as set forth in the Methodology Order” requires ground water districts to secure storage water “equal to their proportionate share of the April IDS.” (*Sixth Methodology Order*, p. 42, Step 3.)

The *Order Denying Reconsideration* contradicts the plain language of the *Order Approving Storage Water Plan* and the *Sixth Methodology Order* by requiring ground water districts to secure a volume of storage water equal to the total April IDS as opposes to “their proportionate share of the April IDS.”

IGWA respectfully requests that the Director amend or vacate and replace the *Order Denying Reconsideration* to allow ground water districts to mitigate strictly for material injury caused by groundwater use within the district in accordance with Idaho Code § 42-5224(11) by securing storage water equal to their proportionate share of the April IDS in accordance with the plain language of the *Order Approving Storage Water Plan* and the *Sixth Methodology Order*.

Request for Expedited Decision

In light of the May 17, 2024, deadline to provide notice of mitigation, IGWA respectfully requests that the Director issue an expedited decision that amends or vacates and replaces the *Order Determining Deficiency* and the *Order Denying Reconsideration* to authorize ground

water districts to mitigate for their proportionate share of the April IDS in accordance with Idaho Code § 42-5224(11) and the plain language of the *Order Approving Storage Water Plan* and the *Sixth Methodology Order*.


DATED May 14, 2024.

RACINE OLSON, PLLP

By: 
Thomas J. Budge
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2024, I served the foregoing document on the persons below via email or as otherwise indicated:


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