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**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

**MOTION FOR RECONSIDERATION
 OF ORDER DETERMINING
 DEFICIENCY IN NOTICES OF
 SECURED WATER**

COMES NOW American Falls-Aberdeen Ground Water District (“AFA”), by and through its undersigned counsel, pursuant to IDAPA 37.01.01.740.02.b, to file this *Motion for Reconsideration* seeking revisions to section 2 of the Director’s May 10, 2024 *Order Determining Deficiency in Notices of Secured Water* (“*Deficiency Order*”).

The *Deficiency Order* conditions AFA’s safe harbor from curtailment in 2024 on the arbitrary requirement that it provide, by May 17, 2024, evidence it has secured storage water to satisfy the *entire* 50,000 acre-feet (“50kaf”) delivery obligation under the *2016 Mitigation Plan* (“*2016 Plan*”). The *Deficiency Order*’s requirement is inconsistent with the plain language of the underlying settlement that was adopted as the *2016 Plan* and with the Department’s prior interpretations of the ground water districts’ obligations under the *2016 Plan*. The *Deficiency Order* section 2 would hold AFA to a standard that is also completely

inconsistent with the underlying goals of the *2016 Plan*, which were for the *parties* to adaptively manage the districts' annual obligations to achieve long term aquifer recovery *before* the Department or a court got involved.

The 50kaf delivery obligation under the *2016 Plan* was, until this year, historically divided amongst all of Idaho Ground Water Appropriators, Inc.'s ("IGWA") member districts¹ in the manner shown in paragraph 6 of the *Declaration of Timothy P. Deeg* filed herewith ("*Deeg Decl.*"). AFA has conferred with the Surface Water Coalition ("SWC") regarding its delivery of storage water to the SWC, is prepared to provide its proportionate share of the 50kaf this year, and has secured sufficient storage water to do so. *See Deeg Decl.* at 3, ¶ 8; *id.*, Ex. 1. The Director should, consistent with the language and goals of the *2016 Plan*, withdraw section 2 of the *Deficiency Order* to allow the SWC and AFA to collaborate and determine whether AFA's provision of its proportionate share of the 50kaf is adequate this year, or whether any other "adaptive management" actions under the *2016 Plan* are appropriate.

BACKGROUND

The *2016 Plan* (and amendments) incorporated a settlement (and amendments to the settlement) entered into with the SWC by eight IGWA member districts, including AFA. The settlement did not require IGWA to comply with the settlement; it required the *individual districts* to comply. The Director adopted the settlement in the May 2, 2016, *Final Order Approving Stipulated Mitigation Plan* ("*Final Order*"), noting with approval of the SWC's stipulation that mitigation provided under the plan by "participating IGWA

¹ Even in 2023, when most IGWA districts elected to operate under the *2009 Mitigation Plan* ("*2009 Plan*"), the 50kaf was delivered to SWC.

member[s]” would be adequate to avoid injury.² The Director’s *Final Order* provides that *participating Districts* in compliance with the terms receive safe harbor from the Surface Water Coalition (“SWC”) delivery call. *Final Order* at Conclusion of Law, ¶¶6 and 9.

Unlike the *2009 Plan*, which requires delivery of storage water to the SWC in volumes sufficient to offset the predicted In-season Demand Shortfall (“IDS”) calculated under the Methodology,³ the *2016 Plan* requires delivery of 50kaf of storage water annually regardless of the IDS prediction. *See 2015 Settlement*, ¶ 3.b.i. (attached as Ex. B to the March 9, 2016 *Stipulated Mitigation Plan and Request for Order*.)

Further, while the *2009 Plan* requires participating Districts to adhere to the timelines set forth in the Methodology,⁴ *see Order Approving Mitigation Plan* at 10-11 (Docket No. CM-MP-2009-007, Jun. 3, 2010),⁵ the *2016 Plan* requires Districts to deliver the 50kaf within twenty-one (21) days of the Date of Allocation, *2015 Settlement*, ¶ 3.b.i.

² Only 9 of the 10 IGWA’s ground water district members signed onto the 2015 settlement, and thus only these districts are subject to the *2016 Plan*.

³ *See IWGA’s Mitigation Plan for the Surface Water Coalition Delivery Call* at 7 (Docket No. CM-MP-2009-007, Nov. 9, 2009) (“The mitigation obligation resulting from Twin Falls Canal Company’s irrigation season diversions will be replaced by the Ground Water Districts by the delivery of storage water credited to the storage water account of Twin Falls Canal Company as determined by order of the Director. . . . Other material injury to other SWC Entities will be mitigated by underwriting and guaranteeing their supply in the same manner as described above for Twin Falls Canal Company.”)

⁴ For example, the *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-season Demand and Reasonable Carryover* dated July 19, 2023 (“Sixth Methodology Order”) provides at page 42:

Step 3: By May 1, or within fourteen (14) days from issuance of the final order predicting the April FS, 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 the April IDS unless the April IDS is revised as explained below in paragraph 6. If junior ground water users secured water for a reasonable carryover shortfall to an individual SWC member in the previous year, the current-year mitigation obligation to the individual SWC member will be reduced by the quantity of water secured for the reasonable carryover shortfall. The secured water will not be required to be delivered to the injured members of the SWC until the Time of Need.

(Emphasis added.)

⁵ “IGWA’s obligation to provide storage water shall be determined as set forth in the Methodology Order. . . . IGWA’s obligation for mitigation shall be determined as set forth in the Methodology Order. . . . if 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 . . .”

The delivery of the 50kaf of storage water under the *2016 Plan* is untethered from an IDS prediction under the Methodology.

As noted by former Idaho Supreme Court Chief Justice Roger Burdick, acting as Hearing Officer in the 2022 Breach matter, compliance with the *2016 Plan* “is monitored and evaluated disjunctively from the timing of the Methodology’s as-applied orders (e.g., Steps 1-3 in April, Steps 5-6 in July, and Step 9 in November). . . .” *Order on Motions for Partial Summary Judgment* at 7 (Docket No. CM-MP-2016-001, Mar. 12, 2024) (emphasis added) (hereinafter “*MSJ Order*”). If the districts breach the 50kaf delivery obligation, the *2016 Plan* prescribes a dispute resolution process (involving a Steering Committee). *See 2017 Amendment to Settlement*, ¶ 2.c (attached as Ex. A to the March 9, 2016 *Stipulated Mitigation Plan and Request for Order* (Docket No. CM-MP-2016-001, Feb. 7, 2017)). Only if that dispute resolution process fails does the Director get involved. *Id.*

The Department has recognized the differences between the *2009 Plan* and the *2016 Plan*. In fact, the April 18, 2024 *Final Order Regarding April 2024 Forecast Supply (Methodology Steps 1-3)* (“2024 Steps 1-3 Order”), provides:

Regarding IGWA’s mitigation plan CM-MP-2016-001 (the 2016 SWC/IGWA settlement agreement mitigation plan), IGWA does not need to establish that it can mitigate its proportionate share of the predicted IDS. 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.

Id. at 5-6 n.8 (emphasis added). Nonetheless, the May 10, 2024 *Deficiency Order* stated in relevant part:

Because the ground water districts have not met the full 50,000-acre-foot obligation, no ground water district can be protected by the *2016 Settlement Mitigation Plan*. As a result of this determination, the Director will give the ground water districts until May 17, 2024, to demonstrate to his satisfaction that

they have contracted for the total required storage of 50,000 acre-feet to qualify for protection.

Deficiency Order at 10.

The Director has no legal basis to impose this proof-of-secured-water requirement on AFA or any district complying with, and seeking safe harbor under, the *2016 Plan*.

ARGUMENT

1. Safe Harbor Under the 2016 Plan is Not Contingent Upon the Showings Required under the 2024 Steps 1-3 Order.

As described above (and as reflected in footnote 8 of the *2024 Steps 1-3 Order*), the *2009 Plan* and the *2016 Plan* are fundamentally different in nature.⁶ The Department is well aware of this difference: a review of the docket in this matter demonstrates that between 2016⁷ and 2022 the Department did not require *any* district to provide notice of secured storage water under the *2016 Plan*; the requirement was imposed in 2023 (and again in 2024) to handle the districts that purported to comply with the *2009 Plan* to seek safe harbor.⁸ Thus, while the *Deficiency Order* states: “Historically, [IGWA], acting on behalf of its member ground water districts, filed a notice of mitigation with the Department to establish that the ground water districts can mitigate for their proportionate share of the predicted IDS in accordance with an approved mitigation plan,” (*Deficiency Order* at 2), this statement only applies to districts operating under the *2009 Plan*.

In the *2024 Steps 1-3 Order* at footnote 8, the Director correctly limited the secured

⁶ The distinctions between the two plans are further described in the summary judgment briefing before Hearing Officer Burdick in Docket No. CM-MP-2016-001. *See, e.g., AFAGWD’s Memorandum in Support of Motion for Partial Summary Judgment* at 8 (Feb. 12, 2024).

⁷ Indeed, IGWA’s 2016 filing notes that it need not provide proof of secured storage water because the Districts were now operating under the *2016 Mitigation Plan*, and thus protected from curtailment under the SWC Delivery Call. *See IGWA’s Notice of Mitigation* (May 3, 2016).

⁸ AFA maintains the *2009 Plan* has been superseded by the *2016 Plan*, and urges the Department to review and either adopt or modify Justice Burdick’s *MSJ Order* in the 2022 Breach case. However, if the Department intends to breathe life into the *2009 Plan*, then the *2016 Plan* is on its deathbed.

water requirement to those Districts operating under the *2009 Plan*, and AFA accordingly submitted no papers by May 2, 2024. The *Deficiency Order* identifies no language or other legal basis under the *Sixth Methodology Order*, the *2016 Plan*, or any other relevant document that requires districts otherwise in compliance with the *2016 Plan* to submit notices of secured storage water under Step 3 of the Methodology (or a related *Deficiency Order*). The Director’s new requirement is unsupported, arbitrary, and capricious and AFA requests that the Director modify section 2 of the *Deficiency Order* to remove this requirement.

2. AFA is in Compliance with the 2016 Plan and the Director’s Conditioning of Safe Harbor on the new requirement imposed by the Deficiency Order is Without Legal Basis.

It is undisputed that AFA is in compliance with the *2016 Plan*—it has: cured its 2022 breach⁹; performed its proportionate share of IGWA’s 240,000 AF conservation obligation in 2023¹⁰; committed to providing its share of IGWA’s remedy to cure the 2021 breach¹¹; committed to providing its share of the 50kaf to the SWC in 2024¹²; and committed to performing its share of the *increased* 252,000 AF conservation obligation in 2024 given the Director’s May 3, 2024 *Final Order Specifying Additional Actions*.¹³ The Steering Committee is not currently involved in a dispute resolution process to resolve any alleged

⁹ See *Notice of Satisfaction of American Falls-Aberdeen Ground Water District 2022 Mitigation Obligation* (Docket No. CM-MP-2016-001, Nov. 7, 2023).

¹⁰ AFA included Brain Ragan (IDWR) on the distribution list when it transmitted its *2023 Performance Report* to the Steering Committee via email on April 1, 2024.

¹¹ AFA has until 10 days after the Date of Allocation to deliver this water. *Settlement Agreement* at 2 (Sep. 7, 2022).

¹² AFA has until 21 days after the Date of Allocation to deliver this water. See *2015 Settlement*, ¶ 3.b.i. (attached as Ex. B to the March 9, 2016, Stipulated Mitigation Plan and Request for Order.) See also, Exhibit 1 to the Affidavit of Timothy Deeg, AFA’s lease with the Shoshone-Bannock Tribe.

¹³ The fact that the 2023 ground water level goals of the *2016 Plan* were not met does not mean that AFA is in breach; instead, as the *2016 Plan* provides, the Director (because the Steering Committee reached an impasse) imposed additional actions in the *Final Order Specifying Additional Actions*. AFA expressed its commitment to meet the increased obligations. See *AFA Mitigation Notice* (May 6, 2024). No other district has committed to satisfying the Department’s newly imposed reductions.

breach by AFA, and the Steering Committee has not asked the Director to take action against AFA. Thus, pursuant to paragraph 5¹⁴ of the *2015 Settlement*, AFA is not subject to the SWC Delivery Call, including Methodology Step 3 notice requirements or subsequent curtailment orders, in 2024. In light of these facts, the Director lacks authority to condition AFA’s safe harbor from curtailment on a showing that it has secured sufficient storage water to satisfy the 50kaf delivery obligation, and maintaining this position is *ultra vires*. Cf. *MSJ Order* at 7 (“[C]ompliance [with the *2016 Mitigation Plan*] is monitored and evaluated disjunctively from the timing of the Methodology’s as-applied orders . . .”) (emphasis added).

CONCLUSION

AFA requests that the Director withdraw the portions of the *Deficiency Order* that condition AFA’s safe harbor from curtailment on providing proof it has secured 50kaf of storage water.

Respectfully submitted this 17th day of May 2024.

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¹⁴ “**Safe Harbor**. No ground water user participating in this Settlement Agreement will be subject to a delivery call by the SWC members as long as the provisions of the Settlement Agreement are being implemented.”

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

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