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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 Reply to SWC's Response to IGWA's Conditional Notice of Mitigation Compliance / Petition for Reconsideration

Idaho Ground Water Appropriators, Inc. ("IGWA"), through counsel, submits this reply to *Surface Water Coalition's Response to IGWA's Conditional Notice of Mitigation Compliance / Petition for Reconsideration* ("SWC Response") filed May 23, 2024. As expected, the Surface Water Coalition ("SWC") opposes IGWA's request that ground water districts be required to mitigate only for the impacts of groundwater use by their own members. It is the position of the SWC that ground water districts ought to be required to mitigate for the effects of groundwater use by people who do not belong to the districts, do not pay assessments to the districts, and do not contribute toward the districts' mitigation plans. Not only is the SWC position patently unjust and unreasonable, it is legally wrong.

First, the SWC's objective is obviously to secure a windfall. The SWC wants IGWA to mitigate for the entire demand shortfall while the SWC extracts additional mitigation (storage water and money) from A&B Irrigation District, Falls Irrigation District, The Water Mitigation Coalition, Southwest Irrigation District, and the Coalition of Cities.

Second, the SWC's demand for immediate curtailment is not due to an existing water supply shortage. As of Tuesday of this week (May 21, 2024), flood water continued to spill past

Milner Dam. Moreover, the *Final Order Regarding April 2024 Forecast Supply (Methodology Steps 1-3)* (“*April 2024 As-Applied Order*”) predicts that the SWC collectively acre-feet 539,131 acre-feet more water than it needs. (April 2024 As-Applied Order, p. 3.) Thus, it is not a genuine water supply shortage that is driving the SWC’s demand for immediate curtailment.

Third, the SWC relies on the statement in the *Order Determining Deficiency in Notices of Secured Water* (“*2024 Deficiency Order*”) issued May 10, 2024, that ground water districts must mitigate for all groundwater users, not just their members. (SWC Resp. 5.) However, as explained in *IGWA’s Conditional Notice of Mitigation Compliance / Petition for Reconsideration*, the *2024 Deficiency Order* is based on a mistaken reading of the May 23, 2023, *Order Determining Deficiency in IGWA’s Notice of Secured Water* (“*2023 Deficiency Order*”). While the *2023 Deficiency Order* quotes IGWA’s *2009 Storage Water Mitigation Plan* proposal to “mitigate any and all material injury,” it also recognized that the Director’s order approving that plan established a different standard, stating: “The *Order Approving Mitigation Plan* issued on June 3, 2010, makes clear that any obligation determined will be set based on the amount of shortfall determined through the methodology order process.” (*2023 Deficiency Order*, p. 4; emphasis added.) The precise language used in the 2009 *Order Approving Mitigation Plan* is: “IGWA’s obligation to provide storage water shall be determined as set forth in the Methodology Order.” (*Order Approving Mitigation Plan*, IDWR Docket No. CM-MP-2009-007 (June 3, 2010), p. 10.) And, the Methodology Order clearly states that junior groundwater users are responsible to mitigate their “proportionate share” of the demand shortfall: “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.” (*Sixth Methodology Order*, p. 42, Step 3.) In keeping therewith, the *2023 As-Applied Order* explicitly broke out IGWA’s proportionate share (63,645 acre-feet) of the then total demand shortfall prediction (75,200 acre-feet). IGWA’s request to the Director is to maintain consistency with the Department’s prior rulings by allowing ground water districts to mitigate for the impacts of groundwater used caused by their members (i.e. their “proportionate share”) and not others.

Fourth, the SWC remarkably argues that “IGWA never appealed the underlying *Order Approving Mitigation Plan* that was issued years ago back in 2010.” (SWC Resp. 6.) Yet, there was no need for IGWA to appeal that order because it defined IGWA’s obligation “as set forth in the Methodology Order,” and the Methodology Order holds all junior groundwater users responsible to mitigate their proportionate share.

In fact, the doctrine of *res judicata* cuts against the SWC argument that ground water districts must mitigate for the full demand shortfall. Since the *2023 April As-Applied Order* (April 21, 2023) clearly requires juniors to mitigate for their “proportionate share,” the SWC had an obligation to appeal that decision if the SWC believed that ground water districts must mitigate more than their proportionate share. The SWC failed to do so. Therefore, the doctrine of *res judicata* bars the SWC from now arguing, and it bars the Director from now ruling, that ground water districts are required to mitigate for more than their proportionate share of the demand shortfall.

Fifth, the SWC is attempting to hold its foes to a different standard than its friends. The SWC has made deals with its friends (A&B, Falls Irrigation District, American Falls-Aberdeen Ground Water District) to allow them to mitigate for their proportionate share of the mitigation

obligation, while asking IDWR to curtail ground water districts unless they mitigate for more than their proportionate share. Idaho law does not tolerate such conduct, as explained in *IGWA's Notice of Secured Storage Leases* filed May 17, 2024.

Finally, the SWC again tries to force all ground water districts to mitigate under the 2016 Plan, but that is not feasible because the Director has found some Districts out of compliance with that plan, and due to the Director's reinterpretation of that plan to impose different obligations than the districts accepted in 2016, there is no longer agreement among the districts as to their respective obligations under sections 3.a.ii and 3.b.i of the 2016 Plan. Since the 2016 Plan does not prescribe the proportionate mitigation obligations of each district, and since the districts are not in agreement as to their respective obligations, it is impossible for any district to demonstrate compliance with the 2016 Plan.

CONCLUSION

For the reasons set forth above and in *IGWA's Conditional Notice of Mitigation Compliance / Petition for Reconsideration* and *IGWA's Notice of Secured Storage Leases*, IGWA respectfully requests that the Ground Water Districts be permitted to mitigate for their proportionate share of the predicated demand shortfall under the 2009 storage water plan.

DATED May 24, 2024.

RACINE OLSON, PLLP

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2024, I served the foregoing document on the persons below via email or as otherwise indicated:


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