

**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

**AMENDED ORDER  
DETERMINING DEFICIENCY IN  
NOTICES OF SECURED WATER**

**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 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 As-Applied Order*”), in which the Director determined the predicted shortfall obligation for junior ground water users for 2024. The Director concluded that Twin Falls Canal Company (“TFCC”) is the only entity with a predicted in-season demand shortfall (“IDS”) for 2024 and the IDS is 74,100 acre-feet. *April 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.*

Historically, the Idaho Ground Water Appropriators, Inc. (“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. However, this year, individual ground water districts submitted their own mitigation notices.<sup>1</sup>

On May 2, 2024, Bonneville-Jefferson Ground Water District (“Bonneville-Jefferson”) and Jefferson-Clark Ground Water District (“Jefferson-Clark”) each individually filed mitigation notices. *BJGWD’s Notice of Mitigation in Resp. to April 2024 As-Applied Order (Methodology Steps 1-3)* [hereinafter *BJGWD’s Notice*]; Letter from Jerry Rigby, attorney for Jefferson-Clark, to Mathew Weaver, Department Director (Regarding mitigation water obligations of Jefferson-Clark).

Also on May 2, Magic Valley Ground Water District (“Magic Valley”) and North Snake Ground Water District (“North Snake”) jointly filed a mitigation notice and Henry’s Fork Ground Water District (“Henry’s Fork”) and Madison Ground Water District (“Madison”) jointly filed a mitigation notice. *Joint Notice of Compliance—Magic Valley Ground Water Dist. & North Snake Ground Water Dist.’s 2024 Irrigation Season Mitigation Commitments* [hereinafter *MVNS’s Notice*]; Letter from Jerry Rigby, attorney for Henry’s Fork and Madison, to Mathew Weaver, Department Director (Regarding mitigation water obligations of Henry’s Fork and Madison).

On May 3, 2024, Bingham Ground Water District (“Bingham”) filed a mitigation notice. *Notice of Bingham Ground Water District 2024 Mitigation*. On the same day, Carey Valley Ground Water District (“Carey Valley”) submitted a letter proposing a “mitigation plan for 2024 . . . .” Letter from Leta Hansen, Chairman of Carey Valley, to Mathew Weaver, Department Director. While the letter was framed as a “mitigation plan,” the Director will consider it a mitigation notice.

Also on May 3, the Director held a status conference to discuss the status of IGWA’s mitigation plans and IGWA’s mitigation efforts for this irrigation season. *Am. Notice of Status Conf.*, at 1.

On May 6, 2024, American Falls-Aberdeen Ground Water District (“American Falls-Aberdeen”) filed a mitigation notice. Letter from Sarah Klahn, attorney for American Falls-Aberdeen, to Mathew Weaver, Department Director [hereinafter *AFA Mitigation Notice*] (Regarding Case Nos. CM-DC-2010-001 and CM-MP-2016-001).

On May 8, 2024, the Department received a letter from IGWA regarding ground water district compliance with IGWA’s *2016 Settlement Mitigation Plan* (CM-MP- 2016-001). In the letter, IGWA clarifies its intent to comply with certain elements of the plan regarding its 2021 performance. Letter from T.J. Budge, attorney for IGWA, to Mathew Weaver, Department

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<sup>1</sup> The Department received *IGWA’s Request for Mitigation Credit for Aquifer Enhancement Activities (2024)* on May 2, 2024. This request will be addressed by the Director in a separate order.

Director (Regarding Case Nos. CM-DC-2010-001, CM-MP-2016-001, and Sept. 7, 2022 Settlement Agreement between IGWA and SWC).

On May 10, 2024, the Director issued the *Order Determining Deficiency in Notices of Secured Water* (“*Order Determining Deficiency*”).

On May 14, 2024, IGWA submitted *IGWA’s Conditional Notice of Mitigation Compliance; Petition for Reconsideration; and Request for Expedited Decision* (“*IGWA Second Petition for Reconsideration*”) in which IGWA asked the Director to reconsider the Director’s conclusion in the *Order Determining Deficiency* that under the *2009 Storage Water Mitigation Plan* IGWA must mitigate for all ground water users. *IGWA Second Petition for Reconsideration*, at 2–3. On the same day, Bingham filed a *Brief in Support of IGWA’s Conditional Notice of Mitigation Compliance; Petition for Reconsideration; and Request for Expedited Decision* (“*Bingham’s Brief*”), in which Bingham took issue with the Director’s use of the term “free rider” in the *Order Determining Deficiency*. *Bingham’s Brief*, at 1–2.

On May 17, 2024, American Falls-Aberdeen filed a *Motion for Reconsideration of Order Determining Deficiency in Notices of Secured Water* (“*AFA’s Motion for Reconsideration*”) in which it also sought reconsideration of the *Order Determining Deficiency*. American Falls-Aberdeen argued that the Director requiring “evidence [that] it has secured storage water to satisfy the entire 50,000 acre-feet (“50kaf”) delivery obligation . . . 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*.” *AFA’s Motion for Reconsideration*, at 1. American Falls-Aberdeen argued that the *2016 Settlement Mitigation Plan* does not require the ground water districts to deliver the 50,000 acre-feet until 21 days after the day of allocation and that “[t]he Director has no legal basis to impose this proof-of-secured-water requirement on AFA or any district complying with, and seek safe harbor under, the *2016 Plan*.” *Id.* at 3, 5. American Falls-Aberdeen also argued that the parties to the *2016 plan* must resolve disputes through the steering committee before bringing issues of breach to the Director. *Id.* at 4. American Falls-Aberdeen requested the Director reconsider the *Order Determining Deficiency* to remove any obligation on behalf of the ground water districts to provide proof that 50,000 acre-feet of storage water has been secured under the *2016 Settlement Mitigation Plan*. *AFA’s Motion for Reconsideration*, at 5–7.

On May 28, 2024, the Director issued an order denying *IGWA’s Second Petition for Reconsideration*. *Order Denying IGWA’s Second Petition for Reconsideration; Order Determining Deficiency in IGWA’s May 17, 2024 Notice of Storage Water Leases*, at 8. On the same day, the Director issued an *Order Granting Upper Valley Districts Limited Intervention and AFA’s Motion for Reconsideration*, in which the Director agreed with the arguments in *AFA’s Motion for Reconsideration* and agreed to issue this *Amended Order Determining Deficiency in Notices of Secure Water* with changes shown in strikeout/underline.

## ANALYSIS

At the status conference, the Director started by asking each participating ground water district to identify whether, in 2024, they plan to mitigate under IGWA’s *2009 Storage Water*

*Mitigation Plan* (CM-MP-2009-007) or IGWA’s *2016 Settlement Mitigation Plan*. The Director asked this because many of the mitigation notices submitted by the ground water districts included vague, confusing, or contradictory statements regarding compliance with the approved mitigation plans. Bonneville-Jefferson, Magic Valley, and North Snake indicated that they had secured water for 2024 and would dedicate their secured water towards the mitigation requirements under the *2009 Storage Water Mitigation Plan*. Jefferson-Clark, Henry’s Fork, and Madison indicated that they also had secured storage water and would dedicate their secured storage water towards required mitigation activities set forth in either the *2009 Storage Water Mitigation Plan* or the *2016 Settlement Mitigation Plan*. American Falls-Aberdeen indicated that it planned to mitigate under the *2016 Settlement Mitigation Plan* only. Bingham indicated it will not mitigate under any approved mitigation plan. Carey Valley did not participate in the status conference.

At the status conference, questions arose regarding whether the ground water districts storage water obligations were additive between the 2009 and 2016 plans, and if and how the ground water district’s secured storage water could count towards compliance with either plan. In response, the Director indicated that the ground water districts obligations were not additive between the 2009 and 2016 plans. However, the Director clarified that the ground water districts can apply their secured storage water to either plan, but not both.

This order evaluates whether the ground water districts that seek protection under the *2009 Storage Water Mitigation Plan* and the *2016 Settlement Mitigation Plan* are entitled to protection under their chosen mitigation plan, evaluates the mitigation notices submitted by the ground water districts, and evaluates whether each ground water district has shown, to the satisfaction of the Director, that they have secured the required storage water. The order also discusses Bingham and Carey Valley’s decisions not to mitigate under either plan.

## **1. Mitigation Pursuant to IGWA’s *2009 Storage Water Mitigation Plan***

### **a. The May 3, 2024 Status Conference**

At the status conference, Jefferson-Clark, Henry’s Fork, Madison, Magic Valley, North Snake, and Bonneville-Jefferson indicated that in 2024, they plan to mitigate using IGWA’s *2009 Storage Water Mitigation Plan*. In response to a question about the status of the *2009 Storage Water Mitigation Plan*, the Director recognized that a recent decision by Hearing Officer Roger Burdick in another matter created a question of whether the ground water districts can still use the *2009 Storage Water Mitigation Plan*. The Director concluded that the Hearing Officer’s decision was still pending, and the issue had not yet been presented to him for consideration so he would consider the *2009 Storage Water Mitigation Plan* available for use at this time. The Director also stated that he reviewed former Director Spackman’s 2023 *Order Determining Deficiency in IGWA’s Notice of Secured Water* and agreed with two key conclusions reached in that order related to the *2009 Storage Water Mitigation Plan*. First, that the plain language of the *2009 Storage Water Mitigation Plan* “clearly states” that IGWA will mitigate for all ground water users, not just its members and non-member participants. *Order Determining Deficiency in IGWA’s Notice of Secured Water*, at 4. Second, 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.” *Id.* at 5. The Director reiterated that regarding the *2009 Storage Water Mitigation Plan*, if ground water districts submit adequate contracts to establish that they have 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.

At the status conference, the ground water districts seeking to use the *2009 Storage Water Mitigation Plan* claimed that they secured the following volumes of water for use in 2024:

<b>Ground Water Districts (GWD)</b>	<b>GWD Volume of Secured Water (acre-feet)</b>
Aberdeen-American Falls GWD	0
Bingham GWD	0
Bonneville-Jefferson GWD	8,928
Carey Valley GWD	0
Jefferson-Clark GWD	6,858
Henry's Fork GWD	1,500
Madison GWD	
Magic Valley GWD	11,925
North Snake GWD	3,665
<b>Total</b>	<b>32,876</b>
2009 Mitigation Plan Secured Storage Water Obligation	74,100
Deficiency in the Amount of Secured Storage Water	41,224

The above table shows that the ground water districts have indicated that they have secured 32,876 acre-feet, which is less than the full shortfall obligation of 74,100 acre-feet. Because the amount secured is less than the shortfall obligation, the Director will credit the volume against the overall obligation, thus reducing the overall obligation for all ground water users, if the ground water districts are able to show, to the satisfaction of the Director, that they have secured 32,876 acre-feet of water. The Department has calculated what the revised curtailment date would be if these ground water districts can show, to the satisfaction of the Director, that they have secured 32,876 acre-feet of water. The revised curtailment date for all ground water users would be February 16, 1970. However, to reemphasize the point, this is contingent upon the Director concluding in subsection 1.b. below that the ground water districts provide sufficient evidence that they have secured 32,876 acre-feet of storage water.

b. Sufficiency of Mitigation Notices

Mitigation notices must show that the water user has secured, to the satisfaction of the Director, the storage water needed to mitigate. The ground water districts are required to provide the Director with legally enforceable contracts, options, or similar documentation to establish

that they have secured the water necessary to meet the mitigation obligation. *See Order on Pet. for Judicial Review*, at 19, *A&B Irrigation Dist. v. Tuthill*, No. CV-2008-551 (Gooding Cnty. Dist. Ct. Idaho July 24, 2009). Below, the Director reviews the mitigation notices submitted by the ground water districts and determines whether they have complied with these requirements.

*i) Bonneville-Jefferson's Mitigation Notice*

In its May 2 mitigation notice, Bonneville-Jefferson states that it “will mitigate this season by providing its proportionate share of the IDS from the leases attached hereafter as Exhibit ‘A’.” *BJGWD's Notice*, at 2. Unfortunately, the leases included as Exhibit A are all leases entered into by IGWA, not Bonneville-Jefferson. It is unclear whether Bonneville-Jefferson has the authority to submit IGWA’s leases to the Director for the benefit of Bonneville-Jefferson. Furthermore, even if Bonneville-Jefferson is authorized to lease water under IGWA’s leases, Department records do not show that Bonneville-Jefferson has sought or received approval from Water District 01 for any lease. Without approval by Water District 01 and payment of the required fees, Bonneville-Jefferson has not demonstrated to the satisfaction of the director that it has secured the volume of water reported in its May 2 mitigation notice. As indicated in Subsection 1.c. below, Bonneville-Jefferson will have until May 17, 2024, to resolve these issues.

*ii) Jefferson-Clark's Mitigation Notice*

At the status conference and in its May 2 mitigation notice, Jefferson-Clark indicated that it would mitigate under the *2009 Storage Water Mitigation Plan* for 2024 and that it has secured 6,858 acre-feet of storage water. Unfortunately, Jefferson-Clark did not include contracts, leases, options, or similar documentation to establish that it had secured the water necessary to meet or offset the obligation. Furthermore, the Department records do not show that Jefferson-Clark sought or received approval from Water District 01 for any lease. Without approval by Water District 01 and payment of the required fees, Jefferson-Clark has not demonstrated to the satisfaction of the Director that it has secured the volume of water reported in its May 2 mitigation notice. As indicated in Subsection 1.c. below, Jefferson-Clark will have until May 17, 2024, to resolve these issues.

*iii) Henry's Fork and Madison's Mitigation Notice*

At the status conference and in its May 2 mitigation notice, Henry’s Fork and Madison indicate that they will mitigate under the *2009 Storage Water Mitigation Plan* for 2024 and that they have secured 1,500 acre-feet of storage water. Unfortunately, Henry’s Fork and Madison did not include contracts, leases, options, or similar documentation to establish that they have secured the water necessary to meet the obligation. Furthermore, the Department records do not show that Henry’s Fork and Madison sought or received approval from Water District 01 for any lease. Without approval by Water District 01 and payment of the required fees, Henry’s Fork and Madison have not demonstrated to the satisfaction of the Director that they have secured the water reported in their May 2 mitigation notice. As indicated in Subsection 1.c. below, Henry’s Fork and Madison will have until May 17, 2024, to resolve these issues.

iv) *Magic Valley and North Snake's Mitigation Notice*

Magic Valley and North Snake's May 2 mitigation notice indicates that they will collectively provide 15,590 acre-feet of storage water to the SWC pursuant to the *2009 Storage Water Mitigation Plan. MVNS's Notice*, at 2. Unfortunately, Magic Valley and North Snake did not include contracts, leases, options, or similar documentation to establish that they had secured the water necessary to meet the obligation. Furthermore, the Department records do not show that Magic Valley and North Snake sought or received approval from Water District 01 for any lease. Without approval by Water District 01 and payment of the required fees, Magic Valley and North Snake have not demonstrated to the satisfaction of the Director that they have secured the water reported in their May 2 notice. As indicated in Subsection 1.c. below, Magic Valley and North Snake will have until May 17, 2024, to resolve these issues.

c. Conclusion Regarding 2009 Storage Water Mitigation Plan

While certain ground water districts indicate their intent to mitigate under the *2009 Storage Water Mitigation Plan*, they have failed to show, to the satisfaction of the Director, that they have secured the storage water needed to mitigate in full or in part. The Director will extend the deadline for the ground water districts to submit information to establish, to his satisfaction, that they can mitigate for all or part of the predicted April IDS of 74,100 acre-feet. The ground water districts have until May 17, 2024, to submit the appropriate documentation and to pay any fees required by Water District 01. If appropriate documentation is submitted and fees paid by this deadline, the Director will adjust the curtailment date accordingly.

**2. Mitigation Using IGWA's 2016 Settlement Mitigation Plan**

At the status conference and in its mitigation notice, American Falls-Aberdeen indicates that it intends to mitigate under the *2016 Settlement Mitigation Plan*. At the status conference, Jefferson-Clark, Henry's Fork, and Madison also indicated that they would dedicate their secured storage water towards the *2016 Settlement Mitigation Plan* if that would result in their compliance with the plan. The *2016 Settlement Mitigation Plan* allows individual ground water districts to mitigate for their proportionate share of the 240,000-acre-foot reduction obligation set forth in the plan. It also requires that the ground water districts annually provide 50,000 acre-feet of storage water through private leases to the SWC 21 days after the day of allocation. ~~While the 2016 Settlement Mitigation Plan allows for determining the proportionate share of the reduction obligation of the parties, it does not authorize the proportionate sharing of the 50,000-acre-foot storage volume by the parties. As a result of the plain language of the plan, for any ground water district to be in compliance with the plan, the entire 50,000-acre-foot must be provided.~~

a. The 2021 Breach

Ground water districts were found to have breached the *2016 Settlement Mitigation Plan* in 2021. *Am. Final Order Regarding Compliance with Approved Mitigation Plan*, at 16–17, *In re IGWA's Settlement Agreement Mitigation Plan*, No. CM-MP-2016-001 (Idaho Dept. of Water Res. Apr. 24, 2023) [hereinafter *Compliance Order*]. In his April 24, 2023 *Compliance Order*, the Director approved a one-year settlement agreement to remedy the 2021 breach. *Id.* at 20. In

the settlement agreement, the parties agreed that “IGWA will collectively provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year. Such amounts will be in addition to the long-term obligations set forth in section 3 of the Settlement Agreement and approved Mitigation Plan.” *Settlement Agreement*, at 2, No. CM-MP-2016-001 (Sept. 7, 2022).

The first question that arises in evaluating whether any ground water district is complying with the *2016 Settlement Mitigation Plan* is addressing compliance with the agreed upon cure of IGWA’s 2021 breach. It is the Director’s understanding that the ground water districts provided the required 30,000 acre-feet of storage in 2023. In its May 6 mitigation notice, American Falls-Aberdeen states that it “has entered into a lease with the Shoshone-Bannock Tribe for approximately 11,000 acre feet of water.” AFA Mitigation Notice, at 1. American Falls-Aberdeen states it plans to provide its share of the 15,000-acre-foot obligation under the 2021 Breach Order, approximately 2,900 acre-feet, to the SWC using this lease. *Id.* In its May 8 letter to the Director, IGWA confirms that it will “deliver the balance of the 15,000 acre-feet.” The obligation to supply the water does not accrue until ten days after the day of allocation. *Settlement Agreement*, at 2.

So long as the entire 15,000-acre-foot obligation is provided to the SWC within ten days following the forthcoming day of allocation, the 2021 breach has been remedied.

b. The 2022 Breach

American Falls-Aberdeen and certain other ground water districts were found to have breached the *2016 Settlement Mitigation Plan* in 2022. *Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance*, at 9, No. CM-MP-2016-001 (Aug. 2, 2023). The following table summarizes the volume of the individual ground water district’s breaches.

<b>Ground Water Districts (GWD)</b>	<b>2022 Deficiency in GWD Compliance with 2016 Mitigation Plan (acre-feet)</b>
Aberdeen-American Falls GWD	1,352
Bingham GWD	32,476
Bonneville-Jefferson GWD	5,204
Carey Valley GWD	0
Jefferson-Clark GWD	18,605
Henry's Fork GWD	0
Madison GWD	0
Magic Valley GWD	0
North Snake GWD	0

*Id.* at 8.



American Falls-Aberdeen subsequently entered into an agreement with the SWC and mitigated for their breach. *Notice of Satisfaction of American Falls-Aberdeen Ground Water District 2022 Mitigation Obligation*, No. CM-MP-2016-001 (Nov. 7, 2023). American Falls-Aberdeen has remedied their 2022 breach.

c. The Sentinel Well Benchmark

The ground water districts also failed to achieve the 2023 sentinel well benchmark established by the *2016 Settlement Mitigation Plan*. On May 3, 2024, the Director issued an order determining the additional actions that ground water districts that are signatories to the 2016 settlement agreement must take as part of ongoing adaptive management requirements to ensure they comply with the plan. The Director ordered ground water districts to:

increase their proportionate share of the total annual ground water use reduction of 240,000 acre-feet by an additional 5% (12,000 acre-feet) during the 2024 irrigation season. The [ground water districts] will increase their proportionate share of the total annual ground water use reduction of 240,000 acre-feet by an additional 12,000 acre-feet each year thereafter until the 2023 benchmark is achieved

*Final Order Specifying Additional Actions*, at 5, No. CM-MP-2016-001 (May 3, 2024).

In its May 6 mitigation notice, American Falls-Aberdeen confirmed that it intends to “satisfy all its obligations under the *2016 Settlement Mitigation Plan*,” including the “adaptive management” obligations prescribed by the Director in his *Final Order Specifying Additional Actions* in CM-MP-2016-001. AFA Mitigation Notice, at 1.

d. 50,000 Acre-Feet of Storage Water

As discussed above, the *2016 Settlement Mitigation Plan* requires the ground water districts to provide the SWC with 50,000 acre-feet of storage water annually. Under the plain language of the *2016 Settlement Mitigation Plan*, the 50,000-acre-foot obligation does not come due until 21 days after the day of allocation. *Settlement Agreement* at 2, ¶ 3.b.i. Furthermore, the *2016 Settlement Mitigation Plan* does not require documentation of securing the water. Therefore, American Falls-Aberdeen’s safe harbor from curtailment is not contingent on American Falls-Aberdeen providing proof it has secure 50,000 acre-feet of storage water at this time. In addition, the *2016 Settlement Mitigation Plan* specifically spells out a dispute resolution process if the Districts breach the 50,000-acre-foot obligation. *Id.* at ¶ 2c. Only if that dispute resolution process fails does the Director get involved. *Id.* Since there is no requirement for American Falls-Aberdeen to provide proof that it has secured water at this time and because the steering committee has not referred an allegation of breach of the 50,000-acre-foot obligation to the Director, the Director concludes that American Falls-Aberdeen is in compliance with the requirements of the *2016 Settlement Mitigation Plan*’s requirements related to the 50,000 acre-foot of storage water. —At the status conference, the Director reiterated that he would adopt former Director Spackman’s reasoning regarding the *2016 Settlement Mitigation Plan* and that to comply with the plan, the entire 50,000 acre-foot obligation must be provided (not just a proportionate share). In other words, were American Falls-Aberdeen the only ground water

district seeking protection under the *2016 Settlement Mitigation Plan*, it would have to secure and deliver the full 50,000 acre-feet to remain in compliance. In its May 6 mitigation notice, American Falls-Aberdeen does not explicitly state how much water it has secured towards this obligation. However, it reports having secured 11,000 acre-feet of storage water, of which it will credit approximately 2,900 acre-feet towards its 2021 breach obligations. The director interprets American Falls-Aberdeen's notices and statements to imply it has secured 8,100 acre-feet towards the 50,000-acre-foot storage water obligation.

In addition to American Falls-Aberdeen, at the status conference, Jefferson Clark, Henry's Fork, and Madison also indicated they would count their secured storage water towards the *2016 Settlement Mitigation Plan* if that would result in their compliance with the plan.

Based on the ground water district's mitigation notices and comments at the status conference, the following table summarizes the potential volumes of water secured to comply with the *2016 Settlement Mitigation Plan*:

<b>Ground Water Districts (GWD)</b>	<b>GWD Volume of Secured Water (acre-feet)</b>
Aberdeen-American Falls GWD	8,100
Bingham GWD	0
Bonneville-Jefferson GWD	0
Carey Valley GWD	0
Jefferson Clark GWD	6,858
Henry's Fork GWD	1,500
Madison GWD	
Magie Valley GWD	0
North Snake GWD	0
Total	16,458
2016 Mitigation Plan Secured Storage Water Obligation	50,000
Deficiency in the Amount of Secured Storage Water	33,542

e. Conclusion Regarding 2016 Settlement Mitigation Plan

Based on the above discussion previous summary table, the Director concludes that ground water districts that (1) did not breach the 2016 Settlement Mitigation Plan in 2022 or who did breach and have remedied their breach, and (2) agree to the "additional actions" required in the Final Order Specifying Additional Actions in CM-MP-2016-001, are in compliance with the 2016 plan and entitled to protection under the plan. At this time, American Falls-Aberdeen is the only ground water district that has told the Director that it continues to uphold and seek protection under the 2016 Settlement Mitigation Plan and has demonstrated that it continues to

~~comply with all elements of the plan. the ground water districts are short of the 50,000-acre-foot obligation by approximately 33,542 acre-feet. 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-foot to qualify for protection. The Director will also require confirmation from the Tribes that the water has been paid for and is available for use as mitigation.~~

### **3. Ground Water Districts Planning to Use Neither the 2009 Storage Water Mitigation Plan nor the 2016 Settlement Mitigation Plan.<sup>2</sup>**

At the status conference, Bingham indicated that it had secured 8,590 acre-feet of water for the coming irrigation season but that it did not intend to mitigate under either the 2009 Storage Water Mitigation Plan or the 2016 Settlement Mitigation Plan. While Bingham stated in its mitigation notice that there “does not appear to be an option for mitigation” under the 2009 Storage Water Mitigation Plan for this year, *Notice of Bingham Ground Water District 2024 Mitigation*, at 3, the Director made clear at the status conference he would consider mitigation proposals under the 2009 Storage Water Mitigation Plan for 2024. Still, when pressed at the status conference, counsel for Bingham indicated that Bingham would not apply its storage water towards its mitigation obligations under either of the approved mitigation plans. It is surprising that ~~Why~~ a ground water district would secure storage water but then refuse to claim protection from curtailment under an approved mitigation plan ~~is surprising~~. While the 8,590 acre-feet of water the district has already secured would not make up the current shortfalls under either approved mitigation plan, under the 2009 Storage Delivery Plan, it would nonetheless advance the priority date and reduce the number of its ground water users subject to curtailment. Furthermore, if the other ground water districts contribute storage under the 2009 Storage Water Mitigation Plan but Bingham does not, ~~this makes Bingham a free rider in this year’s delivery call proceedings because~~ some of its members will nonetheless benefit, by avoiding curtailment through the actions of other ground water districts contributing storage water while Bingham undertakes no commensurate actions. Regardless, if the Bingham Ground Water District Board Members do not want to contribute the water they have already secured, ~~would rather free ride under the 2009 Storage Water Delivery Plan and not to~~ increase the number of its members protected from curtailment, that is its choice. The Director cannot force the district to obligate its secured storage water to maximize the protection of its users.

In its mitigation notice, Bingham expresses frustration about its inability to seek protection under a new mitigation plan that it filed in January of 2024. The new mitigation plan was only for the benefit of Bingham Ground Water District. *Pet. for Approval of Bingham Ground Water District’s Mitigation Plan for the Surface Water Coalition*, No. CM-MP-2024-001 (Jan. 2, 2024). Several other ground water districts also submitted individual mitigation plans at about the same time. The plans were advertised, and they were protested by numerous entities. The Director appointed an independent hearing officer, Gerald F. Schroeder, to hear the contested cases on behalf of the Department. It is the Director’s understanding that some of the

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<sup>2</sup> The changes in this section are made in response to *Bingham’s Brief* in which Bingham took issue with the use of the term “free rider.”

parties to those contested cases sought to stay the new mitigation plan proceedings until an order was issued by the Director related to the proceeding before Hearing Officer Burdick. Others, including Bingham, did not want to stay the proceedings. It is the Director's understanding that Hearing Officer Schroeder heard arguments on both sides and concluded that it was best to wait for Hearing Officer Burdick's order before scheduling a hearing. While the Director understands Bingham's desire to move forward to hearing, Hearing Officer Schroeder considered the arguments raised by those who wanted to move forward and concluded that it was most appropriate to wait. The Director will not second guess the hearing officer's approach.

Carey Valley did not participate in the May 3, 2024 status conference. Its mitigation notice does not mention securing storage under the *2009 Storage Water Mitigation Plan* or the *2016 Settlement Mitigation Plan*. The Director concludes that Carey Valley has not secured any storage water and as a result does not seek protection under either mitigation plan in 2024.

### ORDER

Based on and consistent with the foregoing, IT IS HEREBY ORDERED that the mitigation notices filed by Bonneville-Jefferson, Jefferson-Clark, Magic Valley, North Snake, Henry's Fork, Madison, Bingham, and Carey Valley, ~~and American Falls-Aberdeen~~ ground water districts are deficient and fail to demonstrate that they are operating in accordance with an approved mitigation plan. American Falls-Aberdeen Ground Water District has demonstrated that it is operating in accordance with an approved mitigation plan. ~~The Director will give the ground water districts until May 17, 2024, to submit additional notice that demonstrates to the satisfaction of the director that they have secured storage water in compliance with either the 2009 Storage Water Delivery Plan or the 2016 Settlement Mitigation Plan.~~

Dated this 28th day of May 2024.



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MATHEW WEAVER  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of May 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>John K. Simpson  MARTEN LAW LLP  PO Box 2139  Boise, ID 83701-2139  <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Travis L. Thompson  Abigail Bitzenburg  MARTEN LAW LLP  PO Box 63  Twin Falls, ID 83303-0063  <a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a>  <a href="mailto:abitzenburg@martenlaw.com">abitzenburg@martenlaw.com</a>  <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher  FLETCHER LAW OFFICE  PO Box 248  Burley, ID 83318  <a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Thomas J. Budge  Elisheva M. Patterson  RACINE OLSON  PO Box 1391  Pocatello, ID 83204-1391  <a href="mailto:tj@racineolson.com">tj@racineolson.com</a>  <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>David W. Gehlert  Natural Resources Section  Environment and Natural Resources Division  U.S. Department of Justice  999 18<sup>th</sup> St., South Terrace, Suite 370  Denver, CO 80202  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234  <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Sarah A Klahn  Maximilian C. Bricker  Somach Simmons &amp; Dunn  1155 Canyon Blvd, Ste. 110  Boulder, CO 80302  <a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a>  <a href="mailto:mbricker@somachlaw.com">mbricker@somachlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>

<p>Rich Diehl  City of Pocatello  PO Box 4169  Pocatello, ID 83205  <a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Candice McHugh  Chris Bromley  MCHUGH BROMLEY, PLLC  380 South 4<sup>th</sup> Street, Suite 103  Boise, ID 83702  <a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a>  <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Robert E. Williams  WILLIAMS, MESERVY, &amp; LOTH SPEICH, LLP  PO Box 168  Jerome, ID 83338  <a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Robert L. Harris  HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC  PO Box 50130  Idaho Falls, ID 83405  <a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Michael A. Kirkham  City Attorney, City of Idaho Falls  PO Box 50220  Idaho Falls, ID 83405  <a href="mailto:mkirkham@idahofallsidaho.gov">mkirkham@idahofallsidaho.gov</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Skyler C. Johns  Nathan M. Olsen  Steven L. Taggart  OLSEN TAGGART PLLC  PO Box 3005  Idaho Falls, ID 83403  <a href="mailto:sjohns@olsentaggart.com">sjohns@olsentaggart.com</a>  <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a>  <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Dylan Anderson  DYLAN ANDERSON LAW PLLC  PO Box 35  Rexburg, Idaho 83440  <a href="mailto:dylan@dylanandersonlaw.com">dylan@dylanandersonlaw.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p><b>COURTESY COPY TO:</b>  Craig Chandler  IDWR—Eastern Region  900 N. Skyline Drive, Ste. A  Idaho Falls, ID 83402  <a href="mailto:craig.chandler@idwr.idaho.gov">craig.chandler@idwr.idaho.gov</a></p>	<input checked="" type="checkbox"/> Email

<p><b>COURTESY COPY TO:</b>  Corey Skinner  IDWR—Southern Region  1341 Fillmore St., Ste. 200  Twin Falls, ID 83301-3033  <a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>	<input checked="" type="checkbox"/> Email
<p><b>COURTESY COPY TO:</b>  William A. Parsons  PARSONS, LOVELAND, SHIRLEY &amp;  LINDSTROM, LLP  PO Box 910  Burley, ID 83318  <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a>  <a href="mailto:wparsons@magicvalley.law">wparsons@magicvalley.law</a></p>	<input checked="" type="checkbox"/> Email
<p><b>COURTESY COPY TO:</b>  Jerry R. Rigby  RIGBY, ANDRUS &amp; RIGBY LAW, PLLC  PO Box 250  Rexburg, ID 83440  <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a></p>	<input checked="" type="checkbox"/> Email
<p><b>COURTESY COPY TO:</b>  Andrew J. Waldera  SAWTOOTH LAW OFFICES, PLLC  1101 W. River Street, Suite 110  Boise, Idaho 83702  <a href="mailto:andy@sawtoothlaw.com">andy@sawtoothlaw.com</a></p>	<input checked="" type="checkbox"/> Email

  


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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.