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 **ORDER DENYING IGWA'S SECOND PETITION FOR RECONSIDERATION** **ORDER DETERMINING DEFICIENCY IN IGWA'S MAY 17, 2024 NOTICE OF STORAGE WATER LEASES**

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").

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 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 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 that they can mitigate, "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 the Idaho Ground Water Appropriators, Inc.'s ("IGWA") obligation under its approved

2009 storage water 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 asked the Director to reconsider requiring IGWA to mitigate ground water diversions by non-IGWA members. *Petition for Reconsideration*, at 2. IGWA disputed the Director's conclusion that under IGWA's 2009 storage water mitigation plan, IGWA must provide the full 74,100-acre-foot obligation. *Id*.

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. However, this year, individual ground water districts submitted their own mitigation notices. Between May 2 and May 6, 2024, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Magic Valley Ground Water District together with North Snake Ground Water District, Henry's Fork Ground Water District together with Madison Ground Water District, Bingham Ground Water District, Carey Valley Ground Water District, and American Falls-Aberdeen Ground Water District (collectively, the "Districts") all filed mitigation notices with the Department.

On May 10, 2024, the Director issued two orders, the (1) *Final Order Denying IGWA's Petition for Reconsideration of April As-Applied Order* ("*Order Denying Reconsideration*") and (2) *Order Determining Deficiency in Notices of Secured Water* ("*Order Determining Deficiency*"). In the *Order Denying Reconsideration*, the Director concluded:

> 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.

Order Denying Reconsideration, at 4. In the *Order Determining Deficiency*, the Director found that the mitigation notices filed by the Districts "are deficient and fail to demonstrate that they are operating in accordance with an approved mitigation plan." *Id*. at 11. The Director gave the Districts until May 17, 2024, "to submit additional notice that demonstrates to the satisfaction of

the [D]irector that they have secured storage water in compliance with either the *2009 Storage Water Delivery Plan* or the *2016 Settlement Mitigation Plan*." *Id*. The Director also noted,

> 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.

Id. at 4.

On May 14, 2024, the Department received *IGWA's Conditional Notice of Mitigation Compliance; Petition for Reconsideration; and Request for Expedited Decision* ("*Second Petition for Reconsideration*"). The *Second Petition for Reconsideration* seeks to:

> (1) [P]rovide 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*] and the [*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.

Second Petition for Reconsideration, at 1. Given the May 17, 2024 deadline found in the *Order Determining Deficiency*, IGWA requests that the *Order Determining Deficiency* and *Order Denying Reconsideration* be "amend[ed] or vacate[d] and replace[d]" on an expedited basis. *Id*. at 3–4.

On May 17, 2024, the Director issued an order shortening the time for parties to respond to the *Second Petition for Reconsideration*. *Order Shortening Time to Respond* at 2.

On May 17, 2024, IGWA submitted *IGWA's Notice of Storage Water Leases* ("*IGWA's Notice*") for the purpose of demonstrating that adequate storage water leases have been secured to mitigate material injury caused by ground water use within Bonneville-Jefferson, Jefferson-Clark, Magic Valley, North Snake, Henry's Fork, Madison, Bingham, and Carey Valley ground water districts, in compliance with the *2009 Storage Water Mitigation Plan*. *IGWA's Notice*, at 1. Attached to *IGWA's Notice* are copies of storage water leases evidencing "44,509 acre-feet available to meet the proportionate mitigation of the" Districts, excluding American Falls-Aberdeen Ground Water District. *Id.* at 2. IGWA asserts "[a]ll Water District 01 fees have been paid (no fees are owed on the Shoshone-Bannock Tribes lease)." *Id*. *IGWA's Notice* relies upon the following "proportionate mitigation obligations" its expert proposed via the *Declaration of Sophia Sigstedt* filed by IGWA on May 2, 2024:

Ground Water District	Proportionate Share of 74,100 Acre-Feet
Bingham	12,986
Bonneville-Jefferson	8,928
Carey Valley	327
Henry's Fork + Madison	98
Jefferson-Clark	6,858
Magic Valley	10,638
North Snake	3,269
Total	43.104

Id. Further, IGWA stated:

> These leases are submitted on condition that they are utilized by IDWR strictly to mitigate for material injury caused by groundwater use within the districts listed above [the Districts, excluding American Falls-Aberdeen Ground Water District] in accordance with Idaho Code § 42-5224(11). These leases cannot be used to roll back the curtailment date for all groundwater users or to otherwise mitigate for groundwater users that do not belong to the districts listed above.

Id. at 3.

On May 23, 2024, the SWC filed *Surface Water Coalition's Response to IGWA's Conditional Notice of Mitigation Compliance / Petition for Reconsideration* ("*SWC Response*"). In the *SWC Response*, the SWC voices its concern about the delay in curtailment, states that the delay is contrary to previous district court decisions and asks the Director to "enforce his prior orders and decisions without delay." *SWC Response*, at 4. The SWC argues that the *Second Petition for Reconsideration* should be denied because (1) the Department's procedural rules do not authorize a second petition for reconsideration; (2) IGWA did not timely challenge the order approving the mitigation plan; and (3) the *2009 Storage Water Mitigation Plan* has been superseded. *Id*. at 5–7.

ANALYSIS

I. The Director lacks the authority to grant IGWA the relief it seeks in its *Second Petition for Reconsideration*.

While the SWC is correct that the Department's procedural rules do not authorize a second petition for reconsideration, IGWA raises a new argument that needs to be addressed because of its significant implications. IGWA argues that ground water districts "are quasi-governmental organizations with powers granted by statute in Idaho Code § 42-5224." *Second Petition for Reconsideration*, at 2. IGWA argues that § 42-5224(11) only grants the ground water districts the authority to "mitigate any material injury caused by ground water use within the district . . . ." *Id*. IGWA argues "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." *Id*. IGWA asks the Director to "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 . . . ." *Id*.

First, it is worth pointing out that IGWA is not made up of only ground water districts.[1] But even if ground water districts were its only members, the Director could still not provide the relief requested by IGWA in its *Second Petition for Reconsideration*. Accepting, without deciding for the purposes of this order, that Idaho Code § 42-5224(11) limits the authority of ground water districts, the problem that this argument presents is that if the Director were to agree with IGWA, the Director would either need to declare the mitigation plan void as contrary to law or treat IGWA's request as a request to reprocess the mitigation plan.

IGWA admits in its *Second Petition for Reconsideration* that its mitigation plan, by its plain language, proposed to mitigate for all ground water users, not just IGWA members: "IGWA offered to provide storage water to mitigate all material injury, whether caused by IGWA members or others." *Id*. The order approving the 2009 storage water mitigation plan quotes the factors the Director may consider in approving a plan. *Order Approving Mitigation Plan*, at 4–5, No. CM-MP-2009-007. One factor the Director can consider is "[w]hether delivery, storage, and use of water pursuant to the mitigation plan is in compliance with Idaho law." *Id*. at 4. In response to this factor, the Director concluded that "IGWA's proposed rental of storage water and delivery of the storage water and use of water pursuant to the mitigation plan is in compliance with Idaho law." *Id*. at 9. If IGWA's argument regarding § 42-5224 were accepted, then IGWA submitted, and former Director Spackman subsequently approved a plan that is contrary to law and contrary to Conjunctive Management Rule 43.03.a. If this is true, the Director cannot remedy the matter by "either amend[ing] or vacat[ing] and replac[ing] the *Order Determining Deficiency*" as suggested by IGWA. The Director would either need to void the order approving the plan or treat IGWA's request as a request to amend the plan and then process the request as set out in the Conjunctive Management Rules. Neither action by the Director would result in the immediate protection of the ground water districts under the *2009 Storage Water Mitigation Plan* in the way which they desire.

Stated another way, any action taken by the Director at this point would relate to the plan itself and the order approving the plan. The order approving the mitigation plan was issued in 2010 and no party challenged the order. IGWA now asks the Director to allow IGWA to mitigate in a way that is contrary to the plain language of the approved mitigation plan. If the Director

[1] IGWA's *2009 Storage Water Mitigation Plan* was submitted by counsel "on behalf of its Ground Water District Members and its other water user members, which are set forth on Exhibit A . . . , for and on behalf of their respective members and those groundwater users who are non-member participants in their mitigation activities*." IGWA's Mitigation Plan for the Surface Water Coalition Delivery Call*, at 1, No. CM-MP-2009-007. Exhibit A lists "IGWA Members" as of November 2009, and includes seven ground water districts, three irrigation districts, seven cities, and some businesses. Additionally, footnote 2 of the *Order Approving Mitigation Plan* defines "IGWA" as follows: "IGWA is comprised of ground water districts, irrigation districts, municipal providers, and commercial and industrial water users. A list of members is attached as the last page of IGWA's Mitigation Plan." *Order Approving Mitigation Plan*, at 2 n.2, No. CM-MP-2009-007.

were to do this, the Director would effectively approve a new plan. The Director cannot approve a new mitigation plan on his own. Rather he must strictly follow the notice requirements of the Conjunctive Management Rules. *Order on Pet. for Jud. Rev.*, at 48, *Clear Springs Foods, Inc. v. Blue Lakes Trout Farm, Inc.*, No. 2008-444 (Gooding Cnty. Dist. Ct. Idaho June 19, 2009). So even if the Director were to agree with IGWA that Idaho Code § 42-5224(1) limits the authority of ground water districts, simply revising the *Order Determining Deficiency* would not achieve the result IGWA seeks.

Finally, IGWA's challenge of the *2009 Storage Water Mitigation Plan* is untimely. Former Director Spackman approved the plan on June 3, 2010. IGWA did not appeal the decision. However, the SWC did appeal and petitioned the Fifth Judicial District Court for judicial review. At the conclusion of that legal proceeding, Judge Wildman affirmed the Director's approval of the *2009 Storage Water Mitigation Plan*. *See Mem. Decision & Order on Pet. for Jud. Rev.*, *Twin Falls Canal Co. v. Spackman*, No. CV-2010-3075 (Twin Falls Dist. Ct. Idaho Jan. 25, 2011). The doctrine of *res judicata* precludes IGWA from relitigating former Director Spackman's 2010 approval of the *2009 Storage Water Mitigation Plan* because the same parties—IGWA, the SWC, and the Department—existed then as now, and the 2009 plan was previously reviewed and judged on its merits. *Id.*

II. In approving the *2009 Storage Water Mitigation Plan*, Director Spackman did not reject IGWA's proposal to mitigate for all water users.

As discussed above, IGWA admits that the *2009 Storage Water Mitigation Plan* "offered to provide storage water to mitigate all material injury, whether caused by IGWA members or others." *Second Petition for Reconsideration*, at 2. But IGWA suggests that Director Spackman's order approving the plan "did not adopt IGWA's mitigation plan wholesale." *Id*. at 3. IGWA argues that Director Spackman's order approving the plan "contains several changes from what IGWA proposed." *Id*. IGWA suggests that Director Spackman intended to reject IGWA's proposal to mitigate for all water users by including a statement in the order that "IGWA's obligation to provide storage water shall be determined as set forth in the Methodology Order." *Id*. IGWA argues that because the *Methodology Order* now includes language about proportionate shares, IGWA is only required to mitigate the proportionate shares of the ground water districts seeking protection. *Id*.

First, Director Spackman did not reject IGWA's proposal to mitigate for all ground water users. IGWA is correct that Director Spackman rejected some portions of IGWA's mitigation plan. However, when Director Spackman approved the plan, the portions of IGWA's plan that he rejected were discussed in detail, and he explained why he was rejecting those aspects of the plan. *Order Approving Mitigation Plan*, at 6–8, No. CM-MP-2009-007. There is no discussion of rejecting IGWA's stated intent and, to the contrary, the order talks generally in terms of approving IGWA's plan. *Id*. at 9–10.

IGWA quotes the following language in support of its argument that the Director rejected IGWA's proposal to mitigate for all ground water users: "IGWA's obligation to provide storage water shall be determined as set forth in the Methodology Order." *Id.* at 10. This language is not

a rejection of IGWA's proposal to mitigate for all water users but makes clear that any annual shortfall obligation of the ground water users will be established in the methodology order, not in the *2009 Storage Water Mitigation Plan*. The context leading up to this statement is important. The order approving the mitigation plan states, "the mitigation plan generally proposes supplying water stored in Snake River reservoirs to the SWC 'that will be available on an annual basis for delivery to SWC entities as may be required by the Director's orders.'" *Id.* at 2. The order further recognized that the "exact amount of water required to be delivered to SWC entities under this [*2009 Storage Water Mitigation Plan*] cannot be known in advance but can be expected to vary annually based upon the forecasted water supply and reasonable irrigation requirements which are used to determine the amount of water needed for the irrigation season and reasonable carryover storage." *Id*. Furthermore, at the time, IGWA only had the approved storage water delivery mitigation plan for the SWC delivery call. When read in context with the understanding that IGWA proposed to mitigate for all ground water users, the statement that "IGWA's obligation to provide storage water shall be determined as set forth in the Methodology Order" is an express recognition of the fact that the shortfall obligation will change from year to year and is not a fixed amount and will be established in a different order. The language is not a rejection of IGWA's express intent to "mitigate any and all material injury by guaranteeing and underwriting the senior water user's water supply."

Furthermore, while the current *Methodology Order* does speak in terms of proportional shares, even IGWA recognizes that the proportionate share language was not in the methodology order when the Director issued the *Order Approving Mitigation Plan*. This terminology was changed in a later version of the methodology order in response to mitigation plans that were submitted and approved following the approval and implementation of the *2009 Storage Water Mitigation Plan*. For example, A&B Irrigation District's 2015 mitigation plan states that A&B will mitigate using storage water. *Final Order Approving Mitigation Plan*, at 2, No. CM-MP-2015-003 (Dec. 15, 2016). To determine how much water A&B must provide, the Department must determine its proportionate share of the overall obligation. While IGWA is correct that in the spring of 2023 Director Spackman did assign a proportionate share to IGWA less than its full obligation, he subsequently reconsidered the obligation and concluded that the plain language of the *2009 Storage Water Mitigation Plan* obligates IGWA to mitigate for the entire shortfall. *Order Determining Deficiency in IGWA's Notice of Secured Water*, at 5 (May 23, 2023). Director Spackman found that IGWA's proportional share is the entire shortfall amount because IGWA agreed to mitigate for any and all junior ground water users. This remains true today. IGWA's proportional share under its 2009 storage water mitigation plan is the entire shortfall amount.

III. *IGWA's Notice* is deficient.

When IGWA submitted its notice of storage water leases, IGWA conditioned the Director's acceptance of the leases upon the Director also accepting IGWA's argument that, under the *2009 Storage Water Mitigation Plan* IGWA is not required to mitigate for all ground water users. *IGWA's Notice*, at 3. Because the Director concludes above that IGWA's *2009 Storage Water Mitigation Plan* requires IGWA to mitigate for all junior ground water users, the leases are not available for the Director to consider. Because the Director cannot consider the

leases, *IGWA's Notice* is deficient because it fails to demonstrate that Bonneville-Jefferson, Jefferson-Clark, Magic Valley, North Snake, Henry's Fork, Madison, Bingham, and Carey Valley ground water districts are operating in accordance with an approved mitigation plan.

The Director will issue a curtailment order on Thursday, May 30, 2024. Any ground water district that previously sought protection under the *2009 Storage Water Mitigation Plan* that now wishes to seek protection under the *2016 Settlement Mitigation Plan* has until Wednesday, May 29, 2024, at 5:00 p.m. (MT) to inform the Director of their intention to do so and to demonstrate they are in compliance with the *2016 Settlement Mitigation Plan*.

ORDER

Based on and consistent with the foregoing, IT IS HEREBY ORDERED that (1) *IGWA's Conditional Notice of Mitigation Compliance; Petition for Reconsideration; and Request for Expedited Decision* is DENIED and (2) *IGWA's Notice of Storage Water Leases* is deficient and fails to demonstrate that Bonneville-Jefferson, Jefferson-Clark, Magic Valley, North Snake, Henry's Fork, Madison, Bingham, and Carey Valley ground water districts are operating in accordance with an approved mitigation plan. Because these districts have not established, to the satisfaction of the Director, that they can mitigate in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water users in these districts. Any ground water district that previously sought protection under the *2009 Storage Water Mitigation Plan* that now wishes to seek protection under the *2016 Settlement Mitigation Plan* has until Wednesday, May 29, 2024, at 5:00 p.m. (MT) to inform the Director of their intention to do so and to demonstrate they are in compliance with *the 2016 Settlement Mitigation Plan*.

Dated this 28th day of May 2024.

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:

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Sarah Tschohl
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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.