

**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 GRANTING UPPER
VALLEY DISTRICTS LIMITED
INTERVENTION AND AFA’S
MOTION FOR
RECONSIDERATION**

BACKGROUND

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 that the predicted in-season demand shortfall (“IDS”) for 2024 amounts to a 74,100-acre-foot shortfall obligation for junior ground water users. *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.*

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

On May 10, 2024, the Director issued an *Order Determining Deficiency in Notices of Secured Water* (“*Order Determining Deficiency*”). In section 2 of the *Order Determining Deficiency*, the Director concluded:

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-feet must be provided.

Order Determining Deficiency, at 6. Further, the Director concluded that the potential volume of water secured by the ground water districts to comply with said 50,000-acre-foot storage volume obligation only amounts to 16,458 acre-feet, with AFA potentially supplying 8,100 acre-feet of that, leaving a shortage of approximately 33,542 acre-feet. *Id.* at 9–10. The Director determined that “[b]ecause 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*.” *Id.* at 10. He gave “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” under the *2016 Settlement Mitigation Plan*. *Id.* at 10.

On May 17, 2024, AFA filed a *Motion for Reconsideration of Order Determining Deficiency in Notices of Secured Water* (“*AFA’s Motion for Reconsideration*”) and a supporting *Declaration of Timothy P. Deeg in Support of AFA’s Motion for Reconsideration of Order Determining Deficiency in Notices of Secured Water* (“*Deeg Declaration*”). In *AFA’s Motion for Reconsideration*, AFA argues that 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. AFA argues 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. *Id.* at 3. AFA argues “[t]he 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*.” *Id.* at 5. AFA argues 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. AFA requests 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 17, 2024, the SWC filed the *Surface Water Coalition’s Response to American-Falls Aberdeen Ground Water District’s Motion for Reconsideration* (“*SWC’s Response*”).¹ The *SWC’s Response* agreed that “AFA is under no obligation to deliver any storage water to the

¹ On May 24, 2024, AFA filed *AFA’S Joinder in Support of SWC’s Response to IGWA’s Conditional Notice of Mitigation Compliance/Petition for Reconsideration*.

SWC at this time” and asserts that “it would be fundamentally unfair to order AFA, the only district to represent that it will comply with the 2016 Plan in 2024, to shoulder the burden of that entire [50,000 acre-foot] amount while the remaining Districts have refused to comply with that Plan” *SWC’s Response*, at 3. The SWC goes on to say:

[I]f the Director apportions the 50,000 acre-feet between the ground water districts and AFA delivers its proportionate share of the 50,000 acre-feet within 21 days from the date of allocation as approved by the Director, the Coalition would not assert a breach of the 2016 Plan against AFA or any other ground water district that is otherwise in compliance with the 2016 Plan and is not currently in breach.

Id. at 4.

On May 24, 2024, Henry’s Fork Ground Water District, Jefferson Clark Ground Water District and Madison Ground Water District (collectively, “Upper Valley Districts”) filed a *Petition to Intervene for Limited Purpose*, asking the Director to allow them to intervene in this matter (and the related CM-MP-2016-001) to respond to *AFA’s Motion for Reconsideration*.² *Pet. to Intervene for Limited Purpose*, at 2. At the same time, they filed *Upper Valley Ground Water Districts’ Response in Opposition to American-Falls Aberdeen Ground Water District’s Motion for Reconsideration* (“*Upper Valley’s Response*”). *Upper Valley’s Response* claims that “AFA’s motion is based upon a presumption that the past allocation among [ground water districts] is permanent when there is absolutely no agreement to support that position.” *Upper Valley’s Response*, at 3. The Upper Valley Districts argue “impacts and NOT diversions make the most sense when determining where and who should be mitigating for their pumping” and that ESPAM 2.2 modeling of impacts “clearly evidences [] that for all years to date, most of the impacts caused by AFA have been mitigated by other IGWA [ground water districts], especially Jefferson Clark Ground Water District.” *Id.* at 4. The Upper Valley Districts request that *AFA’s Motion for Reconsideration* be denied and “advocate[] that the Director should use the Transient-State modeling in order to allocate demand shortfall as among the [ground water districts].” *Id.* at 5.

On May 24, 2024, Bonneville-Jefferson Ground Water District (“BJGWD”) filed a *Joinder in Support of Upper Valley Ground Water Districts’ Response in Opposition to American-Falls Aberdeen Ground Water District’s Motion for Reconsideration*. On the same day, Bingham Ground Water District (“BGWD”) filed *BGWD’s Response to AFA’s Motion for Reconsideration of Order Determining Deficiency in Notices of Secured Water* (“*BGWD’s Response*”). In its response, BGWD asserts that “AFA seems to contend that it should be allowed to mitigate its proportionate share only, with the idea that all other ground water districts will ultimately be found in breach and assessed their proportionate share.” *BGWD’s Response*, at 2. BGWD “does not object to AFA mitigating under the 2016 plan or simply providing its

² On May 24, 2024, Magic Valley Ground Water District and North Snake Ground Water District (collectively, “MVNSGWD”) filed a *Response to American Falls-Aberdeen Ground Water District’s Motion for Reconsideration of Order Determining Deficiency in Notices of Secured Water*. Like the Upper Valley Districts, MVNSGWD are not named parties to this matter, however, unlike the Upper Valley Districts, MVNSGWD did not concurrently file a petition to intervene in the matter on any basis. Therefore, the Department will not consider MVNSGWD’s response to *AFA’s Motion for Reconsideration*.

proportionate share” but does object “to the idea that such actions would initiate obligations on other ground water districts related to the 50,000 acre-feet or any other obligations of the 2016 plan.” *Id.* BGWD argues that “SWC’s acceptance of mitigation from AFA, regardless of what their proportionate share is determined to be, must be for AFA’s proportionate impacts.” *Id.* at 3.

Also on May 24, 2024, AFA filed *AFA’s Reply to UVGWD’s Response in Opposition to AFA’s Motion for Reconsideration of Order Determining Deficiency in Notices of Secured Water* (“*AFA’s Reply*”) and *AFA’s Response and Opposition to UVGWD’s Petition to Intervene for Limited Purpose* (“*AFA’s Opposition to Intervention*”). In *AFA’s Reply*, AFA argues that the Upper Valley Districts’ petition to intervene and argument that transient-state modeling should be used to allocate demand shortfall should be denied and that “the 2016 Plan is untethered from the Methodology Order injury determinations, curtailment distribution, or, for that matter, IGWA’s internal decision-making about how to distribute the demand shortfall amongst its members.” *AFA’s Reply*, at 3. AFA points out that the *Upper Valley’s Response* does not even attack its primary argument in *AKA’s Motion for Reconsideration*—“that the Director should not require notice of secured water for any portion of the 50kaf that is the full annual delivery obligation of all the Districts that are parties to the *2016 Plan*.” *Id.* at 4. AFA reiterates the request that the Director “modify section 2 of the *Deficiency Order* to remove the erroneous requirement that AFA provide proof of secured storage water and conditions AFA’s safe harbor in 2024 on such showing.” *Id.* at 5. In *AFA’s Opposition to Intervention*, AFA argues that the Upper Valley Districts’ petition to intervene is untimely and they have no direct and substantial interest in *AFA’s Motion for Reconsideration* “[u]nless and until the [Upper Valley Districts] commit to complying with the terms of the *2016 Plan*, or the Director adopts Chief Justice Burdick’s summary judgment order and invalidates the *2009 Plan*” *AFA’s Opposition to Intervention*, at 2 (footnote omitted).

PETITION TO INTERVENE

The Upper Valley Districts’ May 24, 2024 *Petition to Intervene for Limited Purpose* requests limited intervention in this matter, pursuant to IDAPA 37.01.01.350, in order to respond to *AFA’s Motion for Reconsideration* “as well as any other areas of the above-entitled proceeding which deal with apportionment of ground water district’s mitigation obligations.” *Pet. to Intervene for Limited Purpose*, at 2. In their petition, the Upper Valley Districts state they “have a direct and substantial interest in the proceeding because their water rights may be affected by the outcome of this formal proceeding.”

The Department’s Rule of Procedure 350 states that: “A person who is not already a party to a contested case and who has a direct and substantial interest in the proceeding may petition for an order granting intervention as a party to the contested case.” IDAPA 37.01.01.350. When deciding petition to intervene, the Department’s Rule of Procedure 353 provides that:

If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a contested case and does not unduly broaden the issues, the agency shall grant intervention, subject to reasonable conditions, unless the applicant’s interest is adequately represented by existing parties.

IDAPA 37.01.01.353.

Given that the Upper Valley Districts are member districts of IGWA, who has historically represented their interests in this matter, and based on the *Petition to Intervene for Limited Purpose* and concurrently filed *Upper Valley's Response*, the Director concludes that the Upper Valley Districts have a direct and substantial interest in this matter as it concerns *AFA's Motion for Reconsideration*. The Director concludes that the Upper Valley Districts' intervention, so long as it is limited to proceedings resulting directly from *AFA's Motion for Reconsideration*, does not unduly broaden the issues and that their interests are not adequately represented by existing parties, evidenced by the lack of response to *AFA's Motion for Reconsideration* filed by IGWA.

MOTION FOR RECONSIDERATION

The Director has reviewed AFA's arguments and agrees with AFA. The timing of storage water procurement and deliveries under the *2009 Storage Water Mitigation Plan* is different from the timing under the *2016 Settlement Mitigation Plan*. 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. The requirements under the *2009 Storage Water Mitigation Plan* and the *April 2024 As-Applied Order* for documentation of securing water are spelled out in those orders. The *2016 Settlement Mitigation Plan* does not require similar documentation. Furthermore, AFA is correct that 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.* The Director agrees that those portions of the *Order Determining Deficiency* that condition AFA's safe harbor from curtailment on providing proof it has secure 50,000 acre-feet of storage water should be withdrawn and replaced. Issued at the same time as this order is the *Amended Order Determining Deficiency in Notices of Secure Water* with the changes shown in strikeout/underline.

While the *Deeg Declaration* submitted with AFA's motion does discuss AFA's historical proportional share (8,705 acre-feet) of the 50,000-acre-foot obligation, AFA does not ask the Director to affirm 8,705 acre-feet as the appropriate proportional share. In fact, AFA asks the opposite. AFA states the Director should not get involved unless there is a declaration of breach by the SWC and an impasse reached by the steering committee:

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.*

Motion for Reconsideration, at 4.

The Steering Committee is not currently involved in a dispute resolution process to resolve any alleged breach by AFA, and the Steering Committee has not asked the Director to take action against AFA.

Id. 6–7.

The responses filed by the Upper Valley Districts and BGWD oppose *AFA's Motion for Reconsideration* on various grounds related to AFA's historical proportionate share calculation. *BGWD's Response* also raises questions about whether the SWC's acceptance of 8,705 acre-feet of storage from AFA would result in the SWC "com[ing] after other groundwater districts for any shortfall." *BGWD's Response*, at 2.³ The Director agrees with AFA that the plain language of the 2016 *Settlement Mitigation Plan* calls for the parties to first address these issues and to bring them to the Director if there is a dispute that cannot be resolved through the steering committee. It would be premature for the Director to declare each entity's proportionate share of the 50,000-acre-foot obligation at this stage. Accordingly, the issues raised by the Upper Valley Districts and BGWD regarding AFA's proportional share are not ripe for action by the Director.⁴

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that:

- 1) Henry's Fork Ground Water District, Jefferson Clark Ground Water District, and Madison Ground Water District's *Petition to Intervene for Limited Purpose* is GRANTED IN PART. They are granted limited intervention in this matter solely so that they may participate as a party to any proceedings directly resulting from *AFA's Motion for Reconsideration*.
- 2) American Falls-Aberdeen Ground Water District's *Motion for Reconsideration of Order Determining Deficiency in Notices of Secured Water* is GRANTED. Along with this order, the Director is issuing the *Amended Order Determining Deficiency in Notices of Secure Water*.

DATED this 28th day of May 2024.



MATHEW WEAVER
Director

³ While the responses filed by the Upper Valley Districts and BGWD also include discussion about proportionate shares under the 2009 *Storage Water Mitigation Plan*, because the current motion before the Director only addresses the 2016 plan, the Director will not address proportionate shares under the 2009 plan or any other mitigation requirement.

⁴ The SWC also invites the Director to apportion the 50,000-acre-foot obligation. *SWC Response* at 4. For the reasons discussed above, the Director will not do so at this time.

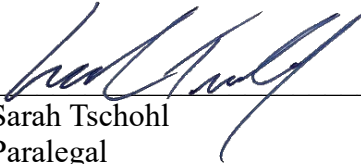
CERTIFICATE OF SERVICE

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
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.