

**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 Nos. CM-DC-2010-001
 CM-MP-2009-006

**FINAL ORDER DENYING IGWA'S
REQUEST FOR MITIGATION
CREDIT FOR AQUIFER
ENHANCEMENT ACTIVITIES
(2024)**

IN THE MATTER OF IGWA'S MITIGATION
PLAN FOR CONVERSIONS, DRY-UPS, AND
RECHARGE

BACKGROUND

On October 6, 2009, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed with the Director of the Department of Water Resources (“Department”) *IGWA’s Mitigation Plan for Conversions, Dry-Ups and Recharge* (“Plan”). The *Plan* was filed “on behalf of [IGWA’s] Ground Water District Members and other water user members for and on behalf of their respective members and those ground water users who are non-member participants in their mitigation activities” *Plan*, at 1, No. CM-MP-2009-006.

The *Plan* proposes that the Director authorize any or all of the following mitigation activities:

- 1) existing and future conversions of acres irrigated from groundwater to surface water irrigation; 2) dried up acres through the Conservation Reserve Enhancement Program (CREP); AWEP or other voluntary program[s] resulting in the dry-ups of groundwater irrigated acres; and 3) groundwater recharge.

Plan, at 1–2. Through the *Plan*, IGWA seeks to “obtain mitigation credit in response to findings of material injury in the existing and any future delivery calls placed by Clear Springs Foods, Inc. (Clear Springs), Blue Lakes Trout Farm, Inc. (Blue Lakes), [and] the Surface Water Coalition (SWC)” *Plan*, at 3.

On April 7, 2010, the Director issued a *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Methodology Order*”). The *Methodology Order* established 10 steps for determining material injury to members of the SWC. *Methodology Order*, 33–36, No. CM-DC-2010-001. In addition, the *Methodology Order* established an in-season demand shortfall (“IDS”) prediction method

using linear regression models which only considered the predicted natural flow at Heise to calculate the forecast natural flow supply for each SWC member. *Id.* at 20.

On April 29, 2010, the Director issued an *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4)* (“*April Forecast Supply Order*”). In the *April Forecast Supply Order*, the Director predicted an IDS and gave junior ground water users mitigating using storage water mitigation plans 14 days to establish that they have secured the required amount of storage water or face curtailment. *April Forecast Supply Order*, at 4, No. CM-DC-2010-001.

On May 6, 2010, IGWA filed a petition for reconsideration and request for hearing, which the Director granted on May 10, 2010. On May 14, 2010, the SWC filed a request for hearing.

On May 12, 2010, IGWA filed *IGWA’s Request for Mitigation Credit* to offset the mitigation obligations under the SWC Delivery Call. *IGWA’s Req. for Mitigation Credit*, at 4, No. CM-MP-2009-006.

On May 14, 2010, the Director issued an *Order Approving Mitigation Plan* and ordered that “[i]f mitigation credit is sought by IGWA, the Director shall determine the appropriate credit, if any, to provide.” *Order Approving Mitigation Plan*, at 4.

On May 17, 2010, the Director issued an *Order Approving Mitigation Credits Regarding SWC Delivery Call* where the Director concluded that IGWA’s mitigation activities that year would increase gains pursuant to the regression models used in the then-applicable *Methodology Order*. *Order Approving Mitigation Credits Regarding SWC Delivery Call*, at 4, No. CM-MP-2009-006.

On May 17, 2010, the Director also issued an interlocutory *Order Regarding IGWA Mitigation Obligation* (“*2010 Mitigation Obligation Order*”). In that order, the Director adjusted the predicted shortfall obligation from *April Forecast Supply Order* because of new information. *2010 Mitigation Obligation Order*, at 3, No. CM-DC-2010-001. Furthermore, the Director concluded he would stay the curtailment discussed in the *April Forecast Supply Order* pending the outcome of the hearings over IGWA’s mitigation plan. *Id.* at 7. Although that order was an interlocutory order staying curtailment until the proceeding was held, the Director described how IGWA could mitigate its predicted shortfall by subtracting any potential approved mitigation credits and recalculating the priority date for curtailing ground water rights. *Id.* at 5.

On May 28, 2010, the SWC requested a hearing on the *Order Approving Mitigation Credits Regarding SWC Delivery Call*. On June 29, 2010, the Director conducted a hearing on the matter.

On July 19, 2010, the Director issued a *Final Order Approving Mitigation Credits Regarding SWC Delivery Call* (“*2010 Order Approving Mitigation Credits*”). In the *2010 Order Approving Mitigation Credits*, the Director granted *IGWA’s Request for Mitigation Credit* for the 2010 irrigation season, in response to the SWC delivery call in May 2010. *2010 Order Approving Mitigation Credits*, at 6.

The methodology for the SWC delivery call has been revised several times since April 7, 2010, in response to judicial review and updated technical information. On April 17, 2015, the Director issued the *Third Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Third Amended Methodology Order*”), which updated the predictive models used to forecast natural flow supply for the Twin Falls Canal Company (“TFCC”) and other members of the SWC. *See Third Amended Methodology Order*, at 16–18, No. CM-DC-2010-001.

On April 30, 2015, IGWA filed *IGWA’s Request for Mitigation Credit to the SWC for Aquifer Enhancement Activities (2015)* (“*2015 Request for Mitigation Credits*”), requesting mitigation credit towards its mitigation obligations to the SWC for the 2015 irrigation season. *2015 Request for Mitigation Credits*, at 1.

Following IGWA’s submittal of its *2015 Request for Mitigation Credits*, IGWA and the SWC participated in several settlement meetings that resulted in their joint filing of the *Surface Water Coalition and IGWA Stipulation and Joint Motion Regarding April As Applied Order and Third Methodology Order* (“*2015 Joint Stipulation*”) on May 8, 2015. Among other things, the *2015 Joint Stipulation* requested that the “Director withdraw the April As-Applied Order and the Third Methodology Order . . . to allow the Parties an opportunity to reach a long-term agreement by July 1, 2015” *2015 Joint Stipulation*, at 3, No. CM-DC-2010-001, CM-MP-2009-007. In response, the Director withdrew the As-Applied and Third Methodology Order and, as a result, never considered or ruled on IGWA’s *2015 Request for Mitigation Credits*.

On May 11, 2016, the Director issued an *Order Determining Deficiency in A&B Irrigation District’s Notice of Mitigation* (“*A&B Deficiency Order*”) denying a similar request for mitigation credit by A&B Irrigation District under mitigation plan CM-MP-2015-003 based on the predictive models established in the *Third Amended Methodology Order*. *A&B Deficiency Order*, at 3.

On July 19, 2023, the Department issued its *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Sixth Amended Methodology Order*”). The *Sixth Amended Methodology Order* calculates “material injury to water rights by determining [reasonable in-season demand (“RISD”)] and reasonable carryover [to] be based on updated data, the best available science, analytical methods, and the Director’s professional judgment as manager of the state’s water resources.” *Sixth Amended Methodology Order*, at 2, No. CM-DC-2010-001. The *Sixth Amended Methodology Order* authorizes the Director to calculate the IDS and adjust the methodology used to accommodate for the varying climatic changes. *Id.*

On April 18, 2024, the Department issued its *Final Order Regarding April 2024 Forecast Supply (Methodology Steps 1-3)* (“*April 2024 As-Applied Order*”) concluding the SWC has a predicted April IDS of 74,100 acre-feet. *April 2024 As-Applied Order*, at 4, No. CM-DC-2010-001. Accordingly, the Director required the Districts¹ to secure their proportionate share for

¹ North Snake Ground Water District, Carey Valley Ground Water District, Magic Valley Ground Water District, American Falls-Aberdeen Area Ground Water District, Bingham Ground Water District, Bonneville-Jefferson
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delivery to the injured members of the SWC on or before May 2, 2024. *Id.* at 6. In that order, the Director warned the Districts that failure to comply with the May 2, 2024 deadline would result in an “order curtailing junior-priority ground water user[s].”² *Id.*

On May 2, 2024, the Department received IGWA’s *Request for Mitigation Credit for Aquifer Enhancement Activities (2024)* (“*Credit Request*”). IGWA filed its *Credit Request* to receive mitigation credit for the material injury predicted to occur to the SWC during the 2024 irrigation season. *Credit Request*, at 1; *see also April 2024 As-Applied Order*, at 6.

IGWA “requests a credit of 5,025 acre-feet towards the collective mitigation obligation of IGWA’s members under the Methodology Order, and a recalculation of the curtailment date applicable to IGWA’s members as a result of the credit.” *Credit Request*, at 2. The request is based on “surplus conservation by the Districts during” 2016–2023. *Id.* IGWA filed a *Declaration of Sophia Sigstedt* concurrently with, and in support of, the *Credit Request*. Ms. Sigstedt’s declaration “contains [her] best estimate and opinion of the amount of surplus reach gains for the Near Blackfoot to Minidoka reach of the Snake River which have resulted in 2024 due to past surplus ground water reduction and private recharge activities (“conservation activities”) performed by [the Districts].” *Sigstedt Decl.*, at 2.

ANALYSIS

I. The regression models used to predict in-season demand shortfall already account for the benefits of the enhancement activities performed by IGWA.

The Director issued the *April 2024 As-Applied Order* requiring “[j]unior ground water users holding consumptive water rights bearing priority dates junior to March 31, 1954, within the Eastern Snake Plain Aquifer area of ground water supply [to] mitigate for their proportionate share of the predicted April IDS in accordance with an approved mitigation plan” by May 2, 2024. *April 2024 As-Applied Order*, at 5. IGWA’s *Credit Request* states that the Districts have “implemented conversion projects, conducted managed aquifer recharge, and partially or fully dried up farmland to satisfy their mitigation obligations” from 2016-2023 under the *Sixth Amended Methodology Order*. *Credit Request*, at 2. Because of its claimed mitigation efforts, IGWA requested a credit for an additional 5,025 acre-feet due to its mitigation efforts to meet IGWA’s obligation under the *Sixth Amended Methodology Order* and to recalculate the curtailment date due to the mitigation credit. *Id.*

The predicted IDS is the shortfall predicted after the benefits of ongoing aquifer enhancement activities performed by the ground water Districts have already been realized. In other words, the predicted IDS already accounts for the benefits of ongoing aquifer enhancement activities performed by the Districts. Essentially, the predicted IDS would be higher if the aquifer enhancement activities had not occurred.

Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry’s Fork Ground Water District are collectively known as the “Districts.”

² The Department subsequently issued an order extending the deadline to May 17, 2024. *See Order Determining Deficiency in Notices of Secured Water*, at 11, No. CM-DC-2010-001 (May 10, 2024).

The current methodology uses updated predictive models to forecast natural flow supply for the SWC. Because the Eastern Snake Plain Aquifer provides reach gains to the Snake River that sustain natural flow during late summer, the prediction of natural flow supply for some of the SWC members was improved by incorporating parameters representing the status of the aquifer into the predictive models. See *Third Amended Methodology Order*, at 16–18. The parameters selected included flows at Box Canyon, flows at Spring Creek, and depth to water at Well 05S2E27ABA1. See *id.*; *Sixth Amended Methodology Order*, at 19–21.

The April Forecast Supply prediction for five of the SWC members, including TFCC, incorporates November-March flows at Box Canyon into a multi-linear regression to predict natural flow diversions during the upcoming irrigation season. *Third Amended Methodology Order*, at 16. The current *Sixth Amended Methodology Order* continues this practice. *April 2024 As-Applied Order*, at 3. The multi-linear regressions used to predict natural flow supply are updated yearly to include recent data.

The July Forecast Supply prediction for TFCC incorporates January–May flows at Spring Creek into a multi-linear regression to predict natural flow diversions during the remainder of the irrigation season. *Third Amended Methodology Order*, at 18. The July Forecast Supply prediction for three other members of the SWC incorporates depth to water at Well 05S2E27ABA1 into a multi-linear regression to predict natural flow diversions during the remainder of the irrigation season. *Id.* The current *Sixth Amended Methodology Order* continues this practice. *Sixth Amended Methodology Order*, at 21. The multi-linear regressions used to predict natural flow supply are updated yearly to include recent data.

Because the parameters representing the aquifer’s ability to sustain natural flow during late summer are included in the improved predictions of natural flow supply for several members of the SWC, the predicted IDS already accounts for the impacts of mitigation activities. Mitigation activities benefit the ground water users by reducing the predicted shortfall volume calculated by the current methodology. In the 2024 April Forecast Supply calculation, every 1,000 acre-feet of additional flow at Box Canyon increased the predicted natural flow supply for the SWC members by a total of 21,506 acre-feet, including an increase of 7,027 acre-feet per 1,000 acre-feet in the predicted natural flow supply for TFCC. See *April 2024 As-Applied Order*, Attach. A. The benefits of mitigation activities are accounted for in the predicted natural flow supply, which was subtracted from the baseline demand to calculate the IDS. Awarding the additional mitigation credit request by IGWA would double-count the benefits of mitigation.

The benefits of ongoing mitigation will also be accounted for in the July Forecast Supply prediction. Any benefits of mitigation to reach gains occurring between April and June will be accounted for in the natural flow diverted. Benefits of mitigation yet to accrue to reach gains will be accounted for in the predicted natural flow diversions for the remainder of the irrigation season. In the 2023 July Forecast Supply, every 1,000 acre-feet of additional flow at Spring Creek increased the predicted natural flow diversions for TFCC by 3,214 acre-feet. See *Order Revising April 2023 Forecast Supply and Amending Curtailment Order (Methodology Steps 5 & FINAL ORDER DENYING IGWA'S REQUEST FOR MITIGATION CREDIT FOR AQUIFER ENHANCEMENT ACTIVITIES (2024)*—Page 5

6), No. CM-DC-2010-001 (July 19, 2023) (Supp. 2023 July Background Information, <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2010-001/2023-July-Background.zip>). Every foot of increase in water level at Well 05S2E27ABA1 increased the predicted natural flow diversions for three other members of the SWC by a total of 45,065 acre-feet. *Id.* Regression coefficients for the July 2024 Forecast Supply will be updated to account for recent data but are expected to be similar.

IGWA's request is like the mitigation credit request that was denied in the *A&B Deficiency Order*. In the *A&B Deficiency Order*, the Director rejected A&B's request for mitigation credit because, like here, the calculations used to predict the IDS at that time used similar predictive models and already included consideration of the benefits of ongoing aquifer enhancement activities. *A&B Deficiency Order*, at 1–3. Therefore, the Director will not reduce the predicted demand shortfall, or any entity's proportionate share thereof, because the models used to predict in-season demand shortfall already account for the benefits of the enhancement activities performed by IGWA.

II. IGWA has not submitted sufficient documentation to support a mitigation credit.

Even if it were determined that IGWA's "surplus conservation" actions were not a double-counting of mitigation benefits, IGWA has submitted insufficient information to (1) determine if IGWA's "surplus conservation" actions qualify as mitigation activities authorized under the *Plan* and (2) quantify the benefits of the "surplus conservation" actions to the reach gains of the Near Blackfoot to Minidoka reach of the Snake River.

Mitigation credit approval for conversions requires information regarding each conversion site, such as the Water Management Information System ("WMIS") ground water diversion number(s), the number of acres converted to surface water irrigation, the volume of surface water delivered to the conversion site, and the volume of ground water diverted (if any). Mitigation credit approval for dried-up acres requires information delineating the locations of dried-up acres, such as digital shapefiles. Mitigation credit approval for managed recharge requires information such as documentation specifying the location, volumes, and timing of aquifer recharge.

Neither IGWA's *Credit Request* nor the *Declaration of Sophia Sigstedt* distinguish between mitigation actions authorized by the *Plan* and other mitigation actions that included a reduction in ground water pumping via improvements in irrigation efficiency, delivery efficiency, changes in crop mix, or other means besides conversions and dried-up acres. Instead, the analysis described in the *Declaration of Sophia Sigstedt* includes actions not authorized as mitigation by the *Plan*.

Therefore, because IGWA failed to provide adequate documentation to support its request for mitigation credit under the *Plan's* delineated mitigation activities, which are limited to conversions, dried-up acres, and managed recharge, the Director will deny IGWA's request for credit.

ORDER

IT IS HEREBY ORDERED that *IGWA's Request for Mitigation Credit for Aquifer Enhancement Activities (2024)* is DENIED.

Dated this 15th day of May 2024.



MATHEW WEAVER

Director

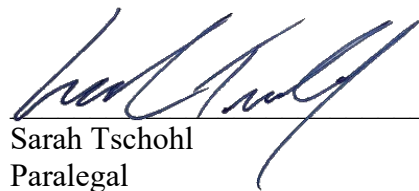
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th 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 jsimpson@martenlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
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<p>COURTESY COPY TO: William A. Parsons PARSONS, LOVELAND, SHIRLEY & LINDSTROM, LLP PO Box 910 Burley, ID 83318 wparsons@pmt.org wparsons@magicvalley.law</p>	<input checked="" type="checkbox"/> Email



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.