

**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-MP-2016-001  
CM-DC-2010-001

**ORDER DENYING SWC'S  
MOTION FOR SUMMARY  
JUDGMENT & CONDITIONALLY  
GRANTING BJDWD'S PETITION  
TO INTERVENE**

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

**BACKGROUND**

On September 8, 2022, the Director of the Idaho Department of Water Resources (“Director”) issued a *Final Order Regarding Compliance with Approved Mitigation Plan* (“Compliance Order”). The Compliance Order concluded that, in 2021, the Idaho Ground Water Appropriators, Inc. (“IGWA”) failed to comply with its approved Mitigation Plan in the Surface Water Collation (“SWC”) delivery call.<sup>1</sup> The Compliance Order also approved the SWC’s and IGWA’s September 7, 2022 *Settlement Agreement* to remedy IGWA’s breach.

On September 22, 2022, IGWA timely filed a *Petition for Reconsideration and Request for Hearing* (“Petition”). The Petition requested that the Director amend the Compliance Order to “withdraw those parts . . . that adjudicate IGWA’s contractual obligations under the Settlement Agreement . . .” or in the alternative, set the matter for a merits hearing. *Petition* at 7.

On October 13, 2022, the Director issued an order denying IGWA’s petition for reconsideration, granting IGWA’s request for a hearing, and setting a prehearing conference. The prehearing conference was held on November 10, 2022. On December 7, 2022, the Director issued an *Order Authorizing Discovery; Notice of Hearing*, scheduling a three-day hearing for February 8–10, 2023. Formal discovery is ongoing between the parties.<sup>2</sup>

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<sup>1</sup> For purposes of this order, the term “Mitigation Plan” refers to the four agreements comprising IGWA’s approved mitigation plan: (1) the SWC-IGWA Agreement, (2) the First Addendum, (3) the A&B-IGWA Agreement, and (4) the Second Addendum. *See Compliance Order* at 1–3 (discussing the Mitigation Plan background). In addition to the Mitigation Plan itself, the Director has issued: (1) the May 2, 2016 *Final Order Approving Stipulated Mitigation Plan* regarding the first three agreements above, and (2) the May 9, 2017 *Final Order Approving Amendment to Stipulated Mitigation Plan* regarding the Second Addendum.

<sup>2</sup> In addition to requesting a hearing with the Department, IGWA also filed a *Petition for Judicial Review* on October 24, 2022. *IGWA v. Idaho Dep’t of Water Res.*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho). The district court dismissed IGWA’s petition and remanded to IDWR on December 12, 2022.

On December 21, 2022, the SWC filed *Surface Water Coalition’s Motion for Summary Judgment and Surface Water Coalition’s Memorandum in Support of Motion for Summary Judgment* (“SWC Memorandum”).

On January 4, 2023, IGWA filed *IGWA’s Response in Opposition to SWC’s Motion for Summary Judgment* (“IGWA’s Response”). Also on January 4, 2023, the Bonneville-Jefferson Ground Water District (“BJGWD”) filed a *Petition to Intervene* (“BJGWD’s Petition”) and *BJGWD’s Response in Opposition to SWC’s Motion for Summary Judgment* (“BJGWD’s Response”).

On January 9, 2023, the SWC filed *Surface Water Coalition’s Opposition to Bonneville-Jefferson Ground Water District’s Motion to Intervene / Motion to Strike Response* (“SWC’s Opposition”).

On January 11, 2023, the SWC filed *Surface Water Coalition’s Reply in Support of Summary Judgment Motion* (“SWC’s Reply”).

On January 17, 2023, BJGWD filed *BJGWD’s Reply and Objection to SWC’s Opposition to Bonneville-Jefferson Ground Water District’s Motion to Intervene / Motion to Strike*.

On January 25, 2023, IGWA’s counsel of record filed a *Notice of Conditional Withdrawal of Representation of Bonneville-Jefferson Ground Water District*.

#### APPLICABLE LAW

The Department’s Rules of Procedure, IDAPA 37.01.01, govern the pending motions in this case. Rule of Procedure 220.03 authorizes motions for summary judgment and states that “Rule 56(a), (c), (d), (e), and (f) of the Idaho Rules of Procedure, apply to such motions before the agency.” IDAPA 37.01.01.230.03. Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). The moving party bears the burden of proving the absence of a material fact. *Sadid v. Idaho State University*, 151 Idaho 932, 938, 265 P.3d 1144, 1150 (2011); *see also* I.R.C.P. 56(c). Evidence and inferences must be liberally construed in favor of the non-moving party. *Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S.*, 159 Idaho 679, 685, 365 P.3d 1033, 1040 (2016).

Rules of Procedure 350 through 353 govern petitions to intervene. “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 a contested case” IDAPA 37.01.01.350. “Petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, or by the date of the initial prehearing conference, whichever is earlier . . . .” IDAPA 37.01.01.352. “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 37.01.01.353.01. The

agency may, however, grant an untimely petition “for good cause” or conditionally grant an untimely petition “to prevent undue broadening of the issues, or for other reasons.” IDAPA 37.01.01.353.02.

## ANALYSIS

### 1. SWC’s Motion for Summary Judgment.

In the Compliance Order, the Director concluded certain IGWA members breached the Mitigation Plan, that senior surface water right holders were materially injured by the breach, and that IGWA should implement the remedy agreed to in its September 7, 2022 *Settlement Agreement* with the SWC. *Compliance Order* at 13–16.

The SWC contends summary judgment is proper because no material facts are in dispute. *SWC Memorandum* at 5. The SWC further contends IGWA’s requested hearing is overly burdensome, pointless, and should be vacated. *SWC’s Reply* at 5–6. The SWC concedes, however, that it has not requested summary judgment on the ultimate issue of whether IGWA was in breach. *Id.* at 14. Meanwhile, IGWA asserts there are genuine issues of material fact and that an evidentiary hearing is necessary. *IGWA’s Response* at 3. IGWA further contends the Director erred in issuing the Compliance Order and should therefore withdraw it. *Id.* at 10.

The Director has reviewed the briefings and concludes that the motion for summary judgment should be denied. IGWA should be allowed to make its case to the Director. Moreover, the SWC erroneously frames the issue as solely a contract interpretation inquiry. *See SWC Memorandum* at 10. Whether the Director erred requires more than interpreting the Mitigation Plan. As the district court recently observed, “this is not a situation involving the Director interpreting an independent contract between the parties outside the scope of his authority.” Order Granting Mot. to Dismiss at 7–8, *IGWA v. Idaho Dep’t of Water Res.*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho Dec. 8, 2022). Rather, this matter involves compliance with “an ongoing mitigation plan under the umbrella of an active delivery call.” *Id.* at 7. The Director finds it appropriate to evaluate the Compliance Order based on a fully developed evidentiary record. Accordingly, the SWC’s motion for summary judgment should be denied.

### 2. BJGWD’s Petition to Intervene.

BJGWD requests intervention “to preserve and not waive certain legal arguments and defenses not raised in IGWA’s Response Brief.” *BJGWD’s Petition* at 1–2. More specifically, BJGWD seeks to raise a variety of breach of contract defenses, including unjust enrichment, legal impracticality, unclean hands, and lack of damages. *BJGWD’s Response* at 3–8. The SWC articulates a variety of reasons BJGWD’s request to intervene should be denied, most notably that BJGWD is already a party and its Petition is both untimely and meritless. *SWC’s Opposition* at 4–6.

IDAPA 37.01.01.002.12 defines a “party” as “[e]ach person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, including an applicant, petitioner, respondent, protestant or intervenor.” BJGWD is a member of IGWA, but not a named or admitted party.

Here, the Director agrees BJGWD has a substantial interest in the proceeding because it is a signatory to the Mitigation Plan. In light of the *Notice of Conditional Withdrawal of Representation of Bonneville-Jefferson Ground Water District* filed by IGWA’s counsel of record, the Director further concludes BJGWD’s interests are not adequately represented. However, IDAPA 37.01.01.352 states that “[p]etitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, or by the date of the initial prehearing conference, whichever is earlier . . . .” The prehearing conference was held on November 10, 2022. BJGWD filed its petition to intervene on January 4, 2023, rendering it untimely.

The untimeliness of BJGWD’s Petition is a pivotal factor because the 2023 irrigation season is fast approaching, and all parties have previously expressed a desire for an expeditious resolution. Therefore, pursuant to IDAPA 37.01.01.353.02, the Director will grant BJGWD’s Petition on the condition that it may not broaden the issues beyond those presented by the existing parties on or before January 4, 2023. Therefore, BJGWD may not, for example, argue the breach of contract defenses referenced in BJGWD’s Response, including unjust enrichment, legal impracticality, unclean hands, and lack of damages. Doing so would unduly broaden the issues at this stage of the proceeding. Additionally, as noted above, this is not a mere contract dispute between independent parties. The parties’ dispute over the Mitigation Plan touches on “final order[s] of the Director issued in accordance with the CM Rules. The final order[s] approve[] an ongoing mitigation plan under the umbrella of an active delivery call.” Order Granting Mot. to Dismiss at 7–8, *IGWA v. Idaho Dep’t of Water Res.*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho Dec. 8, 2022) (citation omitted).

## ORDER

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

(1) The *Motion for Summary Judgment* filed by the Surface Water Coalition is hereby DENIED.

(2) The *Petition to Intervene* filed by the Bonneville-Jefferson Ground Water District is hereby GRANTED, subject to the conditions and limitation addressed above. BJGWD is bound by all previous orders and notices previously entered in this matter pursuant to IDAPA 37.01.01.351.03.

DATED this 27<sup>th</sup> day of January 2023.

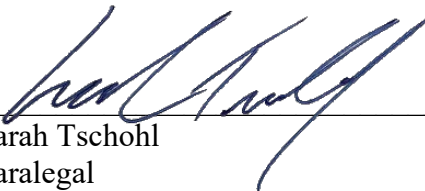
  
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GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

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