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Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

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

Docket No. CM-DC-2016-001

IGWA's Response to Surface Water Coalition's Petition for Reconsideration & Clarification and Request for Enforcement of Orders Approving 2016 Stipulated Plan

Idaho Ground Water Appropriators, Inc. ("IGWA"), acting on behalf of North Snake Ground Water District, Carey Valley Ground Water District, Magic Valley Ground Water District, Aberdeen-American Falls Area Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Henry's Fork Ground Water District, Bonneville-Jefferson Ground Water District, and Bingham Ground Water District, hereby responds to *Surface Water Coalition's Petition for Reconsideration & Clarification and Request for Enforcement of Orders Approving 2016 Stipulated Plan* ("SWC Petition") filed July 31, 2023, in IDWR Docket Nos. CM-DC-2010-001 and CM-MP-2016-001.

IGWA's Amended Notice of Mitigation filed June 1, 2023, states that IGWA will mitigate in 2023 in accordance with its "Storage Water Plan" approved in 2010 in IDWR Docket No. CM-MP-2009-007. Notwithstanding, the SWC asks the Director to rule that certain ground water districts are not in compliance in 2023 with IGWA's "Settlement Agreement Plan" approved in 2016 in IDWR Docket No. CM-MP-2016-001. The SWC argues that certain of IGWA's member ground water districts are "presumably not complying" with the Settlement Agreement Plan, and "there is no verification that IGWA is complying with its stipulated mitigation plan." (SWC

Petition, p. 4.) The premise of the SWC’s argument is that even if IGWA complies with the approved Storage Water Plan, it is contractually obligated to also comply with the Settlement Agreement Plan. The Director should deny the SWC Petition for three reasons.

First, the SWC Petition is a collateral attack on issues that were raised in, and properly belong in, the SWC’s challenge of the Director’s *Final Order Regarding April 2023 Forecast Supply* (“April As-Applied Order”) issued April 21, 2023. The April As-Applied Order states that junior priority groundwater users may mitigate “in accordance with an approved mitigation plan.” (Emphasis added.) It does not obligate IGWA to mitigate under the Settlement Agreement Plan; it allows mitigation under any approved plan. This is consistent with Conjunctive Management Rule 30.07.g which requires the Director to “take into consideration the existence of any approved mitigation plan before issuing any order prohibiting or limiting withdrawal of water from any well,” Conjunctive Management Rule 40.01.b which authorizes out-of-priority diversions “pursuant to a mitigation plan that has been approved by the Director,” Conjunctive Management Rule 41.02.c which requires the Director to “consider the expected benefits of an approved mitigation plan,” and Conjunctive Management Rule 42.02 which allows out-of-priority diversions if “the junior-priority right is covered by an approved and effectively operating mitigation plan.”

The SWC requested a hearing on the April As-Applied Order and filed a statement of issues including: “Whether the order provides that IGWA has an option to comply with the mitigation plan approved in CM-MP-2016-001 to avoid curtailment by complying with the mitigation plan approved in CM-MP-2009-007 instead.” (SWC Req. for Hrg. / Stmt. of Issues, May 5, 2023.) An evidentiary hearing was held June 6-9, 2023, post-hearing briefs were filed, and a decision was entered July 19, 2023. The SWC did not present any evidence at the hearing concerning the foregoing issue, and the Director did not change either the Methodology Order or the As-Applied Order to mandate that IGWA mitigate under the Settlement Agreement Plan. The SWC’s attempt to raise that issue for a second time here is a collateral attack on the Director’s *Post-Hearing Order Regarding Fifth Amended Methodology Order* issued July 19, 2023; therefore, it must be denied.

Second, even if the Director elects to address the SWC’s mitigation plan argument, the Director has no legal basis for precluding IGWA from complying with any approved mitigation plan. The Storage Water Plan is an approved mitigation plan that has not been withdrawn or terminated. Nor do the terms of the Settlement Agreement Plan preclude IGWA from mitigating under the Storage Water Plan. If the SWC contends that IGWA has a contractual obligation to comply with the Settlement Agreement Plan irrespective of its compliance with the Storage Water Plan, the SWC must bring an action in district court for breach of contract. As to the Director’s authority, it is limited to evaluating compliance with any approved mitigation plan.

Third, even if the Director were to rule that IGWA must comply with the Settlement Agreement Plan irrespective of its compliance with the Storage Water Plan, the SWC is not in a position to assert that IGWA is out of compliance. As noted in the SWC Petition, IGWA has delivered 50,000 acre-feet of storage to the SWC consistent with section 3.b.i of the IGWA-

SWC Settlement Agreement.¹ Any questions concerning IGWA's compliance with diversion reductions under section 3.a of the Agreement are not ripe for review until IGWA submits a performance report prior to April 1, 2024, in accordance with section 2.a.i of the Second Addendum to Settlement Agreement dated December 14, 2016.

For the foregoing reasons, IGWA respectfully requests that the Director deny the SWC Petition.

Dated this 3rd day of August, 2023.

RACINE OLSON, PLLP

By: 

Thomas J. Budge
Attorneys for IGWA

¹ Although IGWA elected to mitigate the April As-Applied Order demand shortfall under the Storage Water Plan, IGWA still delivered 50,000 acre-feet of storage water to the SWC, in a good faith effort to maintain the relationship. However, IGWA maintains that it may use the delivered 50,000 acre-feet of storage water to mitigate possible Methodology Order Step 7-8 demand shortfall, should injury be found later in the irrigation season. A letter from IGWA to the SWC, dated July 19, 2023, regarding the delivery of 50,000 acre-feet of storage water made this same reservation.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2023, I served the foregoing document on the persons below via email or as otherwise indicated:


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