

**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
CM-MP-2016-001

**ORDER GRANTING PETITION FOR
RECONSIDERATION/CLARIFICATION
IN PART AND DENYING REQUEST
FOR ENFORCEMENT**

BACKGROUND

On July 19, 2023, the Director of the Idaho Department of Water Resources (“Department”) issued his *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Sixth Methodology Order”) and *Order Revising April 2023 Forecast Supply and Amending Curtailment Order (Methodology Steps 5 & 6)* (“April 2023 As-Applied Order”). The Sixth Methodology Order comprises nine steps to determine material injury to members of the Surface Water Coalition (“SWC”). The April 2023 As-Applied Order applies Steps 5 and 6 to the 2023 irrigation season.

On July 20, 2023, the Director issued his *Notice that Questions Concerning the Sufficiency of IGWA’s Mitigation Notices are Moot* (“Notice”). The Notice concluded that questions concerning the sufficiency of IGWA’s mitigation notices are moot. Because of mootness, the Department did not respond to IGWA’s *Petition for Reconsideration of Order Determining Deficiency in IGWA’s Notice of Secured Water*, filed June 6, 2023, or IGWA’s *Amended Notice of Mitigation*, filed June 1, 2023.

The Department received the *Surface Water Coalition’s Petition for Reconsideration and Clarification; Request for Enforcement of Orders Approving 2016 Stipulated Plan* (“SWC’s Petition”) on July 31, 2023. The SWC’s Petition requests the Director reconsider and clarify a statement made in the April 2023 As-Applied Order— “there is no need to establish a Time of Need as described in Step 6”—and a statement made in the Notice— “[b]ecause there is no demand shortfall, ground water users are no longer required to mitigate.” *SWC’s Petition* at 3. Additionally, the SWC’s Petition requests the Director address IGWA’s 2022 breach through enforcement of the orders approving the March 9, 2016 *Stipulated Mitigation Plan and Request for Order* and its amendments. *Id.* at 3, 5.

On August 3, 2023, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed with the Department *IGWA’s Response to Surface Water Coalition’s Petition for Reconsideration and Clarification and Request for Enforcement of Orders Approving 2016 Stipulated Plan*.

ANALYSIS

A. April 2023 As-Applied Order

The April 2023 As-Applied Order states “[w]ith no additional water owed to SWC members, there is no need to establish a Time of Need as described in Step 6.” *April 2023 As-Applied Order* at 8.

The SWC asks the Director to “reconsider or clarify this statement to provide the parties with notice that this statement is not definitive for the rest of the 2023 irrigation season, and that additional adjustments may be made depending upon climatic conditions and available water supplies.” *SWC’s Petition* at 5.

The Director will clarify this statement. This statement is not definitive for the rest of the 2023 irrigation season. “The Time of Need is established by predicting the day in which the remaining storage allocation will be equal to reasonable carryover.” *Sixth Methodology Order* at 21. Because there was no shortfall calculated in the April 2023 As-Applied Order, it was not necessary to predict the Time of Need in that order. However, the Department is tracking the Time of Need and will issue an order prior to the Time of Need as described in Step 7 of the Methodology Order.¹

B. Notice

The Notice states “[b]ecause there is no demand shortfall, ground water users are no longer required to mitigate.” *Notice* at 3.

The SWC asks the Director to “reconsider or clarify the statement that ‘ground water users are no longer required to mitigate,’ particularly to the extent that statement may be interpreted to obviate any requirements” under an approved mitigation plan. *SWC’s Petition* at 4.

The Director will clarify this statement. The statement was not intended to suggest that ground water users seeking protection of an approved mitigation plan do not need to continue to comply with the obligations described in the mitigation plan.

C. Request for Enforcement

The SWC states “[g]iven the April impasse of the Steering Committee, and IDWR’s recent verification of IGWA’s failure to perform as required in 2022, the [SWC] requests the Director to enforce the orders approving the *Stipulated Plan* and its amendments.” *SWC’s Petition* at 5.

¹ Step 7 states “Shortly before the estimated Time of Need, but following the events described in Steps 5 and 6, the Director will, for each member of the SWC: (1) recalculate RISD; (2) issue a revised FS; and (3) establish the Time of Need.” *Sixth Methodology Order* at 44.

On August 3, 2023, after the SWC's request was filed, the Director issue his *Final Order Regarding IGWA's 2022 Mitigation Plan Compliance* related to IGWA's breach in 2022 of the mitigation plan approved in 2016 in Docket No. CM-MP-2016-001. Issues related to IGWA's compliance with the mitigation plan should be addressed in proceedings related to that order.

ORDER

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

The Director GRANTS IN PART the SWC's petition for reconsideration/clarification.

The Director DENIES the SWC's request for enforcement as the Director recently issued his *Final Order Regarding IGWA's 2022 Mitigation Plan Compliance*.

DATED this 11th day of August 2023.


GARY SPACKMAN
Director

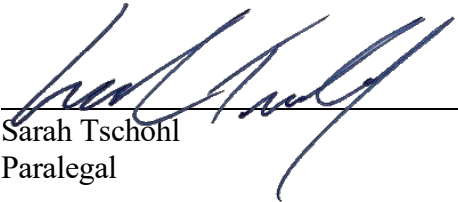
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of August 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

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<p>Thomas J. Budge Elisheva M. Patterson RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 tj@racineolson.com elisheva@racineolson.com</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
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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.