

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
MARTEN LAW LLP
163 Second Ave. West
P.O. Box 63
Twin Falls, Idaho 83303-0063
Telephone: (208) 733-0700
Email: jsimpson@martenlaw.com
tthompson@martenlaw.com

*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company, and Twin Falls
Canal Company*

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Email: wkf@pmt.org

*Attorneys for American Falls
Reservoir District #2 and Minidoka
Irrigation District*

**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

IN THE MATTER OF IGWA'S
SETTLEMENT AGREEMENT
MITIGATION PLAN

Docket No. CM-MP-2016-001

**SURFACE WATER COALITION'S
PETITION FOR RECONSIDERATION
& REQUEST FOR HEARING**

COME NOW, 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 ("Surface Water Coalition" or "Coalition"), by and through counsel of

record, and pursuant to I.C. § 67-5246(4), IDAPA 37.01.01.740.02.a and I.C. § 42-1701A(3), hereby submit this petition for reconsideration and request for hearing concerning the Director’s *Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance* (“2022 Compliance Order”).

FACTS

The Director found that four ground water districts did not comply with their respective mitigation obligations in 2022. *See* 2022 Compliance Order at 8 (American Falls-Aberdeen, Bingham, Bonneville-Jefferson, and Jefferson-Clark). Collectively, the four districts’ reduction actions fell 57,637 acre-feet short of what was required in their mitigation plan previously approved by the Director. Despite the non-compliance, members of those four districts received safe harbor from curtailment and pumped their junior priority ground water rights for the entire 2022 irrigation season. It is presumed that members in those four districts are pumping their full junior rights again during the 2023 irrigation season. Notably, none of these four districts have represented that they are complying with the 2016 Stipulated Mitigation Plan this year. *See e.g. Notice of Ground Water District Mitigation* at 2-3 (stating Bingham, Bonneville-Jefferson, and Jefferson-Clark would not provide mitigation through 2016 Stipulated Plan); *Amended Notice of Mitigation* at 3 (“IGWA will mitigate under the Storage Water Plan in 2023.”).

ARGUMENT

I. The Director’s 2021 Compliance Order Requires Curtailment of Members of the Four Non-Compliant Ground Water Districts.

The Director held the following with the respect to the Districts’ 2021 breach and failure to comply with the 2016 Stipulated Plan:

In this case, certain holders of junior-priority water rights failed to satisfy their mitigation obligation in 2021. Out-of-priority diversions by the IGWA members in Table 3 above were not “pursuant to a mitigation plan that has been approved by the Director.” IDAPA 37.03.11.040.01.b. The approved Mitigation Plan was not “effectively operating” with respect to those IGWA members in

2021. IDAPA 37.03.11.042.02. Consequently, the holders of senior water rights have been and are being materially injured by the failure of the juniors to fully mitigate during the 2021 irrigation season.

The CM Rules contemplate that out-of-priority diversions by junior-priority ground water users will be curtailed absent compliance with an approved mitigation plan. IDAPA 37.03.11.040.01. But curtailment may be avoided if an adequate, alternative source of mitigation water is designated as a contingency. *Rangen 1, 2015 Decision* at 9. Therefore, the Director must determine if there is an adequate contingency for IGWA members' 2021 noncompliance with the Mitigation Plan.

Final Order Regarding Compliance with Approved Mitigation Plan at 15-16 (Sept. 8, 2022) (emphasis added).

The 2016 Stipulated Plan is primarily an aquifer restoration plan that included various long-term actions including delivery of storage water (50,000 acre-feet) to help offset short-term injury and groundwater conservation actions (240,000 acre-feet) to help restore the agreed upon sentinel well levels. The plan identified a long-term ten-year goal that recognized actions needed to be taken year after year regardless of surface hydrologic conditions. None of the actions required by the 2016 Stipulated Plan and Order were dependent on an injury determination by the Director. When the juniors did not fully perform in 2021, the Director concluded that the Agreement was breached and senior water right holders “have been and are being materially injured” by that failure in 2022. *See id.* The same finding should apply to the four districts' non-compliance in 2022 and the fact that senior rights were injured in 2022. Junior ground water users received safe harbor in 2022, and now 2023, even though it is undisputed that four of the districts did not comply with their mitigation obligations.

The failure to fully perform caused injury to the senior water right holders who had to reduce diversions and received less than full mitigation for injuries found throughout the 2022 irrigation season. It appears that the Director believes that the only remedy for the districts' out-of-priority diversions is curtailment, even though the Settlement Agreement allows the Director

to fashion a remedy (see below). In this case, the Director did not even order curtailment, stating that the “2016 Mitigation Plan does not protect these four IGWA members from a curtailment order.” 2022 Compliance Order at 9. It is not clear if the four districts are subject to a curtailment order in 2023, or if that is a continuing consequence for 2024 and future years. Although the Director predicted injury in April 2023, no curtailment order was issued and no remedy was ordered.

If the requirement for curtailment of non-complying juniors is an active curtailment order resulting from a current injury finding, then juniors are free to risk non-compliance one year with the hope that a good water year will follow. That is not the agreement the Surface Water Coalition and the Ground Water Users made when they stipulated to the 2016 Mitigation Plan and does not comply with the intent of the Plan, which was to restore sentinel well levels and sustain and enhance the Eastern Snake Plain Aquifer. The Surface Water Coalition agreed to accept 50,000 acre-feet of storage water each year, regardless of the amount of injury, in exchange for the Ground Water Districts taking other actions to improve the aquifer and sentinel well levels. The Director should reconsider the 2022 Compliance Order and order non-complying juniors within the four districts to curtail pumping under their junior rights.

Reconsideration of the order is particularly warranted where the Ground Water Districts have notified IDWR they are not fully complying with the 2016 Stipulated Plan this irrigation season.¹ See *Amended Notice of Mitigation* at 3 (“IGWA will mitigate under the Storage Water Plan in 2023.”). To allow non-compliant juniors to continue to divert water when not complying with the aquifer restoration activities required by the 2016 Mitigation Order and its amendment

¹ IGWA has assigned 50,000 acre-feet to the SWC in 2023, which is partial compliance with the 2016 Stipulated Plan. See *Elisheva Patterson July 21, 2023 Letter to Tony Olenichak*.

flies in the face of the Director's prior orders and exacerbates the decline of the aquifer and hydraulically connected reach gains to the Snake River.

In this matter, the parties gave notice to the Director that the Surface Water Coalition alleged a breach in 2022 and that the parties were unable to agree that a breach occurred. Paragraph 2(c)(iv) of the *Second Addendum to Settlement Agreement* approved by the Director in the *Final Order Approving Amendment to Stipulated Mitigation Plan* dated May 9, 2017, states if the parties do not agree that a breach has occurred, it will be reported to the Director and if the Director determines that a breach occurred, the Director is to "issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment." That notice was provided to the Director in early April.

The Director has since determined that a breach occurred but has not issued an order specifying actions that must be taken by the breaching party to cure the breach. It is the position of the Surface Water Coalition that the Director should issue the order required by the Agreement and 2016 Stipulated Plan and specify the actions to be taken to cure the 2022 breach, i.e. additional reductions in ground water diversion to offset the amount of depletions that breached the Order in 2022 and the long term effects of that depletion or other remedy fashioned by the Director. If the breaching parties will not comply with the Director's order, they should be curtailed. To effectively ignore the impact of the 2022 breach on sentinel well levels and the water supply of the Surface Water Coalition allows juniors to continue to pump out-of-priority without mitigation in place to the injury of the senior water users for years to come.

The Surface Water Coalition requests that the Director address specific issues concerning enforcement of the 2016 Mitigation Order, as amended:

1 – Can Ground Water Districts comply with the provision of the 2010 Storage Mitigation Plan Order, fail to comply with the requirements of the 2016 Stipulated Plan and Mitigation Order, as amended, and still receive safe harbor?

2 – Will the Director issue an order setting forth a remedy to cure the 2022 breach as required by the Agreement and order curtailment if compliance does not take place?

Whether the 2016 Mitigation Order is viable and whether the Ground Water Districts will be required to take actions to improve aquifer conditions is dependent on the answers to these questions. Those Ground Water Districts that are not taking the required actions to improve sentinel well levels should be curtailed because they are not complying with the Director’s Mitigation Orders.

REQUEST FOR HEARING


The Coalition further requests a hearing on the 2022 Compliance Order pursuant to Idaho Code § 42-1701A(3).

CONCLUSION

The Coalition requests reconsideration of the 2022 Compliance Order as requested above.

DATED this 16th day of August, 2023.


MARTEN LAW LLP



Travis L. Thompson

*Attorneys for A&B Irrigation District,
Burley Irrigation District, Milner Irrigation
District, North Side Canal Company, and
Twin Falls Canal Company*

FLETCHER LAW OFFICE



W. Kent Fletcher for

*Attorneys for American Falls
Reservoir District #2 and Minidoka
Irrigation District*

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

<p>Director Gary Spackman Garrick Baxter Sarah Tschohl State of Idaho Dept. of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail</p> <p>gary.spackman@idwr.idaho.gov garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov file@idwr.idaho.gov</p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only</p> <p>mhoward@usbr.gov</p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only</p> <p>tony.olenichak@idwr.idaho.gov</p>
<p>T.J. Budge Elisheva Patterson Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only</p> <p>tj@racineolson.com elisheva@racineolson.com</p>	<p>Sarah A. Klahn Max C. Bricker Diane Thompson Somach Simmons & Dunn 2033 11th St., Ste. 5 Boulder, CO 80302 *** service by electronic mail only</p> <p>sklahn@somachlaw.com mbricker@somachlaw.com dthompson@somachlaw.com</p>	<p>David Gehlert ENRD – DOJ 999 18th St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only</p> <p>david.gehlert@usdoj.gov</p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only</p> <p>rdiehl@pocatello.us</p>	<p>William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only</p> <p>wparsons@pmt.org</p>	<p>Corey Skinner IDWR – Southern Region 650 Addison Ave W, Ste. 500 Twin Falls, ID 83301-5858 *** service by electronic mail only</p> <p>corey.skinner@idwr.idaho.gov</p>
<p>W. Kent Fletcher Fletcher Law Offices P.O. Box 248 Burley, ID 83318 *** service by electronic mail only</p> <p>wkf@pmt.org</p>	<p>Kathleen Carr U.S. Dept. Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway, Ste. 400 Boise, ID 83706 *** service by electronic mail only</p> <p>kathleenmarion.carr@sol.doi.gov</p>	<p>Candice McHugh Chris M. Bromley McHugh Bromley, PLLC 380 South 4th Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only</p> <p>cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>

<p>Robert E. Williams Williams, Meservy & Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only</p> <p>rewilliams@wmlattys.com</p>	<p>Robert L. Harris Holden, Kidwell, Hahn & Crapo, PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only</p> <p>rharris@holdenlegal.com</p>	<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only</p> <p>rfife@idahofallsidaho.gov</p>
<p>Skyler Johns Steven Taggart Nathan Olsen Olsen Taggart PLLC P.O. Box 3005 Idaho Falls, ID 83403 *** service by electronic mail only</p> <p>sjohns@olsentaggart.com staggart@olsentaggart.com nolsen@olsentaggart.com</p>	<p>Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, ID 83440 *** service by electronic mail only</p> <p>dylan@dylanandersonlaw.com</p>	

Jessica Nielsen
Assistant for Travis L. Thompson