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Canal Company*

**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-MP-2016-001

**SWC’S RESPONSE TO
IGWA’S STATEMENT OF
PROPOSED ISSUES**

IN THE MATTER OF IGWA’S SETTLEMENT
AGREEMENT MITIGATION PLAN

Pursuant to the *Notice of Second Continued Scheduling Conference; Order Setting
Deadlines* dated December 14, 2023, A & B Irrigation District, American Falls Reservoir
District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District,
North Side Canal Company, and Twin Falls Canal Company (collectively “SWC”) responds to
IGWA’S Statement of Proposed Issues dated December 19, 2023 as follows:

IGWA's Proposed Issue 1: Are there genuine issues of material fact that require an evidentiary hearing, or can the *Surface Water Coalition's Petition for Reconsideration* filed August 16, 2023, in IDWR Docket No. CM-MP-2016-001, be decided as a matter of law?

SWC Response to Issue 1: Pursuant to the procedure agreed to in the Second Addendum and approved by the Director in the 2017 Mitigation Order, the SWC asked the Director to issue an order specifying actions that must be taken by the breaching Groundwater Districts to cure the 2022 breaches. In the *Final Order Regarding IGWA's 2022 Mitigation Plan Compliance* dated August 2, 2023, the Director stated "the Second Addendum call [sic] for the Director to also 'issue an order specifying actions that must be taken by the breaching party to cure the breach...'" *Second Addendum* at 3. The parties have failed to provide the Director with sufficient information to make this determination at this time." *2022 Compliance Order*, p.9, fn. 6. However, the Director did not specify what constitutes "sufficient information" for the Director to make that determination.

It is the position of the SWC that IDWR already has sufficient information to identify the breach and order a remedy, but in light of the Director's finding, evidence needs to be presented to the Hearing Officer concerning the impact of the 2022 breaches on the sentinel well levels and the benchmarks and goal described in the 2017 Mitigation Order. This would require the presentation of factual evidence for consideration by the Hearing Officer so that the Hearing Officer can recommend a remedy that cures the long term effects of the breaches on the ESPA aquifer and sentinel well levels in order to bring the breaching Groundwater Districts into compliance with the 2017 Mitigation Order or be curtailed for being in breach of the 2017 Mitigation Order.

IGWA's Proposed Issue 2: Has the Director issued an order in IDWR Docket No. CM-MP-2009-007 that vacates or otherwise terminates the *Order Approving Mitigation Plan* issued June 3, 2010, in IDWR Docket No. CM-MP-2009-007, which approved *IGWA's Mitigation Plan for the Surface Water Coalition Delivery Call* filed November 9, 2009 ("Storage Water Mitigation Plan").

SWC's Response to Issue 2: Whether the Director issued an order that vacates or terminates the 2010 *Order Approving Mitigation Plan* does not address the issues before the Hearing Officer. The question is better addressed by Issues 1 and 2 posed by the SWC – if there is more than one mitigation plan in place, can a junior user pick and choose which plan to perform in order to receive safe harbor? The real issue is whether IGWA has the right to ignore the negotiated and stipulated mitigation plan agreement that was approved and adopted by the Director in the 2017 Mitigation Order. IGWA agreed to a non-injury based mitigation plan that required IGWA to perform annual actions and achieve aquifer benchmarks and goals. In consideration of this, the SWC agreed that IGWA would not have to mitigate for annual in-season injury and pursuant to the agreement the Groundwater Districts received safe harbor even during those years that the SWC was being injured.

IGWA's Proposed Issue 3: If the Director has not vacated or otherwise terminated his order approving the Storage Water Mitigation Plan in IDWR Docket No. CM-MP-2009-007, can IGWA provide mitigation to the SWC in accordance with the Storage Water Mitigation Plan?

SWC's Response to Issue 3: See SWC Response to IGWA's Proposed Issue 2 and SWC's Issues 1 and 2. Alternatively, did IGWA by its actions and stipulation to the 2017 Mitigation Order vacate or otherwise terminate said Storage Water Plan?

IGWA's Proposed Issue 4: Does the plain language of *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* filed March 9, 2016, the *Final Order Approving Stipulated Mitigation Plan* issued May 2, 2016, *Surface Water Coalition's and IGWA's Stipulated Amended Mitigation Plan and Request for Order* filed February 7, 2017, or the *Final Order Approving Amendment to Stipulated Mitigation Plan* issued May 9, 2017, in IDWR Docket No. CM-MP-2016-001, terminate IGWA's ability to provide mitigation to the SWC in accordance with the Storage Water Mitigation Plan?

SWC's Response to Issue 4: It is the position of the SWC that this proposed issue improperly frames the issue before the Hearing Officer. The issue should be if IGWA elects to provide mitigation pursuant to a plan other than the 2017 Mitigation Order, can IGWA fail to perform the annual actions, benchmarks, and goal established in the 2017 Mitigation Order and receive safe harbor? See SWC Issues 1 and 2. By this proposed issue, IGWA is implying that its position is that performance under the Storage Water Mitigation Plan, or any other mitigation plan for that matter, negates IGWA's duty to provide mitigation pursuant to the 2017 Mitigation Order, thus giving IGWA the right to unilaterally ignore the stipulated provisions of the 2017 Mitigation Order.

IGWA's Proposed Issue 5: Given the plain language of conditions "a" and "b" on page five of the *Final Order Approving Amendment to Stipulated Mitigation Plan* issued May 9, 2017, in IDWR Docket No. CM-MP-2016-001, did the Director abuse his discretion when he declined to impose a remedy for alleged non-compliance with the subject mitigation plan ("Settlement Agreement Mitigation Plan") in 2022?

SWC's Response to Issue 5: It is the position of the SWC that IGWA misstates the findings of the Director. The Director did not decline to impose a remedy for alleged non-compliance with the 2017 Mitigation Order.

In the April 2023 *As Applied Order* the Director made a statement “because there is no demand shortfall, groundwater users are no longer required to mitigate.” The SWC filed the *Surface Water Coalition's Petition for Reconsideration and Clarification; Request for Enforcement of Orders Approving 2016 Stipulated Plan* and requested clarification of that statement. In response, the Director issued an *Order Granting Petition for Reconsideration/Clarification in Part and Denying Request for Enforcement* dated August 11, 2023 (“Reconsideration Order”). In that order, the Director clarified the statement and stated “The statement was not intended to suggest that groundwater users seeking protection of an approved mitigation plan do not need to continue to comply with the obligations described in the mitigation plan.” The Director then addressed enforcement by stating “The Director denies the SWC’s request for enforcement as the Director recently issued his *Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance*.” See Reconsideration Order, p. 3.

When one reviews the *Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance*, in response to the request by the SWC to issue an order specifying actions that must be taken by the breaching parties to cure the breaches, the Director stated “The parties have failed to provide the Director with sufficient information to make this determination at this time.” *2022 Compliance Order*, p.9, fn. 6. (Emphasis added). As stated in response to IGWA’s Proposed Issue 1, the Director did not state what constitutes sufficient information for the Director to make that determination, but the Director’s statement indicates that the Director needs information in order to make that determination.

The SWC submits that since the Director found a breach of the 2017 Mitigation Order the real issues before the Hearing Officer are should the Director order a remedy as described in the Stipulated Mitigation Plan attached to the 2017 Mitigation Order and should that remedy address the continuing and long term effects of the breaches on the ESPA aquifer and sentinel well levels in order to comply with the intent of the 2017 Mitigation Order?

IGWA's Proposed Issue 6: Did the Director act in accordance with the Conjunctive Management Rules in determining in the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* on April 21, 2023, that "IGWA has two approved mitigation plans. If IGWA is in compliance with mitigation plan CM-MP-2016-001, IGWA does not need to establish that it can mitigate for its proportionate share of the predicted DS [Demand Shortfall]. If IGWA seeks to provide mitigation by delivery of storage water as approved in mitigation plan CM-MP-2009-007, IGWA's proportionate share of the predicted DS of 75,198 acre-feet is 63,645 acre-feet?"

SWC's Response to Issue 6: It is the position of the SWC that IGWA's Proposed Issue 6 misstates the issue before the Hearing Officer. The issue before the Hearing Officer is whether, if IGWA mitigates or attempts to mitigate pursuant to a plan other than the 2017 Mitigation Order, can IGWA fail to perform the long term actions, benchmarks, and goals of the 2017 Mitigation Order and receive safe harbor?

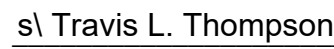
DATED this 22nd day of December, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2023, the above and foregoing was served by email as indicated below:

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