

**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

**ORDER DENYING CITIES'
PETITION TO INTERVENE**

IN THE MATTER OF IGWA'S SETTLEMENT
AGREEMENT MITIGATION PLAN

BACKGROUND

On August 2, 2023, the Director of the Idaho Department of Water Resources issued his *Final Order Regarding IGWA's 2022 Mitigation Plan Compliance* ("2022 Compliance Order"). In the order, the Director concluded that in 2022, certain ground water districts breached their obligations under IGWA's 2016 Mitigation Plan. *2022 Compliance Order* at 9.

On August 16, 2023, 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 (collectively "Surface Water Coalition" or "SWC") filed *Surface Water Coalition's Petition for Reconsideration and Request for Hearing* ("*SWC's Petition*") with the Department. The *SWC's Petition* requested a hearing on the *2022 Compliance Order* pursuant to Idaho Code § 42-1701A(3). *SWC's Petition* at 6.

On September 6, 2023, the Director issued an *Order Granting Request for Hearing; Notice of Scheduling Conference*. On November 7, 2023, an initial scheduling conference was held by the Director and continued to December 12, 2023.

On December 12, 2023, the Director issued an order appointing Roger S. Burdick as the hearing officer in this matter. On December 14, 2023, the hearing officer issued a *Notice of Second Continued Scheduling Conference; Order Setting Deadlines* ("*Notice/Order*"). The order set deadlines for the parties "to file with the Department a written statement of proposed issues for hearing" and "to file a response to the statements of proposed issues." *Notice/Order* at 3.

A second continued scheduling conference was held on December 28, 2023. At the scheduling conference, the hearing officer provided notice that any additional petitions to intervene needed to be filed by 5 p.m. on December 28, 2023, to be considered timely. On December 28, 2023, the Coalition of Cities and the City of Pocatello (collectively "Cities") filed *Coalition of Cities' and City of Pocatello's Petition to Intervene* ("*Petition*").

On December 29, 2023, the hearing officer issued an *Order Authorizing Discovery; Scheduling Order; Order Suspending IDAPA 37.01.01.354; Notice of Prehearing Conference and Hearing* (“*Prehearing Order*”). The order stated that “any party opposing the [*Petition*] must file an objection by January 2, 2024. Responses to the objection must be filed by January 4, 2024.” *Prehearing Order* at 3. On January 2, 2024, the Surface Water Coalition filed *Surface Water Coalition’s Objection to Cities’ Petition to Intervene* (“*Objection*”). On January 3, 2024, the Cities filed *Coalition of Cities’ and City of Pocatello’s Response to SWC’s Objection to Cities’ Petition to Intervene* (“*Response*”).

ANALYSIS

The Rules of Procedure of the Idaho Department of Water Resources govern contested case proceedings before the Department. IDAPA 37.01.01.001. Rule of Procedure 353.01 sets forth the standard for evaluating timely petitions to intervene in a contested case. It states:

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.

In their *Petition*, the Cities argue they have a “direct and substantial interest” in this contested case proceeding because their “interests may be affected by the outcome of this formal proceeding.” *Petition* at 1–2. The Cities explain that they have a separate settlement agreement with the SWC and that their settlement agreement “relates, in part, to the [IGWA 2016 Mitigation Plan].” *Id.* at 2. The Cities argue that they have a substantial and direct interest in this proceeding “because the Cities’ recharge obligations may increase if IGWA is unable to meet its duties under the [IGWA 2016 Mitigation Plan].” *Id.* The Cities also argue that their “participation will not unduly broaden the issues because [the Cities] agree to limit its issues to those already identified by the Hearing Officer.” *Id.* at 4.

The SWC opposes the Cities’ *Petition*. The SWC argues the Cities do not have a substantial and direct interest in this case because this case “solely addresses certain ground water districts’ action pursuant to their mitigation plan.” *Objection* at 2. The SWC argues that the Cities do not have a direct and substantial interest because the Cities only argue that their interests “‘may be affected by the outcome of this formal proceeding’ and that the identified issues ‘may impact the [IGWA 2016 Mitigation Plan] or future negotiations with the SWC on such an agreement and obligations moving forward.’” *Id.* at 4 (emphasis in original). The SWC argues that the issues identified by the hearing officer “are plainly limited to an evaluation of certain ground water districts’ 2022 breach of their 2016 Mitigation Plan and subsequent actions of the Director concerning that mitigation plan.” *Id.* at 5. The SWC argues that the Cities’ separate mitigation plan “is not relevant to this case.” *Id.*

In the *Response*, the Cities reiterate that the Cities’ mitigation obligation “may change depending on [IGWA’s] compliance with the [IGWA 2016 Mitigation Plan]” and that the Cities “may be impacted by the outcome of this contested case,” *Response* at 2.

The hearing officer concludes that the Cities' *Petition* is timely filed. However, the hearing officer concludes that the Cities do not demonstrate a direct and substantial interest in this matter. This contested case proceeding addresses issues regarding IGWA's 2022 noncompliance with the IGWA 2016 Mitigation Plan. It has no direct link to the Cities' separate mitigation plan with the SWC. While the Cities may be required to increase their obligation under the mitigation plan, they have failed to show that such a result is a direct outcome of this proceeding. The Cities' own qualified statement that their interest "may be affected by the outcome of this formal proceeding" is recognition that its interest is not direct. This contested case proceeding will address four questions:

- 1) Did the Director error by not issuing an order specifying the actions needed to cure the 2022 breach of the 2016 Mitigation Plan¹ by certain ground water districts?
- 2) Did the Director error by not immediately issuing an order curtailing ground water districts that breached the 2016 Mitigation Plan in 2022?
- 3) Can the 2009 mitigation plan be used to cure the ground water districts' 2022 breach of the 2016 Mitigation Plan?
- 4) What action must be taken by the ground water districts to cure their 2022 breach of the 2016 Mitigation Plan?

These questions relate to actions by the Director in relation to the IGWA 2016 Mitigation Plan and ways for certain ground water districts to cure the 2022 breach of the 2016 Mitigation Plan. This contested case proceeding has no direct or substantial tie to the Cities' separate mitigation plan with the SWC. Further, there are already multiple parties involved in this case, on both sides of the issue. Any indirect interest the Cities may have in this proceeding will be adequately represented by existing parties. Because the Cities have failed to show a direct and substantial interest in any part of the subject matter of this contested case and because any indirect interest the Cities may have in this proceeding will be adequately represented by existing parties, the hearing officer denies the *Petition*.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the petition to intervene filed by the Coalition of Cities and the City of Pocatello is DENIED.

DATED this 4th day of January 2024.



ROGER S. BURDICK
Hearing Officer

¹ The "2016 Mitigation Plan" as defined within the *2022 Compliance Order*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

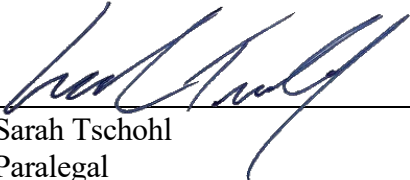
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