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Feb 12, 2024

DEPARTMENT OF
WATER RESOURCES

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

IN THE MATTER OF IGWA'S
SETTLEMENT AGREEMENT
MITIGATION PLAN

Docket No. CM-MP-2016-001

**MEMORANDUM IN SUPPORT OF
IGWA'S MOTION FOR SUMMARY
JUDGMENT**

Idaho Ground Water Appropriators, Inc. ("IGWA"), by and through its counsel of record, hereby moves for summary judgment in the above-captioned matter pursuant to Rule 220.03 of the Rules of Procedure of the Idaho Department of Water Resources ("IDWR" or "Department").

Summary Judgment Standard

The Department's Rules of Procedure, IDAPA 37.01.01, govern motions filed in this case. Rule 220.03 authorizes motions for summary judgment, and states: "Rule 56(a), (c), (d), (e), and (f) of the Idaho Rules of Procedure, apply to such motions before the agency." Under the Idaho Rules of Civil Procedure, summary judgment is proper "if the movant shows that there is no

genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). The moving party bears the burden of proving the absence of a material fact. *Sadid v. Idaho State University*, 151 Idaho 932, 938, 265 P.3d 1144, 1150 (2011); I.R.C.P. 56(c). Evidence and inferences must be liberally construed in favor of the nonmoving party. *Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S.*, 159 Idaho 679, 685, 365 P.3d 1033, 1040 (2016). If the moving party establishes its prima facie case either by an affirmative showing of the moving party’s evidence or by a review of the nonmoving party’s evidence, the burden shifts to the nonmoving party to establish that a genuine issue for trial does exist. *Orthman v. Idaho Power Co.*, 130 Idaho 597, 600, 944 P.2d 1360, 1363 (1997); *Navarrette v. City of Caldwell*, 130 Idaho 849, 851, 949 P.2d 597, 599 (1997). While all reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party, “it is axiomatic that upon a motion for summary judgment the nonmoving party may not rely upon its pleadings, but must come forward with evidence by way of affidavit or otherwise which contradicts the evidence submitted by the moving party, and which establishes the existence of a material issue of disputed fact.” *Zehn v. Associated Logging Contractors, Inc.*, 116 Idaho 349, 350, 775 P.2d 1191, 1192 (1988).

Undisputed Facts

Summary judgment is warranted based on the undisputed facts set forth below. Most of the undisputed facts are set forth in pleadings and orders on file with the Department in this matter and related matters. Rather than file a voluminous declaration of counsel attaching documents from the agency record in such matters, IGWA has filed a *Motion to Take Official Notice* of such records. Such records are cited below by IDWR docket number and filing date.

1. This matter involves IGWA’s compliance with a mitigation plan approved by the Department in connection with the Surface Water Coalition (“SWC”) deliver call, IDWR Docket No. CM-DC-2010-001.

2. IGWA has three approved mitigation plans for the SWC. Its first plan authorizes groundwater users to provide mitigation by converting farmland from groundwater to surface water irrigation (“conversions”), drying up irrigated farmland, and conducting managed aquifer recharge. This plan (“Aquifer Enhancement Plan”) was approved by the Director on March 14, 2010, in IDWR Docket No. CM-MP-2009-006. The Department has not issued an order terminating the Aquifer Enhancement Plan.

3. IGWA's second plan authorizes groundwater users to provide mitigation by delivering storage water to the SWC in lieu of curtailment. This plan ("Storage Water Plan") was approved by the Director on June 3, 2010, in Docket No. CM-MP-2009-007. The Department has not issued an order terminating the Storage Water Plan.

4. IGWA's third plan authorizes groundwater users to provide mitigation by complying with a settlement agreement with the SWC. The settlement agreement consists of (i) the *Settlement Agreement Dated June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of Idaho Ground Water Appropriators, Inc.*, ("2015 Agreement") attached to the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* filed March 9, 2016; (ii) the *Addendum to Settlement Agreement* dated October 19, 2015, attached to the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* filed March 9, 2016; and (iii) the *Second Addendum to Settlement Agreement* dated December 14, 2016, attached to the *Surface Water Coalition's and IGWA's Stipulated Amended Mitigation Plan and Request for Order* filed February 7, 2017. These documents are referred to collectively herein as the "Settlement Agreement." The Settlement Agreement was approved as a mitigation plan ("2016 Mitigation Plan") in this Docket No. CM-MP-2016-001 by the *Final Order Approving Stipulated Mitigation Plan* issued May 2, 2016, and the *Final Order Approving Amendment to Stipulated Mitigation Plan* issued May 9, 2017.

5. The plain language of the Settlement Agreement does not contain any express provisions that terminate prior mitigation plans or preclude ground water districts from providing mitigation under prior mitigation plans.

6. Under the SWC delivery call, junior-priority groundwater rights are regulated under the *Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* issued in IDWR Docket No. CM-DC-2010-001, known colloquially as the "Methodology Order." The Department has issued several iterations of the Methodology Order over the years. During the 2022 irrigation season, the Department administered the SWC delivery call under the Fourth Methodology Order.

7. The Methodology Order prescribes the process by which the Department determines whether, and to what extent, junior-priority groundwater rights will be subject to curtailment under the SWC deliver call. Under that process, the Department predicts the water demand and the water supply of the SWC each irrigation season. If the predicted supply is less than the

predicted demand, a predicted “Demand Shortfall” results. If a Demand Shortfall is predicted, the Department runs the Eastern Snake Plain Aquifer (“ESPA”) groundwater model to determine how many groundwater irrigated acres must be curtailed to increase spring flows from the ESPA to the Snake River upstream of the SWC diversions from the Snake River. The Department then determines the water right priority date (“curtailment date”) for which curtailment will dry up the requisite number of groundwater irrigated acres. Only groundwater rights that are junior to the curtailment date are “out-of-priority” and exposed to curtailment. Groundwater rights that are senior to the curtailment date remain “in priority” and are allowed to continue pumping.

8. From 2016-2022, ground water districts provided mitigation to the SWC under the 2016 Mitigation Plan.

9. In 2023, ground water districts provided mitigation to the SWC under the Storage Water Plan. (*IGWA’s Amended Notice of Mitigation*, IDWR Docket No. CM-DC-2010-001, June 1, 2023.)

10. The Department’s application of Steps 1-3 of the Methodology Order in April 2023 generated a Demand Shortfall prediction of 75,200 acre-feet and a resulting curtailment date of December 30, 1953. (*Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)*, IDWR Docket No. CM-DC-2010-001, Apr. 21, 2023, p. 6.) IGWA secured storage water under the Storage Water Plan to satisfy the mitigation obligations of its ground water district members. (*IGWA’s Amended Notice of Mitigation*, IDWR Docket No. CM-DC-2010-001, June 1, 2023.) Because IGWA was prepared to deliver as much storage water to the SWC as it would receive from curtailment, the Director did not curtail IGWA members.

11. When the Department updated its Demand Shortfall calculation in July 2023, the Department determined that the SWC would not experience a Demand Shortfall, thereby removing the December 30, 1953, curtailment date. (*Order Revising April 2023 Forecast Supply and Amending Curtailment Order*, IDWR Docket No. CM-DC-2010-001, July 19, 2023.) Because the SWC was not short of water, the Director did not order curtailment.

Argument

The *Notice of Hearing* issued in this matter on December 29, 2023, and the *Amended Notice of Hearing* issued January 23, 2024, identify four issues for hearing:

- 1) Did the Director err by not issuing an order specifying the actions needed to cure the 2022 breach of the 2016 Mitigation Plan by certain ground water districts?

- 2) Did the Director err 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?

Each of these issues can and should be resolved on summary judgment, as a matter of law, based on undisputed facts, as follows:

- A) As to Issue 1, the Director did not err because the Director's authority to enforce a breach of a mitigation plan is limited to curtailment of out-of-priority water use in accordance with the prior appropriation doctrine, in the absence of a stipulated remedy.
- B) As to Issue 2, the Director properly declined to curtail ground districts who complied with IGWA's Storage Water Plan in 2023.
- C) As to Issue 3, IGWA does not contend that its compliance with the Storage Water Plan cured any breach of the 2016 Mitigation Plan that may have occurred in 2022.
- D) As to Issue 4, the Director does not have authority to prescribe actions that must be taken to cure any breach of the 2015 Mitigation Plan that may have occurred in 2022, due to the lack of a stipulated remedy.

1. As a matter of law, the Director's authority to enforce a breach of the 2016 Mitigation Plan is limited to curtailment of out-of-priority water use in accordance with the prior appropriation doctrine.

The Director does not have authority to impose damages for a breach of contract. As a matter of law, Idaho state agencies have no inherent authority, they only have those powers granted by the legislature. *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981); *Idaho Retired Firefighters Assoc. v. Pub. Emp. Ret. Bd.*, 165 Idaho 193, 196, 443 P.3d 207, 210 (2019). They are "tribunals of limited jurisdiction." *In re Idaho Workers Comp. Bd.*, 167 Idaho 13, 20, 467 P.3d 377, 384 (2020) (citing *Washington Water Power Co. v. Kootenai Env'tl. Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979)). When implementing express statutory powers, "administrative agencies have the implied or incidental powers that are reasonably necessary in order to carry out the powers expressly granted." *Vickers v. Lowe*, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011) (citing 2 Am.Jur.2d *Administrative Law* § 57 (2004)). If an agency acts outside of its express and implied powers, such actions are void.

Wernecke v. St. Maries Joint Sch. Dist. No. 401, 147 Idaho 277, 286 n.10, 207 P.3d 1008, 1017 n. 10 (2009) (citing 73 C.J.S. *Public Administrative Law & Procedure* § 112).

Adjudication of contract disputes is not among the powers granted to the Department. Such power is vested in the judiciary. While the Department may approve settlement agreements and interpret settlement agreements for the purpose of distributing water, the Department does not have legal authority to conclusively adjudicate disputes over contract interpretation. Nor does the Department have authority to impose damages for breaches of contract. That authority remains with the judiciary.

For example, if a settlement agreement provides that water user A will not divert water during the month of July, the Department can enforce that provision so long as the settlement agreement is operating effectively. If the settlement agreement fails, the Department's sole remedy is to curtail out-of-priority water use in accordance with the prior appropriation doctrine as defined by law.

Likewise, if a settlement agreement between water users contains a liquidated damages clause, the Department cannot order a breaching party pay money to the non-breaching party, nor can the Department issue a writ of garnishment or any other order for the collection of damages. The Department's authority to enforce a breach of contract is limited to curtailment of out-of-priority water diversions in accordance with the prior appropriation doctrine as defined by law.

The Conjunctive Management Rules incorporate this concept. Rule 40.04 states:

Where a mitigation plan has been approved as provided in Rule 42, the watermaster may permit the diversion and use of ground water to continue out of priority order within the water district provided the holder of the junior-priority ground water right operates in accordance with such approved mitigation plan.

IDAPA 37.03.11.040.04 (emphasis added). Similarly, Conjunctive Management Rule 40.05 states:

Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such approved plan or the plan fails to mitigate the material injury resulting from diversion and use of water by holders of junior-priority water rights, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefiting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights.

IDAPA 37.03.11.040.05 (emphasis added).

Thus, the Director's tools of enforcement are limited. If an approved mitigation plan is effectively operating, the Director cannot curtail groundwater uses who are in compliance with the plan. If a mitigation plan is not effectively operating, the Director's authority is limited to curtailment of "out-of-priority" water use or imposition of "such other actions as provided in the mitigation plan." Where, as here, the mitigation plan consists of a stipulated settlement agreement, the "other actions" the Director may take to enforce a breach of the agreement are limited to remedies that are prescribed in the settlement agreement.

Courts have acknowledged that, in the absence of a stipulated remedy, the Director's authority is limited to priority administration. In the Rangen delivery call case, District Court Judge Wildman held: "Juniors know, or should know, that they are only permitted to continue their offending out-of-priority water use so long as they are meeting their mitigation obligations under a mitigation plan approved by the Director. IDAPA 37.03.11.040.01.a, b." Mem. Decision and Order, *Rangen, Inc. v. Idaho Dep't of Water Res.*, Case no. CV-2014-4970, Twin Falls Cnty. Dist. Ct. (June 1, 2015), p. 8 (Decl. of Elisheva Patterson, Ex. A). In that case, the Court explained that, since no alternative remedy had been prescribed, non-compliance would result in curtailment of out-of-priority water use: "IGWA's first mitigation plan did not provide for an alternative source of mitigation water as the contingency. The only contingency under the plan was curtailment." *Id.*

At the time IGWA and the SWC entered into the Settlement Agreement, they wished to build a process for the parties to resolve disagreements cooperatively, and reduce exposure to litigation in court. Therefore, they agreed upon the following process:

If the Surface Water Coalition and IGWA do not agree that a breach has occurred or cannot agree upon actions that must be taken by the breaching party to cure the breach, the Steering Committee will report the same to the Director and request that the Director evaluate all available information, determine if the breach has occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.

(Second Addendum, § 2.c.iv.) This provision remains applicable to actions within the jurisdictional authority of the Department. For example, if a water user fails to install a working measuring device in accordance with section 3.d. of the 2015 Agreement, the Director could impose a deadline for compliance, after which the water user would be subject to priority administration. By contrast, the Director does not have authority to issue an injunction or order the sheriff to install a working meter, as such actions fall outside his statutory authority.

In the present case, the SWC asks the Department to impose permanent curtailment—irrespective of whether junior users are out-of-priority—as damages for non-compliance with the Settlement Agreement. This remedy is not prescribed in the Settlement Agreement, and it goes beyond the statutory authority of the Director. Therefore, the Director responded properly, and in accordance with the Conjunctive Management Rules, by ruling that patrons of non-compliant groundwater districts have lost safe harbor under the Settlement Agreement, and would be subject to regulation in accordance with the prior appropriation doctrine. *Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance*, IDWR Docket No. CM-MP-2016-001 (Aug. 2, 2023), p. 9 (“[non-compliant groundwater districts] will not be entitled to protection of IGWA’s 2016 Mitigation Plan in response to a curtailment order.”).

The facts cited above are undisputed. Therefore, as a matter of law, IGWA requests summary judgment that, in the absence of a stipulated remedy, the Director’s authority to enforce a breach of the 2016 Mitigation Plan is limited to curtailment of out-of-priority water use in accordance with Idaho law.

2. The Director properly declined to curtail patrons of ground water districts who complied with IGWA’s Storage Water Plan in 2023.

Issue 2 is: “Did the Director err by not immediately issuing an order curtailing ground water districts that breached the 2016 Mitigation Plan in 2022?” By the nature of the 2016 Mitigation Plan, compliance with groundwater conservation obligations is measured after-the-fact, such that compliance with 2022 obligations was evaluated in 2023. In 2023, the Director ruled that ground water district patrons who are not in compliance with the 2016 Mitigation Plan “will not be entitled to protection of IGWA’s 2016 Mitigation Plan in response to a curtailment order.”). *Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance*, IDWR Docket No. CM-MP-2016-001 (Aug. 2, 2023), p. 9. Thus, patrons of ground water district who were out of compliance with the 2016 Mitigation Plan lost safe harbor under that plan, exposing them to curtailment of out-of-priority water use under the Methodology Order.

IGWA and its ground water district members dispute that they failed to comply with the 2016 Mitigation Plan in 2022. That dispute turns on how compliance is measured. The dispute is currently in litigation and has not been finally resolved.

Given the uncertainty and dispute over the obligations of the 2016 Mitigation Plan, IGWA provided mitigation to the SWC in 2023 under its Storage Water Plan approved in IDWR Docket

No. CM-MP-2009-007, as explained above in the statement of Undisputed Facts. After the Director predicted in April 2023 that the SWC would suffer a demand shortfall of 75,200 acre-feet, resulting in a curtailment date of December 30, 1952, he properly declined to curtail IGWA's members because they were prepared to deliver storage water to the SWC in an amount equivalent to their collective share of the predicted Demand Shortfall. (*IGWA's Amended Notice of Mitigation*, IDWR Docket No. CM-DC-2010-001, June 1, 2023.) After the Director updated its Demand Shortfall calculation in July 2023, determining that the SWC would not experience a Demand Shortfall, the Director properly declined to curtail groundwater users because they were not out-of-priority. (*Order Revising April 2023 Forecast Supply and Amending Curtailment Order*, IDWR Docket No. CM-DC-2010-001, July 19, 2023.)

As explained below, the Director properly accepted the mitigation IGWA provided under its Storage Water Plan in 2023 because (1) as a matter of law, the Conjunctive Management Rules allow junior priority water users to have multiple approved mitigation plans, (2) IGWA's Storage Water Plan remains in effect, and (3) the SWC is barred by the applicable statute of limitation from arguing that IGWA's Storage Water Plan is invalid.

2.1 As a matter of law, the Conjunctive Management Rules allow junior priority water users to have multiple approved mitigation plans.

Conjunctive Management Rule 40.04 states: "Where a mitigation plan has been approved as provided in Rule 42, the watermaster may permit the diversion and use of groundwater to continue out of priority order within the water district provided the holder of the junior priority groundwater right operates in accordance with such approved mitigation plan." This rule refers to "a" mitigation plan, not "the" mitigation plan, indicating that more than one mitigation plan may be approved by the Department.

Likewise, Conjunctive Management Rule 41.02.c refers to "the expected benefits of an approved mitigation plan," Rule 42.02 allows junior water users to avoid curtailment "where use of water under the junior-priority right is covered by an approved effectively operating mitigation plan," and Rule 43 refers to "mitigation plans" (plural). (Underlining added.) There is nothing in the Conjunctive Management Rules stating that only one mitigation plan can be developed to benefit a senior priority water user.

Were juniors allowed only one mitigation plan in response to a particular delivery call, the Conjunctive Management Rules would state that only one functioning plan may be in place in

any given delivery call, and any subsequent forms of mitigation developed by junior water users must be incorporated into the one plan. They do not. In fact, the Conjunctive Management Rules do not even address the amendment of an existing mitigation plan.

Similarly, Title 42 of the Idaho Code contains no provision which restricts water users to one functioning plan. Rather, the Ground Water District Act refers to multiple mitigation plans. I.C. § 42-5259 (“ . . . the nonmember shall be allowed to participate fully in, and obtain all benefits of, any mitigation plan . . . the district currently has in force. . . .”); I.C. § 42-5248 (“ . . . [if a] nonirrigator seeks only to participate in the district’s mitigation plans and other mitigation activities, the board may require”); I.C. § 42-5229 (“board of directors shall make a report to the department of the condition of the work of any mitigation plans developed by the district. . . .”) (emphasis added).

In practice, the Department has approved multiple mitigation plans in response to various delivery calls. In the SWC delivery call case, the Department has approved seven different mitigation plans—three for IGWA (*Order Approving Mitigation Plan*, May 14, 2010, Docket No. CM-MP-2009-006; *Order Approving Mitigation Plan*, June 3, 2010, Docket No. CM-MP-2009-007; *Final Order Approving Amendment to Stipulated Mitigation Plan*, May 9, 2017, Docket No. CM-MP-2016-001); one for the Coalition of Cities (*Final Order Approving Stipulated Mitigation Plan*, Apr. 9, 2019, Docket No. CM-MP-2019-001); one for Southwest Irrigation District (*Final Order Approving Mitigation Plan and Dismissing Contested Case*, March 26, 2018, Docket No. CM-MP-2010-001); one for several food processors known collectively as the “Water Mitigation Coalition” (*Final Order Approving Mitigation Plan*, October 25, 2021, Docket No. CM-MP-2007-001); and one for A&B Irrigation District (*Final Order Approving Mitigation Plan*, Dec. 16, 2015, Docket No. CM-MP-2015-003).

In connection with the delivery call filed by Blue Lakes Trout Farm, Inc., the Department approved four mitigation plans (Docket Nos. CM-MP-2009-001, CM-MP-2009-002, CM-MP-2009-003, CM-MP-2009-006). In connection with the Clear Springs Foods, Inc., delivery call, the Department approved two mitigation plans (Docket Nos. CM-MP-2009-004, CM-MP-2009-005). And in connection with the Rangen delivery call, the Department approved six mitigation plans (Docket Nos. CM-MP-2014-001, CM-MP-2014-002, CM-MP-2014-003, CM-MP-2014-004, CM-MP-2014-006, CM-MP-2014-007). Two of the Rangen mitigation plans were approved

for IGWA (Docket Nos. CM-MP-2014-001, CM-MP-2014-003, CM-MP-2014-006). IGWA implemented both of its plans, obtaining mitigation credit under each.

The facts cited above are part of the agency record, and are undisputed, Therefore, IGWA requests summary judgment that, as a matter of law, the Conjunctive Management Rules allow a junior-priority water users to have more than one approved mitigation plan in connection with a particular delivery call.

2.2 IGWA’s Storage Water Plan remains in effect.

The SWC raised the question of whether a ground water district can have multiple approved mitigation plans specifically in reference to two mitigation plans approved for IGWA to mitigate injury to the SWC. *SWC Issues for Hearing*, Dec. 19, 2023 (“In this case a 2009 plan and a subsequent 2015 plan?”).

As mentioned above, IGWA has three approved mitigation plans for the SWC—the Aquifer Enhancement Plan approved in Docket No. CM-MP-2009-006, the Storage Water Plan approved in Docket No. CM-MP-2009-007, and the 2016 Mitigation Plan approved in Docket No. CM-MP-2016-001. The SWC has argued that the 2016 Mitigation Plan precludes IGWA from providing mitigation to the SWC under the Storage Water Plan, and presumably the Aquifer Enhancement Plan.

The Aquifer Enhancement Plan and the Storage Water Plan were approved by final orders issued by the Department under the Idaho Administrative Procedures Act, Chapter 52, Title 67, Idaho Code. The Department has not issued an order terminating or vacating the approval orders.

By contrast, the Department has previously issued an order in the SWC delivery call case that terminated three mitigation plans that had been superseded by a subsequent mitigation plan. The Coalition of Cities and the cities of Pocatello and Idaho Falls each filed mitigation plans that were later superseded by a joint mitigation plan. When that happened, the Director issued an order terminating the prior plans. *Order Dismissing Mitigation Plans*, IDWR Docket Nos. CM-MP-2015-001, CM-MP-2015-004, CM-MP-2015-005, CM-MP-2016-002 (June 12, 2019). No such order has been issued terminating the Aquifer Enhancement Plan or the Storage Water Plan.

The facts cited above are undisputed. Therefore, IGWA requests summary judgment that the Storage Water Plan and the Aquifer Enhancement Plan remain in effect.

The SWC may attempt to argue that, despite the lack of an order terminating the Aquifer Enhancement Plan and the Storage Water Plan, IGWA is precluded from providing mitigation

under those plans under the terms of Settlement Agreement. This argument should be perfunctorily dismissed because the Department has not issued an order terminating or vacating the Storage Water Plan or the Aquifer Enhancement Plan. Unless and until the Department issues such an order in Docket Nos. CM-MP-2009-006 and CM-MP-2009-007, the Storage Water Plan and the Aquifer Enhancement Plan remain in effect.

Should the Department consider the SWC argument, despite the lack of a Department order terminating either plan, the Department should still find that the Settlement Agreement did not terminate the ability of IGWA to provide mitigation under the the Storage Water Plan or the Aquifer Enhancement Plan. There is nothing in the plain language of the Settlement Agreement that terminates prior mitigation plans or precludes IGWA from providing mitigation under prior mitigation plans. To the contrary, the Settlement Agreement contemplates that mitigation may be provided under other approved plans. Section 6 of the 2015 Agreement states: “Any ground water user not participating in this Settlement Agreement or otherwise have another approved mitigation plan will be subject to administration.” This language is clear and unambiguous.

The SWC presumably intends to argue at the hearing that, despite the lack of any order issued by the Department terminating the Storage Water Plan or the Aquifer Enhancement Plan, and despite the lack of any term in the Settlement Agreement to that effect, the SWC *intended* that the 2016 Mitigation Plan would preclude IGWA from mitigating under the other plans. The parol evidence rule precludes the SWC from offering such evidence, as explained in the *Memorandum in Support of IGWA’s Motion In Limine to Exclude Parol Evidence* filed concurrently herewith.

The facts cited above are undisputed. Therefore, IGWA respectfully requests summary judgment that the Storage Water Plan and the Aquifer Enhancement Plan remain in effect, and the Settlement Agreement does not preclude IGWA from providing mitigation under those plans.

2.3 The SWC is barred by the applicable statute of limitation from arguing that IGWA’s Storage Water Plan and Aquifer Enhancement Plan are invalid.

The orders approving the 2016 Mitigation Plan were issued as final orders in accordance with Idaho Code § 67-5246. Petitions for reconsideration must have been filed within 14 days, and petitions for judicial review within 28 days. Had the SWC believed that those orders should have terminated the ability of ground water districts to provide mitigation under the Storage Water Plan or the Aquifer Enhancement Plan, the SWC had a duty to timely petition for

reconsideration or judicial review. The SWC is barred by the applicable statute of limitation from raising that objection now.

In fact, the Department has issued several orders since 2016 acknowledging that the Storage Water Plan and the Aquifer Enhancement Plan remain in effect. On November 29, 2016 (after the 2016 Mitigation Plan had been approved), the Department issued the *Final Order Establishing 2016 Reasonable Carryover (Methodology Step 9)* in the SWC delivery call case which identifies six approved mitigation plans, including IGWA's Storage Water Plan and Aquifer Enhancement Plan (underlined):

Mitigation plans filed by the Idaho Ground Water Appropriators, Inc. ("IGWA"), A&B Irrigation District ("A&B"), Southwest Irrigation District and Goose Creek Irrigation District (collectively, "SWID"), and the City of Pocatello, City of Idaho Falls, and Coalition of Cities (collectively, the "Cities") are currently approved for the SWC delivery call to mitigate for material injury to in-season demand and reasonable carryover. Final Order Approving Mitigation Credits Regarding SWC Delivery Call, CM-MP-2009-006 (July 19, 2010); Order Approving Mitigation Plan, CM-MP-2009-007 (June 3, 2010); Final Order Approving Mitigation Plan, CM-MP-2015-003 (Dec. 16, 2015); Final Order Approving Mitigation Plan for 2016, CM-MP-2010-001 (Mar. 29, 2016); Final Order Approving Mitigation Plan for 2016, CM-2016-002 (Apr. 27, 2016); Final Order Approving Stipulated Mitigation Plan, CM-MP-2016-001 (May 2, 2016).

Subsequent as-applied orders also acknowledge IGWA's three approved mitigation plans. Subsequent orders continued to reference six approved mitigation plans until the Water Mitigation Coalition's plan was approved on October 25, 2021. Every as-applied orders which determined material injury to the SWC, issued from 2016-2021, state: "there are six approved mitigation plans in place." After the Water Mitigation Coalition's plan was approved, several Department orders acknowledge that "there are currently seven approved mitigation plans in place for responding to the SWC delivery call." *Final Order Establishing 2021 Reasonable Carryover (Methodology Step 9)*, IDWR Docket No. CM-DC-2010-001 (Dec. 21, 2021), p. 2; *Final Order Curtailing Ground Water Rights Junior to November 27, 1984*, IDWR Docket No. CM-DC-2010-001 (Jan. 11, 2022), p. 2; *Final Order Regarding April 2022 Forecast Supply (Methodology Steps 1-3)*, IDWR Docket No. CM-DC-2010-001 (Apr. 20, 2022), p. 5; *Final Order Curtailing Ground Water Rights Junior to December 25, 1979*, IDWR Docket No. CM-DC-2010-001 (May 5, 2022), p. 1-2; *Order Revising April 2022 Forecast Supply and Amending Curtailment Order (Methodology Steps 5 & 6)*, IDWR Docket No. CM-DC-2010-001 (July 20,

2022), p. 10; *Final Order Establishing 2022 Reasonable Carryover (Methodology Step 9)*, IDWR Docket No. CM-DC-2010-001 (Nov. 30, 2022), p. 2; *Final Order Curtailing Ground Water Rights Junior to May 31, 1989*, IDWR Docket No. CM-DC-2010-001 (Dec. 14, 2022), p. 1-2. The order issued December 21, 2021, specifically identifies five entities that have mitigation plans—A&B Irrigation District, Southwest Irrigation District, IGWA, the Coalition of Cities, and the Water Mitigation Coalition. Although there are five entities with mitigation plan, IGWA has three plans, bringing the total to seven.

The orders cited above were issued as final orders in accordance with Idaho Code § 67-5246. Petitions for reconsideration must have been filed within 14 days, and petitions for judicial review within 28 days. Had the SWC believed IGWA could only mitigate under the 2016 Mitigation Plan, it had a duty to raise that objection in response to the Department order approving the 2016 Mitigation Plan, within the time frames allowed by statute. The SWC is barred by the applicable statute of limitation from raising that objection now.

3. IGWA does not contend that mitigation it provided in 2023 under the Storage Water Plan remedies any breach of the 2016 Mitigation Plan that may have occurred in 2022.

Issue 3 is: “Can the 2009 mitigation plan be used to the cure the Ground Water Districts’ 2022 breach of the 2016 mitigation plan?” While IGWA disputes the SWC’s allegation that a breach occurred in 2022, if a breach did in fact occur, IGWA does not contend that it was cured by IGWA’s provision of mitigation under the Storage Water Plan in 2023.

As explained above, compliance with the 2016 Mitigation Plan is evaluated after-the-fact. Whether any ground water district actually breached the Settlement Agreement is currently in litigation. Given that uncertainty, IGWA utilized the Storage Water Plan to mitigate the obligations of ground water districts under the methodology order in 2023. IGWA does not claim that it’s utilization of the Storage Water Plan in 2023 remedied any breach of the 2016 Mitigation Plan in 2022.

Based on the Director’s current interpretation of the Settlement Agreement, which IGWA disputes, four ground water districts are currently out of compliance with the 2016 Mitigation Plan. *Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance*, IDWR Docket No. CM-MP-2016-001 (Aug. 2, 2023), p. 8. If the Director’s decision is reversed on appeal, these districts may be found in compliance in 2022. If the Director’s decision is not reversed, and it is determined that one more ground water districts are out of compliance with the 2016 Mitigation

Plan, and such breach is not remedied by a stipulation between the parties, IGWA acknowledges that the uncured breach will result in a loss of safe harbor under the 2016 Mitigation Plan, thereby exposing groundwater users to curtailment under the Methodology Order unless mitigation is provided under another approved mitigation plan.

Conclusion

Based upon the foregoing, IGWA respectfully request that the following issues be decided as a matter of law, based on undisputed fact:

1. In the absence of a stipulated remedy, the Director's authority to enforce a breach of a mitigation plan is limited to curtailment of out-of-priority water use in accordance with the prior appropriation doctrine.
2. The Director properly declined to curtail ground water districts who complied with IGWA's Storage Water Plan in 2023 because (a) the Conjunctive Management Rules allow junior priority water users to have multiple approved mitigation plans, and (b) IGWA's Storage Water Plan remains in effect.
3. If a breach of the 2016 Mitigation Plan occurred in 2022, it was not cured by the provision of mitigation under IGWA's Storage Water Plan in 2023.
4. If a breach of the 2016 Mitigation Plan occurred in 2022, the Director does not have authority to prescribe actions that must be taken to cure the breach, due to the lack of a stipulated remedy.

If the Department grants summary judgment on each of the foregoing issues, the hearing currently scheduled March 14-15, 2024, can be vacated.


RESPECTFULLY SUBMITTED this 12th day of February, 2024.

RACINE OLSON, PLLP

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2024, I served the foregoing document on the persons below via email at the address shown:



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