

RECEIVED

Feb 26, 2024

DEPARTMENT OF  
WATER RESOURCES

Thomas J. Budge (ISB# 7465)  
Elisheva M. Patterson (ISB#11746)  
RACINE OLSON, PLLP  
201 E. Center St. / P.O. Box 1391  
Pocatello, Idaho 83204  
(208) 232-6101 – phone  
(208) 232-6109 – fax  
tj@racineolson.com  
elisheva@racineolson.com

*Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)*

**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

Docket No. CM-MP-2016-001

**IGWA’S RESPONSE TO THE SWC AND  
AFAGWD’S MOTIONS FOR SUMMARY  
JUDGMENT**

IN THE MATTER OF IGWA’S  
SETTLEMENT AGREEMENT  
MITIGATION PLAN

Idaho Ground Water Appropriators, Inc. (“IGWA”) submits this response brief pursuant to Rule 220.02(b) of the Rules of Procedure of the Idaho Department of Water Resources (“IDWR” or “Department”) in opposition to *Surface Water Coalition’s Motion for Summary Judgment* (“SWC Motion”) and *American Falls-Aberdeen Ground Water District’s Motion for Partial Summary Judgment* (“AFAGWD Motion”), both filed February 12, 2024. As explained below, along with the reasons set forth in IGWA’s *Motion for Summary Judgment* filed the same date, the Hearing Officer should deny the motions and grant summary judgment in favor of IGWA.

## ARGUMENT

Of the four issues identified in the *Notice of Prehearing Conference and Hearing* issued December 29, 2023, the SWC seeks summary judgment on issues 3 and 4:

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?

(SWC Mot., 10.) AFAGWD seeks summary judgment on issue 3. (AFAGWD Mot., 7.) IGWA's arguments in response to both motions are largely contained in the *Memorandum in Support of IGWA's Motion for Summary Judgment* filed February 12, 2024 ("IGWA's Memorandum"), in this matter. The arguments set forth below supplement the arguments made in IGWA's Memorandum.

As a preliminary matter, the SWC asserts that the 2016 Mitigation Plan "is often referred to as an aquifer restoration plan." (SWC Mot., 5.) While the 2016 Mitigation Plan does indeed seek to improve aquifer conditions as a way to increase reach gains to the Snake River, IGWA has never heard it referred to as an "aquifer restoration plan." The 2016 Mitigation Plan is commonly referred to as the "Settlement Agreement Plan," but it is not commonly referred to as an aquifer restoration plan. IGWA's 2009 *Mitigation Plan for Conversions, Dry-Ups, and Recharge* is commonly referred as an "aquifer enhancement plan." The two should not be confused.

The SWC and AFAGWD emphasize that the 2016 Mitigation Plan is "requires long term actions" (SWC Motion, p. 5), which is precisely why the ground water districts had historically used averaging (average diversions over a multi-year period) to measure compliance with the 2016 Mitigation Plan. From 2016-2022, the ground water districts conserved 313,586 acre-feet annually on average.

Under the Settlement Agreement, IGWA delivered 110,000 acre-feet of storage in 2015 and has delivered 50,000 acre-feet annually since, for a total of 510,000 acre-feet. During the same period, IDWR has calculated a total Demand Shortfall to the SWC of 153,456 acre-feet. *See Decl. of Patterson, Ex. D* (sum of Step 9 As-Applied Order final irrigation season material injury volumes from November 29, 2016 through present). Thus, IGWA has delivered far more

storage to the SWC than it has suffered in Demand Shortfall as calculated by IDWR. IGWA further delivered 50,000 ac-ft of storage water to the SWC in 2023, despite having mitigated under the 2009 Mitigation Plan which did not require the delivery.

Unfortunately, the significant benefits that have accrued to the SWC under the 2016 Mitigation Plan did not deter them from initiating litigation and asking the Director to undo the method by which the ground water districts had measured performance since the beginning, find certain districts in breach in 2022, and order wholesale curtailment.

**1. IGWA has stipulated that if any ground water district breached the 2016 Mitigation Plan in 2022 (an issue under litigation), the districts' use of the 2009 Storage Water Plan to mitigate material injury to the SWC in 2023 did not cure any 2022 breach of the 2016 Mitigation Plan.**

The SWC Motion largely focuses on issue no. 3 (Can the 2009 mitigation plan be used to cure the ground water districts' 2022 breach of the 2016 Mitigation Plan?) and the AFAGWD focuses entirely on issue no. 3. The hearing officer can easily dispose of this issue because IGWA does not contend that the districts' use of the 2009 Storage Water Plan to mitigate injury in 2023 cures any breach that may have occurred in 2022. (IGWA's Memorandum, 5.)

As discussed in IGWA's Motion for Summary Judgment, the real issue is whether the CM Rules allow a party to have multiple mitigation plans, and if so, whether IGWA's prior mitigation plans have been terminated by IDWR. IGWA maintains multiple mitigation plans are allowed as a matter of law, and that its 2009 Storage Water Plan and 2009 Aquifer Enhancement Plan are valid, approved plans.

**2. The SWC's request that the Director order immediate curtailment violates the priority administration doctrine and the CM Rules.**

The SWC alleges that the Director committed two errors in his *Final Order Regarding IGWA's 2022 Mitigation Plan Compliance* ("2022 Compliance Order"). First, the SWC contends that the Director erred in not "specifying actions that must be taken by the breaching party to cure the breach." (SWC Mot., 12-13.) There is no error because the Director declined to bind himself to any particular enforcement action. His *Final Order Approving Amendment to Stipulated Mitigation Plan* issued May 9, 2017, states:

- a. While the Department will exert its best efforts to support the activities of IGWA and the SWC, approval of the Second Addendum does not obligate the Department to undertake any particular action.

- b. Approval of the Second Addendum does not limit the Director's enforcement discretion or otherwise commit the Director to a particular enforcement approach.

Thus, the Director has no legal obligation to take any particular action in response to a Steering Committee impasse. He retained discretion to determine appropriate action, if any, he would take in a given circumstance. Even had the Director elected to determine an action to cure the alleged breach, he has no authority to compel the ground water districts to cure the alleged breach. Rather, the penalty for failing to cure the breach via the Director's prescribed action is that a ground water district could not receive safe harbor from a curtailment order issued under the Methodology. Which is what the Director found in the 2022 Compliance Order. (“[non-compliant ground water districts] will not be entitled to protection of IGWA's 2016 Mitigation Plan in response to a curtailment order.”).

The SWC argues that the 2016 Mitigation Plan *requires* the Director to impose a blanket curtailment, regardless of a water user's priority date, in response to any breach of the Settlement Agreement. (SWC Motion, 13: “The Director erred by not immediately issuing an order curtailing the Ground Water Districts that breached the 2016 Mitigation Plan in 2022.”). Curtailment of water rights, without being out-of-priority, violates the priority administration doctrine and the CM Rules. (*See* IGWA's Memorandum, 5-8.) Under Idaho law, the Director's enforcement authority is limited to curtailment only curtails *out-of-priority* water rights. *Id.* at 7.

When the 2022 Compliance Order was issued, no ground water users diverted out of priority and no curtailment order was issued at the time. The SWC does not suggest an alternative method for determining priority pumping. And Idaho law does not support blanket curtailment used solely as punishment. Decl. of Patterson, Ex. A (“Rangen 2015”) (“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.”)

**3. The SWC's arguments concerning history and intent are irrelevant because the 2016 Mitigation Plan contains no term which terminates IGWA's 2009 Mitigation Plans.**

Since the 2016 Mitigation Plan does not purport to terminate the IGWA's 2009 Storage Water Plan or Aquifer Enhancement Plan, and since IDWR has never issued orders terminating its approval of those mitigation plans, the SWC resorts to parol evidence to its *intent* that the 2016 Mitigation Plan would preclude the ground water districts from providing mitigation under

IGWA's 2009 Mitigation Plans. The Department should refuse to consider the SWC's parol evidence for the reason stated on page 12 of IGWA's Memorandum and pages 3-4 of the *Memorandum in Support of IGWA's Motion in Limine*.

The SWC argues that IGWA "ignored the 2009 Mitigation Plan and did not attempt to provide storage water under the plan" after the 2016 Mitigation Plan was implemented. (SWC Mot., 16.) That is correct. IGWA did not provide mitigation under its 2009 Storage Water Plan or its 2009 Aquifer Enhancement Plan while it was providing mitigation under the 2016 Mitigation Plan because it would have been duplicative. Nor do the CM Rules limit water users to a single mitigation plan, as explained on pages 9-11 of IGWA's Memorandum.

Nowhere in the 2009 Storage Water Plan does it state that IGWA must provide storage water every year. *Order Approving Mitigation Plan*, IDWR Docket No. CM-MP-209-007 (June 3, 2010), p. 10-11. ("IGWA's obligation for mitigation shall be determined as set forth in the Methodology Order. . . . If IGWA does not provide proof of acquisition of storage water and commitment of storage water was set forth above, ground water rights pumping from the Eastern Snake Plain Aquifer will be curtailed according to the Methodology Order to provide water to the SWC."); *IGWA's Mitigation Plan for the Surface Water Coalition Delivery Call*, IDWR Docket No. CM-MP-209-007 (Nov. 9, 2009), p. 2-3 ("It is the desire and intent of the Ground Water Users by this mitigation plan to have a permanent and ongoing mitigation plan in place that can be implemented on a year-to-year basis as necessary to avoid or reduce curtailment."). Nothing in either plan required IGWA to abandon one over the other. Rather, they are two valid, approved plans under which IGWA's out-of-priority water diversions are permitted. That IGWA elected to mitigate under the 2016 Mitigation Plan rather than the 2009 Storage Water Plan has no bearing on whether the 2009 Storage Water Plan remains an approved plan and capable of protecting junior-priority water users from curtailment.

The SWC further argues that use of the 2009 Storage Water Plan "would render the aquifer restoration goals of the 2016 Mitigation Plan impossible to achieve," and it is counter to the "intent of the 2016 Mitigation Plan." First, the SWC ignores with this statement the very real and substantial conservation activities that IGWA has performed. As discussed above, IGWA on average conserved 313,586 ac-ft annually.

As for the intent of the parties, parol evidence cannot be considered, as discussed in IGWA's *Memorandum in Support of Motion in Limine*.

**CONCLUSIONS**

For the foregoing reasons, IGWA respectfully requests that the hearing officer deny the motions for summary judgment filed by the SWC and AFAGWD.

RESPECTFULLY SUBMITTED this 26th day of February, 2024.

RACINE OLSON, PLLP

By:   
\_\_\_\_\_  
Elisheva M. Patterson  
*Attorneys for IGWA*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of February, 2024, I served the foregoing document on the persons below via email at the address shown:

  
Elisheva M. Patterson

Hon. Roger S. Burdick, Hearing Officer Sarah Tschohl, Paralegal Idaho Department of Water Resources 322 E. Front St. Boise, ID 83720-0098	<a href="mailto:roburd47@gmail.com">roburd47@gmail.com</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a> <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a>
Garrick Baxter Idaho Department of Water Resources 322 E Front St. Boise, ID 83720-0098	<a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a>
Dylan Anderson DYLAN ANDERSON LAW PO Box 35 Rexburg, Idaho 83440	<a href="mailto:dylan@dylanandersonlaw.com">dylan@dylanandersonlaw.com</a>
Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC 1449 E 17th St, Ste A PO Box 3005 Idaho Falls, ID 83403	<a href="mailto:sjohns@olsentaggart.com">sjohns@olsentaggart.com</a> <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a> <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a>
John K. Simpson Travis L. Thompson Abigail R. Bitzenburg MARTEN LAW P. O. Box 63 Twin Falls, ID 83303-0063	<a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a> <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a> <a href="mailto:abitzenburg@martenlaw.com">abitzenburg@martenlaw.com</a> <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a>
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	<a href="mailto:wkf@pmt.org">wkf@pmt.org</a>

<p>Sarah A Klahn  Maximilian C. Bricker  SOMACH SIMMONS &amp; DUNN  2033 11th Street, Ste 5  Boulder, Co 80302</p>	<p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a>  <a href="mailto:mbricker@somachlaw.com">mbricker@somachlaw.com</a>  <a href="mailto:vfrancisco@somachlaw.com">vfrancisco@somachlaw.com</a></p>
--	---

*Courtesy Copies to:*

<p>Candice McHugh  Chris Bromley  MCHUGH BROMLEY, PLLC  380 South 4th Street, Suite 103  Boise, ID 83 702</p>	<p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a>  <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>
<p>Robert E. Williams  WILLIAMS, MESERVY, &amp; LOTH SPEICH, LLP  P.O. Box 168  Jerome, ID 83338</p>	<p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>
<p>Robert L. Harris  HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC  P.O. Box 50130  Idaho Falls, ID 83405</p>	<p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>
<p>Michael A. Kirkham  City Attorney, City of Idaho Falls  P.O. Box 50220  Idaho Falls, ID 83402</p>	<p><a href="mailto:mirkham@idahofallsidaho.gov">mirkham@idahofallsidaho.gov</a></p>
<p>Rich Diehl  City of Pocatello  P.O. Box 4169  Pocatello, ID 83205</p>	<p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>
<p>David W. Gehlert  Natural Resources Section  Environment and Natural Resources Division  U.S. Department of Justice  999 18th St., South Terrace, Suite 370  Denver, CO 80202</p>	<p><a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>
<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234</p>	<p><a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>



Tony Olenichak IDWR-Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402	<a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a>
Corey Skinner IDWR-Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033	<a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a>
William A. Parsons PARSONS, LOVELAND, SHIRLEY & LINDSTROM, LLP P.O. Box 910 Burley, ID 83318	<a href="mailto:wparsons@magicvalley.law">wparsons@magicvalley.law</a>