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RECEIVED

Feb 26, 2024

DEPARTMENT OF
WATER RESOURCES

Attorneys for Bonneville-Jefferson Ground Water District

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

**JOINDER IN SUPPORT OF IGWA'S
MOTIONS FOR SUMMARY JUDGMENT
AND RESPONSE TO
SWC AND AFAAGWD MOTIONS FOR
SUMMARY JUDGMENT AND
RESPONSE TO AFAAGWD'S
MOTION FOR SUMMARY JUDGMENT**

The Bonneville-Jefferson Ground Water District (hereafter "Bonneville-Jefferson"), acting for and on behalf of its respective members, through counsel, joins in support of *IGWA's Motion for Summary Judgment* and *IGWA's Response to the SWC and AGAAGWD's Motion for Summary Judgment* filed in this matter. Bonneville-Jefferson also responds to the American Falls-Aberdeen Area Ground Water District's Motion for Summary Judgment. This response is supported by the *Declaration of Skyler C. Johns in Support of Joinder in Support of IGWA's Motion for Summary*

Judgment and Response to SWC and AFAAGWD Motions for Summary Judgment and Response to AFAAGWD's Motion for Summary Judgment (hereafter “Dec. of Johns”) and the record.

ARGUMENT

The allegations in AFAAGWD’s briefing incorrectly suggest that IGWA districts were not united in the decision to provide mitigation under an alternative plan to the 2015 Settlement Agreement in 2023. AFAAGWD also argues that the ground water district cannot use alternative mitigation plans but must mitigate under the 2016 Settlement Agreement. This argument is inconsistent with the prior position taken by AFAAGWD in 2023 with respect to how it provided mitigation to the Surface Water Coalition.

On June 1, 2023, the Idaho Ground Water Appropriators, Inc. (hereafter “IGWA”), filed *IGWA’s Amended Notice of Mitigation* in Docket No. CM-DC-2010-001. Dec. of Johns, Exhibit

A. This document stated that

IGWA will mitigate under the Storage Water Plan in 2023. The April 2023 As-Applied Order states that IGWA’s share of the total predicted demand shortfall of 75,200 acre-feet is 63,645 acre- feet. (April 2023 As-Applied Order, p. 5, fn 5.) Attached hereto as Appendix A are copies of storage lease contracts secured by IGWA’s member ground water districts totaling 77,714 acre-feet.

Id. at pp. 3 (emphasis added).

The opening paragraph stated that AFAAGWD supported IGWA and all its districts in the decision to mitigate as a group under the Storage Water Delivery Plan in 2023:

Idaho Ground Water Appropriators, Inc. (“IGWA”), acting on behalf of North Snake Ground Water District, Carey Valley Ground Water District, Magic Valley Ground Water District, Aberdeen-American Falls Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Henry’s Fork Ground Water District, Bonneville-Jefferson Ground Water District, and Bingham Ground Water District (collectively, the “Districts”), through their respective counsel, hereby provides notice that the Districts can mitigate for their proportionate share of the demand shortfall predicted in the Final Order Regarding April Forecast Supply (Methodology Steps 1-3) (“April 2023 As-Applied Order”) issued April 21, 2023, in this matter.

Id. at pp. 1.

On July 19, 2023, the Director issued is *Order Revising April 2023 Forecast Supply and Amending Curtailment Order (Methodology Steps 5 & 6)*, finding that there would be no demand shortfall to any Surface Water Coalition members during the 2023 irrigation season. On July 20, 2023, the Director also issues a *Notice that Questions Regarding the Sufficiency of IGWA's Mitigation Notices are Moot*, finding that these issues were moot because IGWA did not have to mitigate for any demand shortfall during the 2023 irrigation season.

What the aforementioned filing from IGWA and the Orders from the Director show is that AFAGWD previously took a position that it, along with other IGWA ground water districts, could mitigate under different plans and it benefitted from taking that position because it was not curtailed or obligated to mitigate any demand shortfall for 2023. Judicial estoppel typically would bar this type of selective argumentation, but that doctrine “does not preclude inconsistent positions taken before an administrative agency.” *Sadid v. Idaho State Univ.*, 154 Idaho 88, 96, 294 P.3d 1100, 1108 (2013). Notwithstanding, the Idaho Supreme Court recognizes “[t]here might be other forms of estoppel available for administrative proceedings, but that estoppel, if any, should be raised in the agency. *Id.*

Similar to the doctrine of judicial estoppel, “the doctrine of quasi estoppel applies when it would be unconscionable to allow a party to assert a right which is inconsistent with a prior position.” *Mitchell v. Zilog, Inc.*, 125 Idaho 709, 715, 874 P.2d 520, 526 (1994). Bonneville-Jefferson submits that it would be unconscionable to allow AFAGWD to deviate from its former position, from which a benefit was significant was derived, and now attack its fellow IGWA members for doing the very thing which AFAAGWD did less than one year ago – mitigate under a mitigation plan different from the 2016 Settlement Agreement. Therefore, Bonneville-Jefferson

respectfully requests the Hearing Officer not consider AFAAGWD's inconsistent positions in this matter.

CONCLUSION

Bonneville-Jefferson joins in support of the IGWA's summary judgment motion and its responses to SWC and AFAAGWD's motions for summary judgment. Bonneville-Jefferson requests and Order granting summary judgment in favor of IGWA and denying summary judgment against SWC and AFAAGWD, respectively.

DATED: February 26, 2024

/s/ Skyler C. Johns

SKYLER C. JOHNS

CERTIFICATE OF SERVICE

I hereby certify that on this the 26th day of February 2024, I served a true and correct copy of the foregoing Notice of Service of *Bonneville-Jefferson's Expert Report Disclosure* on the following by the method indicated:

/s/ Skyler C. Johns
Attorney for Bonneville-Jefferson

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