

John K. Simpson, ISB#4242
Travis L. Thompson, ISB#6168
Abby R. Bitzenburg, ISB#12198
MARTEN LAW LLP
163 Second Ave. West
P.O. Box 63
Twin Falls, Idaho 83303-0063
Telephone: (208) 733-0700
Email: jsimpson@martenlaw.com
tthompson@martenlaw.com
abitzenburg@martenlaw.com

W. Kent Fletcher, ISB#2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Email: wkf@pmt.org

*Attorney for American Falls
Reservoir District #2 and Minidoka
Irrigation District*

*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company, and Twin Falls
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

**SURFACE WATER COALITION’S
RESPONSE TO IGWA’S MOTION FOR
SUMMARY JUDGMENT**

IN THE MATTER OF IGWA’S
SETTLEMENT AGREEMENT
MITIGATION PLAN

COME NOW, 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 (hereafter collectively referred to as “Surface Water
Coalition” “SWC” or “Coalition”), by and through counsel of record, and hereby respond to the

Motion for Summary Judgment filed by the Idaho Ground Water Appropriators, Inc. (hereinafter collectively referred to as “IGWA”) on February 12, 2024.¹ For the reasons set forth below, the Hearing Officer should deny IGWA’s motion and grant summary judgment in favor of the Coalition regarding the Director’s authority to declare a breach and the inapplicability of prior mitigation plans versus the properly utilized *2016 Mitigation Plan*.²

INTRODUCTION

IGWA has moved for summary judgment by mischaracterizing this action as a contract enforcement action instead of a breach of mitigation order action. IGWA also requests that the Hearing Officer find the following: the Director did not have authority to issue an order specifying actions needed to cure the 2022 breach of the *2016 Mitigation Plan* by certain Ground Water Districts and only has authority to order curtailment in the event of breach even though the *2016 Mitigation Plan* and the Director’s Orders provide otherwise; that the Ground Water Districts could receive safe harbor by providing mitigation pursuant to the annual injury based *Storage Water Plan* even though they did not comply with the annual actions required by the *2016 Mitigation Plan*; that IGWA admits that compliance with the *Storage Water Plan* does not cure a breach of the *2016 Mitigation Plan*; and that the Director does not have authority to prescribe actions that must be taken to cure a breach of the *2016 Mitigation Plan* without a stipulation of the parties even though IGWA and the Ground Water Districts agreed and the Director’s Orders adopting the Plan provide that the Director could craft a remedy.

¹ The motion was supported by the *Memorandum in Support of IGWA’s Motion for Summary Judgment* (hereinafter referred to as “*IGWA Br.*”); *Declaration of Elisheva M. Patterson* (“*Patterson Dec.*”); and the Motion to Take Official Notice.

² See SWC’s *Motion for Summary Judgment* for background on this issue.

IGWA's Motion is not supported by the provisions of the *2016 Mitigation Plan*, the Director's Orders, the CMRs and other law. The Hearing Officer should deny the Motion and enter summary judgment on these issues in favor of the Coalition.

STANDARD OF REVIEW

A motion for summary judgment is allowed in any contested case under the Department's Rules of Procedure. IDAPA 37.01.01.220.03. Rule 56 of the Idaho Rules of Civil Procedure ("I.R.C.P") is applicable to motions before the Department except for subsections (b) and (g). The Department is required to grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the relevant movant is entitled to a judgment as a matter of law." I.R.C.P. 56(a). The Department must "construe disputed facts in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party." I.R.C.P. 56(c).

ARGUMENT

I. This is Not a Contract Action.

IGWA attempts to cloud the issues by arguing that the Director does not have authority to impose damages for breach of contract and even goes so far as to argue that the Department cannot order a breaching party to pay money or issue a writ of garnishment. This is not a contract action. The subject matter of this action is a stipulated mitigation plan that was adopted in an order issued by the Director pursuant to the CMRs. The Coalition has never sought monetary damages or a writ of garnishment or other monetary penalty. The Coalition only seeks to have the Department enforce the terms of the *2016 Mitigation Plan* as stipulated to by IGWA and the Ground Water Districts and as ordered by the Director. The arguments made by IGWA concerning damages is a red herring and should be treated as such.

Further, IGWA argues that “in the absence of stipulated remedy, the Director’s authority is limited to priority administration.” On its face the argument is correct. The problem with the argument is that the *Second Addendum* to the *2016 Mitigation Plan* contains a stipulated remedy to which IGWA and the Ground Water Districts agreed:

If the Surface Water Coalition and IGWA do not agree that 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 a 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.

See *Second Addendum* paragraph 2(c)(iv) (emphasis added).

This process was adopted and approved by the Director in the *Final Order Approving Amendment to Stipulated Mitigation Plan* (May 9, 2017). See *2017 Order* at 5. Although the Director reserved his “enforcement discretion” and noted that his approval did not “commit the Director to a particular enforcement approach”, he followed the *Second Addendum* process when he was notified of the Districts’ 2021 breach. Specifically, when the SWC notified the Director of the 2021 breach, he ordered the following:

The original settlement agreement established a steering committee to review the signatory ground water districts’ progress towards the practices and goals in the agreement. In the *Second Addendum to Settlement Agreement*, the parties agreed to a specific process for addressing any alleged breach or noncompliance of the mitigation plan. Final Order Approv. Amend. to Stip. Mitigation Plan, *In re IGWA’s Settlement Agreement Mitigation Plan*, No. CM-MP-2016-001, ex. A (Idaho Dep’t Water Res. May 9, 2017) [hereinafter 2nd Addendum].

The first step is to have the steering committee review the available technical information. *2nd Addendum* ¶ 2.c.i. Then, if the steering committee finds a breach of one of the long-term practices of the plan (like the diversion reduction component), the steering committee is required to notify the breaching party in writing. *Id.*, ¶ 2.c.iii. If the breaching party fails to cure the breach, the steering committee then reports the breach to the Director. *Id.* If the SWC 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 this to the Director and ask the Director to determine if a breach has occurred. *Id.* ¶ 2.c.iv.

Under either paragraph 2.c.iii or 2.c.iv, any alleged breach should first be addressed by the steering committee and then a report from the steering committee should be submitted to the Director. The Director understands that the steering committee plans to meet on May 18, 2022 to discuss this topic.

Response to Request for Status Conference; Notice of Status Conference at 2-3 (May 5, 2022).

When the Steering Committee completed its meetings and the SWC reported the impasse to the Director (July 21, 2022), the Director held a status conference (Aug. 5, 2022) and ultimately issued his *Final Order Regarding Compliance with Approved Mitigation Plan* (Sept. 8, 2022). In his *Final Order* the Director acknowledged the process set forth in the Second Addendum had been followed and that it was before him to determine an appropriate remedy:

The parties to the Mitigation Plan, therefore, do not dispute that the Steering Committee’s principal members—the SWC and IGWA—do not agree that a breach of the Mitigation Plan occurred in 2021. Accordingly, the Director finds no further notice from the Steering Committee is required before he may consider whether a breach of the Mitigation Plan occurred in 2021 and, if so, the remedy.

* * *

Because the SWC and IGWA disagree on whether a breach has occurred, the Director should evaluate the available information, determine if a breach of the Mitigation Plan has occurred, and determine an appropriate remedy for any such breach.

Final Order at 9 (Sept. 8, 2022) (emphasis added).

The above process was followed again in 2023 with respect to the three ground water districts’ breach in 2022. However, the difference here is that the Director did not “determine an appropriate remedy for any such breach.” Instead, the Director indicated he did not have “sufficient information to make this determination at this time,” hence that is the reason for this contested case hearing. *See Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance at 9, n. 6 (August 2, 2023).*

IGWA’s attempt to characterize a request that IDWR enforce its own mitigation order based upon a stipulated mitigation plan as a request for “damages for non-compliance” is simply

another attempt by IGWA to mischaracterize the nature of this action and avoid the stipulated obligations and terms of the *2016 Mitigation Plan*. The terms of the plan and the Director's orders are undisputed, and summary judgment should be entered stating that this is not a contract enforcement action, that this is an action to enforce a stipulated mitigation plan and the Director's orders entered pursuant to the plan, and that the plan contains the stipulated remedy described above in the *Second Addendum*. The Director has followed the process before, and IGWA stipulated to allow the Director to identify a remedy to the 2022 breach.

Further, summary judgment should be entered stating that if the Director is not willing to fashion a remedy as provided in the *Second Addendum* to the Mitigation Plan then curtailment must be ordered pursuant to the CMRs, as argued in the Coalition's Motion for Summary Judgment.

II. IGWA Cannot use Other Mitigation Plans to Avoid Compliance and Enforcement of the *2016 Mitigation Plan*.

IGWA argues that it has multiple mitigation plans in place and that so long as it complies with any of them, the Ground Water Districts are entitled to safe harbor. The Coalition admits that other mitigation orders are in place and have not been formally terminated. However, IGWA and the Ground Water Districts are still bound by the terms of the *2016 Mitigation Plan* and orders entered by the Director pursuant to that plan, and pursuant to their terms, IGWA cannot rely on the any other plan or agreement to comply with its mitigation obligations.

The *2016 Mitigation Plan* must be reviewed as a whole in order to understand how it differs from plans that attempt to avoid injury in a single irrigation season. As outlined in the Coalition's Motion for Summary Judgment, there are many components to the *2016 Mitigation Plan*, including required annual reductions, annual storage water delivery, benchmarks in 2020, 2023 and a goal to be met in 2026.

Most important to this discussion, there is nothing in the Plan allowing IGWA or any of the Ground Water Districts to rely on any other mitigation plan as a substitute for what is required in the *2016 Mitigation Plan*. Further, the *2016 Mitigation Plan* is not an annual injury based plan, but rather is a long-term aquifer recovery plan unlike any other mitigation plan. Conservation actions are required every year regardless of annual injury determinations. That is a risk the Coalition took by agreeing to the plan, but it is also a requirement that the Districts agreed to knowing that they would not have to come up with additional storage in years of greater injury determinations (i.e. greater than 50,000 acre-feet).

The plan recognizes that it is the mitigation plan between the parties and prohibits reference to extrinsic matters. IGWA and the Ground Water Districts stipulated to integration clauses in the *2016 Mitigation Plan*, the *First Addendum*, and the *Second Addendum* as follows:

This Agreement sets forth all understandings between the parties with respect to SWC delivery call. There are no other understandings, covenants, promises, agreements, conditions, either oral or written between the parties other than those contained herein. The parties expressly reserve all rights not settled by this Agreement.

Settlement Agreement June 30, 2015, paragraph 9.

This agreement and the Settlement Agreement set forth all understandings between the parties. There are no other understandings, covenants, promises, agreement, conditions, either oral or written between the parties other than those contained herein and the in the Agreement between A&B and IGWA dated _____. The parties expressly reserve all rights not settled by this Agreement.

Addendum to Settlement Agreement, paragraph 5.

This Second Addendum and the Settlement Agreement set forth all understandings between the Parties. There are no other understandings, covenants, promises, agreements, conditions, either oral or written between the Parties other than those contained herein and in the Agreement between A&B and IGWA dated October 7, 2015. The Parties expressly reserve all rights not settled by this Agreement. The parties further reserve all remedies, including the right to judicial action, to enforce the terms of the Settlement Agreement and this Second Addendum.

Second Addendum to Settlement Agreement, paragraph 4.

It must be noted that the above clauses in the addenda make specific reference to the agreement between A&B and IGWA but make no reference to any other mitigation plan or any other agreement. Pursuant to their terms, the *2016 Mitigation Plan* and its addenda, as adopted by Director, contain the only terms of mitigation. IGWA argues that because the CMRs do not prohibit multiple mitigation plans, it can achieve safe harbor through any adopted mitigation plan. That argument is contrary to the express terms of the *2016 Mitigation Plan*.

Contrary to IGWA's argument, it is not parol evidence to point out what the *2016 Mitigation Plan* and its addenda state and do not state. Nothing in the *2016 Mitigation Plan* allows other mitigation plans to be used as substitute mitigation, or as a contingency for not complying with the terms of the *2016 Mitigation Plan*. Summary judgment should be entered that IGWA must comply with the terms of the *2016 Mitigation Plan*, a remedy imposed by the Director in the event of breach or be subject to curtailment.

III. Summary Judgment Must be Entered Stating the 2009 Storage Water Plan does not Remedy a Breach of the 2016 Settlement Agreement.

In its *Memorandum*, IGWA admits that its use of the *Storage Water Plan* cannot be used to cure a 2022 breach of the *2016 Mitigation Plan*, as was argued by the Coalition in its Motion for Summary Judgment. *See IGWA Br.* at 5 (“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”).

Based upon IGWA's stated admission, there are no issues of law or fact concerning this issue and summary judgment should be entered accordingly on this issue. *See also, Surface Water Coalition's Motion for Summary Judgment* at 16-18.

IV. IGWA’s Arguments Regarding 2023 Mitigation Issues are Beyond the Scope of This Contested Case.

IGWA makes several references to mitigation actions in 2023. *See IGWA Br.* at 4, ¶¶ 8-11; 8-9, 14-15. The alleged mitigation in 2023, including whether or not IGWA complied with the *2016 Mitigation Plan* in 2023, is not at issue in this contested case and exceeds the four specific issues identified by the Hearing Officer.³ *See Order Authorizing Discovery et al.* at 4 (Dec. 29, 2023). This case concerns the Ground Water Districts’ non-compliance with required mitigation in 2022 and the Director’s response thereto. Therefore, any argument or alleged facts regarding conjunctive administration and administration in 2023 should be disregarded.

CONCLUSION

As requested in the Coalition’s Motion for Summary Judgment, the Hearing Officer should enter summary judgment finding that there are no issues of law or fact as to the following issues, and that based upon the *2016 Mitigation Plan* and its addenda, the orders entered by the Director pursuant to that plan, and CMRs and other applicable law:

1 - This is not a contract enforcement action; this is an action to enforce a stipulated mitigation plan and the Director’s orders entered pursuant to the plan.

2 - The plan contains a stipulated remedy in the *Second Addendum* authorizing the Director to order a remedy in the event of breach.

³ The Coalition disputes IGWA’s claims regarding storage water that it delivered to the Coalition in 2023 and under what mitigation plan that was provided under. In its *Request for Reconsideration / Enforcement*, the SWC acknowledged IGWA’s provision of 50,000 acre-feet under the *2016 Mitigation Plan*, but noted its concern “there are serious questions as to whether the individual groundwater districts are complying with the remaining long-term obligations as agreed to and ordered by the Director.” *SWC Request for Reconsideration / Enforcement* at 3-4 (July 31, 2023). The substance of the Coalition’s dispute with IGWA on the issue of the 50,000 acre-feet is further contained in confidential settlement letters to IGWA’s counsel that could be provided for the Hearing Officer’s in camera review if necessary. The fact remains that both IGWA and the Coalition dispute under which mitigation plan the 50,000 acre-feet of storage water was provided in 2023. However, that dispute is beyond the scope of this proceeding so it should be disregarded by the Hearing Officer anyway.

3 – As a result of the 2022 breaches of the *2016 Mitigation Plan*, the Director erred by not issuing an order specifying the actions needed to be taken by the breaching Ground Water Districts to cure the breaches.

4 – If the Director is not going to enter an order specifying the actions needed to be taken by the breaching Ground Water Districts, the Director must immediately curtail the breaching Ground Water Districts for failing to effectively operate the *2016 Mitigation Plan* pursuant to its terms, the orders of the Director and the CMRs and they should remain curtailed until they come into compliance with the terms of the *2016 Mitigation Plan*.

5 – Compliance with the 2009 mitigation plan (*Storage Water Plan*) cannot and does not cure the breaching Ground Water Districts’ breaches of the *2016 Mitigation Plan*.

The only issue remaining to be litigated is the 4th issue listed in the *Scheduling Order*. In order to address the 4th issue the Coalition intends to offer evidence of what the Director could have ordered to cure the 2022 breaches, since the Director indicated in the *Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance* dated August 2, 2023 that he did not have enough information to order a remedy.

DATED this 26th of February, 2024

MARTEN LAW LLP



Travis L. Thompson
Abby R. Bitzenburg

*Attorney for A&B Irrigation District,
Burley Irrigation District, Milner Irrigation
District, North Side Canal Company, and
Twin Falls Canal Company*

FLETCHER LAW OFFICE



for

W. Kent Fletcher

*Attorney for Minidoka Irrigation
District and American Falls
Reservoir District #2*

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 2024, I served a true and correct copy of the foregoing *Surface Water Coalition's Response to IGWA's Motion for Summary Judgment* on the following by the method indicated:

| | | |
|--|--|--|
| <p>Hearing Officer Roger S. Burdick Garrick Baxter Sarah Tschohl State of Idaho Dept. of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail roburd47@gmail.com garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov file@idwr.idaho.gov</p> | <p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only mhoward@usbr.gov</p> | <p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only tony.olenichak@idwr.idaho.gov</p> |
| <p>T.J. Budge Elisheva Patterson Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only tj@racineolson.com elisheva@racineolson.com</p> | <p>Sarah A. Klahn Max C. Bricker Veva Francisco Somach Simmons & Dunn 2033 11th St., Ste. 5 Boulder, CO 80302 *** service by electronic mail only sklahn@somachlaw.com mbricker@somachlaw.com vfrancisco@somachlaw.com</p> | <p>David Gehlert ENRD – DOJ 999 18th St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only david.gehlert@usdoj.gov</p> |
| <p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only rdiehl@pocatello.us</p> | <p>William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only wparsons@pmt.org</p> | <p>Corey Skinner IDWR – Southern Region 650 Addison Ave W, Ste. 500 Twin Falls, ID 83301-5858 *** service by electronic mail only corey.skinner@idwr.idaho.gov</p> |
| <p>W. Kent Fletcher Fletcher Law Offices P.O. Box 248 Burley, ID 83318 *** service by electronic mail only wkf@pmt.org</p> | <p>Kathleen Carr U.S. Dept. Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway, Ste. 400 Boise, ID 83706 *** service by electronic mail only kathleenmarion.carr@sol.doi.gov</p> | <p>Candice McHugh Chris M. Bromley McHugh Bromley, PLLC 380 South 4th Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only cbromley@mchughbromley.com cmchugh@mchughbromley.com</p> |
| <p>Robert E. Williams Williams, Meservy & Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only rewilliams@wmlattys.com</p> | <p>Robert L. Harris Holden, Kidwell, Hahn & Crapo, PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only rharris@holdenlegal.com</p> | <p>Michael A. Kirkham City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only mirkham@idahofallsidaho.gov</p> |

| | | |
|---|--|--|
| <p>Skyler Johns Steven Taggart Nathan Olsen Olsen Taggart PLLC P.O. Box 3005 Idaho Falls, ID 83403 *** service by electronic mail only sjohns@olsentaggart.com staggart@olsentaggart.com nolsen@olsentaggart.com</p> | <p>Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, ID 83440 *** service by electronic mail only dylan@dylanandersonlaw.com</p> | |
|---|--|--|



Travis L. Thompson