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Feb 29, 2024

DEPARTMENT OF
WATER RESOURCES

SWC/IGWA SETTLEMENT AGREEMENT MITIGATION PLAN – 2022 BREACH REBUTTAL REPORT Docket No. CM-MP-2016-001

Prepared for:
Idaho Surface Water Coalition

February 29, 2024

Project Number 1604FLE01-24

The technical material in this report was prepared by or under the supervision and direction of the undersigned, whose seal as a Professional Geologist is affixed below.



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TABLE OF CONTENTS

Section 1:	Introduction	1
Section 2:	Rebuttal to IGWA Expert Reports	1
2.1	Lynker Expert Report	2
2.2	Water Well Consultants' Expert Report	3
Section 3:	SWC Expert Opinions Review and Applicability to Hearing Issues	3
Section 4:	References	4

SECTION 1: INTRODUCTION

In 2015, the Surface Water Coalition (SWC) entered into an agreement (IDWR, 2016a) with Idaho Ground Water Appropriators, Inc. (IGWA) that is described in several documents and was ultimately approved by the Idaho Department of Water Resources (IDWR) Director in May of 2016 (IDWR, 2016b; “2016 Mitigation Plan”).

On August 2, 2023, the Director of IDWR issued the *Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance* (IDWR, 2023a; “2022 Compliance Order”), which relates to IGWA’s 2022 underperformance compared to the 2016 Mitigation Plan terms and conditions. On December 29, 2023, IDWR issued a related order that included scheduling deadlines for an upcoming hearing. (IDWR, 2023b; “2023 Scheduling Order”)

The 2023 Scheduling Order specified that the issues for hearing are:

- 1) *Did the Director error 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 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?* (IDWR, 2023b)

The 2023 Scheduling Order also set a deadline of February 15, 2024 for filing of expert reports. The Idaho Ground Water Appropriators filed expert reports prepared by Lynker (Lynker, 2024) and Water Well Consultants (Water Well Consultants, 2024).

This report provides David Colvin’s opinions and rebuttal responses to IGWA’s expert reports on the matter. I have been retained by the SWC for issues being addressed herein. I am basing my opinions on the information available at this time and reserve the right to alter my opinions should new or different information become available in the future.

SECTION 2: REBUTTAL TO IGWA EXPERT REPORTS

On February 15, 2024, IGWA submitted a disclosure that included two expert reports. Both reports contain erroneous references to distribution of the 240,000 acre-foot groundwater diversion reduction to non-IGWA Ground Water Districts. They also include erroneous applications of multi-year or averaged annual mitigation actions to IGWA’s 2022 mitigation plan obligations. Despite these errors, both reports identify Bingham Ground Water District as being in breach of 2022 mitigation plan obligations.

The Director of IDWR provided a 2021 mitigation plan compliance order with unambiguous treatment of both issues (IDWR, 2022; “2021 Compliance Order”):

2021 Compliance Order Findings of Fact #1: “*The Mitigation Plan obligates IGWA to reduce total ground water diversions by 240,000 acre-feet every year” (p. 9, emphasis added). It goes on to clarify that, “As explained above, the plain language of section 3.a.i imposes an annual—i.e., every year—obligation and thus does not allow for averaging over multiple years.” (p. 11)*

2021 Compliance Order Findings of Fact #2: “*The 240,000 acre-foot diversion reduction obligation is the sole responsibility of IGWA members participating in the Mitigation Plan.*” (page 11) Further clarified: “*Therefore, the 240,000 acre-foot diversion reduction obligation is IGWA’s sole responsibility. A&B and Southwest are not responsible for any portion of the 240,000 acre-foot diversion reduction obligation.*” (page 12)

The Director’s 2022 Compliance Order reiterates these issues (IDWR, 2023a).

2022 Compliance Order Findings of Fact #2: “Of import here, the 2016 Mitigation Plan obligates IGWA members to reduce total diversions or recharge an equivalent volume of 240,000 acre-feet each year.” (page 6)

2022 Compliance Order Findings of Fact #9: “The Director concludes that, as addressed in detail in the Amended Final Order Regarding IGWA’s 2021 Compliance, IGWA’s assignment to A&B and Southwest of a proportionate share (34,603 acre-feet) of its 240,000 acre-foot reduction obligation was improper.” (page 7)

2.1 LYNKER EXPERT REPORT

Lynker’s expert report (Lynker, 2024) summarizes their groundwater modeling analysis of excess conservation measures within Ground Water Districts during the period of 2016-2022. Modeled conservation measures included reductions in groundwater diversions (well pumping) and aquifer recharge. They modeled the 2022 impacts on near Blackfoot to Minidoka Snake River reach gains. Lynker then added storage water delivered by IGWA in 2022 to calculate the total 2022 benefit to SWC resulting from IGWA’s activities from 2016-2022.

The 2021 and 2022 Compliance Orders clearly state that IGWA’s mitigation responsibility is to provide 240,000 acre-feet of conservation measures annually. Lynker’s modeling of the impact from 2016-2021 activities is irrelevant to the 2022 breach and does not address the four issues specified for this hearing. Lynker does not address whether the Director was in error by not specifying actions to cure the 2022 breach or by not immediately issuing an order curtailing Ground Water Districts in breach, nor does Lynker address what actions must be taken by ground water districts to cure their 2022 breach.

2.2 WATER WELL CONSULTANTS' EXPERT REPORT

IGWA has reported annual Settlement Agreement Performance Reports summarizing their conservation activities since the 2016 irrigation season. The Water Well Consultants expert report presents alternative methods for evaluating IGWA's performance in an attempt to show that there was no 2022 breach. All but one of the alternative methods results in Bingham Ground Water District being in breach in 2022. None of the methods have been reviewed or agreed to by the SWC or, to our knowledge, IDWR. The methods presented appear to be biased toward raising the baseline pumping numbers to make it easier to avoid a 2022 breach.

The Director found four Ground Water Districts breached the agreement in 2022. Whether there is a breach, and the amount of the breach are not listed as any of the four issues specified for this hearing. Water Well Consultants did not address whether the Director was in error by not specifying actions to cure the 2022 breach or by not immediately issuing an order curtailing Ground Water Districts in breach, whether the 2009 mitigation plan can be used as a cure, or what actions must be taken by Ground Water Districts to cure their 2022 breach.

SECTION 3: SWC EXPERT OPINIONS REVIEW AND APPLICABILITY TO HEARING ISSUES

The SWC Expert Report for the 2022 Breach issue (LRE Water, 2024; "LRE Expert Report") contains opinions relevant to the issues specified for this hearing. The LRE Expert Report does not specify that the Director is in error. However, it contains opinions that directly address the technical issues specified for the hearing that request actions that could be taken by IGWA to cure the 2022 breach. The LRE Expert Report opinions include:

LRE Water Expert Report Opinion #8. 2016 Mitigation Plan underperformance would be minimized by accurate measurement and near real-time reporting of groundwater pumping.

LRE Water Expert Report Opinion #9. An effective remedy to the 2022 Breach could include reducing 2024 pumping at the locations where the excessive pumping occurred.

LRE Water Expert Report Opinion #10. Implementing additional pumping reductions for Bingham, Bonneville-Jefferson, and Jefferson-Clark Ground Water Districts in the 2024 irrigation season is a realistic remedy to address the long-term impacts of the 2022 Breach. 2024 additional pumping reductions should equal the 2022 excessive pumping amounts of 32,476; 5,204; and 18,605 acre-feet, respectively.

SECTION 4: REFERENCES

IDWR, 2016a. *Docket No. CM-MP-2016-001, Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order*. Idaho Department of Water Resources, March, 2016. <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-MP-2016-001/CM-MP-2016-001-20160309-SWCs-and-IGWAs-Stipulated-Mitigation-Plan-and-Request-for-Order.pdf>, accessed February 9, 2024.

IDWR, 2016b. *Docket No. CM-MP-2016-001, Final Order Approving Stipulated Mitigation Plan*. Idaho Department of Water Resources, May, 2016. <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-MP-2016-001/CM-MP-2016-001-20160502-Final-Order-Approving-Stipulated-Mitigation-Plan.pdf>, accessed February 9, 2024.

IDWR, 2022. *Docket No. CM-MP-2016-001, Final Order Regarding Compliance with Approved Mitigation Plan*. Idaho Department of Water Resources, September, 2022. <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-MP-2016-001/CM-MP-2016-001-20220908-Final-Order-Regarding-Compliance-with-Approved-Mitigation-Plan.pdf>

IDWR, 2023a. *Docket No. CM-MP-2016-001, Final Order Regarding IGWA's 2022 Mitigation Plan Compliance*. Idaho Department of Water Resources, August, 2023. <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-MP-2016-001/CM-MP-2016-001-20230802-Final-Order-Regarding-IGWAs-2022-Mitigation-Plan-Compliance.pdf>, accessed February 9, 2024.

IDWR, 2023b. *Docket No. CM-MP-2016-001, Order Authorizing Discovery, Scheduling Order, Order Suspending IDAPA 37.01.01.354, Notice of Prehearing Conference and Hearing*. Idaho Department of Water Resources, December, 2023. <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-MP-2016-001/CM-MP-2016-001-20231229-Order-and-Notice-of-Prehearing-Conference-and-Hearing.pdf>, accessed February 26, 2024.

LRE Water, 2024. *SWC/IGWA Settlement Agreement Mitigation Plan – 2022 Breach Expert Report*, Docket No. CM-MP-2016-001. Prepared by LRE Water for the Idaho Surface Water Coalition. February, 2024.

Lynker, 2024. *Hydrology and Groundwater Modeling Evaluation of IGWA's Settlement Agreement Performance, in the Matter of IGWA's 2016 Settlement Agreement Mitigation Plan*. Docket No. CM-MP-2016-001 - IGWA's Expert Report Disclosure, Exhibit A. February 15, 2024.

Water Well Consultants, 2024. *Evaluation of ground water district compliance with the IGWA-SWC Settlement Agreement in 2022*. Docket No. CM-MP-2016-001 - IGWA's Expert Report Disclosure, Exhibit B. February 15, 2024.