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**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

**BONNEVILLE-JEFFERSON’S POST-
HEARING BRIEF**

IN THE MATTER OF IGWA’S
SETTLEMENT AGREEMENT
MITIGATION PLAN

The Bonneville-Jefferson Ground Water District (hereafter “Bonneville-Jefferson”), acting for and on behalf of its members, through counsel, hereby submits its Post-Hearing Briefing.

- 1. The action pertains to a Mitigation Plan for a Delivery Call, governed by the Rules for Conjunctive Management – Not the rules for Ground Water Management Areas.**

The misinterpretation of the IGWA-SWC Settlement Agreement mitigation plan (“2016 Plan”) in this case arises largely from the misconception that it “is basically an aquifer recovery plan intended to deal with historical pumping... that predates” the 2016 Plan. Colvin, Tr. Vol I, pp. 70, ¶¶8 – 16; pp. 79, ¶ 25, pp 80 ¶¶ 1-7; see also Ex. 1, pp. 4 & 8. Although there are various auspicious aquifer level benchmarks, the 2016 Plan is a “Mitigation Plan” in a “Delivery Call” as defined under the Rules for Conjunctive Management (hereafter “Cm Rules”), IDAPA 37.03.11 et. seq., promulgated in part pursuant to Idaho Code § 42-603 and section 42-1805(8). A “Delivery Call is “[a] request from the holder of a water right for administration of water rights under the prior appropriation doctrine.” *Id.* at 37.03.11.010.04. “Mitigation Plans” are intended “to prevent or compensate holders of senior-priority water rights for, material injury...” *Id.* at 37.03.11.010.15. “Material Injury” is the “[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person...” *Id.* at 37.03.11.010.14. The Director must approve a Mitigation Plan consistent with the CM Rules. *Id.* at 37.03.11.043. That is precisely what the 2016 Plan is – a Mitigation Plan designed to mitigate material injury sustained by SWC.

The authority granted to the Director to approve Mitigation Plans is specific to mitigating material injury to senior water users, whereas the authority granted to the Director to approve a ground water management plan is specific to “managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water.” Idaho Code § 42-233b. The Hearing Officer should construe the 2016 Plan consistently with the goals and authority of the Director under the CM Rules governing water Delivery Calls.

2. The Director is not required to order curtailment of ground water users when SWC does not experience an in-season demand shortfall.

There is no dispute that the Director issue no curtailment order under the Rules for Conjunctive Management against ground water districts in 2023 because SWC did not experience an in-season demand shortfall. His decision is consistent with the Settlement Agreement, the CM Rules, and the his methodology order. At issue here is section 2(c) 3.m(iv) of the Settlement Agreement, which states:

[i]f the Director determines based on all available information that a breach exists which has not been cured, the Steering Committee will request that the Director issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to immediate curtailment pursuant to CM Rule 40.05.CM

(Emphasis added). CM Rule 40.05 states:

...[w]here 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.

(Emphasis added).

CM Rule 40.05 requires the Director to first determine a priority date for curtailment to know which of the out-of-priority water users are subject to curtailment. This determination is conducted annually through the use of the applicable *Methodology For Determining Material Injury to Reasonable In-Seasons Demand and Reasonable Carryover* (hereafter “Methodology Order”). In 2022, the Fourth Methodology Order controlled how priority dates were calculated in

this Delivery Call. The most current version is the Sixth Methodology Order, which applied in 2023. The Sixth Methodology Order details in part that the Four Methodology Order “...established methods for quantifying mitigation obligation by holders of junior priority ground water rights for shortfall in predictive and actual SWC water demands, and... established a method for determining a priority date for curtailment...”

This plain language shows that cannot curtail in this Delivery Call unless a water user is diverting out-of-priority. The Director’s method for determining out-of-priority water users in 2023 showed SWC would experience no demand shortfall, therefore, no ground water district was out-of-priority in 2023. Accordingly, ground water districts had no patrons diverting water “out-of-priority” in 2023, and the Director did not have authority under the law, nor was he authorized by the parties’ agreement, to curtail any of the ground water districts in 2023.

3. The Director is not required to order a remedy to cure the alleged 2022 breach.

3.1 A remedy is only appropriate where SWC has insufficient water supply caused by the breach.

SWC is demanding additional pumping reductions and/or curtailment of districts for the alleged 2022 breach, even though SWC had sufficient water supply in 2023 and even received more water through the Blackfoot to Milner reach from these districts than was required under the Settlement Agreement. Con tor Tr. Vol. II, pp. 62-66 ¶¶1-11, pp. 86 ¶¶ 23-25, pp. 87-89 ¶¶ 1-7. The plain language of the agreement demonstrates that SWC’s water supply must be diminished to support an order requiring actions to cure a breach. There are no provisions in the Agreement that liquidate damages or that mandate any penalties for non-compliant district. The operative

language found in section 2.c.3.m.iv. does not mandate any specific remedy for breach; it only states that the parties can “request that the Director evaluate all available information, determine if a breach has occurred,” which was done here, and the Director “shall issue an order specifying action that must be taken by the breaching party to cure the breach or be subject to curtailment” if he acts the request of the parties. *Id.* (emphasis added). In other words, if an action to cure breach is ordered, but not implemented, a district would be curtailed. But as stated in section 2 above, the Director must first determine whether curtailment is appropriate each year under the Methodology Order. The logic follows that if there is no curtailment order, then there is no need to fashion a remedy for breach because there was no material injury caused by the breach.

This interpretation of the 2016 Plan is also consistent with Idaho contract law.¹ It is axiomatic that for a party “[t]o succeed on a breach of contract claim, a plaintiff must demonstrate: (a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages.” *TCR, LLC v. Teton Cnty., No. 49487*, 2024 WL 118096, at *20 (internal citations omitted). Stated more simply, even if some Districts breached the 2016 Plan, SWC must be damaged for a remedy or curtailment to be warranted.

The undisputed evidence at the hearing shows SWC received more water from Bonneville-Jefferson and other districts in 2022 and 2023 than was required under the Agreement. Mr. Contor testified that from 2016 to 2022, Bonneville-Jefferson conserved more water than it was required

¹ Although this action deals with the Mitigation Plan approved by the Director, and Bonneville-Jefferson believes the Director lacks authority to order contract remedies in a Delivery Call actions, the Hearing Officer applied contract law to support his *Order on Motions for Partial Summary Judgment*. Therefore, it is appropriate and consistent for the Hearing Officer to consider damage analysis under contract law in determining whether a remedy for breach of the 2016 plan is warranted.

to conserve under the Agreement. He modeled the effects of these efforts through the Eastern Snake Plain Aquifer Model (“ESPAM”), which showed how much additional water accumulated to the SWC from these efforts. He concluded that if Bonneville-Jefferson had only conserved what the 2016 Plan required as required under the agreement, SWC would have received less water in 2022 than what Bonneville-Jefferson actually provided SWC from its cumulative efforts from 2016 to 2022. Contor Tr. Pp. 72 ¶¶ 15-25, pp. 73-78 ¶¶ 1-22. This also supports the Director not curtailing Districts in 2023. Mr. Colvin did not conduct an analysis of the Districts’ past conservation on the relevant reaches. Colvin Tr. Vol 1, pp. 70 ¶¶ 2-16. As such, Mr. Contor’s testimony was not controverted in the hearing. On this basis, the Hearing Officer may reasonably conclude that the SWC received more water from Bonneville-Jefferson in 2022 than was required under the 2016 Plan.

SWC argues that any excess conservation counts toward the District’s obligation to increase the Sentinel Well Index levels. However, this is inconsistent with the first objective of the 2016 Plan to “provide part of the water supply” for the SWC through the “natural flow in the Near Blackfoot to Milner reaches...” Ex. 500, Section (1)(a). If SWC is not materially injured, short any water, it had adequate water supply, was not damaged, and has no basis to seek a remedy.

3.1.a Ordering further pumping reductions or curtailment would unjustly enrich SWC.

Because SWC received more water supply to diver than it was entitled to receive under the agreement from Bonneville-Jefferson, it would be unjustly enriched by an order from the Director requiring further pumping reductions and or curtailment.

3.1.b Bonneville-Jefferson’s past conservation offsets any alleged damage by the Coalition.

In Idaho, “an injured party has a right to reliance damages “less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed. Therefore, under the Restatement, the breaching party is entitled to an offset for losses that would have occurred had the contract been performed.” *Burns Concrete, Inc. v. Teton Cnty.*, 168 Idaho 442, 458, 483 P.3d 985, 1001 (2020) (internal quotations and citations omitted). For the reasons explained in section 3.1.a above, the additional actions are not warranted for any breach in 2022 because SWC received more water than they would have received had Bonneville-Jefferson only done what it was required to do under the Agreement from 2016 to 2023.

4. SWC’ proposed method to calculate a remedy is technically flawed.

Mr. Colvin mistakenly identifies the Sentinel Well Index as the primary measure for a district’s compliance with the 2016 Plan. Ex. 1, pp. 4; Tr. Pp. 72 ¶¶ 15-25, pp. 73-78 ¶¶ 1-22. None of the stated objectives of the Settlement Agreement identify increasing the Sentinel Well Index to a particular level. *See* Ex. 500. Section 1 – Objectives. The 2016 Plan also draws an important distinction as to what triggers adaptive measures and what triggers a breach and how one determines actions to cure breach. Section 3 – Long Term Practices – addresses, among other things, the annual reduction requirement for the districts in subsection (a). Ex. 500, section 3. The section does not specify what occurs if this goal is not met, so the rest of the 2016 Plan must be consulted to make this determination.

The first stated Objective of the Agreement is to “[m]itigate for material injury to senior

surface water rights that rely upon natural flow in the Hear Blackfoot to Milner reaches to provide part of the water supply for the senior surface water rights. *Id.* at (1)(a) (emphasis added). This objective is consistent with the goals of the CM Rules to regulate a Delivery Call. Thus, the primary inquiry in determining how to handle a breach is whether SWC has sufficient water each year to fill its water right.

Section 3(e) – Ground Water Level Goal and Benchmarks – discusses the stabilization goals and benchmarks and specifies how compliance with these goals will be measured. *Id.* at (e)(i)-(iii). Subsection (v) specifically states that “[i]f any of the benchmarks, or the ground water level goal, is not achieved, adaptive measures will be identified and implemented per section 4 [Adaptive Water Management Measures]...” Thus, failure to meet the Sentinel Well Index goals does not trigger a breach – it triggers adaptive management. Evaluating injury to the Sentinel Well Index, without focusing on the SWC’s water supplies, to determine actions to remedy a breach is inconsistent with the plain language of the agreement.

How the parties address a breach of the agreement. Section 2(c)(3.m)(iv) provides:

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 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.

Section 3 – Long Term Practices – outlines the Districts’ annual obligation to reduce their ground water diversions. *Id.* at (a). Unlike Section 3(e), subsection 3(a) does not state what happens if the Districts breach these obligations. *Id.* The separation of these obligations and the plain

language is unmistakable – the aquifer level benchmarks (measured by the Sentinel Well Index) trigger adaptive management, and do not constitute a breach. This is also consistent with the law governing a Mitigation Plan within a Delivery Call because the Director is only authorized to take actions against junior water users if the Methodology Order shows that SWC is injured during an irrigation season.

Mr. Contor testified during the hearing that it is technically incorrect to exclude analysis of past conservation efforts of districts. Contor Tr. Vol II, pp. 49 ¶¶ 20-25, pp. 50-105. Mr. Colvin did not dispute this. Rather, he testified that he did not analyze the past conservation of districts because he interpreted the Agreement as not permitting him to do so. He further testified that the Agreement required him to focus on injury to the Sentinel Well Index, even though he could not identify any express provision of the Agreement that stated this. Furthermore, as set forth above, Mr. Colvin’s interpretation is not supported by the plain language of Sections 3(a), 3(e), and 2(3.m)(iv). Furthermore, Mr. Colvin’s lack of focus on the water supply provided to SWC through the reach gains was inconsistent with the first objective of the Agreement, the CM Rules goal that Mitigation Plans mitigate Material Injury. In other words, Mr. Colvin’s analysis relied upon a flawed interpretation of the Agreement and was technically incorrect. Thus, his proposed remedy was not supported by competent evidence in the record.

5. The Settlement Agreement contains another latent ambiguity as to how a remedy for breach of the annual reduction requirement is calculated by the Director.

As provided by this Court in *Potlatch Education Ass'n v. Potlatch School District No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010), “[a]contract term is ambiguous when there are

two different reasonable interpretations or the language is nonsensical.” (internal citations and quotations omitted). “A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist. *Id.* Mr. Colvin and Mr. Contor both read the same agreement but came to different conclusions as to what guidance it gave them in determining a cure for a breach of the annual reduction obligation. Tr. Vol II, Contor, pp. 55 ¶¶ 15-25, pp 56 ¶ 1-13, pp. 103 ¶¶ 2-25, pp. 104, 105 ¶ 1; Colvin Tr. Vol II, pp. 129 ¶¶ 22-25, pp. 130 ¶¶ 1-4.

Mr. Contor’s interpretation is consistent with the plain language of the 2016 Plan and the CM Rules. Testimony at the hearing shows that Mr. Colvin’s interpretation that the 2016 Plan only allows the Director to look at the year in which the breach occurred and then model the impact over-pumping had in that year on subsequent years is flawed. On cross-examination, Mr. Colvin could not identify where the agreement expressly stated that the Director was precluded from considering ground water districts conservation from previous years. Tr. Vol I, Colvin, pp. 70 ¶¶ 2-16; pp. 84 ¶¶ 2-25; Colvin Tr. Vol II pp. 127 ¶¶ 9-25, pp. 128, pp. 129 ¶¶ 1-22. Mr. Contor testified that he read the agreement and could not identify any specific provisions that limited the technical inquiry to the year in which the breach occurred followed by the subsequent years. Contor Tr. Vol II, pp. 55 ¶¶ 18-25, pp. 56 ¶¶ 1-13. Mr. Contor also pointed out that there are no provisions of the Agreement that state that the remedy must be based on the injury caused to the Sentinel Well Index. Contor Tr. Vol. II, pp. 63 ¶¶ 7-25, pp. 64-65, pp. 66 ¶¶ 1-11. Both experts conducted different analysis based upon their respective interpretations of the 2016 Plan revealing yet another latent defect in interpreting the document. For that reason, the Hearing Officer should adopt the interpretation posited by Mr. Contor.

DATED: April 8, 2024

/s/ Skyler C. Johns

SKYLER C. JOHNS

CERTIFICATE OF SERVICE

I hereby certify that on this the 8th day of April 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
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