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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

**IGWA’S MOTION TO
VACATE OR AMEND 2022
COMPLIANCE ORDER**

IN THE MATTER OF IGWA’S
SETTLEMENT AGREEMENT
MITIGATION PLAN

Idaho Ground Water Appropriators, Inc. (“IGWA”), by and through counsel, submits this motion pursuant to rule 220 of the Department’s rules of procedure to vacate or amend the *Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance* (“2022 Compliance Order”) issued August 2, 2023, in this matter. As explained below, the 2022 Compliance Order should be vacated or amended because it is predicated on an obsolete compliance method. This motion is supported by documents currently in the agency record in IDWR Docket No. CM-MP-2016-001, and by testimony admitted into evidence in hearings held February 8, 2023, and March 14-15, 2024, which are part of the agency record in IDWR Docket No. CM-MP-2016-001, and by the

Declaration of Elisheva M. Patterson in Support of Motion to Vacate Order (“Patterson Decl.”) filed herewith.

BACKGROUND

IDWR Docket No. CM-MP-2016-001 involves a stipulated mitigation plan that is based upon a settlement agreement between IGWA, several ground water districts, and the members of the Surface Water Coalition (the “Settlement Agreement”). The mitigation plan is commonly referred to as the “Settlement Agreement Mitigation Plan” or the “2016 Plan.”

The 2016 Plan enables ground water district patrons to avoid curtailment by conserving groundwater by way of reduced groundwater diversions and/or aquifer recharge. However, the 2016 Plan does not specify how diversion reductions will be measured. From 2016-2021, the districts measured diversion reductions by comparing current year diversions against average diversions from 2010-2014 (the “5-year baseline”). This compliance method, including the 5-year baseline, is set forth in the annual performance reports the districts submitted to the SWC and IDWR from 2016-2021.

From 2016-2022, the ground water districts allowed surplus conservation in one year to carry forward to the following year (referred to generally as “averaging”). (Patterson Decl., Ex. A, p. 10-11; Ex. B, p.12-14, 17-18.). On September 8, 2022, the former Director issued the *Final Order Regarding Compliance with Approved Mitigation Plan* (“2021 Compliance Order”) which (1) disallowed the use of averaging to measure compliance, (2) increased each district’s conservation obligation under the 2016 Plan, and (3) found that, as a consequence of those rulings, certain ground water districts failed to satisfy their groundwater conservation obligations in 2021, causing them to be in breach of the Settlement Agreement.

The Director’s disallowance of averaging upended the conservation programs implemented by the ground water districts since 2016. It put district patrons at risk of curtailment even though they had complied with their district’s conservation program.

The 2021 Compliance Order was issued without a prior hearing. Therefore, IGWA filed a petition for reconsideration and requested a hearing to present evidence, which was held February 8, 2023. Since the Settlement Agreement does not prescribe how groundwater conservation is measured, and since the SWC had previously agreed to averaging, and the districts had utilized averaging from the beginning, the districts were optimistic that the evidence presented at the hearing would persuade the Director to allow averaging. If the Director declined

to reinstate averaging, it would compel the districts to reevaluate how to measure groundwater conservation under the Settlement Agreement.

At the time the ground water districts' 2022 performance report was due (April 1, 2023), the Director had not yet issued a decision on the evidence presented at the February 8, 2023, hearing. Since the districts intended to adopt a different compliance method if the averaging were disallowed, the 2022 performance report did not specify a compliance method. Rather, it states: “[s]ince the method of measuring compliance will change depending on the outcome of the Director’s reconsideration of the Compliance Order, the enclosed spreadsheet does not purport to demonstrate compliance with the Agreement in 2022,” and “IGWA will determine a more appropriate method of measuring compliance once the Director’s decision becomes final.” *Id.* at Ex. C, p. 1-2.

On April 13, 2024, before a decision had been entered on the evidence presented at the February 8, 2024, hearing, the SWC sent a letter to the Director asserting that certain ground water districts breached the Settlement Agreement in 2022 based on the compliance method used from 2016-2021.

On April 24, 2023, the Director issued the *Amended Final Order Regarding Compliance with Approved Mitigation Plan* (“Amended 2021 Compliance Order”), which affirmed the 2021 Compliance Order, again disallowing the use of averaging.

On May 15, 2023, IGWA petitioned for judicial review of the Amended 2021 Compliance Order. While that was pending, the Director issued the *Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance* (“2022 Compliance Order”) on August 2, 2023, finding that four ground water districts breached the Settlement Agreement in 2022 based on the compliance method used from 2016-2021.

On November 16, 2023, the district court issued its *Memorandum Decision and Order* in response to IGWA’s petition for judicial review, affirming the Amended 2022 Compliance Order. *IGWA v. Spackman*, Case No. Ada County Case No. CV01-23-7893, Patterson Decl. Ex. D.) The district court decision did not address the central issue on appeal; namely, whether the Settlement Agreement is ambiguous since it does not prescribe how compliance is measured. Therefore, IGWA filed a petition for rehearing. The district court denied the petition on March 5, 2024. (*Ord. Denying Pet. for Rehearing*, Patterson Decl., Ex. E)

After the district court issued its *Memorandum Decision and Order* in November of 2023, the ground water districts began evaluating alternative methods of measuring groundwater conservation under the Settlement Agreement. They elected to change from the 5-year baseline to a 3-year baseline as set forth in the First Addendum to 2022 Performance Report submitted to the SWC and IDWR on February 22, 2022. (Patterson Decl., Ex. F.)

ARGUMENT

The ground water districts' adoption of a 3-year baseline to measure compliance in 2022 renders the 2022 Compliance Order moot. As explained below, (1) the Settlement Agreement does not prescribe any particular method by which groundwater conservation must be measured, (2) the 5-year baseline is not set in stone, (3) the districts preserved their right to change the baseline used to measure compliance in 2022, (4) the 3-year baseline is reasonable, and (5) the districts conserved more than 240,000 acre-feet in 2022 based on the 3-year baseline. The change in compliance method renders the 2022 Compliance Order moot, and the Director has inherent authority to vacate orders that are moot or that otherwise should not be applied prospectively.

1. The Settlement Agreement does not prescribe any particular method by which groundwater conservation must be measured.

As demonstrated in detail and at the hearing held February 8, 2022, and in subsequent briefing filed in this Docket No. CM-MP-2016-001, neither the Settlement Agreement nor the 2016 prescribe any particular method for measuring groundwater conservation under section 3.a.ii of the Settlement Agreement.

2. The 5-year baseline is not set in stone.

When the Director issued the 2021 Compliance Order finding that certain ground water districts breached the Settlement Agreement in 2021, he did not conclude that the terms of the Settlement Agreement mandate the use of a 5-year baseline to measure compliance. Rather, he simply relied upon the diversion reduction figures shown in the performance report IGWA submitted for 2021, which used the 5-year baseline. (2021 Compliance Order, p. 13.)

The district court adopted the same rationale when it affirmed the Amended 2021 Compliance Order. The court did not rule that the terms of the Settlement Agreement mandate the use of a 5-year baseline to measure compliance; rather, it ruled that the Director did not err

because the Amended 2021 Compliance Order was “[b]ased on the diversion numbers supplied by IGWA for 2021.” (Patterson Decl., Ex. E, p. 4.)

IGWA argued to the Director and the district court that the failure of the Settlement Agreement to prescribe a particular compliance method makes it ambiguous. The Director and the district court avoided the issue by ruling that the lack of a prescribed compliance method simply means the Director may rely upon the compliance method that IGWA reports, which from 2016-2021 used the 5-year baseline. The upshot of this ruling is that the districts are free to change the method by which compliance is measured, at least within reason. Indeed, there is nothing in the terms of the Settlement Agreement or the 2016 Plan that prevents IGWA and the districts from using a 3-year baseline.

3. The districts preserved their right to change the baseline for 2022.

As discussed above, the district court upheld the Amended 2021 Compliance Order because it was based on the groundwater reduction data that IGWA reported. When IGWA filed its 2022 performance report on April 1, it stated that “the method of measuring compliance will change depending on the outcome of the Director’s reconsideration of the Compliance Order,” and “IGWA will determine a more appropriate method of measuring compliance once the Director’s decision becomes final.” (Patterson Decl., Ex. C, p. 2.) The ground water districts reasonably waited until after the district court decision before selecting the compliance method used for 2022. Nothing in the terms of the Settlement Agreement or the 2016 Plan precludes them from doing so, and they expressly preserved the right to do so in their 2022 report.

4. The 3-year baseline is reasonable.

The 3-year baseline adopted for 2022 is reasonable because it covers the 3-year period immediately prior to the Settlement Agreement (2012-2014), and because it is consistent with the SWC’s agreement in 2016 that ground water districts could use a 3-year average for measuring compliance with the Settlement Agreement. On March 9, 2016, IGWA and the SWC filed *Surface Water Coalition’s and IGWA’s Stipulated Amended Mitigation Plan and Request for Order* in this docket, which contains a proposed order allowing groundwater conservation to be measured “based on a 3-year rolling average going forward.” Although the Director has since disallowed the use of a 3-year average for measuring compliance, the SWC’s consent to a 3-year average confirms its reasonableness.

5. The ground water districts collectively conserved more than 240,000 acre-feet in 2022 based on the 3-year baseline.

As set forth in the First Addendum to 2022 Performance Report (“First Addendum”), the ground water districts collectively conserved more than 240,000 acre-feet, and all but one district (Bingham Ground Water District) satisfied its proportionate conservation obligation.

6. The Director has inherent authority to vacate or amend orders that are moot or otherwise should not be applied prospectively.

The Director has inherent legal authority to vacate or amend Department orders that become moot, void, contain clerical errors, require amendment based on newly discovered evidence, or otherwise for legal or equitable reasons should not be applied prospectively. It is akin to the authority of courts to set aside judgments under rule 60(b) of the Idaho Rules of Civil Procedure. The Director’s periodic amendment of the methodology order in IDWR Docket No. CM-DC-2010-001 is one such example of the Director’s exercise of this authority. There are presumably other examples within the records of the Department where an agency order was vacated or amended for legal or equitable reasons.

A matter becomes moot when “the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” *Frantz v. Osborn*, 167 Idaho 176, 180 (2020) (quoting *Ferrell v. Whiteman*, 146 Idaho 604, 610 (2009)). Only a hypothetical question remains “when the party asserting [a matter] has received all the relief to which that party might have been found to be entitled.” *Sallaz v. Rice*, 161 Idaho 223, 230 (2016) (citing *Dorman v. Young*, 80 Idaho 435, 436-37 (1958)).

The 2022 Compliance Order is moot because it is predicated on a 5-year baseline which is not used to measure compliance with the Settlement Agreement in 2022. At a minimum, the Director should amend the 2022 Compliance Order based on the compliance method actually used as set forth in the First Addendum.

RESPECTFULLY SUBMITTED this 8th day of April, 2024.

RACINE OLSON, PLLP

By: 
Thomas J. Budge
Attorneys for IGWA

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2024, I cause the foregoing document to be served on the persons below via email at the address shown:


Thomas J. Budge

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