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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
IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN	**IGWA'S POST-HEARING BRIEF**

Idaho Ground Water Appropriators, Inc. ("IGWA"), by and through counsel, submits this post-hearing brief pursuant to verbal instructions given by the hearing officer at the conclusion of the hearing held March 14-15, 2024.

ARGUMENT

1. Ground water districts have been remarkably successful at conserving groundwater.

Counsel for the Surface Water Coalition ("SWC") argued at the hearing that "the ground water districts don't really abide by necessarily what the director orders. They don't really care what the district court has said." (Fletcher, Tr. Vol. I, 16:12-15.) Evidence presented at the

hearing shows otherwise. Since implementing the Settlement Agreement, the participating districts have conserved a total of 2,195,103 acre-feet, or 313,586 acre-feet annually on average. (Ex. 142, p. 4.) District patrons have removed end-guns, changed cropping patterns, reduced the number of cuttings, and dried up farmland to achieve this. (Stoddart, Tr. Vol. II, 149:13-22.) By and large, they have complied with the conservation programs crafted by the districts. *Id*. at 150:6-13. In addition, the ground water districts have spent millions of dollars recharging the ESPA. *Id.* at 151:18-152:1.

From 2016-2022, the districts performed as much aquifer recharge as possible, believing surplus conservation would carry forward to the following year. In 2017, for example, they conserved a total of 495,384 acre-feet. (Ex. 521.) That year, Jefferson-Clark Ground Water District conducted more aquifer recharge than its entire conservation obligation, at tremendous expense. (Stoddart, Tr. Vol. II, 153:24-154:13; 151:18-20.) The districts reported these surpluses to the SWC and IDWR, neither of whom suggested, let alone formally stated, that the districts would receive no mitigation credit for surplus conservation. *Id*. at 154:7-13. In fact, IDWR acknowledged that during wet periods it is important to capture as much water into the aquifer as possible for later use. (Sigstedt, Tr. Vol I, 145:15-146:5; Ex. 143, p. 5.)

The ground water district's conservation activities have improved both aquifer levels and Snake River reach gains, as demonstrated by the Eastern Snake Plain Aquifer Model (ESPAM). (Sigstedt, Tr. Vol. I, 139:14-140:4; Ex. 143, p. 6, Fig. 2; Colvin, Tr. Vol. II, 122:14-123:7.) Without the district's conservation activities, ESPA water levels would be much lower. (Sigstedt, Tr. Vol. 1, 140:14-18; Colvin, Tr. Vol. II, 124:7-17.)

2. The sentinel well benchmark is irrelevant to this proceeding.

This case involves the SWC's request that the Director identify actions to cure a breach of section 3.a of the Settlement Agreement. The SWC attempted to confuse the issue by presenting evidence that the sentinel well index has not met the 2023 benchmark under section 3.e of the Settlement Agreement. Whether or not the 2023 benchmark is met has no bearing on this case.

However, if the Director elects to identify actions to cure a breach, the sentinel well index is relevant to the extent it reflects the effect on aquifer water levels from deficit groundwater conservation in 2022, if any, as well as the effect of surplus conservation in prior years which caused a net increase in the sentinel well index. (Ex. 142, p. 13.)

3. The Director did not err when he declined to specify actions needed to cure the alleged 2022 breach.

The hearing officer ruled on summary judgment that the Director "erred" by not imposing a remedy or curtailment for the alleged breach in 2022. This ruling presumes the Director has a duty to impose a remedy for non-compliance with the 2016 Plan, which he does not.

First, the Director is not a party to the Settlement Agreement. Therefore, he is not bound by its terms.

Second, even if the Director were bound by the terms of the Settlement Agreement, the terms do not mandate that the Director specify actions to cure a breach. It states only that "the Steering Committee will report [an impasse] 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 …." (Ex. 502, p. 3, emphasis added.) Whether the Director accepts such a request is discretionary.

Third, when the Director approved the Settlement Agreement as a mitigation plan, he declined to accept responsibility to specify actions needed to cure a breach. His order approving the 2016 Plan states: "While the Department will exert its best efforts to support the activities of IGWA and the SWC, approval of the Second Addendum does not obligate the Department to undertake any particular action." (Ex. 508, p. 5.)

Since the Director has no duty to specify actions that may be taken to remedy non-compliance with the 2016 Plan, the Director did not err by declining to do so.

4. The Director correctly declined to order curtailment in August of 2023.

The hearing officer ruled on summary judgment that the Director erred by not "issu[ing] a curtailment order to the breaching party" in August of 2023. (*Ord. on Mot. for Part. Summ. J.*, p. 8.) The summary judgment decision does not explain which groundwater rights should be curtailed, or for how long, but it suggests that the ground water districts ceded the priority dates of their patrons' water rights by signing the Settlement Agreement. *Id.* at p. 6. n. 9. Presumably, the hearing officer's ruling is that the director should immediately and permanently curtail every groundwater right within a district that is deemed in breach of the 2016 Plan, regardless of whether individual patrons are in compliance with the district's conservation program, or whether individual patrons are senior or junior to the curtailment date prescribed by the

Methodology Order, or whether curtailment is needed to meet the water needs of the SWC. This ruling misapprehends the Director's authority under the Conjunctive Management Rules.

As discussed in section 1 of the *Memorandum In Support of IGWA's Motion for Summary Judgment* filed February 12, 2024, the Director's authority, as granted by the Legislature, is limited to the administration of water in accordance with the prior appropriation doctrine, which allows the Director to curtail out-of-priority water use as needed to meet the water needs of senior users. An approved mitigation plan allows "use of ground water to continue out of priority." CM Rule 40.04. Non-compliance with a mitigation plan allows the watermaster to "terminate the out-of-priority use of ground water rights," CM Rule 40.05. There is nothing in the Conjunctive Management Rules that authorizes the Director to curtail "in priority" water use due to non-compliance with a mitigation plan.

Nor do the terms of the Settlement Agreement give the Director authority to curtail "in priority" water use as a consequence of non-compliance. To the contrary, section 5 of the Settlement Agreement (the "safe harbor" provision) states: "[n]o ground water user participating in this Settlement Agreement will be subject to a delivery call by the SWC members as long as the provisions of the Settlement Agreement are being implemented." (Ex. 500, p. 5.) Thus, consistent with the CM Rule 40.05 cited above, compliance with the Settlement Agreement protects juniors from the delivery call (priority curtailment), whereas non-compliance does not.

The Second Addendum likewise recognizes that the Director's enforcement authority is limited to curtailment of out-of-priority water use. It enables the Director to "issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment." The ability to "specify actions" does not mean the Director has authority to compel such actions, except by threat of priority curtailment. Junior groundwater users must decide whether to implement cure actions specified by the Director "or be subject to curtailment."

The term "subject to curtailment" means priority curtailment, consistent with the CM Rules and the safe harbor provision cited above. It most certainly does not mean out-of-priority curtailment. The notion that the Settlement Agreement deprived groundwater users of the priority dates of their water rights is extreme and unfounded. Ground water district patrons did not sign the Settlement Agreement, and ground water districts have no legal authority to deprive their patrons of their water right priority dates.

Thus, when the Director determined in August of 2023 that certain ground water districts were out of compliance with the 2016 Plan, that ruling caused patrons of those districts to lose safe harbor and be subject to out-of-priority curtailment. At that time, there was no curtailment date in effect under the Methodology Order. Therefore, the Director properly declined to order immediate curtailment.

5. To the extent there was a groundwater conservation deficit in 2022, the ground water districts remedied the deficit in advance via surplus conservation.

The SWC and IGWA agree that, to the extent there was a groundwater conservation deficit in 2022, an appropriate remedy is for the districts to conduct additional conservation to make up the deficit. The SWC insists that the deficit must be remedied in arrears, yet it is hydrologically more effective to remedy the deficit in advance, as actually occurred.

5.1 Surplus conservation conducted prior to 2022 is an effective remedy.

As mentioned above, the ground water districts conserved a total of 2,195,103 acre-feet, or 313,586 acre-feet annually on average—73,586 acre-feet more than required annually (240,000 acre-feet). (Ex. 142, p. 4.) When accounting for the effects of the conservation deficit in 2022, the surplus conservation from 2016-2020 created a net gain to both Snake River reach gains and ESPA water levels as measured by the sentinel well index. (Ex. 142, p. 11; Ex. 143, p. 5-6.) The SWC's expert testified that surplus conservation performed in advance would propagate for years, and he acknowledged that providing surplus conservation in arrears is less effective than providing surplus conservation in advance. (Colvin, Tr. Vol. I, 68:10-69:18; 78:7-82:20.)

5.2 Curtailment or increased conservation in 2024 is not an effective remedy.

Even though the ground water districts prepared for a period of drought by implementing surplus conservation in advance, the SWC argues that it would be better to have the districts conduct surplus conservation in arrears, despite the fact that surplus conservation in 2024 does nothing to mitigate the hydrologic impacts of the 2022 deficit. If the Director disregards surplus conservation performed in advance and mandates additional conservation in 2024, this will likely be the death knell for ground water districts whose patrons are expected to rebel if they are told that they will receive no credit for all of the surplus conservation performed previously, and that they will suffer additional curtailment in 2024 despite having complied with their district's conservation program. (Stoddart, Tr. Vol. II, 166:17-169:2.)

5.3 The Director did not bar averaging until the end of the 2022 irrigation season.

It is significant that the director did not bar the use of averaging to measure compliance until September 8, 2022. That decision runs contrary to the conservation programs implemented by district patrons from 2016-2022 which allowed averaging. The 2022 irrigation season was exceptionally hot and dry, and district patrons understood they could draw on surplus conservation from prior years in order to meet irrigation demand. The Director's decision to eliminate averaging was made *after* the districts had issued implemented their conservation program for the 2022 irrigation season, *after* planting decisions were made, and *after* the bulk of the irrigation was performed for the 2022 season. (Stoddart, Tr. Vol. II, 156:4-158:15.) This further supports the acceptance of pre-2022 surplus conservation to remedy any deficit conservation that occurred in 2022.

6. The 2016 Plan does not preclude IGWA from providing mitigation under its 2009 mitigation plans.

The hearing officer ruled on summary judgment that the Settlement Agreement precludes IGWA from providing mitigation under its 2009 mitigation plans which allow mitigation to be provided via storage water deliveries and aquifer enhancement activities (recharge, conversions, etc.). IGWA contends this ruling is mistaken. If the hearing officer upholds this ruling, then clarification is needed.

6.1 The terms of the 2016 Plan do not preclude IGWA from providing mitigation under its 2009 mitigation plans.

The hearing officer's summary judgment ruling states that "the terms of the 2016 Mitigation Plan operate to rescind the 2009 Mitigation Plan." (*Ord. on Mot. for Part. Summ. J.*, p. 10.) Yet, the plain language of the Settlement Agreement does not state this. Nor do the Director's orders approving the 2016 Plan. Notwithstanding, the hearing officer ruled that the integration clause in the 2016 Plan causes it to supersede the 2009 mitigation plan. *Id*.

The integration clause in the 2016 Mitigation Plan has no bearing on the 2009 mitigation plan because integration clauses apply only to prior *agreements* among the same parties: "In order for one contract to be integrated, or merged, into a subsequent contract, both contracts must be between the same parties, both contracts must embrace the same subject matter, and the parties must intend for integration." *Smith v. Smith*, 794 S.W.2d 823, 828 (Tex. App.—Dallas

1990, writ withdrawn) (citing 17A C.J.S. *Contracts* § 380 (1963)); *Stiffler v. Hydroblend, Inc*., 172 Idaho 630, ___, 535 P.3d 606, 618 (2023) ("It is well settled that the terms of a written contract may be varied, modified, waived, annulled, or wholly set aside by any subsequently executed contract.") (Emphasis added). Unlike the 2016 Plan, the 2009 mitigation plan was not the product of a stipulated agreement. It was the product of a contested case before IDWR, approved by order issued by the Director over the objection of the SWC.

Ostensibly, the hearing officer's decision is based on a presumed intent of the parties, yet he did not find that the Settlement Agreement is ambiguous, nor did he take any evidence regarding the parties' intent.

6.2 The hearing officer wrongly refused to take official notice of IDWR precedent that is relevant to the effect of the 2016 Plan on the 2009 mitigation plans.

IGWA cited in its summary judgment brief several IDWR decisions to demonstrate that multiple mitigation plans have been approved in response to other delivery calls, that multiple mitigation plans have operated effectively, and that IGWA and the SWC have in other circumstances stipulated to the termination of existing mitigation plans. (IDWR Docket No. CM-MP-2015-001 (Ord. Dismissing Mit. Plans, June 12, 2019) (filing of a joint mitigation plan by cities, IGWA, and SWC which stated "This Joint Mitigation Plan replaces the previously filed plans" resulted in a finding from the Director that "the purpose of the Joint Mitigation Plan is to supplant the four previously filed plans . . ." in the order terminating prior plans.) This is relevant to show how IDWR has handled the termination of mitigation plans in other proceedings. (Tr. Vol. I, 20:2-22:22.) IGWA filed a motion to take official notice of these decisions, which was unopposed. (*IGWA's Mot. for Hearing Officer to Take Off. Not. of Dept. Files*, p. 1-2; Tr. Vol. I, 24:7-9) Surprisingly, despite no opposition from the parties, the motion was denied on the eve of the hearing. (*Ord. Denying IGWA's Mot. in Limine and Mot. to Take Off. Not*.) IGWA made a verbal motion for reconsideration at the outset of the hearing, explaining in detail the relevance of each document, but this too was denied. (Tr. Vol. I, 20:2-27:6.)

It was an abuse of discretion to refuse to take official notice of agency precedent that is arguably relevant to this case. First and foremost, the documents IGWA requested be taken official notice consist entirely of agency decisions, and they were cited by IGWA for the purpose of showing agency precedent. IDWR cannot shield itself from its own precedent. The Director may find agency precedent more or less binding, and more or less compelling, but he cannot

preclude litigants from arguing precedent, just as a judge in a court of law cannot preclude litigants from arguing precedent from the same court.

To the extent the Department's prior decisions contain relevant facts, the hearing officer still abused discretion by refusing to take official notice. Evidentiary standards for agencies are relaxed, and IDWR's procedural rules direct that "[e]vidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development." IDAPA 37.01.01.600. In keeping with this standard, "[t]he presiding officer may take official notice of any facts that could be judicially noticed in the courts of Idaho, of generally recognized technical or scientific data or facts within the agency's specialized knowledge and records of the agency." IDAPA 37.01.01.602; *see also* Idaho Code § 67-5251. The hearing officer disregarded the legal standard, stating that he did not want to take judicial notice because "they would become a part of the evidentiary base work in this matter." Tr. Vol. I, 18:7-16.

For reference, Idaho Rule of Evidence 201, which governs judicial notice of adjudicative facts, provides that a court "**must** take judicial notice if a party requests it and the court is supplied with the necessary information." (Emphasis added.). Here, IGWA met all required factors. It identified the documents to be noticed (by name, IDWR docket number, and date), all of which part of IDWR's public records. Counsel for IGWA also explained the relevance of each document to the present action.

Based on the foregoing, it was an abuse of discretion for the hearing officer to exclude the identified agency records offered by IGWA on relevancy grounds.

6.3 Clarification is needed as to the scope of the hearing officer's decision.

If the hearing officer declines to change his ruling that the 2016 Plan precludes mitigation under IGWA's 2009 mitigation plans, then clarification of the scope of that ruling is necessary. In determining that the 2016 Plan supersedes the 2009 plans, the summary judgment decision states that the "*2016 Mitigation Plan* dealt with the subject matter of the former *2009 Mitigation Plan* so comprehensively as to be complete within itself …. Therefore, the Hearing Officer finds that the terms of the *2016 Mitigation Plan* operate to rescind the *2009 Mitigation Plan*." (*Ord. on Mot. for Part. Summ. J.*, p. 10.) It is IGWA's understanding this decision does not address the effect of the 2016 Plan on IGWA's 2009 mitigation plans—*i.e*. whether the 2016 Plan precludes junior groundwater users from filing mitigation plans subsequent to the 2016 Plan. Clarification of the scope of the hearing officer's decision on this issue is important.

7. The hearing officer's selective application of the *res judicata* doctrine is erroneous.

When IGWA sought to admit the First Addendum to the 2022 Performance Report (First Addendum) into the agency record to demonstrate that the districts had complied with the Settlement Agreement in 2022, the hearing officer barred that evidence and testimony on the basis that IGWA did not appeal the 2022 Compliance Order.

By contrast, when the SWC argued that the 2016 Plan supersedes the 2009 mitigation plans, IGWA objected because IDWR had previously issued numerous orders recognizing the 2016 Plan as well as the 2009 mitigation plans as valid mitigation plans, which the SWC had not appealed. On this issue, however, the hearing officer took the opposition position, ruling that the SWC's argument was not a collateral attack on the prior orders because the SWC "had no need to raise the issue until this proceeding based upon arguments presented by the parties."[1]

The hearing officer applied the *res judicata* doctrine wrong in both instances. With respect to the Director's orders recognizing the 2009 mitigation plans as valid plans, there is no reason the SWC could not and should not have challenged those orders when they were issued.

On the other hand, at the time the Director issued the 2022 Compliance Order, the First Addendum did not exist. There was no need for the ground water districts to challenge that order because the Director did not have the ability to consider the contents of the First Addendum when he issued the 2022 Compliance Order. Consequently, the 2022 Compliance Order is not *res judicata* as to the effect of the First Addendum.

The common thread between the above rulings is that the hearing officer wielded the doctrine of *res judicata* to the disadvantage of IGWA and the ground water districts in both instances, whereas a proper application of the doctrine calls for the opposite.

RESPECTFULLY SUBMITTED this 8th day of April, 2024.

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[1] *Ord. on Mot. for Part. Summ. J.*, p. 10.

CERTIFICATE OF SERVICE

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

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