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**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 ET AL.)
)
 IN THE MATTER OF IGWA’S)
 SETTLEMENT AGREEMENT)
 MITIGATION PLAN)
 _____)

Docket No. CM-MP-2016-001

**SURFACE WATER COALITION’S
 POST-HEARING MEMORANDUM**

COME NOW, A&B IRRIGATION DISTRICT ET AL. (collectively “Surface Water Coalition” or “Coalition”), by and through its counsel of record, MARTEN LAW LLP and FLETCHER LAW OFFICE, and pursuant to the Hearing Officer’s request at the conclusion of the administrative hearing held March 14-15, 2024, hereby provides the following post-hearing memorandum for consideration.¹

¹ The parties received a copy of the hearing transcript on Monday March 25, 2024. Pursuant to the Hearing Officer’s stated deadline, this memorandum is being filed within 14 days, by April 8, 2024.

INTRODUCTION

The sole issue² at hearing was the following, as set forth in the Hearing Officer’s *Order Authorizing Discovery et al.* (Dec. 29, 2023) (“*Scheduling Order*”):

- 4) What action must be taken by the ground water district to cure their 2022 breach of the 2016 Mitigation Plan?

Scheduling Order at 4.

The Coalition was the only party to offer evidence on a proposed remedy that could be implemented by the breaching districts and IDWR in 2024. IGWA and the breaching districts did not present any evidence on a proposed remedy but instead relied on actions taken in prior years to assert that they did not need to fully perform the 2022 annual conservation volume required by the 2016 Mitigation Plan. The Coalition requests that the Hearing Officer recommend that the Director order the breaching districts undertake conservation actions³ in the following amounts within their respective districts in 2024 (in addition to the annual required actions in the 2016 Mitigation Plan) or be curtailed for failing to have an effectively operating mitigation plan in place:

Bingham Ground Water District	32,476 acre-feet
Bonneville-Jefferson Ground Water District	5,204 acre-feet
Jefferson-Clark Ground Water District	18,605 acre-feet

See Ex. 512 at 8 (August 2, 2023 Order).

² The Hearing Officer disposed of issues #1-3 as a matter of law in his *Order on Motions for Partial Summary Judgment* (March 12, 2024). The Coalition agrees with that order and requests that it be adopted in whole for purposes of the final recommended order issued in this matter.

³ Conservation action means “ground water reduction” or “an equivalent private recharge activity” within the boundary of the breaching district. *See* Ex. 500 at 2. Given the geographical size of a ground water district, the actions taken should be modeled to ensure the mitigation is “in-time” and “in-place” of where the underperformance occurred.

BACKGROUND

For purposes of this hearing and a recommended order, the following is not in dispute or subject to re-litigation. First, the Director found four ground water districts breached the 2016 Mitigation Plan and three remained in breach at the time of the hearing in the amounts set forth above. The Director was first made aware of the breaches when the Districts submitted their 2022 Performance Report on April 1, 2023. *See Ex. 516*. Pursuant to the procedures in the *Second Addendum*, the Steering Committee met but disagreed whether a breach had occurred. *See Ex. 515 (Thompson 4/13/23 Letter to Dir. Spackman)*. This impasse was communicated to the Director on April 13, 2023. *See id.* Shortly after, the Director issued the April 2023 Steps 1-3 Order and concluded that Twin Falls Canal Company was forecasted to suffer an injury of 75,200 acre-feet during the 2023 irrigation season. At that time American Falls-Aberdeen (AFA), Bingham, Bonneville-Jefferson, and Jefferson-Clark were not in compliance with the 2016 Mitigation Plan. Despite the non-compliance and no stipulated remedy, the Director did not order junior ground water rights within those districts curtailed. Instead, the members of those breaching districts were allowed to pump their junior rights out-of-priority for the entire 2023 irrigation season, thus receiving the “safe harbor” benefit of the 2016 Mitigation Plan. Even though the Director did not take action, AFA subsequently cured its breach through stipulation with the Coalition and recharging water within its district boundary in the fall of 2023. *See Ex. 19 (Notice of Filing of Agreement, Nov. 3, 2023, and Notice of Compliance)*.

The Director delayed action on the Steering Committee impasse until August 2, 2023. *See Ex. 512*. By that time water conditions had changed and there was no longer a predicted in-season demand shortfall. *See id.* at 9. Consequently, the Director concluded that “curtailing ground water use by American Falls-Aberdeen, Bingham, Bonneville-Jefferson and Jefferson

Clark is unwarranted at this time.” *See id.* The Director further concluded those districts “will not be entitled to the protection of IGWA’s 2016 Mitigation Plan in response to a curtailment order.” *See id.* Finally, in response to the request for an order to cure the breach, the Director noted that it was his opinion the “parties have failed to provide the Director with sufficient information to make this determination at this time.” *See Ex. 512 at 9, n. 6.*

The evidence submitted at the hearing provides additional information for ordering a remedy to cure the 2022 breach, albeit the ordered remedy will now be implemented over a year after the Director became aware of the breach in April 2023.

PROPOSED REMEDY EVIDENCE

Dave Colvin, the Coalition’s expert witness, offered an opinion on the proposed remedy that the Director could order to cure the 2022 breach:

An effective remedy to the 2022 Breach could include reducing 2024 pumping at the locations where the excessive pumping occurred. The 2016 Mitigation Plan includes pumping allocations at the GWD level rather than the farm or well level. As such, a remedy for the 2022 Breach proposed here is at the GWD scale. It is important that a remedy happen in the same location as where the excessive pumping occurred. This will be the best way to most closely replicate the timing and location of over pumping impacts. . . . 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.

Ex. 1 at 7-8.

At hearing, Mr. Colvin testified on the importance of implementing the remedy in the same location as the breach, and that it could be measured and monitored during the 2024 irrigation season. Day 1 Tr. p. 49:6-25.⁴ He also testified that a potential remedy that could help prevent future breaches would be to require more accurate and timely diversion measurement

⁴ In this memorandum, the Coalition uses the shorthand “Day 1” (March 14, 2023) or “Day 2” (March 15, 2023) to refer to the particular transcript page and line in the *Transcriber’s Transcript of Proceedings* provided to the parties on Monday March 25, 2023.

reporting. *See id.*, p. 50:3-15; Ex. 1 at 9 (“2016 Mitigation Plan underperformance would be minimized by accurate measurement and near real-time reporting of groundwater pumping”). Finally, in his rebuttal testimony, Mr. Colvin noted that the proposed remedy could be implemented at the individual well level for those specific pumpers that did not fully perform in 2022, rather than just district-wide. Day 2 Tr. p. 110:18 – 111:24.

DISTRICTS’ EVIDENCE ON PAST PERFORMANCE

The breaching ground water districts and IGWA did not offer evidence on a proposed remedy for the 2022 breach. Instead, the consultants and one lay witness all testified that it was their belief the excess conservation in prior years (2016-2020) was sufficient to offset or cure any breach that occurred in the 2022 irrigation season. *See* Ex. 142 at 14; (Sigstedt Testimony) Day 1 Tr. p. 150:5 - 151:5; Ex. 300 at 3, 8, 11; (Contor Testimony) Day 2 Tr. p. 92:8-13; (Stoddart Testimony) Day 2 Tr. p. 176:20 - 177:1. This is despite the fact that Ms. Sigstedt’s report found that Bingham Ground Water District did not perform its annual obligation after applying her analysis. Ex. 142 at 14 (“7. Only Bingham ground water district shows a 2022 deficit . . .”). These parties are essentially asking the Hearing Officer to find no “breach” by “crediting” past actions against a future deficiency that occurred in 2022 and ignoring the fact that under their analyses a District did not comply with the Agreement. Nothing in the 2016 Mitigation Plan or the Director’s subsequent orders authorizes such a conclusion.

Ms. Sigstedt testified that her proposed remedy was solely based on evaluating the estimated impacts on the Snake River resulting from past district actions. Day 1 Tr. p. 151:1-5 (“if you’re accepting my analysis based on the mitigation credit and looking at the reach gain, then there would not be action needed to be taken . . .”). However, this proposed remedy does not cure the 2022 underperformance by Bingham, Bonneville-Jefferson, and Jefferson-Clark, and

Ms. Sigstedt agreed the reach gains going forward would have been higher had those districts fully performed as required. Day 1 Tr. p. 164:4-15.

Mr. Contor's testimony related to his impression that the "goal" of the 2016 Mitigation Plan was improved reach gains. Day 2 Tr. p. 81:3-15; p. 82:8-16. Mr. Contor also commented that he analyzed prior actions and that the Coalition would have received less of a benefit had Bonneville-Jefferson only conserved the required amount prior to 2022. Day 2 Tr. 88:2 - 89:23.

ARGUMENT

First, the 2016 Mitigation Plan requires the Districts to conserve 240,000 acre-feet each and every year. *See* Ex. 500 at 2; Ex. 512 at 8. The obligation is "annual." Although nothing prevented the Districts from conserving more than the required amount in any given year, they were not allowed to "average" or "credit" that additional quantity against a future shortfall. *See generally, Amended Final Order Regarding Compliance with Approved Mitigation Plan ("Amended Compliance Order")* (April 24, 2023).⁵

Conserving more groundwater or performing more recharge in good water years was advisable given the 2016 Mitigation Plan's "sentinel well benchmarks and goal." *See* Ex. 500 at 3 ("Stabilize and ultimately reverse the trend of declining ground water levels and return ground water levels to a level equal to the average of the aquifer levels from 1991-2001"). At hearing, IGWA's consultant Ms. Sigstedt agreed that those actions would benefit the districts as to that component of the mitigation plan. Day 1 Tr. p. 168:13-18. Mr. Bill Stoddart, IGWA's lay witness, also agreed such actions or additional conservation in good water years would be beneficial to the districts in meeting the sentinel well index goal. Day 2 Tr. p. 173:1-7.

⁵ The Director's order is part of the record in this proceeding (CM-MP-2016-001) and a copy is also included as Ex. J to the *Declaration of Travis L. Thompson in Support of Surface Water Coalition's Motion for Summary Judgment* (Feb. 12, 2024).

The 2016 Mitigation Plan does not allow the Districts to cure a breach of the annual conservation requirement through a “credit” based upon past actions or overperformance. The Director was clear on this issue in the September 8, 2022 Order where he found the following with respect to the 2021 breach:

Here, the Mitigation Plan obligates IGWA to undertake total diversion reductions or equivalent recharge of 240,000 acre-feet every year. Each IGWA member is annually responsible for their proportionate share of that total.

* * *

In this case, certain holders of junior-priority water rights failed to satisfy their mitigation obligation in 2021. Out-of-priority diversions by the IGWA members in Table 3 above were not “pursuant to a mitigation plan that has been approved by the Director.” IDAPA 37.03.11.040.01.b. The approved Mitigation Plan was not “effectively operating” with respect to those IGWA members in 2021. IDAPA 37.03.11.042.02. Consequently, the holders of senior water rights have been and are being materially injured by the failure of the juniors to fully mitigate during the 2021 irrigation season.

The CM Rules contemplate that out-of-priority diversions by junior-priority ground water users will be curtailed absent compliance with an approved mitigation plan. IDAPA 37.03.11.040.01. But curtailment may be avoided if an adequate, alternative source of mitigation water is designated as a contingency. *Rangen June 1, 2015 Decision* at 9. Therefore, the Director must determine if there is an adequate contingency for IGWA members’ 2021 noncompliance with the Mitigation Plan.

The Mitigation Plan itself does not include a contingency in the event IGWA did not meet the 240,000 acre-foot reduction obligation, but it does contemplate the Director will “issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.” *Second Addendum* § 2.c.iv. The Director concludes the SWC and IGWA’s Remedy Agreement provides a cure for the breach and constitutes an adequate contingency for IGWA members’ noncompliance in 2021. . . . Therefore, in lieu of curtailment, the Director will order that IGWA must implement the 2021 remedy in section 1 of the Remedy Agreement.

Ex. 510 at 15-16 (Sept. 8, 2022 Order).

The above findings and conclusions were affirmed in the *Amended Compliance Order* issued by the Director in April 2023, and the District Court’s order on judicial review and final

judgment issued November 2023. *See also, Memorandum Decision and Order* (Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV01-23-7893). The Director noted that the 2016 Mitigation Plan “does not include a contingency” if a district breaches its share of the 240,000 acre-feet reduction obligation. *See Amended Compliance Order* at 19. Consequently, unless the Coalition stipulates to a remedy, as was done in 2021, then the Director must “issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.”⁶

The 2016 Mitigation Plan does not provide for “credit” for past performance as such a contingency. IGWA previously argued this position at the hearing on the Director’s September 2022 Order. The Director rejected this interpretation in the *Amended Compliance Order*:

Were IGWA’s argument to prevail, IGWA’s failure to conserve 240,000 ac-ft in one year would not necessarily constitute a breach of § 3.a.i as the reduction obligation deficit could be recouped by reducing more than 240,000 ac-ft in other years. The Director rejects IGWA’s arguments because they are contrary to the plain and unambiguous language of the Mitigation Plan.

Amended Compliance Order at 13.

Whether the argument is styled as “averaging” the annual obligation, or a proposed “remedy”, the end result is the same: no credit is allowed for over performance in 2016-2020 to cure the breach or underperformance that occurred in 2022. Indeed, if IGWA’s argument was accepted, then the Director would have authorized the “credit” for past actions for the 2021 breach, no remedy agreement with the Coalition would have been necessary in the first place, and the Director would not have found that the Districts breached the agreement in 2022. The Districts’ argument is simply prohibited by the terms of the 2016 Mitigation Plan the Director’s prior orders.

⁶ The Coalition and the American Falls-Aberdeen Ground Water District stipulated to such a remedy that was implemented by the district last fall. *See Ex. 514.*

CONCLUSION

The remaining issue in this matter is relatively straightforward: “What should the Director order to cure the 2022 breach?” As explained by the Coalition’s expert, the Hearing Officer should recommend that the breaching districts make up their 2022 shortfall through additional conservation actions in 2024. Although not perfect, the Hearing Officer found that the Director erred by not addressing the issue when it was brought to the Director’s attention in the spring of 2023. IDWR can still order a remedy at this time and correct the error. The other parties that participated in this hearing did not offer a viable alternative for the Hearing Officer’s consideration, even though it was IGWA’s expert’s opinion that at least one ground water district (Bingham) failed to perform as required by the Agreement. The Coalition submits that requesting “credit” for past actions should be rejected.

Although the Districts may have performed excess conservation in certain years, that effort benefits the Districts’ attempts to achieve the sentinel well benchmarks and ultimate goal, and does not excuse underperformance in 2022. Failing to perform annual obligations does not comply with the 2016 Mitigation Plan. The three breaching Districts must take additional actions now to come back into compliance for purposes of 2024 conjunctive administration. The Coalition requests that the Hearing Officer recommend that the Director adopt the Coalition’s proposed remedy accordingly.

In sum, the Director must “issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.” Ex. 502 at 3 (Section 2.c.iv). The Director has sufficient information to issue that order and there is no reason to not require the breaching districts to cure that breach now.

DATED this 8th day of April, 2024.

MARTEN LAW LLP



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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2024, I served a true and correct copy of the foregoing *Surface Water Coalition's Post-Hearing Memorandum* on the following by the method indicated:

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