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 Canal Company*

**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, 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**

**SURFACE WATER COALITION’S  
 MOTION TO STRIKE OR DENY  
 IGWA’S MOTION TO VACATE OR  
 AMEND 2022 COMPLIANCE ORDER**

IN THE MATTER OF IGWA’S  
 SETTLEMENT AGREEMENT  
 MITIGATION PLAN

COME NOW, 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 (hereafter collectively referred to as “Surface Water  
 Coalition” “SWC” or “Coalition”), by and through counsel of record, and hereby responds to the  
**SWC’S MOTION TO STRIKE OR DENY IGWA MOTION**

*Motion to Vacate or Amend 2022 Compliance Order* filed by the Idaho Ground Water Appropriators, Inc. (hereinafter collectively referred to as “IGWA”) on April 8, 2024. For the reasons set forth below, the Hearing Officer should strike or deny IGWA’s motion.

## **ARGUMENT**

### **I. IGWA’s Untimely Motion Should be Stricken.**

The Director issued his *Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance* (“2022 Compliance Order”) on August 2, 2023. The final order was accompanied by IDWR’s standard “explanatory information to accompany final order” advising parties they could: 1) file a petition for reconsideration within 14 days as provided by section 67-5246(4); 2) request a hearing within 15 days pursuant to section 42-1701A(3); or appeal the order to district court pursuant to sections 67-5270 and 5272. IGWA pursued none of these remedies; IGWA did not ask for a hearing on the issues of breach, the Director’s allocation of the Districts’ shortages, or any other issue presented in the final order. However, the Surface Water Coalition filed a timely request for reconsideration and hearing on the issue of the Director’s duty to order a remedy, and the Director granted the request for hearing. *See Order Granting Request for Hearing* (Sept. 6, 2023). The administrative hearing was held before the Honorable Roger S. Burdick on March 14-15, 2024, and the parties recently filed post-hearing briefing on April 8, 2024.

Although IGWA was presented with another opportunity to raise issues it wanted to address at the hearing, the issues identified in IGWA’s present motion were not raised with the Hearing Officer as required by the *Order Setting Deadlines* (Dec. 14, 2023). *See also, IGWA’s Statement of Proposed Issues* (Dec. 19, 2023). Despite failing to exercise any of its statutory remedies back in August 2023, or comply with the Hearing Officer’s prior orders, IGWA now requests the agency (or Hearing Officer) to “vacate” or “amend” the 2022 Compliance Order.

*See generally, IGWA Motion.* IGWA’s motion is an untimely collateral attack on the Director’s final order and the Hearing Officer’s prior orders and statement of issues. *See* I.C. §§ 67-5246(4)(14-day deadline to seek reconsideration); 42-1701A(3)(15-day deadline to request a hearing). As such the motion should be stricken as a matter of law. *See e.g.* I.R.C.P. 12(f) (court may strike from a pleading an insufficient defense, or immaterial or impertinent matter).

In short, a party cannot fail to challenge a final department order, participate in a contested case that is currently pending, and then seek to have that order “vacated” or “amended” several month later. The statutory deadlines preclude IGWA’s present motion and for that reason IGWA’s motion should be stricken from the administrative record accordingly.

## **II. Alternatively, IGWA’s Motion Should be Denied.**

Dissatisfied with the Director’s (and District Court’s) interpretation of the 2016 Stipulated Mitigation Plan, IGWA now argues that the 2022 Compliance Order should be amended or vacated because IGWA believes it can unilaterally change the measurement criteria a year after its original performance reported was submitted. *See IGWA Motion* at 4-5. While IGWA disputes the Director’s final orders finding certain districts breached the 2016 Mitigation Plan, rather than continue to pursue those challenges (i.e. the pending contested case before Hearing Officer Burdick and separate appeal to the Idaho Supreme Court), IGWA believes it can change the evaluation criteria for compliance and thus erase those matters entirely. The 5-year baseline that IGWA and IDWR have used for measuring compliance with the 2016 Mitigation Plan was created by IGWA and has been applied since 2017 (the first year the plan was evaluated). The Coalition and IDWR accepted this baseline and it has been used for the past 7 years to measure actions taken by the Districts pursuant to the Director’s order approving the 2016 Mitigation Plan. Since the Director and the District Court ruled that some Districts breached the requirements of

this order in 2021, IGWA apparently believes it can unilaterally change the criteria after-the-fact and calculate annual actions in a way that doesn't result in a breach.

Whereas the baseline was implemented in years where the Districts performed in compliance with the plan, IGWA has no right or ability to change this criteria on its own in years of non-compliance. Further, IGWA has no right to change the baseline after the Director has issued final orders relying upon IGWA's reporting and after IGWA failed to request a review of the Director's determination. Finally, the Director has not approved IGWA's changed criteria. Accordingly, while IGWA attempts to rewrite history on its own, it cannot change the Director's 2022 Compliance Order without a legal basis by unilaterally changing the measure of compliance with the Director's order approving the 2016 Mitigation Plan. The untimely collateral attack on the agency's final order should be denied.

**CONCLUSION**

IGWA's motion is several months late and is improperly attempting to influence the outcome of an administrative matter that has been submitted and is pending before the Hearing Officer. The Coalition respectfully requests that IGWA's motion be stricken or denied accordingly.

DATED this 16<sup>th</sup> of April, 2024

**MARTEN LAW LLP**



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for

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## CERTIFICATE OF SERVICE

I hereby certify that on this 16<sup>th</sup> day of April, 2024, I served a true and correct copy of the foregoing *Surface Water Coalition’s Motion to Strike or Deny IGWA’s Motion to Vacate or Amend 2022 Compliance Order* on the following by the method indicated:

<p>Hearing Officer Roger S. Burdick Garrick Baxter Sarah Tschohl Idaho Dept. of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail <a href="mailto:roburd47@gmail.com">roburd47@gmail.com</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a> <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a></p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>	<p>Craig Chandler IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only <a href="mailto:craig.chandler@idwr.idaho.gov">craig.chandler@idwr.idaho.gov</a></p>
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