

**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

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

IN THE MATTER OF IGWA’S  
SETTLEMENT AGREEMENT  
MITIGATION PLAN

**BACKGROUND**

On April 24, 2023, the Director of the Idaho Department of Water Resources (“Department”) issued the *Amended Final Order Regarding Compliance with Approved Mitigation Plan (“Amended 2021 Compliance Order”)*. In the *Amended 2021 Compliance Order*, the Director found that certain members of the Idaho Ground Water Appropriators, Inc. (“IGWA”), breached IGWA’s 2016 Mitigation Plan in 2021 but that IGWA could remedy noncompliance by supplying “to the [Surface Water Coalition] an additional 30,000 [ac-ft] of storage water in 2023 and an additional 15,000 [ac-ft] of storage water in 2024 within 10 days after the Data of Allocation of such year.” *Amended 2021 Compliance Order*, at 20.

On May 15, 2023, IGWA filed a *Petition for Judicial Review* on the *Amended 2021 Compliance Order*. See *IGWA v. Idaho Dep’t of Water Res.*, No. CV01-23-07893 (Ada Cnty. Dist. Ct. Idaho).

On August 2, 2023, the Director issued the *Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance (“2022 Compliance Order”)*. In the *2022 Compliance Order*, the Director held that certain IGWA members failed to satisfy their proportionate share of IGWA’s mitigation obligation in 2022 and were not in compliance with IGWA’s 2016 Mitigation Plan. *2022 Compliance Order*, at 1. However, the Director declined to issue a curtailment order because the mid-season as-applied order predicted that the SWC members would not suffer a demand shortfall during the 2023 irrigation season. *Id.*

On August 16, 2023, the Surface Water Coalition (“SWC”) filed its *Surface Water Coalition’s Petition for Reconsideration & Request for Hearing (“Request for Hearing”)*, pursuant to Idaho Code § 42-1701A(3). In its *Request for Hearing*, the SWC requested the Director hold a hearing to issue an order requiring IGWA to cure the 2022 breach and order curtailment if compliance did not take place. *Request for Hearing*, at 6.

On August 22, 2023, IGWA filed *IGWA's Response to SWC's Petition for Reconsideration and Request for Hearing* (“*Response to Request for Hearing*”), requesting the Department deny SWC’s *Request for Hearing*. *Response to Request for Hearing*, at 1.

On September 6, 2023, the Department issued an *Order Granting Request for Hearing; Notice of Scheduling Conference* (“*Hearing Order*”). The *Hearing Order* was granted on the legal basis that the SWC was not previously afforded an opportunity for a hearing on the 2022 *Compliance Order*. *Hearing Order*, at 2.

On November 16, 2023, the Snake River Basin Adjudication District Court of the Fifth Judicial District (“*District Court*”) affirmed the Department’s *Amended 2021 Compliance Order*. *Mem. Decision & Order*, at 10, *IGWA v. Idaho Dep’t of Water Res.*, No. CV01-23-7893 (Ada Cnty. Dist. Ct. Nov. 16, 2023) [hereinafter *Memorandum Decision & Order*].

On November 29, 2023, IGWA filed a *Petition for Rehearing* with the District Court in the *Amended 2021 Compliance Order* case.

On December 12, 2023, the Department issued an *Order Appointing Hearing Officer* for SWC’s *Request for Hearing* regarding the 2022 *Compliance Order*. The order appointed former Idaho Supreme Court Justice Roger S. Burdick as the hearing officer.

On December 29, 2023, Hearing Officer Burdick issued an *Order Authorizing Discovery; Scheduling Order; Order Suspending IDAPA 37.01.01.354; Notice of Prehearing Conference and Hearing* (“*Notice of Hearing*”). The *Notice of Hearing* identified four issues for hearing regarding the 2022 *Compliance Order*. *Notice of Hearing*, at 4.

On February 12, 2024, the *Surface Water Coalition's Motion for Summary Judgment / Supporting Points & Authorities* (“*SWC's Motion for Summary Judgment*”) was filed, requesting the Hearing Officer find (1) the Director erred in failing to order specific actions for IGWA to cure its 2022 breach or to issue an order curtailing certain ground water districts not in compliance; and (2) IGWA must comply with the 2016 Mitigation Plan to cure the 2022 breach. *SWC's Motion for Summary Judgment*, at 19.

On February 12, 2024, IGWA filed a *Motion for Summary Judgment and Memorandum in Support of IGWA's Motion for Summary Judgment* (collectively, “*IGWA's Motion for Summary Judgment*”).

On March 5, 2024, the District Court issued an *Order Denying Petition for Rehearing* in the *Amended 2021 Compliance Order* case.

On March 12, 2024, Hearing Officer Burdick issued an *Order on Motions for Partial Summary Judgment* granting the *SWC's Motion for Summary Judgment* and resolving issues one through three identified in the *Notice of Hearing*. See *Order on Mots. for Partial Summ. J.*, at 10–11.

On March 14–15, 2024, Hearing Officer Burdick held a hearing on the fourth issue identified in the *Notice of Hearing* which discussed what actions must be taken by the ground water districts to cure their 2022 breach. *Notice of Hearing*, at 4. The Department is awaiting a recommended order based on that hearing.

On April 5, 2024, IGWA filed a notice of appeal of the District Court’s *Memorandum Decision and Order* and *Denial of Petition for Rehearing* in the *Amended 2021 Compliance Order* case with the Idaho Supreme Court.

On April 8, 2024, IGWA filed *IGWA's Motion to Vacate or Amend 2022 Compliance Order* (“*Motion to Vacate*”). In its *Motion to Vacate*, IGWA claims that the ground water districts may use a novel 3-year baseline calculation to measure compliance, so the *2022 Compliance Order* is moot. *Motion to Vacate*, at 4. On April 8, 2024, IGWA also filed *Declaration of Elisheva M. Patterson in Support of Motion to Vacate Order* (“*Patterson Declaration*”).

On April 16, 2024, the SWC filed *Surface Water Coalition's Motion to Strike or Deny IGWA's Motion to Vacate or Amend 2022 Compliance Order* (“*Motion to Strike*”). In its *Motion to Strike*, the SWC claims IGWA is not authorized to change the baseline on its own after the Director issued a final order finding IGWA's noncompliance and that IGWA failed to timely request a review of the Director's determination. *Motion to Strike*, at 4.

On April 25, 2024, IGWA filed *IGWA's Reply Brief in Support of Motion to Vacate or Amend 2022 Compliance Order* (“*Reply Brief*”) stating that IGWA's *Motion to Vacate* is not barred by the doctrine of res judicata. *Reply Brief*, at 1.

The Director considered the arguments of counsel and the record presently before him and for the reasons stated below, the Director will deny IGWA's *Motion to Vacate*.

### ANALYSIS

The first issue that must be addressed is who has authority to rule on IGWA's *Motion to Vacate*. When IGWA filed its motion, it did not serve the motion upon the Director but served it upon Hearing Officer Burdick. However, throughout the *Motion to Vacate*, IGWA addresses the Director's authority to vacate or amend orders. *See, e.g., Motion to Vacate*, at 6. The scope of Hearing Officer Burdick's authority was limited to holding the contested case hearing requested by the SWC regarding the *2022 Compliance Order*. *Order Appointing Hr 'g Officer*, at 2. The Director concludes the request to vacate an order of the Director is outside the scope of Hearing Officer Burdick's authority. Furthermore, time is of the essence as the Department has predicted that the SWC will suffer an in-season demand shortfall this year and a curtailment order is pending in the related delivery call matter. *See Final Order Regarding April 2024 Forecast Supply*, at 6, No. CM-DC-2010-001 (Apr. 18, 2024). Questions regarding the status of IGWA's 2016 Mitigation Plan must be addressed promptly by the Director. Accordingly, the Director will address the *Motion to Vacate*.

In its *Motion to Vacate*, IGWA claims it can retroactively change the baseline used to measure its compliance with the 2016 Mitigation Plan. IGWA states it has unilaterally “elected to change from the 5-year baseline to a 3-year baseline . . . .” *Motion to Vacate* at 4. IGWA claims it can make this change now because the 2016 Mitigation Plan “does not specify how diversion reductions will be measured.” *Id.* at 2. IGWA argues that neither the Director's nor the District Court's earlier rulings “mandate the use of a 5-year baseline to measure compliance . . . .” *Id.* at 4. IGWA claims that because of its retroactive change in the baseline calculation, it did not breach the 2016 Mitigation Plan in 2022 and thus the Director's earlier determination of breach in the *2022 Compliance Order* is now “moot.” *Id.* at 4. IGWA suggests the Director has “inherent authority to vacate orders that are moot or that otherwise should not be applied prospectively.” *Id.* IGWA suggests the Director's authority “is akin to the authority of courts to set aside judgments under rule 60(b) of the Idaho Rules of Civil Procedure.” *Id.* at 6.

The *2022 Compliance Order* is not a final order because the SWC requested a hearing on the order. See IDAPA 37.01.01.740.02.c.. However, to the extent IGWA is asking the Director to exercise his discretionary authority to modify an earlier order either using “inherent authority” or under some authority “akin to IRCP 60(b),” the Director will not do so.<sup>1</sup> As described in the background section above, there has been extensive litigation involving IGWA’s compliance with the 2016 Mitigation Plan. The Director held a hearing related to IGWA’s 2021 compliance with the plan, after which the Director concluded that certain IGWA members breached the 2016 Mitigation Plan. IGWA’s compliance in that case was based on the 5-year baseline that it developed, implemented, and complied with from 2016 to 2023. IGWA sought judicial review of that order, and the District Court affirmed the Director’s *Amended 2021 Compliance Order*. The case is now pending before the Idaho Supreme Court.

Regarding IGWA’s compliance in 2022, the Department issued an order determining that IGWA breached its 2016 Mitigation Plan in 2022. IGWA’s compliance in 2022 was also based on its 5-year baseline. The SWC requested a hearing on that order to address issues with the 2016 Mitigation Plan that were not ripe when the Director held the hearing on IGWA’s 2021 compliance. The hearing requested was assigned to Hearing Officer Burdick and he has issued an order on partial summary judgement and has already held the hearing in the matter. A decision is expected on that matter shortly.

It is absurd for IGWA to argue that it can, at this point in all these proceedings, unilaterally decide to change the method used for determining compliance.<sup>2</sup> IGWA admits it has used the 5-year baseline to measure compliance since the start of the 2016 Mitigation Plan. *Motion to Vacate*, at 2. IGWA created the 5-year baseline, and it has been used by IGWA, the SWC, and the Department for the past 7 years to measure actions taken by the ground water districts pursuant to the 2016 Mitigation Plan.<sup>3</sup> IGWA cannot now unilaterally change the baseline after-the-fact just so it can try to argue it did not breach the 2016 Mitigation Plan and so it can avoid the consequences of its lack of compliance with the plain language of the 2016 Mitigation Plan. Issuing an order finding the *2022 Compliance Order* moot amid active proceedings would be detrimental to the administrative process and wasteful of resources.

The Director also finds that IGWA’s *Motion to Vacate* has been filed in bad faith as a further attempt to avoid undertaking aquifer conservation activities that it agreed to and for which it received safe harbor from past curtailments. In its 2016 Mitigation Plan, IGWA agreed to take certain annual actions including reducing ground water use and conducting recharge to recover aquifer levels as measured in a series of sentinel wells, by approximately 5.10 feet from

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<sup>1</sup> The decision to grant or deny a motion under I.R.C.P. 60(b) is committed to the discretion of the hearing officer. See *Eby v. State*, 148 Idaho 731, 734, 228 P.3d 998, 1001 (2010).

<sup>2</sup> While IGWA only asks the Director to vacate the *2022 Compliance Order* and does not ask the Director to vacate the *Amended 2021 Compliance Order* (at least at this time), if IGWA can retroactively change the baseline in the 2022 Compliance Order, it could do so for the *Amended 2021 Compliance Order*, thereby unsettling the litigation before the Idaho Supreme Court.

<sup>3</sup> Further, if IGWA was permitted to unilaterally change the universally relied-upon compliance calculation and recalculate its performance retroactively to perpetually avoid a determination of noncompliance, the agreement underlying the 2016 Mitigation Plan could be considered illusory.

2016 to 2023, and by an additional 4.83 feet from 2023 to 2026.<sup>4</sup> In the Spring of 2023, sentinel well levels were approximately equal to 2016 levels. In other words, IGWA missed its 2023 aquifer level benchmark by approximately 5.10 feet or the full amount. If the aquifer level benchmarks were not achieved, the 2016 Mitigation Plan calls for adaptive water management measures to be implemented by IGWA. The settlement agreement between IGWA and the SWC states in relevant part:

If any of the benchmarks or the ground water level goal is not met, additional recharge, consumptive use reductions, or other measures as recommended by the Steering Committee shall be implemented by the participating ground water parties to meet the benchmarks or ground water level goal.

*Settlement Agreement Entered Into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc.*  
§ 4.a.

IGWA's aquifer conservation activities have not resulted in the desired increases in aquifer levels as measured in the sentinel wells. As a result, as previously agreed, IGWA should now be working through the Steering Committee to implement adaptive water management measures including further decreasing its ground water consumptive use or conducting more recharge. Instead, IGWA now chooses to rejigger the math in such a way that its historical actions, those actions that failed to have the agreed-upon positive effect on the aquifer, can now be viewed as compliant with the 2016 Mitigation Plan. The Director finds IGWA's attempt to decrease its obligations under the 2016 Mitigation Plan at the exact time it previously agreed to increase its obligations to be a disingenuous act that will allow it to further injure senior surface water users.

The Director also denies IGWA's request because it is untimely. Idaho Code § 42-1701A(3) provides in relevant part:

Unless the right to a hearing before the director . . . is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action . . . who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written

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<sup>4</sup> In its 2016 Mitigation Plan, IGWA agreed to "increase ground water levels at identified wells by April 2026 to [levels equal to the average aquifer levels from 1991-2001]" and to "[i]ncrease [] ground water levels by April 2023 to a point half way between 2015 ground water levels and [levels equal to the average aquifer levels from 1991-2001]. . . ." The parties agreed to use an index value of agreed-to "sentinel well" as the measure of aquifer levels contemplated in the 2016 Mitigation Plan and as the basis to evaluate the effectiveness of IGWA's mitigation activities. Sentinel well index values for the 2016 Mitigation Plan's 2020, 2023, and 2026 benchmark years are negative 8.72, negative 3.90, and positive 0.93 feet respectively. Sentinel well index values were measured at negative 5.57 feet in 2020 and negative 8.97 feet in 2023.

petition stating the grounds for contesting the action by the director and requesting a hearing.

After the Director issued the *2022 Compliance Order*, the SWC timely filed its *Request for Hearing* asking the Director to “issue an order setting forth a remedy to cure the 2022 breach as required by the Agreement and order curtailment if compliance does not take place.” *Request for Hearing*, at 6. The Department granted the SWC’s *Request for Hearing* pursuant to Idaho Code § 42-1701A(3) because it did not hold a hearing before issuing the *2022 Compliance Order*. *Hearing Order*, at 2.

Initially, IGWA opposed SWC’s *Request for Hearing* on the *2022 Compliance Order* because “[t]he Director’s decision was appropriate and wise and should not be changed.” *Response to Request for Hearing*, at 1. If IGWA had grievances with the *2022 Compliance Order*, it should have timely requested a hearing within 15 days after the order was issued pursuant to Idaho Code § 42-1701A(3). IGWA did not ask for a hearing on the baseline or any other issue. In addition to failing to timely request a hearing, IGWA failed to raise the baseline issue at other critical times. IGWA did not raise the baseline issue in its *Response to Request for Hearing*. IGWA failed to raise the baseline issue when Hearing Officer Burdick provided the parties an opportunity to identify the issues they wanted to address at hearing. *See IGWA’s Statement of Proposed Issues*. IGWA failed to raise the issue in *IGWA’s Motion for Summary Judgment*.<sup>5</sup> Instead, IGWA waited eight months to request to vacate the *2022 Compliance Order* amid administrative proceedings held by Hearing Officer Burdick and Idaho Supreme Court proceedings regarding the *Amended 2021 Compliance Order*. Because IGWA failed to timely raise the baseline calculation issue, IGWA cannot now unilaterally change the baseline methodology used in the *2022 Compliance Order*.

## ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that *Idaho Ground Water Appropriators, Inc’s Motion to Vacate or Amend the 2022 Compliance Order* is DENIED.

DATED this 2nd day of May 2024.

  
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MATHEW WEAVER  
Director

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<sup>5</sup> Similarly, the District Court in the petition for judicial review regarding the *Amended 2021 Compliance Order* recognized that IGWA failed to raise the baseline issue there. *Memorandum Decision & Order*, at 11 n.8 (“How IGWA calculates the pre-2015 baseline year was not raised as a disputed issue before the Director below and is not at issue on judicial review.”).

## CERTIFICATE OF SERVICE

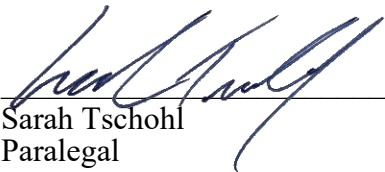
I HEREBY CERTIFY that on this 2nd day of May 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

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\_\_\_\_\_  
Sarah Tschohl  
Paralegal

## **EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER**

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

### **REQUEST FOR HEARING**

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

### **APPEAL OF FINAL ORDER TO DISTRICT COURT**

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.