

**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

**FINAL ORDER SPECIFYING
ADDITIONAL ACTIONS**

IN THE MATTER OF IGWA'S SETTLEMENT
AGREEMENT MITIGATION PLAN

This final order determines the additional actions that ground water districts that are signatories to the *SWC-IGWA Agreement* ("Districts") must take to achieve the 2023 sentinel well benchmark established in the Idaho Ground Water Appropriators, Inc.'s ("IGWA") 2016 Mitigation Plan.

BACKGROUND

A. Procedural history of IGWA's 2016 Mitigation Plan.

In 2015, the Surface Water Coalition ("SWC")¹ and IGWA executed the *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.* ("SWC-IGWA Agreement").

In October of 2015, the SWC and IGWA executed an *Addendum to Settlement Agreement* ("First Addendum"). Also, in October of 2015, the A&B Irrigation District ("A&B") and IGWA entered into a separate agreement ("*A&B-IGWA Agreement*").

On March 9, 2016, the SWC and IGWA submitted *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* ("*First Stipulated Mitigation Plan*") to the Director of the Idaho Department of Water Resources ("Department"). The *First Stipulated Mitigation Plan* was submitted in response to the SWC's delivery call (Docket No. CM-DC-2010-001). *First Stipulated Mitigation Plan*, at 3.

On May 2, 2016, the Director issued the *Final Order Approving Stipulated Mitigation Plan* ("*Order Approving Mitigation Plan*"), which approved the parties' stipulated mitigation plan.

¹ The SWC is comprised 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.

On December 14, 2016, the SWC and IGWA executed the *Second Addendum to Settlement Agreement* (“*Second Addendum*”). The *Second Addendum* amended the *SWC-IGWA Agreement* by adding details concerning the implementation of certain sections, including sections specifically relevant to this order: sections 3.e (Ground Water Level Goal and Benchmarks) and 3.m (Steering Committee). *Compare SWC-IGWA Agreement §§ 3–4, with Second Addendum § 2*. The *Second Addendum* also explained the process by which the Steering Committee would address any failure to achieve the ground water level benchmarks or goal set forth in the *SWC-IGWA Agreement*. *Second Addendum § 2.c.ii*.

On February 7, 2017, the SWC and IGWA submitted the *Surface Water Coalition’s and IGWA’s Stipulated Amended Mitigation Plan and Request for Order* (“*Second Stipulated Mitigation Plan*”). The SWC and IGWA requested that the Director issue an order approving the *Second Addendum* as an amendment to the mitigation plan. *Second Stipulated Mitigation Plan ¶ 6*.

On May 9, 2017, the Director issued the *Final Order Approving Amendment to Stipulated Mitigation Plan* (“*Order Approving Amendment to Mitigation Plan*”), approving the *Second Addendum* as an amendment to the parties’ mitigation plan. *Order Approving Amendment to Mitigation Plan*, at 5.

The following six documents are collectively referred to as “2016 Mitigation Plan” in this order:

- (1) the *SWC-IGWA Agreement*;
- (2) the *A&B-IGWA Agreement*;
- (3) the *First Addendum*;
- (4) the *Order Approving Mitigation Plan*;
- (5) the *Second Addendum*; and
- (6) the *Order Approving Amendment to Mitigation Plan*.

B. The SWC’s request to address the failure to achieve the 2023 sentinel well benchmark.

On March 8, 2024, the SWC sent a letter to the Director advising that the 2016 Mitigation Plan’s 2023 sentinel well benchmark was not achieved. Letter from the SWC to the Director of the Department, at 1 (Mar. 8, 2024) [hereinafter SWC’s 2024 Benchmark Letter] (Regarding 2016 Stipulated Mitigation Plan / 2023 Sentinel Well Benchmark). Attached to the letter was a memorandum from the Sentinel Well Technical Working Group to the SWC/IGWA Steering Committee. The memorandum included the figure below, showing the 2023 Sentinel Well Index value dropping to -8.97 feet, which is well below the 2023 benchmark.

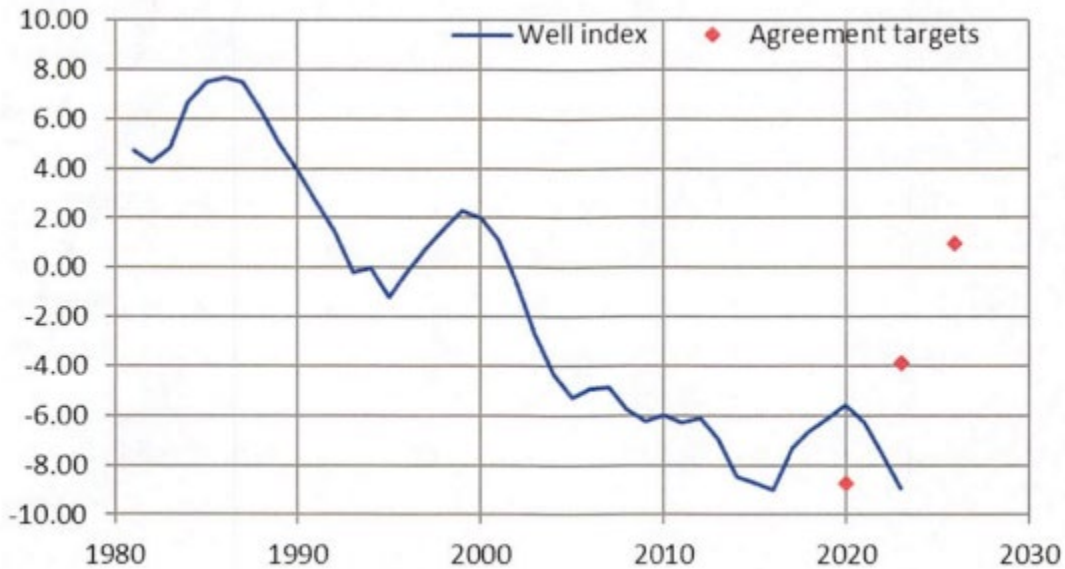


Figure 1 - Graph of Sentinel Well Index Values and Agreement Targets

The SWC advised that the Steering Committee met on November 2, 2023, to discuss additional actions to be undertaken by the Districts to achieve the benchmark consistent with Paragraph 2.c.ii of the *Second Addendum. Id.* According to the SWC, the Steering Committee tasked a technical working group to evaluate hydrologic information and perform model runs to make recommendations by late December 2023 or early January 2024. *Id.* However, the technical working group did not complete the evaluation work or make recommendations by the agreed upon timeline. *Id.* In SWC’s 2024 Benchmark Letter, the SWC requested that the Director issue an order requiring additional actions to be undertaken by the Districts to achieve the benchmark because the SWC and IGWA failed to agree upon additional actions by March 1 of this year. *Id.* at 1–2.

On April 5, 2024, IGWA sent a letter to the Director responding to SWC’s 2024 Benchmark Letter. Letter from IGWA to the Director of the Department (Apr. 5, 2024) [hereinafter IGWA’s 2024 Benchmark Letter] (Regarding 2023 Sentinel Well Benchmark). First, IGWA argues the Director should not act on the SWC’s request because the SWC failed to file a motion under Rule 220 of the Department’s Rules of Procedure, IDAPA 37.01.01. *Id.* at 1. Second, IGWA argues that the Director must first hold a hearing before responding to the SWC’s request. *Id.* Finally, IGWA argues that the Steering Committee did not reach an impasse concerning the benchmarks, so the Director cannot issue an order specifying additional actions to meet the benchmarks. *Id.*

ANALYSIS

In the *Second Addendum*, the SWC and IGWA agreed to a specific process for addressing any alleged breach of or noncompliance with the mitigation plan, including when the groundwater level benchmarks are not met. The *Second Addendum* § 2.c.ii states:

If, based on the information reported and available, the Surface Water Coalition and IGWA find that the Long Term Practices as set forth in paragraph 3 of the Agreement have been performed but the groundwater level benchmarks or goal set forth in 3.e.ii have not been met, the Steering Committee shall recommend additional actions to be undertaken by the Districts pursuant to 3.m.iii of the Settlement Agreement. If the Surface Water Coalition and IGWA do not agree upon additional actions prior to March 1 of the following year, the Steering Committee will request that the Director issue an order requiring additional actions to be undertaken by the Districts to achieve the benchmarks or goal not met.

Figure 1 (above) illustrates the 2023 Sentinel Well Index value dropping to -8.97 feet, which is well below the 2023 groundwater level benchmark agreed to by the SWC and IGWA. Pursuant to paragraph 2.c.ii of the *Second Addendum*, because the 2023 benchmark was not met, the Steering Committee was required to recommend, by March 1, 2024, the additional actions the Districts must take to achieve the benchmark. It is undisputed that the 2023 benchmark was not achieved. It is also undisputed that the Steering Committee failed to reach an agreement by March 1 on additional actions to be undertaken by the Districts to achieve the benchmark. Accordingly, the Steering Committee was required to request that the Director issue an order requiring additional actions to be undertaken by the Districts to achieve the benchmark. The SWC members of the Steering Committee have now requested that the Director issue an order specifying additional actions the Districts must take to achieve the benchmarks. While IGWA opposes the action, its arguments are not well founded.

IGWA argues that there has not been a declared impasse yet, suggesting that ongoing litigation has simply prevented the completion of the work of the Steering Committee. IGWA's 2024 Benchmark Letter, at 1. The problem with this argument is that the plain language of the *Second Addendum* sets a March 1 deadline for the SWC and IGWA to agree upon additional actions. If they do not, the Steering Committee is required to request that the Director issue an order requiring additional actions to be undertaken by the Districts to achieve the benchmark. Because the action is mandatory, the Director will act upon the request filed by the SWC members of the Steering Committee.

IGWA also argues that the SWC cannot raise this issue through a letter and must first file a motion pursuant to the Department's rules of procedure and then the Director is required to hold informal proceedings before deciding the issue. IGWA's 2024 Benchmark Letter, at 1. IGWA argues that after those steps occur, the Director is then required to hold a hearing before issuing an order. *Id.* The Director disagrees with IGWA that these are impediments to addressing the SWC's request. As stated above, in the *Second Addendum*, the SWC and IGWA agreed to a specific process for addressing any alleged breach of or noncompliance with the mitigation plan. The plain language of the *Second Addendum* says that a "request" will be made of the Director. This does not require a motion to be filed with the Director.² The *Second Addendum* does not call for any specific process for the Director to follow. Furthermore, as the Department has explained in litigation involving the Fifth Methodology Order, the Director does not violate the Idaho Administrative Procedures Act when he issues an order without a hearing. *Respondent IDWR's Br.*, at 14–21, *IGWA v. Idaho Dep't of Water Res.*, No. CV01-23-13173 (Ada Cnty.

² Even if a formal filing was required, it would be a petition, not a motion. *See* IDAPA 37.01.01.002.14.

Dist. Ct. Idaho Jan. 19, 2024). Moreover, 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). Step 4 of the Sixth Final Methodology Order compels the Director to issue a curtailment order “as soon as practical after the deadline for junior ground water users with approved mitigation plans to provide notice of secured water. . .” *See Sixth Final Order Regarding Methodology for Determining Material Injury for Reasonable In-Season Demand and Reasonable Carryover*, at 42, No. CM-DC-2010-001. This year, the deadline was May 2, 2024. As a result of Step 4, it is critical that the Districts know what actions they will need to take to ensure compliance with the 2016 Mitigation Plan.

Therefore, the Director concludes that the 2016 Mitigation Plan authorizes the Director to issue this order specifying additional actions the Districts must take to achieve the ground water level benchmarks and the Director will do so to ensure the Districts have certainty in knowing what actions they must perform to ensure compliance with their 2016 Mitigation Plan.

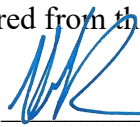
With regards to additional actions, the Director concludes that it is appropriate that the Districts increase their proportionate share of the total annual ground water use reduction of 240,000 acre-feet by an additional 5% (12,000 acre-feet) during the 2024 irrigation season and then increase their proportionate share of the total annual ground water reduction of 240,000 acre-feet by an additional 12,000 acre-feet each year thereafter until the 2023 benchmark is achieved or the Steering Committee fulfills its obligations set forth in § c.ii of the *Second Addendum* and recommends alternative actions. Consistent with the 2016 Mitigation Plan, Districts may continue to conduct an equivalent private recharge activity in place of or in combination with their ground water use reductions. Also as set forth in the 2016 Mitigation Plan, private recharge activities cannot rely on the Water District 01 Common Rental Pool or credits acquired from third parties. The Director believes that this 5% increase in 2024, and 12,000 acre-feet each year after, in aquifer conservation activities is an achievable increase in the Districts’ reduction obligation and will ensure that the 2023 benchmark is ultimately met.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that in addition to the actions already required by the 2016 Mitigation Plan:

The Districts will increase their proportionate share of the total annual ground water use reduction of 240,000 acre-feet by an additional 5% (12,000 acre-feet) during the 2024 irrigation season. The Districts will increase their proportionate share of the total annual ground water use reduction of 240,000 acre-feet by an additional 12,000 acre-feet each year thereafter until the 2023 benchmark is achieved. The Districts may continue to conduct an equivalent private recharge activity in place of or in combination with their ground water use reductions. Private recharge activities cannot rely on the Water District 01 Common Rental Pool or credits acquired from third parties.

Dated this 3rd day of May 2024.



MATHEW WEAVER
Director

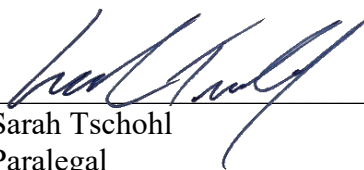
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of May 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>John K. Simpson MARTEN LAW LLP PO Box 2139 Boise, ID 83701-2139 jsimpson@martenlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
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<p>Thomas J. Budge Elisheva M. Patterson RACINE OLSON PO Box 1391 Pocatello, ID 83204-1391 tj@racineolson.com elisheva@racineolson.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
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<p>Sarah A Klahn Maximilian C. Bricker Somach Simmons & Dunn 1155 Canyon Blvd, Ste. 110 Boulder, CO 80302 sklahn@somachlaw.com mbricker@somachlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>

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<p>Michael A. Kirkham City Attorney, City of Idaho Falls PO Box 50220 Idaho Falls, ID 83405 mkirkham@idahofallsidaho.gov</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
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<p>Dylan Anderson DYLAN ANDERSON LAW PLLC PO Box 35 Rexburg, Idaho 83440 dylan@dylanandersonlaw.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
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<p>COURTESY COPY TO: Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 corey.skinner@idwr.idaho.gov</p>	<input checked="" type="checkbox"/> Email
<p>COURTESY COPY TO: William A. Parsons PARSONS, LOVELAND, SHIRLEY & LINDSTROM, LLP PO Box 910 Burley, ID 83318 wparsons@pmt.org wparsons@magicvalley.law</p>	<input checked="" type="checkbox"/> Email



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.