

Dec 26, 2023

DEPARTMENT OF  
WATER RESOURCES

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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

**IGWA’s Response to Surface Water  
Coalition’s Statement of  
Proposed Issues**

IN THE MATTER OF IGWA’S  
SETTLEMENT AGREEMENT  
MITIGATION PLAN

Idaho Ground Water Appropriators, Inc. (“IGWA”), acting on behalf of North Snake Ground Water District, Carey Valley Ground Water District, Magic Valley Ground Water District, Aberdeen-American Falls Area Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry’s Fork Ground Water District, pursuant to the *Notice of Second Continued Scheduling Conference; Order Setting Deadlines* issued December 14, 2023, in this matter, submits this response to the *SWC Issues for Hearing* filed December 19, 2023, in this matter.

Generally, the issues identified by the SWC cover the same topics identified in *IGWA’s Statement of Statement of Proposed Issues* filed December 19, 2023. The issues are framed differently, but they center on the same two questions: (1) does the Settlement Agreement Mitigation Plan preclude the ground water districts from providing mitigation to the Surface Water Coalition (“SWC”) in accordance with the Storage Water Mitigation Plan, and (2) did the

Director err by declining to impose a remedy for the alleged breach of the Settlement Agreement Mitigation Plan?

The principal difference between IGWA’s and the SWC’s framing of the issues is that IGWA focuses on the orders issued by the Director, whereas the SWC makes broad statements about what the IGWA-SWC Settlement Agreement was intended to accomplish. This warrants a brief discussion about the scope of the Director’s authority to interpret the IGWA-SWC Settlement Agreement.

As a matter of law, Idaho state agencies have no inherent authority; they only have those powers granted by the legislature. *Idaho Power Co. v. Idaho Pub. Utils. Comm’n*, 102 Idaho 744, 750 (1981); *Idaho Retired Firefighters Assoc. v. Pub. Emp. Ret. Bd.*, 165 Idaho 193, 196 (2019). They are “tribunals of limited jurisdiction.” *In re Idaho Workers Comp. Bd.*, 167 Idaho 13, 20 (2020) (citing *Washington Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho 875, 879 (1979)). When implementing express statutory powers, “administrative agencies have the implied or incidental powers that are reasonably necessary in order to carry out the powers expressly granted.” *Vickers v. Lowe*, 150 Idaho 439, 442 (2011) (citing 2 Am.Jur.2d *Administrative Law* § 57 (2004)). If an agency acts outside of its express and implied powers, such actions are void. *Wernecke v. St. Maries Joint Sch. Dist. No. 401*, 147 Idaho 277, 286 n.10 (2009) (citing 73 C.J.S. *Public Administrative Law & Procedure* § 112).

Adjudication of contract disputes is not among the powers granted to the Director. Such power is vested in the judiciary. The Director’s statutory duty is to distribute water in accordance with state law. Since water distribution is sometimes affected by contractual arrangements—a stipulated mitigation plan being a good example—the Director may at times be required to interpret contracts in order to perform his statutory duties. His interpretative authority, however, is limited to that which is “reasonably necessary to carry out the powers expressly granted.” *Vickers*, 150 Idaho at 442. In other words, the Director has authority to interpret contracts only to the extent necessary to distribute water in accordance with Idaho law.

The Director does not have statutory authority to ultimately adjudicate contracts or impose damages for breach thereof. Accordingly, when a protest to a water right permit or transfer application is resolved by a settlement agreement that requires actions by the parties, the practice of the Idaho Department of Water Resources is to approve the application with a condition that acknowledges the settlement agreement but declines any duty for enforcement thereof. This is precisely why the Director approved the IGWA-SWC Settlement Agreement with a condition that exempts the Director from taking any particular enforcement action in response to a breach.

Under the Conjunctive Management Rules (“CM Rules”), the Director’s authority to interpret stipulated mitigation plans is limited to (a) determining whether to approve the stipulation as a mitigation plan under CM Rule 43.03.o; and (b) determining whether the approved mitigation plan is effectively operating under CM Rule 42.02. If a mitigation plan is not effectively operating, the only remedy the Director can impose of his own accord is priority curtailment. He does not have authority to impose damages or take other ultra vires actions.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of December, 2023.

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By:   
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## CERTIFICATE OF SERVICE

I hereby certify that on this 26<sup>th</sup> day of December, 2023, I served the foregoing document on the persons below via email or as otherwise indicated:

  
Thomas J. Budge

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