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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO GROUND WATER APPROPRIATORS, INC.,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER RESOURCES, and MATHEW WEAVER, in his capacity as Director of the Idaho Department of Water Resources.

Respondents.

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND FOR THE BENEFIT OF A&B IRRIGATION DISTRICT ET AL.

Case No. CV01-23-07893

SURFACE WATER COALITION'S RESPONSE TO IGWA'S PETITION FOR REHEARING

IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN

COME NOW, Intervenor-Defendants 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 the "Surface Water Coalition" or "Coalition"), by and through their undersigned counsel of record, and hereby file this response in opposition to *IGWA's Petition for Rehearing* pursuant to the schedule set forth in the Court's *Notice of Hearing on Petition for Rehearing* issued on January 22, 2024.

For the reasons set forth below, the Court should deny IGWA's petition for rehearing.

INTRODUCTION

IGWA seeks rehearing on two issues. First, its "proportionate share" argument and dispute with the Director's allocation of the 240,000 acre-feet to the signatory Ground Water Districts. Second, IGWA disputes the Court's finding that no substantial rights were prejudiced by the Director's final order. Both of these arguments should be rejected for the reasons set forth below.

ARGUMENT

I. IGWA's Proportionate Share Argument is Unavailing.

The Court affirmed the Director's final order and found: 1) the approved mitigation plan requires the Districts to reduce 240,000 acre-feet each year; and 2) non-parties are not responsible for any part of that obligation. *See Memorandum Decision and Order* at 9-14 ("*Decision*"). The Court's decision is supported by sound reasoning and precedent as applied to the facts in this case. The Court rightly rejected IGWA's ambiguity arguments and found the

Director properly relied upon the terms of the 2016 Mitigation Plan Order for purposes of his decision in the underlying matter. *See id.*

IGWA seeks rehearing on its belief that the Court's decision "does not fully resolve the issue for which IGWA petitioned for judicial review." *IGWA Br.* at 2. IGWA's primary complaint is that the Director should not have allocated the 240,000 acre-feet in the same manner that the Districts chose to utilize.

The alleged ambiguity concerning "proportionate share" is much ado about nothing. Nothing in the Agreement and Mitigation Plan requires IGWA to perform more or authorizes IGWA to perform less than the stated obligation of 240,000 acre-feet per year. Therefore, the Director properly enforced the plain terms of the Agreement and Mitigation Plan. *See Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 291 P.3d 399 (2012); *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 264, 297 P.3d 222, 227 (2011). This Court rightly affirmed that finding. *See Decision* at 10.

IGWA's primary issue on rehearing is that the Director erred by applying IGWA's method to define each district's share of the annual 240,000 acre-feet conservation obligation. *IGWA Br.* at 2-6. IGWA alleges since the "proportionate share" term is undefined, the Director had no authority to evaluate the Districts' annual compliance against anything but what IGWA claimed each District agreed to do (i.e. volume erroneously allocated based upon 205,000 acre-feet).

This is a strange argument in that it essentially asks the Court to prevent the Director from determining whether individual Districts and groundwater users complied with the approved Mitigation Plan and final order approving the same. IGWA ultimately misses the point that the Districts failed to conserve what was required under the Settlement Agreement and the 2016 Mitigation Plan Order. *See Decision* at 10 ("the Director did not err in determining that

Section 3.a. of the Settlement Agreement unambiguously requires a reduction in ground water diversion in the amount of 240,000 acre-feet each year").

Further, it is undisputed that the Districts only conserved roughly 50% of what was required in 2021. *See id.* at 5 ("122,784 acre-feet"). There is nothing in IGWA's present "proportionate share" argument that changes that fact. Stated another way, IGWA's argument would result in every District being in non-compliance as it is an "all or nothing" claim. *See IGWA Br.* at 3 ("It is axiomatic that the Director cannot find a ground water district in breach of the Settlement Agreement without first defining the district's obligations and how compliance with those obligations is measured").

IGWA reported its performance every year compared to a baseline number[1] (2010-14 average) and an allocation method that it determined (according to historic pumping). *IGWA Op. Br.* at 21 ("IGWA utilized a 5-year average to define the baseline, . . ."); Tr. 97:1-18; R. 972 (Ex. 114). The problem is that IGWA wrongly included non-parties in its allocation of the 240,000 acre-feet obligation (i.e. A&B Irrigation District, Southwest Irrigation District, and Falls Irrigation District). R. 972. IGWA had no ability or right to allocate a conservation obligation to non-parties. Counsel for the SWC identified this problem as early as the spring of 2017 when IGWA submitted its first performance report. R. 976. However, IGWA ignored the warning and continued to assert that the Districts were only going to conserve an amount less than what was stated in the Agreement. R. 979-80. Further, IGWA never requested the Director specifically address this alleged error. Thereafter, the Districts exceeded the 240,000 acre-feet conservation obligation between 2017 and 2020 (R. 685-708), and the parties witnessed increases in annual

[1] As noted this issue is not before the Court on judicial review. *See Decision* at 11, n. 8.

sentinel well readings. As a result, the Districts' mistaken belief was of no consequence as they were exceeding the obligation and ground water levels were increasing.

However, the Districts failed to conserve the required amount in 2021 (R. 709-712). Rather than take a draconian view to find all Districts to be in non-compliance, the Director evaluated the performance data and determined that only certain Districts failed to abide by the approved mitigation plan pursuant to the Districts' own allocation method.

The Director's decision to evaluate the Districts' compliance with the same allocation method that IGWA used was reasonable. Although the Settlement Agreement does not identify the "proportionate share" in terms of individual acre-feet allocations, it is undisputed that the Districts applied the historic pumping volume percentages. R. 972. The Director applied the same method, albeit using the 240,000 acre-feet number as the total volume to allocate. While IGWA continues to argue about different methods that could have been used, it cannot escape the sharing allocation that the Districts actually implemented. The Director did not err in interpreting the Mitigation Plan Order or Settlement Agreement in this regard, he simply applied the same allocation method that the Districts and IGWA used in the first place. While the Districts erroneously started from a wrong number by including non-parties in their calculation, the Director corrected that error in his decision. R. 412.

In sum, IGWA's complaint about what was done doesn't change the result. The Districts were still far short of the 240,000 acre-feet obligation in 2021. If the Court accepts IGWA's present argument that the Director erred by evaluating individual district compliance, then the only logical result is that all Districts should be held in non-compliance if they do not collectively achieve 240,000 acre-feet each year. For this reason, the Court should deny IGWA's "proportionate share" argument on rehearing.

II. No Substantial Right Prejudiced.

IGWA next asks the Court to rehear its finding that no substantial rights were prejudiced. *See IGWA Br.* at 6-7. In its *Decision* the Court explained:

> Therefore, the Final Order did not implement any remedy in relation to the 2021 compliance dispute that was not agreed to by IGWA in resolution of the dispute. It follows the Final Order did not prejudice IGWA's substantial rights.

Decision at 15.

IGWA claims the Director violated "Idaho law governing contract interpretation" and that qualifies as a violation of Idaho's APA. *See IGWA Br.* at 7. In its continuing campaign to avoid enforcement of agreements that it signs as well as final orders of IDWR, IGWA further alleges, without any support in the record, that the "Remedy Settlement was entered into under duress after the Director communicated to IGWA through back channels that he was planning to declare a breach and shut off the ground water districts' members water rights in September of 2021." *Id.* Finally, IGWA alleges that "the Director's interpretation of the Settlement Agreement makes it much more likely that the water rights of IGWA's members will be curtailed by IDWR." *Id.*

Taking IGWA's last point first the Court aptly noted that any compliance issues related to 2022 and 2023 "are not before the Court in this proceeding and cannot be used to establish prejudice to a substantial right for purposes of this case." *Decision* at 15. There is nothing in IGWA's rehearing petition that demonstrates the Court erred in any way on this point.

Next, IGWA's unsupported claims about signing the Remedy Settlement Agreement "under duress" should be rejected. It doesn't matter in this appeal why IGWA signed the Remedy Settlement Agreement, all that matters is that IGWA did and consequently the Director's final order did not prejudice any substantial right. Since no junior ground water right was

curtailed, IGWA cannot use that "non-curtailment" as a basis to cry foul for settling a dispute over its 2021 non-compliance.

Finally, the Director's interpretation and enforcement of his prior orders approving the 2016 Stipulated Mitigation Plan and its amendments have been upheld by this Court. Since IGWA failed to show the Director erred in any manner set forth pursuant to section 67-5279(3), it cannot show any prejudice to any substantial right. The Director enforced his order according to the plain and unambiguous language of the stipulated mitigation plan and applied the same allocation procedure that IGWA used to divide up the conservation obligation. Although the Districts used the wrong number to begin with (i.e. 205,000 acre-feet), that was their unilateral mistake, not the Director's. IGWA's request for rehearing on this issue should be denied accordingly.

CONCLUSION

The Director's final order in this case should be upheld. The Court's *Decision* rightly affirmed the agency finding that the signatory Districts have a 240,000 acre-feet annual conservation obligation and that certain Districts failed to comply with the approved mitigation plan in 2021. IGWA has failed to show any error in this decision and has not shown any prejudice to a substantial right. The Court should deny IGWA's petition for rehearing.

DATED this 5th day of February, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2024, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

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