

IN THE MATTER OF THE DISTRIBUTION)
 OF WATER TO VARIOUS WATER)
 RIGHTS HELD BY AND FOR THE)
 BENEFIT OF A&B IRRIGATION)
 DISTRICT, AMERICAN FALLS)
 RESERVOIRS DISTRICT NO. 2, BURLEY)
 IRRIGATION DISTRICT, MILNER)
 IRRIGATION DISTRICT, MINIDOKA)
 IRRIGATION DISTRICT, NORTH SIDE)
 CANAL COMPANY, AND TWIN FALLS)
 CANAL COMPANY.)
 _____)
 IN THE MATTER OF IGWA'S)
 SETTLEMENT AGREEMENT)
 MITIGATION PLAN)
 _____)

I

BACKGROUND

This matter concerns a Petition seeking judicial review of the Director’s Amended Final Order Regarding Compliance with Approved Mitigation Plan dated April 24, 2023 (“Final Order”). On November 16, 2023, the Court entered a Memorandum Decision and Order, along with a Judgment, affirming the Final Order. The background set forth in the Memorandum Decision is incorporated herein by reference. On November 29, 2023, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed a Petition for Rehearing. The parties briefed the issues raised and a hearing on the Petition for Rehearing was held on February 15, 2024.

II.

ANALYSIS

In the Final Order, the Director held the mitigation plan unambiguously requires participating IGWA members to reduce ground water diversions in the amount of 240,000 acre-feet of water each year. R., 415. He further found the mitigation plan unambiguously prohibits participating IGWA members from apportioning a percentage of the annual reduction requirement to A&B Irrigation District and/or Southwest Irrigation District. R., 416. The Court affirmed the Director’s holdings in these respects in the Memorandum Decision. In its Petition for Rehearing, IGWA reasserts challenges to the Director’s enforcement of the approved

mitigation plan. In particular, it challenges the Director’s proportioning of the 240,000 acre-feet reduction obligation among the participating IGWA members.

A. The Director’s proportioning of the 240,000 acre-feet reduction obligation is affirmed.

With respect to the 240,000 acre-feet reduction obligation, Section 3.a.ii of the Settlement Agreement provides that “Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction” R., 437. Prior to April 1 of each year, the Settlement Agreement requires participating IGWA members to submit their ground water diversions for the prior irrigation season to the steering committee. R., 478. On April 1, 2022, participating IGWA members submitted their performance report for the 2021 irrigation season. R., 709. They also prepared and submitted a document entitled “2021 Performance Summary Table,” which included information on their ground water diversions. R., 845. It set forth the proportionate shares of the reduction obligation as follows:

American Falls-Aberdeen	33,715 acre-feet
Bingham	35,015 acre-feet
Bonneville-Jefferson	18,264 acre-feet
Carey	703 acre-feet
Jefferson-Clark	54,373 acre-feet
Henry’s Fork	5,391 acre-feet
Magic Valley	32,462 acre-feet
North Snake	25,474 acre-feet
A&B	21,660 acre-feet
Southwest ID	12,943 acre feet

TOTAL: 240,000 acre-feet

R., 845.

IGWA’s numbers attributed 34,603 acre-feet of the 240,000 acre-feet reduction obligation to A&B Irrigation District and Southwest Irrigation District. This attribution was contrary to the plain language of the mitigation plan. The Director expressly approved the mitigation plan on the condition that “[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan.” R., 896. The 240,000 acre-feet reduction obligation set forth in Section 3.a. of the Settlement Agreement is an ongoing activity

required under the mitigation plan. Therefore, it cannot be attributed to Southwest Irrigation District which is neither a signatory party to the Settlement Agreement nor a party to the mitigation plan. It also cannot be attributed to A&B Irrigation District, as IGWA expressly agreed that “Paragraphs 2 – 4 of the *Settlement Agreement* do not apply to A&B and its ground water rights.” R., 498. This includes the 240,000 acre-feet reduction requirement set forth in Section 3.

Recognizing that IGWA’s inclusion of A&B Irrigation District and Southwest Irrigation District in the proportionate share numbers was contrary to the mitigation plan, the Director reapportioned IGWA’s numbers to comply with the mitigation plan. The Director did so in a purely mathematical fashion utilizing the information submitted by IGWA. The Director removed A&B Irrigation District and Southwest Irrigation District from the proportionate share numbers. R., 412. The Director then took the 34,603 acre-feet improperly attributed to those two entities and redistributed it to the participating IGWA members. R.412. In doing so, the Director utilizing the same percentages that IGWA utilized in determining each members’ share. R., 412. The Director found each participating IGWA members’ proportionate share of the reduction obligation in 2021 to be as follows:

American Falls-Aberdeen	39,395 acre-feet
Bingham	40,914 acre-feet
Bonneville-Jefferson	21,341 acre-feet
Carey	821 acre-feet
Jefferson-Clark	63,533 acre-feet
Henry’s Fork	6,299 acre-feet
Magic Valley	37,931 acre-feet
North Snake	29,765 acre-feet
A&B	0 acre-feet
Southwest ID	0 acre feet
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TOTAL:	240,000 acre-feet

R., 412. Based on the diversion numbers supplied by IGWA for 2021, the Director found that the following six participating IGWA members failed to satisfy their proportionate share of the 240,000 acre-feet reduction obligation in 2021: American Falls-Aberdeen, Bingham, Bonneville-Jefferson, Jefferson-Clark, Magic Valley, and North Snake. R., 412; 419. In total, participating

IGWA members were 117,216 acre-feet short of the 240,000 acre-feet reduction obligation in 2021.¹

The Director did not act contrary to law in reapportioning IGWA's numbers to comply with the mitigation plan. The Director is statutorily vested with a clear legal duty to distribute water. I.C. § 42-602. The details of how the Director chooses to distribute water are largely left to his discretion. *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994). The Legislature has authorized the Director "to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water, and other natural water resources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof." I.C. § 42-603. The Director has done so in the CM Rules, which were approved by the Legislature and became effective on October 7, 1994.² Under the CM Rules, the Director has broad discretionary authority to administer water. *See e.g., In Matter of Distribution of Water to Various Water Rights Held by or For Ben. of A&B Irr. Dist.*, 155 Idaho 640, 652, 315 P.3d 828, 840 (2013) (recognizing the Director has discretionary authority under the CM Rules to develop and implement a pre-season management plan for allocation of water resources that employs a baseline methodology). The administration of water under the CM Rules includes the discretion to approve, implement, and enforce mitigation plans in lieu of curtailment. IDAPA 37.03.11.043; IDAPA 37.03.11.042.02; *In Matter of Distribution of Water to Various Water Rights Held by or For Ben. of A&B Irr. Dist.*, 155 at 654, 315 P.3d at 842 (when material injury is found to exist in a delivery call, the Director can "either regulate and curtail the diversions causing injury or approve a mitigation plan that permits out-of-priority diversion").

The Director's reapportionment of IGWA's numbers was consistent with both his discretionary authority to approve, implement, and enforce a mitigation plan under the CM Rules and with the plain language of the Settlement Agreement. The proportionate share numbers submitted by IGWA were contrary to the plain language of the approved mitigation plan for the reasons set forth herein. The Director's reapportionment simply accounted for this and, in a

¹ It should be noted that even when IGWA improperly attributed 34,603 acre-feet of the reduction obligation to A&B Irrigation District and Southwest Irrigation District, IGWA was still 82,613 acre-feet short of the 240,000 acre-feet reduction obligation in 2021. R., 845; 412. To arrive at the 117,216 acre-feet deficiency, the Director utilized a baseline of 1,787,604 acre-feet as the starting point. This is the baseline IGWA provided in its 2021 Performance Summary Table. R., 845

² The term "CM Rule" refers to Idaho's Rules for Conjunctive Management of Surface and Ground Water Resources.

mathematical fashion using IGWA's own percentages, redistributed the improperly attributed 34,603 acre-feet to the participating IGWA members. In fact, the terms of the Settlement Agreement contemplate that the Director has the authority to determine whether a disputed breach has occurred:

If the Surface Water Coalition and IGWA do not agree that a breach has occurred or cannot agree upon actions that must be taken by the breaching party to cure the breach, the Steering Committee will report the same to the Director and request that the Director evaluate all available information, determine if a breach has occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.

R., 479. The Director evaluated the information in this case, determined that IGWA's numbers were inconsistent with the mitigation plan, and redistributed the improperly attributed 34,603 acre-feet according to the percentage information submitted by IGWA. The Director did not alter the terms of the Settlement Agreement nor abuse his discretion in this respect.³

As the Director acted consistent with his authority under the CM Rules and with the terms of the Settlement Agreement, the Final Order must be affirmed. It follows that IGWA's petition for reconsideration on this issue is denied.

B. Substantial rights.

In the Memorandum Decision, the Court utilized Idaho Code § 67-5279(4) as one basis on which to affirm the Director's Final Order, finding that IGWA failed to establish prejudice to its substantial rights. The Court held in part as follows:

[T]he only issues before the Court pertain to the dispute over compliance with the approved mitigation plan in 2021. The parties entered into a separate agreement (i.e., the Remedy Settlement Agreement) to resolve that dispute. That Agreement was entered into prior to the Director's issuance of Final Order that is the subject of this proceeding, which Final Order simply implemented the stipulated resolution. 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 prejudiced IGWA's substantial rights.

³ IGWA asserts the Settlement Agreement fails to specify a formula to determine each participating IGWA members' proportionate share of the reduction obligation. It also asserts the Settlement Agreement fails to define a baseline against which the 240,000 acre-feet reduction obligation will be measured. Counsel for IGWA represented at the hearing that parties did not reach any agreement on either of these terms at the time of contracting. IGWA couches its argument in this respect in terms of ambiguity, but it appears to the Court the argument is one of contract formation. That said, none of the parties have argued on judicial review that no enforceable contract came into being in this matter, or that the approved mitigation plan is legally unenforceable. Nor were such argument presented to the Director below. Therefore, the Court does not reach that issue.

Memorandum Decision and Order, p.15.

IGWA requests the Court reconsider its ruling on rehearing. It asserts “the Remedy Settlement Agreement 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” *IGWA Brief in Support of Petition for Rehearing*, p.7. IGWA’s assertion is conclusory and lacks any supporting citation to the evidentiary record. As a result, IGWA’s petition on this issue must be denied. See e.g., *Woods v. Sanders*, 150 Idaho 53, 59, 244 P.3d 197, 203 (2010) (“Conclusory allegations and assertions of fact contained in the brief without citation to the record below are not sufficient to support an argument on appeal”).


III.

ORDER

Therefore, based on the foregoing, IT IS ORDERED the Petition for Rehearing is hereby denied.

Dated

3/5/2024



ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

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