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**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-DC-2010-001

**AFA’S REPLY TO UVGWD’S
 RESPONSE IN OPPOSITION TO
 AFA’S MOTION FOR
 RECONSIDERATION OF ORDER
 DETERMINING DEFICIENCY IN
 NOTICES OF SECURED WATER**

COMES NOW American Falls-Aberdeen Ground Water District (“AFA”), by and through its undersigned counsel, pursuant to IDAPA 37.01.01.220.02.c, and hereby files this brief to reply to the May 24, 2024 *Upper Valley Ground Water Districts’ Response in Opposition to American Falls-Aberdeen Ground Water District’s Motion for Reconsideration* (“UVGWD Response”). AFA states as follows.

BACKGROUND

AFA filed its *Motion for Reconsideration* on May 17, 2024, seeking revisions to section 2 of the Director’s May 10, 2024 *Deficiency Order*.¹ AFA argued that the Director lacks authority to order AFA, or any District complying with the *2016 Plan*, to provide

¹ Any shorthand versions of terms used herein match those that were used in AFA’s *Motion for Reconsideration*.

proof of secured storage water and condition safe harbor upon such a showing. *See Motion for Reconsideration* at 6-7. AFA further demonstrated that it is working collaboratively with the SWC to adaptively manage the implementation of the *2016 Plan* to both sides' satisfaction. *Id.* at 2. AFA also included a table, under sworn testimony, demonstrating how the 50kaf delivery obligation has been historically divided amongst the districts. *See Deeg Decl.* at 2, ¶ 6.

In response, UVGWD—whose limited intervention in this matter to respond to *AFA's Motion for Reconsideration* should be denied, *see AFA's Response and Opposition to Petition to Intervene for Limited Purpose* filed herewith—argue that the historical division of the 50kaf delivery obligation is not “set in stone” or “permanent,” *UVGWD Response* at 3, and then advocates for allocating the 50kaf based on transient modeling. *Id.* at 3-5. In the event the Director grants UVGWD's *Petition to Intervene for Limited Purpose*, he should reject the arguments in the *UVGWD Response*.

ARGUMENT

1. AFA Allocation of the 50kaf Delivery Obligation in the Historical Manner Because it is Consistent with the Department's Allocation of the 240kaf Conservation Obligation Under the 2016 Plan

UVGWD erroneously states that “AFA's motion is based upon a presumption that the past allocation among GWDs is permanent when there is absolutely no agreement to support that position.” *UVGWD Response* at 3. In its *Motion for Reconsideration* in the captioned matter, AFA relied on the historical distribution of the 50kaf because of the historical practice by the Districts and the Director's reliance on the historical distribution of the 240kaf conservation obligation in the 2021 breach matter.² Because UVGWD are not

² *See Amended Final Order Regarding Compliance with Approved Mitigation Plan* (Docket No. CM-MP-2016-001, Apr. 24, 2023).

participating in the 2016 Plan, they have no interest in the allocation of the 50KAF and their arguments should be rejected.

2. Allocating the 50kaf Based on Transient Modeling, as UVGWD May Suggest, Would be Inappropriate

The Department’s move to “transient” modeling was made as part of the *Fifth Methodology Order* as a means to implement curtailment.³ It replaced “steady state” modeling as the means to determine a curtailment date under the Department’s *Fourth Methodology Order*. If the Districts that have elected to operate under the *2009 Plan* want to distribute the demand shortfall (74,100 acre-feet) using transient modeling as between themselves they are free to do so. *See, UVGWD Response* at 5 (Jefferson-Clark Ground Water District “advocates that the Director should use the Transient-State modelling in order to allocate demand shortfall as among the GWDs.”)

However, the *2016 Plan* is untethered from the Methodology Order injury determinations, curtailment distribution, or, for that matter, IGWA’s internal decision-making about how to distribute the demand shortfall amongst its members.⁴ Rather than repeat arguments about the distinction between the *2009 Plan* and the *2016 Plan*, AFA incorporates by reference its arguments made in the 2022 Breach case. *See, AFA’s Memorandum in Support of Motion for Partial Summary Judgment* (Feb. 12, 2024) and *Response Brief* (Feb. 26, 2024), attached here as Exhibits 1 and 2.

At any rate, AFA did not ask the Director to *set in stone* the historical distribution of the 50kaf delivery obligation—instead, AFA’s *Motion for Reconsideration* explained why

³ As UVGWD’s hectoring tone demonstrates, the move to transient modeling has had a significant and negative impact on relationships between water users.

⁴The IGWA Districts that have elected to operate under the *2009 Plan* should distribute the full 74,100 acre-feet amongst themselves. If they’re going to mitigate under an invalid mitigation plan, they should at least mitigate consistent with the terms of the plan. *See, 2009 Plan* at 4 (“This Mitigation Plan will mitigate any and all material injury . . .”).

saddling AFA with the entire 50kaf was inappropriate and that it would provide its historical share of the 50kaf, with the assent of the SWC (*see, SWC's Response to AFA's Motion for Reconsideration*). Accordingly, the Director should reject UVGWD's arguments.

3. UVGWD Do Not Take Issue with the Central Relief Sought by AFA's Motion for Reconsideration

It is worth noting that in all of UVGWD's fulminating it never takes issue with the central point of AFA's *Motion for Reconsideration*: that the Director should not require notice of secured water for any portion of the 50kaf that is the full annual delivery obligation of all the Districts that are parties to the *2016 Plan*.

4. The Director Should Disregard UVGWD's Attachment and Discussion of the Same

Again, apparently mistaken as to the subject matter of AFA's *Motion for Reconsideration*, UVGWD erroneously uses their opposition brief as a vehicle to persuade the Director that the Districts' proportionate shares of the 74,100 acre-feet due under the *2009 Plan* should be based on transient modeling. *UVGWD Response* at 3-5. Why UVGWD did this, when AFA is committed to implementing the *2016 Plan* and is not operating under the *2009 Plan* that has already been declared invalid, is puzzling.

UVGWD then attach tables in support of this puzzling argument. *UVGWD Response* at 8. However, this attachment is inadmissible and should be disregarded by the Director—although the brief alleges that “IGWA's expert have prepared the attached tables,” *id.* at 4, the tables lack authentication, are hearsay, and are wholly irrelevant to the relief that AFA requests in its *Motion for Reconsideration*. *See* I.R.E. Rules 402 (relevancy), 802 (hearsay), 901 (authentication). Although the Idaho Rules of Evidence do not apply to contested cases, the Director retains the discretion to exclude evidence. *See* IDAPA 37.01.01.600. Thus, the

Director should disregard the tables contained in the *UVGWD Response* and summarily reject the arguments therein.

5. The Spiteful Demand that AFA Be Given NO Safe Harbor Should Be Rejected.

AFA is currently in compliance with the *2016 Plan* and is working with SWC to ensure that its implementation of the plan in 2024 in a manner that avoids the SWC declaring a “breach” under the terms of the *2016 Plan*. There is no basis for the UVGWD assertion that AFA “should not be able to seek ‘safe harbor’ under either” the *2009 Plan* or the *2016 Plan* (*UVGWD Response* at 5), and the Director should reject this assertion out of hand.

6. AFA Reserves the Right to Reply to Forthcoming Response Briefs

This response is limited to UVGWD’s brief. The Director’s recent Order Shortening Time applied only to IGWA’s recent filing, and AFA erroneously thought that UVGWD was the only District that would respond to its motion to reconsider. However, in the space of the last hour (between 3 and 4pm mountain time) four other Districts have filed briefs and, under the Department’s Rules of Procedure, the remainder could file next week . AFA reserves the right to respond to the Districts that have filed today, and any briefs subsequently and timely filed, within the timeframe allowed under the Department’s Rules of Procedure.

CONCLUSION

AFA requests that the Director reject and otherwise disregard the *UVGWD Response*, and grant the relief requested in its *Motion for Reconsideration*: modify section 2 of the *Deficiency Order* to remove the erroneous requirement that AFA provide proof of secured storage water and conditions AFA’s safe harbor in 2024 on such a showing.

Respectfully submitted this 24th day of May 2024.

SOMACH SIMMONS & DUNN, P.C.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of May 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

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EXHIBIT 1

**February 12, 2024, AFA's Memorandum in Support of Motion for
Partial Summary Judgment**

RECEIVED

Feb 12, 2024

DEPARTMENT OF
WATER RESOURCES

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**BEFORE THE DEPARTMENT OF WATER RESOURCES
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IRRIGATION DISTRICT, MILNER
IRRIGATION DISTRICT, MINIDOKA
IRRIGATION DISTRICT, NORTH SIDE
CANAL COMPANY, AND TWIN FALLS
CANAL COMPANY

Docket No. CM-MP-2016-001

**AMERICAN FALLS-ABERDEEN
GROUND WATER DISTRICT'S
MEMORANDUM IN SUPPORT
OF MOTION FOR PARTIAL
SUMMARY JUDGMENT**

IN THE MATTER OF IGWA'S SETTLEMENT
AGREEMENT MITIGATION PLAN

COMES NOW American Falls-Aberdeen Ground Water District ("AFAGWD"), by and through its undersigned counsel, pursuant to IDAPA 37.01.01.220.03 and the *Order Authorizing Discovery; Scheduling Order; Order Suspending IDAPA 37.01.01.354; Notice of Prehearing Conference and Hearing* ("Scheduling Order") dated December 29, 2023, to file this *Memorandum in Support of Motion for Partial Summary Judgment* ("Memorandum"). As "there is no genuine dispute as to any material fact," AFAGWD "is entitled to judgment as a matter of law" (Idaho Rule of Civil Procedure ("I.R.C.P.") 56(a)) that IGWA members cannot

cure the 2022 breach of IGWA's *2016 Mitigation Plan* by operating under IGWA's *2009 Mitigation Plan*, and further that operation under any mitigation plan other than the *2016 Mitigation Plan* is not a basis for "safe harbor" from a curtailment order issued pursuant to the Surface Water Coalition ("SWC") delivery call. Filed concurrently herewith is an *Affidavit of Maximilian C. Bricker in Support of Motion for Partial Summary Judgment* ("Bricker Aff."). In support of its *Motion for Partial Summary Judgment* ("Motion"), AFAGWD states as follows:

PROCEDURAL HISTORY

On April 13, 2023, the Surface Water Coalition ("SWC") sent a letter to the Director of the Idaho Department of Water Resources ("IDWR" or "Department") asserting that certain members of Idaho Ground Water Appropriators, Inc. ("IGWA") breached the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* ("2016 Mitigation Plan")¹ in 2022. On August 2, 2023, the Director issued a *Final Order Regarding IGWA's 2022 Mitigation Plan Compliance* ("2022 Breach Order"), which found that certain Ground Water Districts ("GWDs") that are members of IGWA breached their obligations under the *2016 Mitigation Plan* in 2022² but did not order curtailment of pumping in the breaching GWDs because the Director determined the SWC would not suffer a demand shortfall in 2023. *2022 Breach Order* at 8-9. On August 16, 2023, the SWC filed a *Petition for Reconsideration & Request for Hearing* ("SWC Petition"), which was granted by the Director's *Order Granting Request for Hearing; Notice of Scheduling Conference* dated September 6, 2023.

¹ Attached to *Bricker Aff.* as Exhibit 1.

² The GWDs that "failed to satisfy their proportionate share of the mitigation obligation in 2022," along with their respective share of the 57,637 acre-feet total deficit, were AFAGWD (1,352 acre-feet), Bingham GWD (32,476 acre-feet), Bonneville-Jefferson GWD (5,204 acre-feet), and Jefferson Clark GWD (18,605 acre-feet). *2022 Breach Order* at 8-9.

AFAGWD was one of the breaching GWDs in 2022. *See 2022 Breach Order* at 8-9. As required by the Second Addendum to Settlement Agreement, paragraph 2.b.iv,³ AFAGWD subsequently cured its breach by supplying additional recharge water to cover its share of the deficit under the *2016 Mitigation Plan*.⁴

On December 12, 2023, the Director issued an *Order Appointing Hearing Officer*, and on December 14, 2023, the Hearing Officer issued a *Notice of Second Continued Scheduling Conference; Order Setting Deadlines*. On December 27, 2023, AFAGWD filed a *Petition to Intervene* and a *Proposed Statement of Issues*. At the December 28, 2023, scheduling conference, the Hearing Officer approved AFAGWD's intervention and set a deadline of February 12, 2024, for the parties to file dispositive motions, as well as a hearing for March 11-13, 2024. *See Scheduling Order*. The Hearing Officer identified the following issues for hearing:

- 1) Did the Director error by not issuing an order specifying the actions needed to cure the 2022 breach of the 2016 Mitigation Plan by certain ground water districts?
- 2) Did the Director error by not immediately issuing an order curtailing ground water districts that breached the 2016 Mitigation Plan in 2022?
- 3) Can the 2009 mitigation plan be used to cure the ground water districts' 2022 breach of the 2016 Mitigation Plan?
- 4) What action must be taken by the ground water districts to cure their 2022 breach of the 2016 Mitigation Plan?

Id. at 2-4. The Hearing Officer later shortened and reset the hearing to March 14-15, 2024, but did not alter the preceding deadlines. *Order Granting Unopposed Motion to Amend Hearing Schedule; Amended Notice of Hearing* (Jan. 23, 2024) at 1-2.

³ *See Surface Water Coalition's and IGWA's Stipulated Amended Mitigation Plan and Request for Order* (Feb. 7, 2017) at 8-9 (Ex. A at 2-3). Attached to *Bricker Aff.* as Exhibit 2.

⁴ *See Notice of Filing of Agreement-Satisfaction of AF-A-2022 Mitigation Deficit* (Nov. 3, 2023); *Notice of Satisfaction of American Falls-Aberdeen Ground Water District 2022 Mitigation Obligation* (Nov. 7, 2023).

BACKGROUND

On June 3, 2010, the Director entered an *Order Approving Mitigation Plan* (“2010 Mitigation Order”),⁵ approving *IGWA’s Mitigation Plan for the Surface Water Coalition Delivery Call* dated November 9, 2009 (“2009 Mitigation Plan”).⁶ See IDWR Docket No. CM-MP-2009-007. Under the *2009 Mitigation Plan*, IGWA was to offset its proportionate share of the SWC’s demand shortfall⁷ (i.e., material injury) in a given year with storage water. See *Bricker Aff.*, Ex. 3, at 10. If IGWA members failed to supply storage water to mitigate their proportionate share of the demand shortfall, IGWA’s members would face curtailment. *Id.*; *Bricker Aff.*, Ex. 4, at 3-4.

In 2015, the SWC and IGWA entered into a comprehensive settlement agreement (“2015 Settlement Agreement”) “for the purpose of *resolving* pending water delivery calls and provide for on-going management of the ESPA to address the current hydrologic conditions” *Bricker Aff.*, Ex. 1, at 2, ¶ 5 (emphasis added). On March 9, 2016, the SWC and IGWA jointly sought approval of the *2016 Mitigation Plan* (“March 9, 2016, Request”), specifically asking that 2015 Settlement Agreement be incorporated and approved as a mitigation plan.

The parties stipulate and request that the Director issue the attached Order approving the SWC-IGWA Settlement Agreement and the A&B-IGWA Agreement together as a mitigation plan under CMR 43 (“IGWA’s Settlement Agreement Mitigation Plan”).

Bricker Aff., Ex. 1 at 3, ¶13. The *March 9, 2016, Request* also contained the following statement:

Ground water users who are not presently protected under IGWA’s Mitigation Plan may participate on an equitable basis by joining an IGWA Ground Water District or Irrigation District that entered into the SWC-IGWA Settlement Agreement and the A&B-IGWA Agreement and by complying with such District’s obligations under IGWA’s Settlement Agreement Mitigation Plan; or, secure Director approval of an individual mitigation plan which complies with CMR 43

⁵ Attached to *Bricker Aff.* as Exhibit 3.

⁶ Attached to *Bricker Aff.* as Exhibit 4.

⁷A variable amount determined by the Director each year through implementation of the Methodology Order.

and provides adequate mitigation to help achieve the groundwater level goal and benchmarks set forth in the SWC-IGWA Settlement Agreement.

Id. at 3-4, ¶ 14. The *March 9, 2016 Request* was granted by the Director’s *Final Order Approving Stipulated Mitigation Plan* dated May 2, 2016 (“2016 Mitigation Order”);⁸ it does not mention or reference the *2009 Mitigation Plan*.

IGWA’s obligations under the approved *2016 Mitigation Plan*, are, *inter alia*, to: (1) reduce ground water diversions by 240,000 acre-feet (“AF”) each year; (2) deliver 50,000 acre-feet of storage water to the SWC each year; and (3) attain and/or maintain certain “benchmarks,” or “ground water level goals,” by certain dates. *See Bricker Aff.*, Ex. 1, at 15-16 (Ex. B at 2-3, ¶¶ 3.a., 3.b, 3.e.). IGWA members that satisfy the obligations of the *2016 Mitigation Plan* receive safe harbor from a curtailment order issued pursuant to the SWC delivery call—whether or not satisfaction of the terms of the *2016 Mitigation Plan* redresses any material injury found by the Director through implementation of the Methodology Order. *See id.* at 18 (Ex. B at 5, ¶ 5). The *2016 Mitigation Plan* also provides: “This Agreement sets forth all understandings between the parties with respect to the SWC delivery call.” *Id.* (Ex. B. at 5, ¶ 9).⁹

Finally, the *2016 Mitigation Plan* provides:

It is the Parties’ intent that the Director will evaluate the breach and, if a breach is found to exist, provide notice of violation and opportunity to cure to the breaching member. If the member fails to cure the breach the Parties will request the Director to issue an order against the breaching member requiring action to cure the breach or be subject to immediate curtailment as provided under CMR 40.05.

⁸ Attached to *Bricker Aff.* as Exhibit 5. The *2016 Mitigation Order* was amended by a February 7, 2017 joint request for a *Stipulated Amended Mitigation Plan* (*Bricker Aff.*, Ex. 2). The Director approved the requested modification in a *Final Order Approving Amendment to Stipulated Mitigation* (May 9, 2017). Throughout this brief, the terminology “2016 Mitigation Plan” and “2016 Mitigation Order” refer to the Plan and Order as modified by the Director’s 2017 order as well.

⁹ *See also Bricker Aff.*, Ex. 2, at 10 (Ex. A at 4, ¶ 4).

Bricker Aff., Ex. 2, at 8-9 (Ex. A at 2-3, ¶ 2.b.iv.).

From 2016 to 2020, IGWA's members satisfied their obligations under the *2016 Mitigation Plan*. See *IGWA v. IDWR*, Case No. CV01-23-07893 (4th Dist. Ct., Ada County) at R. 840-44.¹⁰ In 2021 and 2022, however, the Director found that certain GWDs had failed to reduce pumping in accordance with the *2016 Mitigation Plan*. See *Amended Final Order Regarding Compliance with Approved Mitigation Plan*, (Apr. 24, 2023) ("2021 Breach Order") at 16-17; *2022 Breach Order* at 8.

When the Director implemented the Methodology Order in April 2023, he predicted that the SWC would suffer material injury, but offered "safe harbor" from curtailment as follows:

There are seven approved mitigation plans in place responding to the SWC delivery call filed by: 1) A&B Irrigation District, 2) Southwest Irrigation District and Goose Creek Irrigation District (collectively, "SWID"), 3) the Idaho Ground Water Appropriators, Inc. ("IGWA"), 4) certain cities commonly referred to as the "Coalition of Cities", and 5) certain entities commonly referred to as the "Water Mitigation Coalition." A&B Irrigation District's proportionate share of the predicted DS of 75,200 acre-feet is 458 acre-feet. Due to the nature of the mitigation plans for SWID, the Coalition of Cities and the Water Mitigation Coalition, these entities do not need to establish that they can mitigate for their proportionate share of the predicted DS. IGWA has two approved mitigation plans. If IGWA is in compliance with mitigation plan CM-MP-2016-001, IGWA does not need to establish that it can mitigate for its proportionate share of the predicted DS. If IGWA seeks to provide mitigation by delivery of storage water as approved in mitigation plan CM-MP-2009-007, IGWA's proportionate share of the predicted DS of 75,198 acre-feet is 63,645 acre-feet.

Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3), IDWR Docket No. CM-DC-2010-001 (Apr. 21, 2023) at 5, ¶ 6, n.5 (emphasis added) (hereinafter "April 2023 Methodology Steps 1-3 Order").

¹⁰ Attached to *Bricker Aff.* as Exhibit 6. IGWA satisfied its obligations in a given year if the sum at the bottom of the column entitled "Total Conservation" equals or exceeds 240,000 AF.

The Director’s footnote frames the core dispute in this case: *can* IGWA’s members cure a breach of the *2016 Mitigation Plan* and continue to receive safe harbor from curtailment by operating under the *2009 Mitigation Plan*?

STANDARD OF REVIEW

The Department’s Rules of Procedure authorize the filing of motions for summary judgment in any contested case. IDAPA 37.01.01.220.03. I.R.C.P. 56 applies to motions before the Department with the exception of subsections (b) and (g). *Id.* Under the Rule 56 standard, the Department “must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). The moving party has the burden of proving the absence of disputed material facts, and the Department “must liberally construe facts in the existing record in favor of the nonmoving party, and draw all reasonable inferences from the record in favor of the nonmoving party.” *Martin v. Thelma V. Garrett Living Trust*, 170 Idaho 1, 5 (2022) (citation omitted). The Department must deny summary judgment “[i]f there are conflicting inferences contained in the record or if reasonable minds might reach different conclusions.” *Id.*

ARGUMENT

I. IGWA Cannot Use the 2009 Mitigation Plan to Cure the Ground Water Districts’ 2022 Breach of the 2016 Mitigation Plan

a. The Plain Language of the Two Plans Does Not Support the Argument that IGWA Members May Cure a Breach of the 2016 Mitigation Plan by Operating Under the 2009 Mitigation Plan.

As described above, IGWA has two “approved” mitigation plans. Neither plan references the other.

- Under the *2009 Mitigation Plan*, IGWA receives safe harbor from curtailment if IGWA supplies storage water to the SWC in an amount and at a time “as set forth in the Methodology Order.” *Bricker Aff.*, Ex. 3, at 10. That means in years when the Director finds there is no material injury to the SWC, IGWA operates without fear of conjunctive administration.
- The *2016 Mitigation Plan*, by contrast, embodies the 2015 Settlement Agreement between IGWA and the SWC, and requires IGWA to undertake certain activities every year (and regardless of the Director’s annual determinations of material injury under the Methodology Order) to redress aquifer levels. It was a stipulated mitigation plan under which the SWC exchanged IGWA’s agreement to conduct annual activities to enhance aquifer health for a guarantee of mitigation water to redress material injury found through implementation of the Methodology Order. Thus, the *2016 Mitigation Plan* provides “other appropriate compensation,” rather than “replacement water supplies,” to the SWC, a valid option under the Conjunctive Management Rules (“CMR”). IDAPA 37.03.11.043.03.c.

Moreover, the *2016 Mitigation Plan* includes provisions related to management of IGWA’s agreed upon aquifer enhancement activities, including a steering committee and a dispute resolution process.¹¹ In the event of a breach, the *2016 Mitigation Plan* provides that the Director take action against “the breaching member [including] requiring action to cure the breach or be subject to immediate curtailment as provided under CMR 40.05.”¹² What the *2016*

¹¹ See *Bricker Aff.*, Ex. 1, at 17-18 (Ex. B at 4-5, ¶¶ 3.m., 4); *Bricker Aff.*, Ex. 2, at 8-10 (Ex. A at 2-4, ¶ 2).

¹² *Bricker Aff.*, Ex. 2, at 8-9 (Ex. A at 2-3, ¶ 2.b.iv.).

Mitigation Plan does **not** include is a term or condition that authorizes IGWA to cure a breach of its obligations by unilaterally deciding to operate under the *2009 Mitigation Plan*.

Nonetheless, IGWA has argued on behalf of the offending GWDs (in various filings)¹³ that language used in footnote 5 of the *April 2023 Methodology Steps 1-3 Order* (mitigation may be carried out by “**an** approved mitigation plan”) and the CMR (Rule 30.07(g), requiring the Director to “take into consideration the existence of **any** approved mitigation plan” before curtailing) authorizes juniors to elect the nature of their mitigation activities. IGWA’s approach is essentially: *Don’t feel like reducing pumping under the 2016 Mitigation Plan? That’s ok, keep your fingers crossed and see if it’s a wet year and then keep pumping; worst case scenario you can “mitigate” under the 2009 Mitigation Plan¹⁴ and avoid curtailment.* This approach has become so popular that, in late 2023 to early 2024, seven of IGWA’s nine GWDs filed petitions for approval of *individual* mitigation plans.¹⁵ Not one of the proposed mitigation plans made any attempt to articulate the relationship between the newly applied-for mitigation plan, the *2016 Mitigation Plan*, and/or the *2009 Mitigation Plan*. From the look of it, some GWDs will continue to ignore their proportionate obligations under the *2016 Mitigation Plan* and administer their own junior pumping in the absence of the Department’s proper exercise of its authority.

¹³ See, e.g., *IGWA’s Response to SWC’s Petition for Reconsideration and Clarification and Request for Enforcement of Orders Approving 2016 Mitigation Plan* (Aug. 3, 2023) at 2.

¹⁴ Or another mitigation plan, see n. 16, *infra*.

¹⁵ See IDWR Docket Nos. CM-MP-2024-001 (Bingham GWD’s *Petition for Approval of Mitigation Plan*); CM-MP-2023-001 (Madison GWD’s & Henry’s Fork GWD’s *Petition for Approval of Mitigation Plan*); CM-MP-2023-002 (Bonneville-Jefferson GWD’s *Petition for Approval of Mitigation Plan*); CM-MP-2023-003 (Jefferson Clark GWD’s *Petition for Approval of Mitigation Plan*); CM-MP-2023-004 (North Snake GWD’s *Petition for Approval of Mitigation Plan*); CM-MP-2023-005 (Magic Valley GWD’s *Petition for Approval of Mitigation Plan*). The only GWDs that have not filed petitions for approval of individual mitigation plans to-date are AFAGWD and Carey GWD.

IGWA's arguments related to the language of the *April 2023 Methodology Steps 1-3 Order* and the CMR are without basis. The fact that these legal authorities contain language acknowledging water users may seek *separate* mitigation plans does not support the idea that a water user may obtain *multiple* mitigation plans and elect—depending on the day of the week, the status of its commercial success in a given irrigation year, or some other intangible—under which mitigation plan it will operate. This is true particularly when the mitigation plan under scrutiny here (the *2016 Mitigation Plan*) provides for “other appropriate compensation” that obligates the water user to perform activities each year regardless of whether there is injury. IGWA's arguments—if adopted—would put conjunctive management into the hands of the offending GWDs and leave entities like AFAGWD who in good faith entered into the 2015 Settlement Agreement and signed onto the *2016 Mitigation Plan*, and are presently in compliance therewith, left holding the bag. If the Department does not reject IGWA's specious arguments in this case, conjunctive management in eastern Idaho is a dead letter.

IGWA's arguments should also be rejected because they are inconsistent with positions it has previously taken before the Department. IGWA previously described the 2015 Settlement Agreement as “historic” and entered into for the “purpose of resolving pending water delivery calls and provide for on-going management of the ESPA to address [current hydrologic conditions].” *Bricker Aff.*, Ex. 1, at 2, ¶ 5. Further, IGWA represented that it desired the only means for non-IGWA ground water irrigators to obtain protection from curtailment should be for them to join an IGWA member-district OR to “secure Director approval of an individual mitigation plan *which complies with CMR 43 and provides adequate mitigation to help achieve the ground water level goal and benchmarks set forth in the SWC-IGWA Agreement.*” *Id.* at 3-

4, ¶ 14 (emphasis added). So, while IGWA argues today that its members can operate under the mitigation plan of their choosing to avoid curtailment and cure the breach of the *2016 Mitigation Plan*, in 2016 it asked the Director to *reject non-IGWA mitigation plans that did not assist IGWA in achieving its goals under the 2015 Settlement Agreement*. The Hearing Officer should reject IGWA’s arguments that offending GWDs may cure their *2016 Mitigation Plan* breach through compliance with other, extraneous mitigation plans, including the *2009 Mitigation Plan*.

b. The Department is Required to Take Action When a Ground Water District Breaches the *2016 Mitigation Plan*, Even Though the *Plan* Provides Alternate Mitigation under Rule 43.03.c.

The *2016 Mitigation Plan* provides mitigation in the form of “other appropriate compensation to the senior-priority water right.” IDAPA 37.03.11.043.03.c. The Director’s failure to enforce the *2016 Mitigation Plan* and penalize the offending GWDs is an abuse of discretion, and the Hearing Officer should find that the Director must enter an order that the offending GWDs cannot receive safe harbor from curtailment in 2024, or beyond, by using the *2009 Mitigation Plan*—or any other plan—so long as they remain in breach of the *2016 Mitigation Plan*.¹⁶ The District Court has previously found the Director abused his discretion when he subjected junior ground water users to curtailment because their mitigation plan provided “other appropriate compensation” rather than replacement water, as explained below; here, the Director is abusing discretion by approving the *2016 Mitigation Plan* yet declining to enforce it.

¹⁶ The Director already ordered that the offending GWDs “will not be entitled to the protection of IGWA’s 2016 Mitigation Plan in response to a curtailment order,” *2022 Breach Order* at 9, and should now clarify that the offending GWDs will also not be entitled to the protection of IGWA’s *2009 Mitigation Plan*—or any other plan—in response to a curtailment order until they cure their breaches that occurred in 2022. See *Bricker Aff.*, Ex. 2, at 8-9 (Ex. A at 2-3, ¶ 2.b.iv.).

Following the hearing in the Rangen Delivery Call, the Coalition of Cities (“Cities”) entered into a stipulated mitigation plan with Rangen for “other appropriate compensation.” *See, Order Conditionally Approving Cities’ Second Mitigation Plan*, IDWR Docket No. CM-MP-2014-007 (Feb. 13, 2015).¹⁷ The Director conditionally approved the plan (*see id.* at 9-10), but the Cities remained subject to curtailment because the Director found their alternative form of mitigation was ineffective to replace their depletions in time, location and amount. *See City of Bliss et al. v. Spackman*, Case No. CV-2015-172 (Memorandum Decision and Order, Sep. 8, 2015) at 3-4.¹⁸ On appeal, the District Court found that the Director abused his discretion because parties to a delivery call can stipulate to “other appropriate compensation” in lieu of providing sufficient replacement supplies at the proper time and place; and upon approval of such a mitigation plan, the Director could not ignore the bargain struck between the parties and impose curtailment on the grounds that the mitigation plan would not provide replacement supplies at the time and place required by the senior right. *See id.* at 9-10.

Whereas in the Rangen call the Director improperly imposed curtailment on juniors who were in compliance with an “other appropriate compensation” mitigation plan because the plan did not provide for replacement of water, here the Director has allowed juniors users in GWDs who are *not* in compliance with the *2016 Mitigation Plan* (also an “other appropriate compensation” plan) to *continue* to pump because the orders implementing the Methodology Order did not predict a demand shortfall in 2023. The Director’s inaction disregards the bargain struck between IGWA members and the SWC in the 2015 Settlement Agreement, and the

¹⁷ <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-MP-2014-007/CM-MP-2014-007-20150213-Order-Confirming-Final-Order-Conditionally-Approving-Cities-Second-Mitigation-Plan.pdf> (last visited Feb. 12, 2024).

¹⁸ <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CV-2015-172/CV-2015-172-20150908-Memorandum-Decision-and-Order.pdf> (last visited Feb. 12, 2024).

Director's incorporation of the 2015 Settlement Agreement into the *2016 Mitigation Plan*. To date, the offending GWDs have avoided any meaningful penalties for their breach of obligations associated with the *2016 Mitigation Plan* in 2022, and appear to believe that they can avoid the most crucial penalty of all—curtailment—by reverting to operating under the *2009 Mitigation Plan*, or their other proposed plans, in 2024. This is a gross inequity and only leads to the erosion of conjunctive management as the rule of law in eastern Idaho.

CONCLUSION

AFAGWD respectfully request that the Hearing Officer enter an order finding that operations under the *2009 Mitigation Plan* will not cure offending GWDs' breach of the *2016 Mitigation Plan*, and that the offending GWDs will not be protected by the *2009 Mitigation Plan*—or any other plan—in response to a curtailment order so long as they are in breach of the *2016 Mitigation Plan*.

Respectfully submitted this 12th day of February 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of February 2024, I caused a true and correct copy of the foregoing document to be filed and served on the persons below via email:

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EXHIBIT 2

February 26, 2024, AFA's Response Brief

RECEIVED

Feb 26, 2024

DEPARTMENT OF
WATER RESOURCES

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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

**AMERICAN FALLS-ABERDEEN
GROUND WATER DISTRICT'S
BRIEF IN RESPONSE TO
IGWA'S MOTION FOR
SUMMARY JUDGMENT AND
IGWA'S MOTION IN LIMINE**

IN THE MATTER OF IGWA'S SETTLEMENT
AGREEMENT MITIGATION PLAN

COMES NOW American Falls-Aberdeen Ground Water District ("AFAGWD"), by and through its undersigned counsel, pursuant to the *Order Authorizing Discovery; Scheduling Order; Order Suspending IDAPA 37.01.01.354; Notice of Prehearing Conference and Hearing* ("Scheduling Order") dated December 29, 2023, and hereby files this brief to respond to Idaho Ground Water Appropriators, Inc.'s ("IGWA") *Memorandum in Support of IGWA's Motion for Summary Judgment* dated February 12, 2024 ("IGWA's Memo"). Based on the arguments

within, AFAGWD requests that the Hearing Officer deny IGWA's *Motion for Summary Judgment* on three of its four claims for relief. With respect to Issue #3, it appears IGWA agrees with AFAGWD that the breaches of the *2016 Mitigation Plan* in 2022 (or any other breach) cannot be cured by operating under another mitigation plan (*see, IGWA's Memo* at 15), thus summary judgment is proper on that issue.

AFAGWD also asks the Hearing Officer to *decline* to decide IGWA's *Motion in Limine to Exclude Parol Evidence* unless and until it becomes necessary based on IGWA's objections to testimony or evidence offered at hearing.

INTRODUCTION

IGWA's Memo has a "head's I win, tails you lose" quality to it. IGWA effectively asks the Hearing Officer to find that:

- the Director is authorized to approve stipulated mitigation plans that provide "other appropriate compensation" in lieu of redressing injury, *but* that his authority to issue remedial orders when a mitigating party is in breach of the plan is limited to priority administration under the Methodology Order (i.e., only order curtailment once the Director determines they are injuring the Surface Water Coalition ("SWC")). *See IGWA's Memo* at 5-8.
- the 2015 Settlement Agreement, incorporated wholesale into the *2016 Mitigation Plan*, provides an offramp to IGWA members who do not feel like "participating" in the mitigation plan via section 6¹—if an IGWA member or entity declines to "participate" in

¹ *See 2016 Mitigation Plan (Bricker Aff., Ex. 1)* at 18 (Ex. B at 5, ¶ 6) ("Any ground water user not participating in this Settlement Agreement or otherwise have another approved mitigation plan will be subject to administration.").

a given year they may instead operate under any other approved mitigation plan or roll the dice with priority administration. Their call. *See IGWA's Memo* at 12.

Combine these two interpretations and the *2016 Mitigation Plan* becomes a wholly aspirational and unenforceable document. The Hearing Officer should summarily reject IGWA's arguments on these issues.

ARGUMENT

I. **IGWA Cannot Use the 2009 Mitigation Plan to Attain Safe Harbor from Curtailment Because it was Effectively Rescinded by the 2016 Mitigation Plan**

IGWA is incorrect that the 2015 Settlement Agreement's language clearly and unambiguously "contemplates that mitigation may be provided under other approved plans." *IGWA's Memo* at 12. Rather, its language demonstrates that the parties intended for the *2016 Mitigation Plan* to be the only mitigation plan under which IGWA's members could operate to attain safe harbor. Thus, the *2016 Mitigation Plan* implicitly rescinded, or superseded, the *2009 Mitigation Plan* and any other plans, thereby precluding ground water districts ("GWDs") from using them as alternatives to complying with the *2016 Mitigation Plan*.

A. **Agreements and Orders can be Effectively Rescinded by Later Actions of the Parties or the Tribunal.**

The *2016 Mitigation Plan* is first and foremost a contract between the SWC and IGWA. *See 2016 Mitigation Plan* at 3.² Thus, the Hearing Officer's "primary objective is to discover the mutual intent of the parties at the time they entered the contract." *Stanger v. Walker Land & Cattle, Ltd. Liab. Co.*, 169 Idaho 566, 573 (2021). A contract can "have the effect of complete

² "The parties hereby incorporate and submit the SWC-IGWA Settlement Agreement and the A&B-IGWA Agreement (collectively, the "Agreements") as a stipulated mitigation plan in reference to the Surface Water Coalition delivery call (IDWR Docket No. CM-DC-2010-001)."

rescission” of a prior contract—or in this case, a prior mitigation plan—if it deals with the same subject matter “so comprehensively as to be complete within itself and to raise the legal inference of substitution” *Stiffler v. Hydroblend, Inc.*, 535 P.3d 606, 618 (Idaho 2023); *cf. Cougar Bay Co. v. Bristol*, 100 Idaho 380, 383 (1979) (internal citations omitted).³ “[A] later instrument [can] rescind an earlier one” if there is “a demonstration of mutual intent” of the parties. *Miller v. Estate of Prater*, 141 Idaho 208, 212 (2005).

Not only can contracts be rescinded by subsequent instruments by operation of law, so can the orders of a tribunal. *See, e.g., Cenlar FSB v. Malenfant*, 151 A.3d 778, 783-84 (Vt. 2016) (finding that a subsequent order “effectively vacated” a prior judgment, thereby avoiding “an irremediable legal limbo,” because if an order is “materially inconsistent with earlier order dealing with same subject matter, latter order operates to implicitly vacate prior order, even if latter order does not so expressly provide”) (citing *Poston Feed Mill Co. v. Leyva*, 438 S.W.2d 366, 369 (Tex. Civ. App. 1969)).

B. The 2016 Mitigation Plan Comprehensively Resolved the SWC Delivery Call Between IWGA and SWC and, When the Director Approved it, Effectively Rescinded Prior Mitigation Plans.

The *2016 Mitigation Plan* is rife with language that both parties intended for it to effectively rescind the *2009 Mitigation Plan* and any other plans. For example, under the “Entire Agreement” section, it states “This Agreement sets forth all understandings between the parties with respect to SWC delivery call. There are no other understandings, covenants, promises, agreements, conditions, either oral or written between the parties other than those contained

³ “[A] subsequent contract completely covering the same subject matter, and made by the same parties, as an earlier agreement, but containing terms inconsistent with the former contract, so that the two cannot stand together, rescinds, supersedes, and is substituted for the earlier contract, and becomes the only agreement of the parties on the subject.”

herein.” *2016 Mitigation Plan* at 18 (Ex. B at 5, ¶ 9) (emphasis added); *see also id.* at 2⁴; *id.* at 3-4⁵; *id.* at 14 (Ex. B at 1, ¶ 1.f.).⁶ The plain language of the document is clear and unambiguous, thus no parol evidence is needed to determine the parties’ mutual intent.⁷ The *2016 Mitigation Plan* is a comprehensive agreement that addresses the same subject matter as the *2009 Mitigation Plan*: removing IGWA’s threat of curtailment from the SWC delivery call. Accordingly, it rescinded the *2009 Mitigation Plan* and became the “only agreement of the parties on the subject,” *Cougar Bay Co.*, 100 Idaho at 383, thereby precluding GWDs from operating under the *2009 Mitigation Plan* or any other plan. So, even if the Conjunctive Management Rules (CMR) allow a junior user to have multiple approved mitigation plans, as IGWA asserts,⁸ that does not help their cause, as the terms of the *2016 Mitigation Plan* operate to rescind the *2009 Mitigation Plan*, so the latter is not available for them to use in response to a curtailment order.

IGWA also misses the mark when it says that the 2015 Settlement Agreement’s plain language does not preclude GWDs from operating under other mitigation plans because the agreement provides that “any ground water user not participating in this Settlement Agreement or otherwise have another approved mitigation plan will be subject to administration.” *IGWA’s Memo* at 12.⁹ This language refers to entities that are not signatories of the Settlement

⁴ Describing the 2015 Settlement Agreement as “historic” and meant to “resolv[e] pending water delivery calls and provide for on-going management of the ESPA”

⁵ Providing that other ground water users could gain protection under the plan if they “help[ed] achieve the groundwater level goal and benchmarks” of the plan.

⁶The agreement sought to “increase reliability and enforcement of water use” and “develop an adaptive groundwater management plan to stabilize and enhance ESPA levels”

⁷ There is no need to consider parol evidence when a contract is unambiguous, i.e., there is only one reasonable way to interpret it. *See Sommer v. Misty Valley, Ltd. Liab. Co.*, 170 Idaho 413, 424-26 (2021).

⁸ *See IGWA’s Memo* at 9-11.

⁹ Citing *2016 Mitigation Plan (Bricker Aff.*, Ex. 1) at 18 (Ex. B at 5, ¶ 6).

Agreement, not the GWDs that signed the agreement. It is patently absurd to assert that this clause provides GWDs with an offramp to circumvent their obligations under the *2016 Mitigation Plan* and yet retain safe harbor by operating under another mitigation plan.

II. Under the Second Addendum, the Director is Authorized to: a) Interpret the 2015 Settlement Agreement; and b) Immediately Curtail IGWA Members who are in Breach of the 2016 Mitigation Plan

IGWA asks the Hearing Officer to find that “in the absence of a stipulated remedy,” the Director’s authority to remediate a breach of the *2016 Mitigation Plan* is limited to subjecting the offending GWDs to priority administration.¹⁰ *IGWA’s Memo* at 5-8. Under IGWA’s theory, if there is a breach, and the parties to the *2016 Mitigation Plan* cannot agree on a remedy (as they did in 2022 regarding the 2021 breach¹¹), the Director has no power to fashion a remedy under the *2016 Mitigation Plan* other than resorting to priority administration under the Methodology Order. This is wrong for several reasons, and IGWA is estopped from making this argument because in prior filings with the Department it adopted a different—and accurate—interpretation of the Director’s authority under the *2016 Mitigation Plan*.

A. The Second Addendum Provides The Director With Authority to Impose Immediate Curtailment When IGWA Members are in Breach of the 2016 Mitigation Plan

Based on the plain language of the Second Addendum to Settlement Agreement at paragraph 2.c.iv.,¹² the parties to the *2016 Mitigation Plan* stipulated that offending GWDs could

¹⁰ The basis for this request appears to be the rhetorical arguments that the Director is not authorized to: a) impose damages for breach of the underlying 2015 Settlement Agreement (*IGWA’s Memo* at 5-6); or b) adjudicate a contract dispute. Undersigned is unaware that either relief has been formally requested in the captioned matter. To the extent IGWA’s argument is a swipe at the Director’s prior orders which interpreted the terms of the 2015 Settlement Agreement, which was incorporated wholesale into the *2016 Mitigation Plan*, this argument is without basis as argued above.

¹¹ See <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-MP-2016-001/CM-MP-2016-001-20220907-Settlement-Agreement.pdf> (last visited Feb. 21, 2024).

¹² *Surface Water Coalition’s and IGWA’s Stipulated Amended Mitigation Plan and Request for Order (Bricker Aff., Ex. 2)* at 9 (Ex. A at 3-4, ¶ 2.c.iv.).

be curtailed if the Director finds a breach but decides not to issue an order “specifying actions that must be taken by the breaching party” It provides, in the event IGWA and SWC do not agree that a breach of the *2016 Mitigation Plan* occurred, that the Steering Committee will “request that the Director evaluate all available information, determine if the 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.*” *Id.* (emphasis added). The plain language of paragraph 2.c.iv. is consistent with the CMR 40.05:

Where a mitigation plan has been approved *and the junior-priority ground water user fails to operate in accordance with such approved plan* or the plan fails to mitigate the material injury resulting from diversion and use of water by holders of junior-priority water rights, the watermaster will notify the Director *who will immediately issue cease and desist orders* and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefiting from such plan *or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights.*

Rule 40.05 does not contemplate that the junior gets to select a different mitigation plan or otherwise take their chances under the Methodology Order: failure to operate pursuant to an approved mitigation plan results in immediate curtailment if the mitigation plan does not provide for other actions that ensure protection of the senior. Here, based on the plain language of the *2016 Mitigation Plan*, the Director should curtail the offending GWDs¹³ in the absence of imposing another suitable remedy.

¹³ For a list of the offending GWDs, see *American Falls-Aberdeen Ground Water District's Memorandum in Support of Motion for Partial Summary Judgment* at 2 n.2. As described above and in its *Memorandum*, AFAGWD has cured its breach. See *id.* at 3; see also *Surface Water Coalition's Motion for Summary Judgment/Support Points & Authorities* at 9 (“It is the position of the SWC that only Bingham Ground Water District, Bonneville-Jefferson Ground Water District, and Jefferson Clark Ground Water District (“Breaching GWDs”) remain in breach of the 2016 Mitigation Plan and orders entered by IDWR for the 2022 irrigation season.”)

B. IGWA Should be Estopped from Asserting the Director Lacks Authority to Impose Immediate Curtailment on the Offending GWDs.

In 2021, certain IGWA members also breached the *2016 Mitigation Plan*. The Director indicated his intention to issue a curtailment order to remedy the breach; IGWA and SWC therefore entered into a “Remedy Agreement” to, *inter alia*, avoid the presumed immediate curtailment.¹⁴ With this in mind, AFAGWD went to great lengths—prior to the scheduling conference in this matter—to cure its 2022 breach to avoid any risk of immediate curtailment, as it understood that would be the outcome of failure to cure. Now, IGWA argues that the Director lacks the authority to curtail breaching entities, rendering AFAGWD’s efforts to cure its breach a futile (yet expensive) exercise. Accordingly, IGWA’s argument should be rejected on quasi-estoppel grounds, which “applies when: (1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party” *See Day v. Idaho Transp. Dep’t*, 533 P.3d 1227, 1238 (Idaho 2023).¹⁵

CONCLUSION

AFAGWD respectfully request that the Hearing Officer enter an order denying IGWA’s *Motion for Summary Judgment*, except for Issue #3, which should be granted, as all parties agree

¹⁴ *See Settlement Agreement* (IDWR Docket No. CM-MP-2016-001, Sep. 7, 2022) at Recital E (“The parties have been advised that the Director of IDWR has prepared an order that interprets the Settlement Agreement and the approved mitigation plan and orders curtailment of certain IGWA members in 2022. The parties desire to reach a settlement such that the Director does not curtail certain IGWA members during the 2022 irrigation season.”).

¹⁵ “Quasi-estoppel prevents a party from changing its legal position and, as a result, gaining an unconscionable advantage or imposing an unconscionable disadvantage over another. . . . Unlike equitable estoppel, quasi-estoppel does not require an undiscoverable falsehood, and it requires neither misrepresentation by one party nor reliance by the other. . . . Quasi-estoppel applies when: (1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.” (internal citations and quotations omitted).

that the GWDs may not use the *2009 Mitigation Plan*, or any other plan, to cure a breach of the *2016 Mitigation Plan*.

Respectfully submitted this 26th day of February 2024.

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CERTIFICATE OF SERVICE

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