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DEPARTMENT OF
WATER RESOURCES

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

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 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 Docket No. CM-MP-2016-001
IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN	**IGWA's Response in Opposition to SWC's Motion for Summary Judgment**

Idaho Ground Water Appropriators, Inc. ("IGWA") submits this response brief pursuant to rule 220 of the Department's rules of procedure in opposition to *Surface Water Coalition's Motion for Summary Judgment* ("Motion") filed December 21, 2022. As explained below, the Director should deny the Motion and grant partial summary judgment in favor of IGWA.

INTRODUCTION

IGWA requested a hearing under Idaho Code 42-1701A(3) to challenge the *Final Order Regarding Compliance with Approved Mitigation Plan* entered in this matter on September 8, 2022 ("Compliance Order"). Specifically, IGWA challenges:

1. The Director's failure to "evaluate all available information" before determining whether a breach occurred, as required by section 2.c.iv of the Second Addendum.

2. The ruling that the IGWA-SWC Settlement Agreement ("Agreement") is unambiguous as to the method of calculating the signatory districts' groundwater conservation obligations under section 3.a of the Agreement.
3. The ruling that the Agreement unambiguously precludes averaging for the purpose of measuring compliance with the signatory districts' groundwater conservation obligations.
4. The ruling that certain IGWA districts breached the Agreement in 2021.

The SWC's Motion addresses issues 2 and 3. It asks the Director to "dismiss IGWA's petition requesting a hearing as a matter of law," arguing that "IGWA's member Ground Water Districts have the clear and unambiguous obligation to reduce 240,000 acre-feet per year pursuant to the terms of the stipulated mitigation plan and the Director's order." (Mot., p. 2.)

As explained below, the Motion should be denied, and partial summary judgment should be entered in favor of IGWA as follows:

- IGWA is statutorily entitled to a hearing under Idaho Code 42-1701A(3).
- IGWA is contractually entitled to a hearing to present "all available information" pursuant to section 2.c.iv of the Second Addendum.
- With respect to the method of calculating the proportionate conservation obligations of the signatory districts, either (a) the plain language of the Agreement provides that their proportionate obligations be calculated relative to total groundwater diversions from the ESPA; (b) the Agreement is patently ambiguous as to the method of calculating their proportionate conservation obligations; or (c) IGWA should be permitted to present evidence of latent ambiguity concerning the matter.
- With respect to averaging, the Agreement is latently ambiguous as to how annual groundwater conservation is to be measured, and the SWC explicitly acknowledged that averaging may be utilized for purposes of compliance.
- The Compliance Order finding that a breach occurred in 2021 is withdrawn.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *Orthman v. Idaho Power Co.*, 130 Idaho 597, 600 (1997). Upon review of a motion for summary judgment, the court is not permitted to weigh the evidence or to resolve controverted factual issues, *Bybee v. Clark*, 118 Idaho 254, 257 (1990); rather, it must draw all reasonable factual inferences and conclusions in favor of the non-moving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 529 (1994). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 110 Idaho 466 (1986).

The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865 (1969). If the moving party fails to challenge an element or fails to present evidence establishing the absence of a genuine issue of material fact on that element, the burden does not shift to the non-moving party, and the non-moving party is not required to respond with supporting evidence. *Orthman*, 130 Idaho at 600. If the record contains conflicting inferences or reasonable minds might reach different conclusions, summary judgment must be denied. *Kline v. Clinton*, 103 Idaho 116 (1982).

"Summary judgment may be rendered for any party, not just the moving party, on any or all the causes of action involved, under the rule of civil procedure." *Harwood v. Talbert*, 136 Idaho 672, 677 (2001) (citation omitted). "The district court may grant summary judgment to the non-moving party even if the party has not filed its own motion with the court." *Id*. "A motion for summary judgment allows the court to rule on the issues placed before it as a matter of law; the moving party runs the risk that the court will find against it." *Id*.

ARGUMENT

1. IGWA is statutorily entitled to a hearing under Idaho Code 42-1701A(3).

Idaho Code 42-1701A(3) creates a statutory right to a hearing for 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." It is not discretionary. When a hearing request is made, "[t]he hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section." *Id*. (emphasis added).

When IGWA petitioned for judicial review of the Compliance Order, the Department moved for dismissal based on the exhaustion doctrine, arguing that a hearing under 42-1701A(3) is a "mandatory administrative remedy." (Resp's Mot. to Dismiss, *IGWA v. IDWR*, Case No. CV27-22-945, Fifth Jud. Dist., Nov. 9, 2022, p. 5.) Judge Wildman agreed, finding that until a hearing is held, "the administrative remedy available to IGWA under Idaho Code § 42-1701A(3) has not been exhausted." (Order Granting Mot. to Dismiss, *IGWA v. IDWR*, Case No. CV27-22-945, Fifth Jud. Dist., Dec. 8, 2022, p. 7.)

It would be a violation of Idaho Code 42-1701A(3) for the Director to dismiss the hearing in this matter by rubber-stamping his prior decision which was made in the absence of a full evidentiary record. Therefore, the SWC's Motion should be summarily denied.

2. IGWA is entitled to a hearing to present "all available information" pursuant to section 2.c.iv of the Second Addendum.

A hearing is also necessary because the Director is obligated under section 2.c.iv of the Second Addendum to consider "all available information" when determining whether a breach occurs. There are many genuine issues of material fact related to IGWA's compliance with the Agreement, including but not limited to those set forth in the *First Declaration of Jaxon Higgs* filed herewith. IGWA has a contractual right to present these and other facts. Therefore, the Motion should be denied.

3. The Director should grant partial summary judgment in favor of IGWA concerning the method by which each district's groundwater conservation obligation under section 3.a.ii of the Agreement is determined.

Section 3.a.i of the Agreement states: "Total ground water diversions shall be reduced by 240,000 ac-ft annually." However, it does not assign this obligation to IGWA or its member districts specifically, which is significant. Other provisions in the Agreement assign obligations on IGWA and its members specifically, including section 2.a ("IGWA on behalf of its member districts will acquire a minimum of 110,000 ac-ft for assignment"), section 3.b.i ("IGWA will provide 50,000 ac-ft of storage water through private leases"), section 3.b.ii ("IGWA shall use its best efforts to continue existing conversions in Water Districts 130 and 140"), and section 3.f ("IGWA's contributions to the State sponsored recharge program will be targeted for infrastructure and operations above American Falls"). There is a reason why section 3.a.i, by contrast, does not.

Section 3.a.i does not obligate IGWA specifically to conserve 240,000 acre-feet because section 3.a.ii requires each participating district to conserve only its "proportionate share" of 240,000 acre-feet, stating: "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 or in conducting an equivalent private recharge activity."

The Agreement does not state how each district's proportionate share of 240,000 acre-feet is to be calculated. IGWA has from the beginning calculated its members' proportionate shares by comparing their groundwater diversions to the total diversions among eleven ground water districts and irrigation districts whose patrons pump water from the ESPA. (Higgs Decl., ¶ 17.) This method takes into account diversions from A&B Irrigation District and Southwest Irrigation District who did not sign the Agreement. Accounting for the diversions by A&B and Southwest results in the signatory districts being responsible to collectively conserve approximately 205,000 acre-feet. (Compliance Order, p. 7.)

The Compliance Order contains a conclusion of law that "the basis IGWA's deduction [of A&B's and Southwest's diversion volumes] is unclear," but nevertheless determines that it is impermissible, ruling instead that the signatory districts alone must conserve 240,000 acre-feet. (Compliance Order, p. 12.) This conclusion is not based on the plain language of the Agreement, however. As noted above, the Agreement does not prescribe how each district's proportionate share is to be calculated. Rather, it is based on a condition contained in the Director's order approving the Agreement as a mitigation plan which reads: "All ongoing activities are the responsibility of the parties to the Mitigation Plan," along with a statement in the A&B Settlement Agreement which reads: "The obligations of the Ground Water Districts set forth in Paragraphs 2-4 of the Agreement do not apply to A&B and its ground water rights." (Compliance Order, p. 12.) In other words, the Compliance Order ruled that since A&B and Southwest did not sign the Agreement, their diversions from the ESPA cannot be considered in determining the proportionate obligations of the districts that did sign the Agreement.

The SWC asks the Director to rubber-stamp this conclusion of law based on the same rationale. (SWC Memo, p. 6.) The SWC's argument, however, suffers from the same error as the Compliance Order. Both fail to distinguish between the method of calculating the proportionate

conservation obligation of the signatory districts versus the responsibility to conserve groundwater under the terms of the Agreement.

IGWA readily agrees that only the signatory districts are obligated to conserve groundwater under the Agreement. A&B and Southwest conserve groundwater under separate mitigation plans approved by the Director in IDWR Docket Nos. CM-MP-2015-003 and CM-MP-2010-001, respectively. They are required to implement and report groundwater conservation under the terms of the Agreement.

The fact that A&B and Southwest are not bound by the Agreement, however, does not answer the question of how to calculate the conservation obligations of the districts that did sign the Agreement. The latter is a separate issue that must be separately analyzed based on rules of contract interpretation.

As explained below, careful application of the rules of contract interpretation should result in the granting of partial summary judgment in favor of IGWA that either (a) the plain language of the Agreement provides that the signatory districts' proportionate conservation obligations be calculated relative to total groundwater diversions from the ESPA; (b) section 3.a.ii is patently ambiguous because it is susceptible to multiple reasonable interpretations; or (c) IGWA should be permitted to present evidence concerning latent ambiguity of section 3.a.ii.

3.1 The plain language of the Agreement provides that the signatory districts' proportionate conservation obligations be calculated relative to total diversions from the ESPA.

As noted above, section 3.a.i refers to a 240,000 acre-feet reduction in "total" groundwater use. Had the parties intended IGWA's members to be solely responsible to conserve 240,000 acre-feet, section 3.a would have simply said something like: "IGWA's members shall collectively reduce their diversions by 240,000 acre-feet annually," or "Total ground water diversion *by IGWA's member districts* shall be reduced by 240,000 acre-feet annually." Instead, section 3.a.i refers to the "total" ground water diversions. By its plain meaning, "total" diversions refers to all pumping from the ESPA, not just pumping by IGWA members.

In keeping with the language of section 3.a.i, section 3.a.ii provides that each of the signatory districts' responsibility to conserve groundwater would be proportionate to "the total annual groundwater reduction." Again, it does not state that 240,000 acre-feet will be allocated solely among IGWA members; it states that each district's proportionate shares shall be relative to total diversions from the ESPA.

This is reinforced by the fact that the 240,000 acre-feet figure in section 3.a.i was not revised downward when Southwest Irrigation District elected to not sign the Agreement. Southwest is a member of IGWA whose patrons pump groundwater from the ESPA, and the parties anticipated that Southwest would participate in the Agreement, which is why it includes a signature page for Southwest. (Agreement, p. 22.) Southwest did not to sign the Agreement, however, electing instead to conserve groundwater under the terms of a separate settlement agreement with the SWC. Southwest contributes toward stabilization and recovery of the ESPA, it just does so under different terms.

If section 3.a was intended to require the signatory districts alone to conserve 240,000 acre-feet, the withdrawal of Southwest would have necessitated an amendment of section 3.a to remove Southwest's proportionate share of 240,000 acre-feet. This was not necessary because the plain language of section 3.a requires each district's proportionate share to be calculated relative to total diversions from the ESPA; therefore, Southwest's withdrawal had no effect on the obligations of the districts that did sign the Agreement.

Based on the plain language of section 3.a, IGWA respectfully requests that the Director enter partial summary judgment that the signatory districts' proportionate conservation obligations be calculated relative to total diversions from the ESPA.

3.2 Alternatively, section 3.a is patently ambiguous because it is susceptible to multiple reasonable interpretations.

If the Director does not grant partial summary judgment based on the plain language of sections 3.a as set forth above, the Director should find that the plain language is patently ambiguous. A contract is ambiguous if there are "two different reasonable interpretations of the term." *Swanson v. Beco Const. Co.*, 145 Idaho 59, 62 (2007). "Idaho courts look solely to the face of a written agreement to determine whether it is patently ambiguous." *Id*. (quoting *Ward v. Puregro Co*., 128 Idaho 366, 369 (1996)). "In determining patent ambiguity, the contract as a whole is considered." *Buku Properties, LLC v. Clark*, 153 Idaho 828, 832 (2012).

As explained above, the terms of the Agreement can reasonably be read to calculate the signatory districts' proportionate share relative to total diversions from the ESPA. If the Director determines that the Agreement can also reasonably be read to calculate the signatory districts' proportionate share relative only to the diversions of other signatory districts, the existence of two different reasonable interpretations results in a patent ambiguity.

When a contract is ambiguous, "a court moves past the initial ambiguity question, and the interpretation of the [document] becomes a question of fact determined by parole [sic] evidence of the facts and circumstances surrounding the [] transaction." *Sommer v. Misty Valley, LLC*, 170 Idaho 413 (2021). Parol evidence is considered to determine the intent of the parties which may be derived not only from the language of the contract but also "the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings." *Stanger v. Walker Land & Cattle, LLC*, 169 Idaho 566, 573 (2021); see also *Bischoff v. Quong-Watkins Properties*, 113 Idaho 826, 829 (Ct. App. 1987) ("A court may look to custom and trade practice in interpreting an agreement as well as using such to supply an essential term which is reasonable in the circumstances to the agreement.").

If the Director finds the Agreement to be patently ambiguous, the SWC's Motion must be denied and the hearing held to consider parol evidence.

3.3 Alternatively, section 3.a.ii is latently ambiguous.

Ambiguity may be patent or latent. *Swanson*, 145 Idaho at 62. "A latent ambiguity is not evident on the face of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist." *Id*. (quoting *In re Estate of Kirk*, 127 Idaho 817, 824 (1995)). In

evaluating latent ambiguity there are two points of analysis: "first, we examine the language of the instrument, including other writings incorporated into the instrument; and second, we examine the reasonable alternative meanings suggested by the parties as to language within the instrument." *Sommer*, 170 Idaho 413 (quoting 11 Williston on Contracts § 30:5 (4th ed.)). The fact finder "may consider extrinsic evidence of the structure of the instrument; the parties' relative positions and bargaining power; the parties' bargaining history; the party drafting the instrument; and *any conduct of the parties which reflects their understanding* of the contract's meaning to determine whether language within the instrument is reasonably susceptible of more than one meaning." *Id*. (emphasis added; internal quotation omitted).

If the Director finds that section 3.a.ii is not patently ambiguous, IGWA contends that it is latently ambiguous because the Agreement does not explain how each district's proportionate share is to be calculated, the parties' conduct demonstrates their intent that this was left to IGWA to determine after the Agreement was signed, and IGWA reasonably accounted for diversions from A&B and Southwest in determining each of the signatory districts' proportionate groundwater conservation obligations. (Higgs Decl., ¶¶ 17-20.)

IGWA is entitled to a hearing to present extrinsic evidence to further support the meaning of section 3.a as it applies to the facts in existence at the time of the Agreement. Therefore, the SWC's Motion must be denied.

3.4 The SWC's integration argument is a red herring and should be ignored.

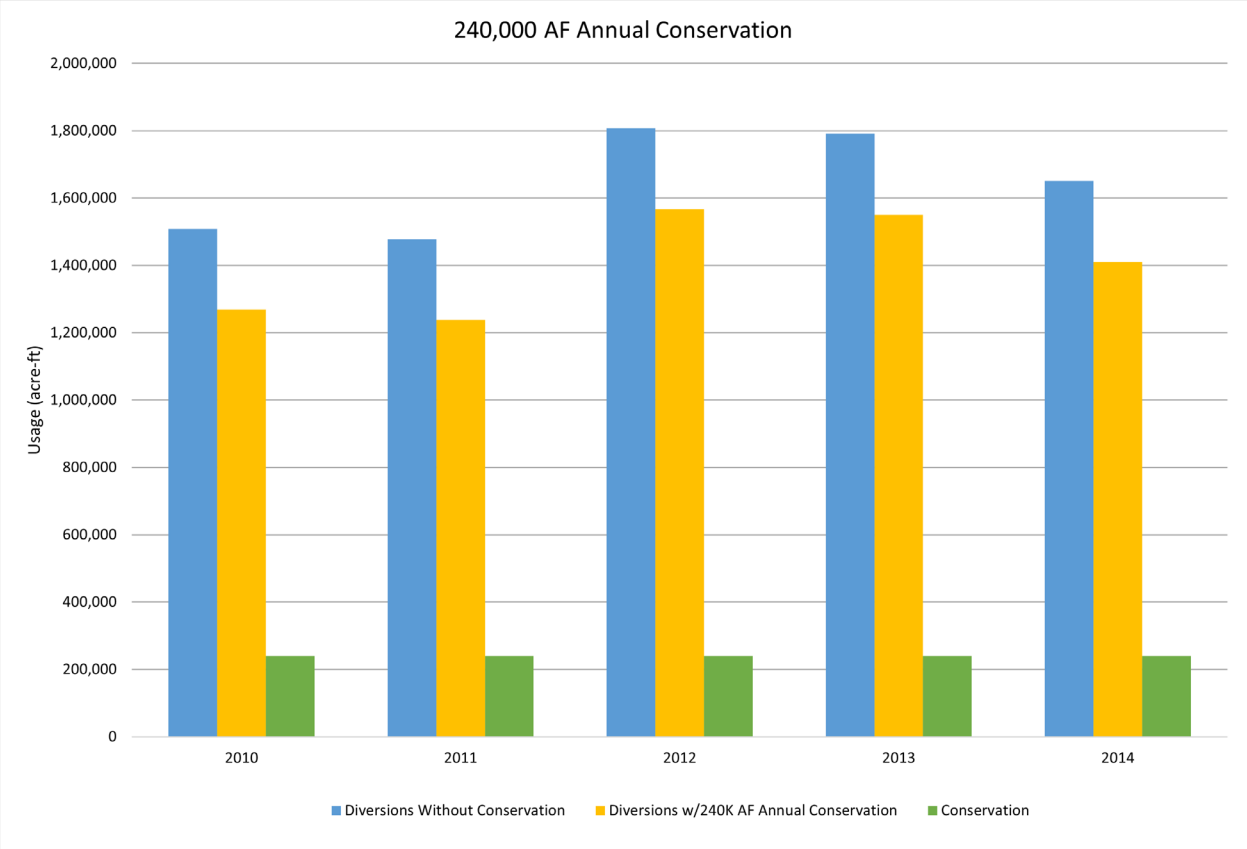
The SWC argues that since the Agreement contains a merger clause, "the parties' intent as to the SWC/IGWA Agreement must be determined solely from the language of the agreement." (SWC Memo, p. 9-10.) This argument misstates Idaho law. A merger clause means that there are no terms of agreement that are not incorporated into the written contract. It does not mean that every term that is incorporated into the contract is unambiguous, and it does not excuse the Director's responsibility to consider parol evidence when the written terms of a contract prove to be ambiguous. The case law is clear that if the terms within the written contract are ambiguous, the Director may consider parol evidence to determine the intent of the parties.

4. The Director should deny the SWC's Motion with respect to averaging because the Agreement is latently ambiguous as to how groundwater conservation is measured, and because the SWC acknowledged that averaging may be utilized.

While the Agreement clearly requires the signatory districts to conserve a certain amount of groundwater annually, it does not prescribe how groundwater conservation will be measured. The Compliance Order ruled that districts cannot average their diversions across multiple years for the purpose of measuring compliance, reasoning that the plain meaning of "annual" requires that "of or measured by a year" or "happening or appearing once a year, yearly." (Compliance Order, p. 10.) The SWC asks the Director to rubber-stamp this ruling, citing the same rationale—that the word "annual" is unambiguous. (SWC Memo, p. 7.)

IGWA concurs that the Agreement requires annual conservation. However, the Agreement does not specify how annual conservation will be measured, and a latent ambiguity arises when one attempts to apply this requirement to the facts in existence.

Measuring annual conservation would be simple if groundwater diversions were static from year-to-year, but they are not—more water is pumped during hot and dry years than in cool and wet years. Thus, reducing diversions by a certain volume annually result in gross diversions being higher in dry years than in wet years, yet in every year less than they would have been in the absence of the Agreement. To illustrate, the following chart compares actual diversions from 2010-2014 (based on the selected data set) versus diversions that would have occurred with 240,000 acre-feet of conservation in each of those years:

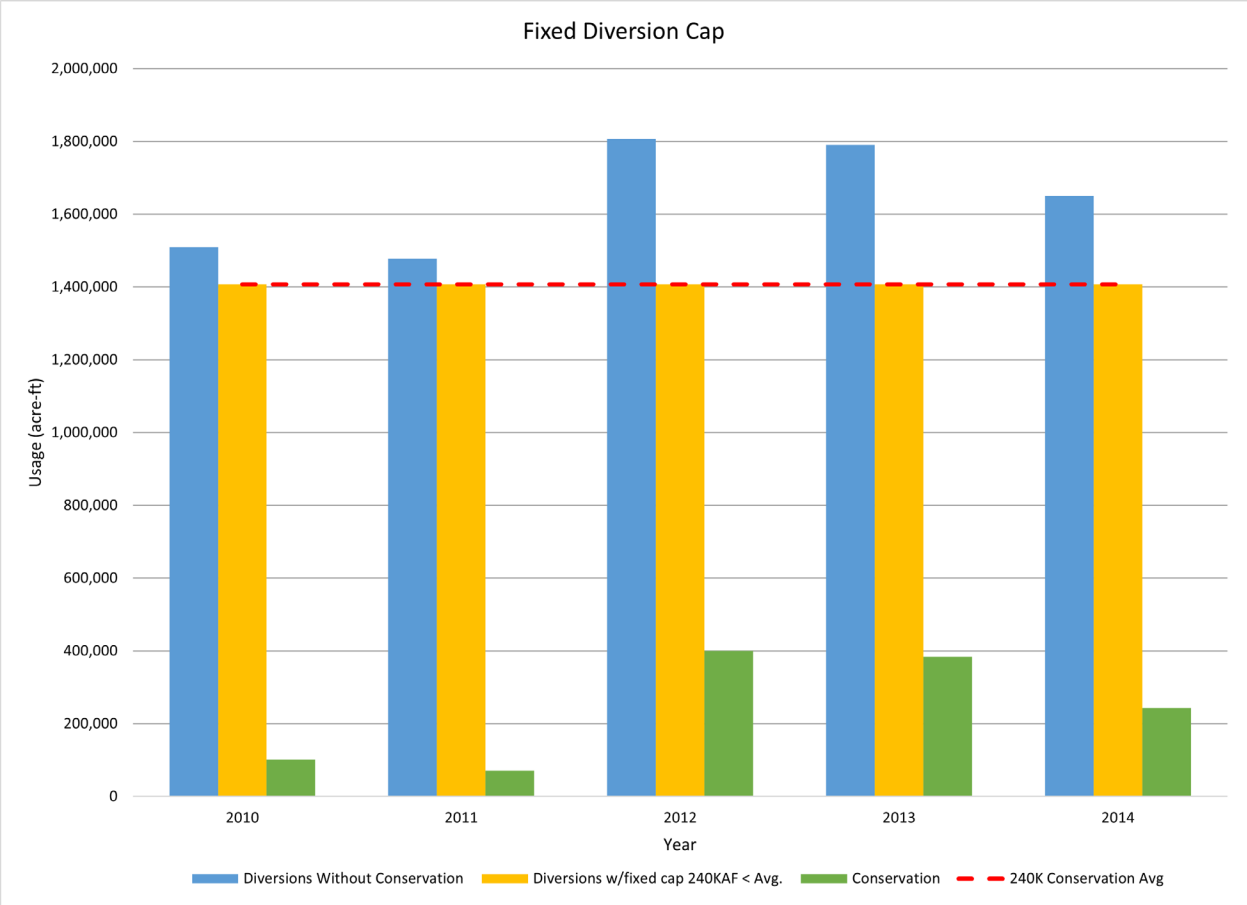


As the above chart shows, conserving 240,000 acre-feet annually would have resulted in actual diversions fluctuating between 1.2 million acre-feet and 1.6 million acre-feet (based on the selected data set).

If groundwater users were to conserve precisely 240,000 acre-feet annually post-Agreement, annual diversions would fluctuate similar to what is shown above. In an ideal world, the participating districts would know how much water their patrons would divert in a given year without conservation measures in place, and then compare that with actual diversions to determine whether each district conserved its proportionate share of 240,000 acre-feet. Of course, that's impossible because farmers cannot farm the same land in the same year both with and without conservation measures in place. Therefore, some other method must be used to measure annual groundwater conservation under the Agreement.

The Agreement does not prescribe how to measure annual conservation. This was left to IGWA to figure out, and there were multiple ways of doing it. (Higgs Decl., ¶¶ 13-14.) Since groundwater diversions naturally fluctuate from year-to-year, IGWA elected to measure compliance by compare average diversions over a multi-year period prior to the Agreement against average diversions over a multi-year period after the Agreement. IGWA selected average diversions from 2010-2014 as the baseline. The Agreement does not prescribe a 5-year average as the baseline; IGWA selected it on its own. *Id*.

If averaging is not available for purposes of measuring compliance with diversion limits, the 2010-2014 average effectively creates a fixed cap which actually contradicts the language of the Agreement by forcing the signatory districts conserve more than their shares of 240,000 acre-feet in some years and less in others, as illustrated by the following chart:



The green bars in the above chart demonstrate that prohibiting the use of averaging would allow the signatory districts to conserve much less than their proportionate shares of 240,000 acre-feet in some years while requiring them to conserve much more in other years.

The point is that measuring "annual" conservation becomes ambiguous when applied to the facts in existence. IGWA is entitled to present evidence concerning this latent ambiguity, and

the parties' intent that IGWA determine how to measure compliance. Therefore, the Motion should be denied on this issue.

Importantly, after the Agreement was entered into the SWC acknowledged that IGWA may utilize averaging for purposes of measuring compliance with the annual conservation obligation. On March 9, 2016, IGWA and the SWC jointly filed with the Department *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order*, which included a proposed order approving the Agreement as a mitigation plan under Rule 43 of the Conjunctive Management Rules. The proposed order includes the a condition that groundwater diversion reductions will be "based on a 3-year rolling average going forward." (Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order, Ex. A, ¶ 2.a.)

5. The Director must withdraw the Compliance Order ruling that a breach occurred in 2021.

The Compliance Order's conclusion that certain of the signatory districts breached the Agreement in 2021 is predicated on the Director's findings that (a) the proportionate shares of the signatory districts must be calculated relative to the collective diversions of the signatory districts as opposed to total diversions from the ESPA, and (b) averaging is not allowed for purposes of measuring compliance. If the Director denies the Motion with respect to either finding, then he must also withdraw his ruling that a breach occurred in 2021.

Even if the Director were to grant the Motion, he must withdraw his ruling that a breach occurred in 2021, for two reasons.

First, the Director's finding that a breach occurred is predicated on the premise that the Agreement requires that compliance be measured from a fixed baseline based on average diversions from 2010-2014. If averaging is not allowed for purposes of compliance, IGWA may no longer use the 2010-2014 average as a baseline. IGWA may instead take into account precipitation and temperature by comparing the current year with a prior analog year of similar precipitation and temperature. In any case, until an alternative measure of compliance is determined, the Director cannot conclude that a breach occurred.

Second, IGWA has not yet had an opportunity to present affirmative defenses to the SWC's breach claim. For example, there is no breach if IGWA substantially performed its long-term obligations under the Agreement. *Hull v. Giesler*, 156 Idaho 765, 774 (2014) ("There is no material breach of contract where a party substantially performs."). "Substantial performance is performance which, despite a deviation from contract requirements, provides the important and essential benefits of the contract to the promisee." *Id*. Excess conservation by IGWA prior to 2021 provided benefits to the SWC that the Director did not take into account in finding that a breach occurred. Also, the SWC cannot pursue a breach claim if its own conduct has been "inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." *Sword v. Sweet*, 140 Idaho 242, 251 (2004). As mentioned above, the SWC acknowledged in 2016 that averaging may be used for purposes of compliance, and it is inequitable for them to now assert that averaging is not permitted. Other affirmative defenses can also be raised.

Therefore, regardless of the Director's ruling as to method of calculating each district's proportionate conservation obligation, and regardless of his ruling as to averaging, the Director should on summary judgment withdraw his finding that a breach occurred in 2021.

CONCLUSION

For the reasons set forth above, IGWA requests that the Director deny the SWC's Motion by ruling as follows:

- IGWA is statutorily entitled to a hearing under Idaho Code 42-1701A(3).
- IGWA is contractually entitled to a hearing to present "all available information" pursuant to section 2.c.iv of the Second Addendum.
- With respect to the method of calculating the proportionate conservation obligations of the signatory districts, either (a) the plain language of the Agreement provides that their proportionate obligations be calculated relative to total groundwater diversions from the ESPA; (b) the Agreement is patently ambiguous as to the method of calculating their proportionate conservation obligations; or (c) IGWA should be permitted to present evidence of latent ambiguity concerning the matter.
- With respect to averaging, the Agreement is latently ambiguous as to how annual groundwater conservation is to be measured, and the SWC explicitly acknowledged that averaging may be utilized for purposes of compliance.
- The Compliance Order finding that a breach occurred in 2021 is withdrawn.

DATED January 4, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2023, the foregoing document was served on the persons below via email as indicated:

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