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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 Docket No. CM-MP-2016-001 **SURFACE WATER COALITION'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN	

COME NOW, 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 (collectively hereafter referred to as the "Surface Water Coalition", "Coalition", or "SWC"), by and through their counsel of record, and hereby file this *Memorandum in Support of Motion for Summary Judgment* pursuant to Rule 220.03 of the Department's Procedural Rules (IDAPA 37.01.01 et seq.) and Idaho Rule of Civil Procedure 56. For the reasons set forth below the Director should grant the Coalition's motion and dismiss *IGWA's Request for Hearing* as a matter of law.

UNDISPUTED FACTS

The facts leading to the Director's *Final Order Regarding Compliance with Approved Mitigation Plan* ("Compliance Order") are undisputed.

In the summer of 2015 IGWA[1] and the Coalition entered into a *Settlement Agreement*[2] ("Agreement") to resolve continued litigation over the Coalition's delivery call.[3] In consideration of certain mitigation actions, IGWA received "safe harbor" from curtailment. Relevant to this contested case, IGWA agreed to the following "long term practices":

> a. *Consumptive Use Volume Reduction.*
>
> > *i.* Total ground water diversion shall be reduced 240,000 ac-ft annually.
> > *ii.* 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. . . .

Agreement at 2 (italics in original).

[1] Signatory members of IGWA are Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Fremont Madison Irrigation District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District. These entities are hereafter referred to collectively as "IGWA" or "the Districts."

[2] A copy of the Agreement can be found at Ex. B to *Stipulated Plan and Request for Order* (March 9, 2016).

[3] The parties later executed a First Addendum in October 2015. *See* Ex. C to *Stipulated Plan*.

The Agreement also included the following merger clause:

> 9. **Entire Agreement.**
>
> This Agreement sets forth all understandings between the parties with respect to the SWC delivery call. There are no understandings, covenants, promises, agreements, conditions, either oral or written between the parties other than those contained herein. The parties expressly reserve all rights not settled by this Agreement.

Agreement at 5 (bold in original).

The Agreement was submitted to IDWR as a stipulated mitigation plan pursuant to CM Rule 43. *See Stipulated Mitigation Plan and Request for Order* (March 9, 2016). IDWR published notice of the mitigation plan in various newspapers around the state. The cities of Idaho Falls and Pocatello filed protests that were later withdrawn by stipulation. *See Motion for Order Approving Stipulation to Conditionally Withdraw Protests* (April 22, 2016). The Director issued a final order approving the mitigation plan on May 2, 2016 with certain conditions ("2016 Order"), including the following:

> a. All ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan.

2016 Order at 4.

The parties then executed a *Second Addendum to Settlement Agreement* in late 2016 and early 2017. The parties submitted the addendum as a stipulated amendment to the previously approved mitigation plan. *See Stipulated Amended Mitigation Plan and Request for Order* (Feb. 7, 2017). Again, IDWR published notice of the amended plan pursuant to CM Rule 43 and the Director approved the amendment by final order dated May 9, 2017 ("2017 Order"). That order included the following provision:

b. Approval of the Second Addendum does not limit the Director's enforcement discretion or otherwise commit the Director to a particular enforcement approach.

2017 Order at 5.

IGWA submitted its 2021 performance report to IDWR and the SWC on April 1, 2022. *See T.J. Budge April 1, 2022 Email and attachments*. As detailed in that report, the Districts only reduced groundwater diversions and recharged a total of 122,784 acre-feet in 2021. Following meetings of the Steering Committee in the summer of 2022, the Coalition provided IDWR with notice of the committee's impasse on the question of the Districts' performance in 2021. *See SWC Notice of Steering Committee Impasse / Request for Status Conference* (July 21, 2022). The Districts filed a response and did not dispute the committee's impasse on the question of the Districts' 2021 performance. *See IGWA's Response to Surface Water Coalition's Notice of Steering Committee Impasse* (August 3, 2022).

The Director held a status conference on August 5, 2022, and then took official notice of the Districts' 2021 performance report and supporting spreadsheets. *See Notice of Intent et al.* (August 18, 2022). The Director issued the *Final Order Regarding Compliance with Approved Mitigation Plan* on September 8, 2022. IGWA filed a *Petition for Reconsideration and Request for Hearing* on September 22, 2022. The Director issued an order granting the request for hearing on October 13, 2022.

STANDARD OF REVIEW

IDWR's Rules of Procedure authorize the filing of motions for summary judgment. Rule 220.03. Such motions are governed by I.R.C.P. 56, except that the rule's time procedure set forth in subsection (b) does not apply. *See id.*

Under Rule 56(a) 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. *See Martin v. Thelma V. Garrett Living Trust*, 170 Idaho 61, 506 P.3d 237, 241 (2022). The burden of proving the absence of material facts is on the moving party 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. *See id.* When an action is tried before an agency without a jury (in this case the Director as presiding officer), the Department can rule upon summary judgment despite the possibility of conflicting inferences arising from undisputed evidentiary facts. *See Nettleton v. Canyon Outdoor Media, LLC*, 163 Idaho 70, 73, 408 P.3d 68, 71 (2017).

Summary judgment is appropriate in this case because the Director is called upon to interpret an unambiguous order and stipulated mitigation plan. There is no disputed issue of fact and pursuant to well-established precedent the Director can dismiss IGWA's petition and contested case challenging the Compliance Order as a matter of law.

ARGUMENT

I. The Mitigation Plan and Director's Orders Approving the Plan are Unambiguous and can be Determined as a Matter of Law.

This case concerns interpretation of the Director's order approving IGWA's stipulated mitigation plan and the Districts' 2021 non-compliance with that order. The parties stipulated to the mitigation plan in 2016, along with an amendment in 2017. *See generally*, 2016 Order and 2017 Order. The Director has the authority to interpret the plan and prior orders and rule on IGWA's present petition as a matter of law. Rather than spending weeks of the parties' and agency's time and resources on developing what would be a moot evidentiary record, the Director can grant the Coalition's motion for summary judgment and dismiss IGWA's petition.

A. Only the Signatory Parties are Responsible for the Mitigation Obligation.

The first issue is who bears the mitigation obligation identified in the plan and the approval order. The stipulated plan was filed by IGWA "on behalf of its participating members identified in the Agreements." *See Stipulated Mitigation Plan* at 3, ¶ 12. The 2015 Agreement was executed by Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Fremont Madison Irrigation District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.[4] *See* Ex. A to *Stipulated Mitigation Plan.*

Non-parties to the Settlement Agreement are not part of the stipulated mitigation activities. *See Greater Boise Auditorium Dist. v. Frazier*, 159 Idaho 266, 274 (2015) (non-parties are generally not bound by contracts they did not enter into). Moreover, the Director ordered that "[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibility of the **parties to the Mitigation Plan**." 2016 Order at 4 (emphasis added). There is no question as to the parties to IGWA's mitigation plan. Moreover, there is no confusion as to A&B Irrigation District's position with respect to its ground water rights since IGWA expressly agreed that "[t]he 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." *See* Ex. C to *Stipulated Mitigation Plan*; *see also* Compliance Order at 12 ("A&B and Southwest are not responsible for any portion of the 240,000 acre-foot diversion reduction obligation").

Accordingly, the mitigation obligations in the stipulated plan and order approving the same fall upon the signatory members of IGWA alone. The Director can make such a finding as a matter of law based upon the Agreement's plain and unambiguous language.

[4] The addendums were executed by the same parties as well.

B. The Signatory Parties' Reduction Obligation is 240,000 acre-feet per year.

The interpretation of IGWA's mitigation plan and the Director's order approving the same, starts with the documents' plain language. The Director must first decide, when construing the plan and prior order, whether they are ambiguous, which is a question of law. *See e.g., Idaho Counties Risk Management Underwriters v. Northland Ins. Companies*, 147 Idaho 84, 86 (2009).

The stipulated mitigation plan states: "Total ground water diversion shall be reduced **240,000 ac-ft annually**." *See* Agreement at 2 (emphasis added). The Director noted the following with regards to IGWA's stipulated mitigation plan:

> 10. As discussed above, the Mitigation Plan requires numerous ongoing activities, including: (a) **annual** ground water reductions and storage water deliveries . . .

2016 Order at 4 (emphasis added).

The terms "annually" and "annual" are unambiguous and have settled legal meaning. Black's Dictionary defines the terms as follows:

> **Annual**. Of or pertaining to year; returning every year; coming or happening yearly. Occurring or recurring once in each year; continuing for the period of a year, accruing within the space of a year; relating to or covering the events or affairs of a year. Once a year, without signifying what time in year.
>
> **Annually**. In annual order or succession; yearly, every year, year by year. At end of each and every year during a period of time. Imposed once a year, computed by the year. Yearly or once a year, but does not in itself signify what time in year.

Black's Law Dictionary at 57-58 (6th ed. 1991).

When the language of a contract is unambiguous, its interpretation is a question of law. *See Nelsen v. Nelsen*, 170 Idaho 102, 508 P.3d 301, 333 (2022). An unambiguous contract will be given its plain meaning. *See Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*,

153 Idaho 716, 723 (2012); *Caldwell Land and Cattle, LLC v. Johnson Thermal Systems, Inc.*, 165 Idaho 787 (2019). The above language is plain and unambiguous and should be enforced by the Director. *See Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 264 (2011).

The unambiguous language simply requires the Districts to reduce diversions or conduct recharge in the amount of 240,000 acre-feet each and every year of the Agreement. There is no other reasonable interpretation of this term and the Director's decision on this issue should be confirmed as a matter of law. *See* Compliance Order at 10 ("The phrase 'shall be reduced by 240,000 ac-ft annually' is unambiguous and must be enforced according to its plain terms."). Just because IGWA disagrees with that interpretation does not make IGWA's position "reasonable," or one that can survive summary judgment in this case.

The Districts wrongly contend that their reduction obligation is only 205,000 acre-feet and that their performance can be evaluated on a five-year rolling average. *See IGWA Response* at 3-5. Nothing in the plain terms of the Agreement refers to the Districts' obligation as "205,000 acre-feet" or that it is measured by a "five-year rolling average." As recognized by the Director, the Agreement's only reference to a "five-year rolling average" is in reference to the Districts' reduction obligation and what could happen once the ground water level goal was achieved and sustained. *See* Compliance Order at 10. Therefore, the Districts' interpretation of the Agreement is patently unreasonable and contrary to its plain terms. Stated another way, no reasonable person would read the Agreement in the manner IGWA suggests.

II. The Agreement and Stipulated Mitigation Plan are Integrated.

The Districts' interpretation of the Agreement should be found invalid as a matter of law since the Agreement (and Stipulated Mitigation Plan) are integrated through its merger clause. As noted above, the Agreement includes an "entire agreement" provision at page 5. Such

language has important legal ramifications that foreclose the Districts' arguments under their petition requesting a hearing.

For example, in *AED, Inc. v. KDC Investments, LLC*, 155 Idaho 159 (2013), the Idaho Supreme Court held the following with respect to a contract's merger clause:

> "Where a written agreement is integrated, questions of the parties' intent regarding the subject matter of the agreement may only be resolved by reference to the agreement's language." *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 267, 297 P.3d 222, 230 (2012) (citing *Valley Bank v. Christensen*, 119 Idaho 496, 498, 808 P.2d 415, 417 (1991)). If a written contract contains a merger clause, it is an integrated agreement for purposes of the parol evidence rule. . . . Thus, extrinsic evidence may not be used to determine whether a written and integrated contract is based upon consideration other than what is contained in the text of the contract.

155 Idaho at 165.

In *AED*, the plaintiff entered into a sales agreement and transferred its interest in a toll bridge to the defendant in exchange for $25,000. *See* 155 Idaho at 162. The sales agreement included a merger clause analogous to the one in the SWC/IGWA Agreement. *See* 155 Idaho at 165; Agreement at 5, ¶ 9. The parties also entered into a separate blasting agreement. The defendant later informed the plaintiff that it did not want to hire plaintiff for the blasting work, implicitly on the basis that the plaintiff did not have a state license to perform the work. The plaintiff sued and ultimately the district court granted summary judgment quieting title to the bridge in the defendant's name. On appeal the plaintiff argued that the blasting agreement was an essential part of the consideration of the sales agreement and that if the blasting agreement was illegal as a matter of law, the defendant was not entitled to the order quieting title. *See* 155 Idaho at 165. The Idaho Supreme Court rejected the plaintiff's argument and found: "The Sales Agreement in this case is a written and integrated contract, therefore, the parties' intent must be determined solely from the language of the agreement." *Id.*

Similarly in this case, the parties' intent as to the SWC/IGWA Agreement must be "determined solely from the language of the agreement" since it includes a merger clause. Whereas the Agreement expressly provides for an annual obligation of 240,000 acre-feet per year, there is nothing left to examine at a factual hearing regarding the parties' intent and the Agreement's plain meaning. Consequently, the Director can grant the Coalition's motion and dismiss IGWA's petition as a matter of law.

CONCLUSION

The plain language of the stipulated mitigation plan and order approving the same is undisputed. The Signatory Ground Water Districts have an annual mitigation obligation of 240,000 acre-feet that is not subject to a five-year rolling average evaluation. The terms are unambiguous and can be settled as a matter of law. Since the Agreement includes a merger clause the Director is left with examining the four corners of the document to identify the parties' intent. As such, there is no basis for any fact-finding in this matter and IGWA's petition requesting a hearing can be dismissed as a matter of law.

DATED this 21st day of December, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2022, I served a true and correct copy of the foregoing *Surface Water Coalition's Memorandum in Support of Motion for Summary Judgment* on the following by the method indicated:

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