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**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

**BJGWD's Response in Opposition to  
 SWC's Motion for Summary Judgment**

IN THE MATTER OF IGWA'S SETTLEMENT  
 AGREEMENT MITIGATION PLAN

The Bonneville-Jefferson Ground Water District (hereafter "BJGWD") hereby joins in the arguments raised by the Idaho Ground Water Appropriators (hereafter "IGWA") *Response in Opposition to SWC's Motion for Summary Judgment* and 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. This brief provided for the purpose

of preserving and not waiving certain arguments and legal defenses applicable to these administrative proceedings and future legal proceedings.

## **I. OVERVIEW**

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”). SWC filed its Motion on December 21, 2022, essentially arguing that there is no need for the Director holding a hearing. On January 4, 2023, IGWA filed its *Response in Opposition to SWC’s Motion for Summary Judgment* (hereafter “IGWA Response”). BJGWD has now joined in its support of the IGWA Response and provides additional legal argument and defenses below:

## **II. STANDARD OF REVIEW**

Summary judgment is appropriate only

if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c).

The burden of proving the absence of material facts is upon the moving party. The adverse party, however, “may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. The moving party is therefore entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party’s case on which that party will bear the burden of proof at trial.

When an action, as here, will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. Resolution of the possible conflict between the inferences is within the responsibilities of the fact finder.

*P.O. Ventures, Inc. v. Loucks Fam. Irrevocable Tr.*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007)  
(internal quotations and citations omitted) (emphasis added).

### **III. ARGUMENT**

The Director should deny the Motion and conduct an evidentiary hearing to permit IGWA and BJGWD an opportunity to prove the following legal defenses at a hearing pursuant to Idaho Code 42-1701A(3):

#### **A. Unjust Enrichment**

SWC argues that averaging was not part of the Agreement, which IGWA disputes. However, assuming *arguendo* that averaging is not contemplated by the Agreement, SWC has been unjustly enriched.

A prima facie case of unjust enrichment consists of three elements: (1) there was a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof. *Aberdeen–Springfield Canal Co. v. Peiper*, 133 Idaho 82, 88, 982 P.2d 917, 923 (1999).

...

The doctrine of unjust enrichment is not permissible where there is an enforceable express contract between the parties which covers the same subject matter. *Wilhelm v. Johnston*, 136 Idaho 145, 152, 30 P.3d 300, 307 (Ct.App.2001) (citing *DBSI/TRI v. v. Bender*, 130 Idaho 796, 805, 948 P.2d 151, 160 (1997)). Equity does not intervene when an express contract prescribes the right to compensation. *Shacocass, Inc. v. Arrington Constr. Co.*, 116 Idaho 460, 464, 776 P.2d 469, 473 (Ct.App.1989); see *Wolford v. Tankersley*, 107 Idaho 1062, 1064, 695 P.2d 1201, 1203 (1984).

*Vanderford Co. v. Knudson*, 144 Idaho 547, 558, 165 P.3d 261, 272 (2007).

SWC argues that the Agreement does not permit IGWA to average its pumping reductions or ground water recharge on a five-year rolling basis. Accepting this argument as true means the

Agreement does not address nor provide compensation to IGWA when it provides SWC additional pumping reductions or recharge.

The record is undisputed that IGWA provide additional pumping reduction and recharge in three of the five years prior to 2021, such that if averaging were recognized, IGWA would not have been over the 240,000 af annual reduction goal for 2021. See annual reports. The reductions and the additional recharge came at substantial cost to IGWA and its members.

Accordingly, IGWA conferred a benefit upon SWC in the years prior to 2021. SWC received this benefit in the form of additional water. SWC has not compensated IGWA for the benefits it received. Given the costs incurred by IGWA to confer these additional benefits to SWC, it would be inequitable for SWC to retain these benefits without compensating IGWA.

#### **B. Legal Impracticability**

IGWA members strict compliance with an annual reduction of 240,000 is legally impracticable. In quoting Section 269 of the RESTATEMENT (SECOND) OF CONTRACTS the Idaho Supreme Court has held that:

Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.

*See also Twin Harbors Lumber Co. v. Carrico*, 92 Idaho 343, 348, 442 P.2d 753, 758 (1968) (Under the doctrine of impossibility, if the existence of a specific thing is essential for performance, a duty to perform is discharged if the thing "subsequently is not in existence in time for seasonable performance." Emphasis added).

*Sutheimer v. Stoltenberg*, 127 Idaho 81, 85, 896 P.2d 989, 993 (Ct. App. 1995)

Section 7 of the Agreement states that it is "perpetual." The Agreement also multiple goals intended to solve long-term problems on the ESPA. It is not merely focused on any single year's

water supply to the parties. Importantly, the Agreement has an objective to “[m]inimize economic impact on individual water users and the state economy arising from water supply shortages.” *See* section 1(c).

Idaho historically has periods of drought, which cycle for multiple years. The 2021 crops in the upper valley required additional irrigation to prevent crop failure in light of the unusually hot and dry irrigation season. Had the ground water pumpers not applied sufficient water during the hot and incredibly dry summer months, crop failure would have occurred.

Wide-spread crop failure in the upper basin would have impacted not only individual IGWA water users, but it would also have had state-wide economic impacts. Under the circumstances present during the 2021 growing season, reducing pumping would have resulted in crop failure across the upper valley. Given this, performing the terms of the agreement requiring reduction in groundwater pumping during last season was legally impracticable.

IGWA users also performed all other terms of the Agreement during the 2021 season and years prior. Based upon this, IWGA water users should be excused from performing the terms of the Agreement requiring reduced ground water pumping for the 2021 season.

### **C. Unclean Hands**

The SWC cannot hold IGWA to a breach where it, too, has breached the Agreement. “The doctrine of unclean hands permits a trial court to deny equitable relief to a party.” *N. Idaho Bldg. Contractors Ass’n v. City of Hayden*, 164 Idaho 530, 543, 432 P.3d 976, 989 (2018).

It allows a court to deny equitable relief to a litigant on the ground that his or her conduct has been “inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue.” *Gilbert*, *supra*; see also *Hoopes v. Hoopes*, 124 Idaho 518, 522, 861 P.2d 88, 92 (Ct. App. 1993); 27 Am. Jur.2d. Equity § 126 (1996).

*Sword v. Sweet*, 140 Idaho 242, 251, 92 P.3d 492, 501 (2004); see also *Andola v. Picott*, 5 Idaho 27, 46 P. 928 (1896) (“...but a condition precedent to any relief either at law or in equity is the

restoration of the consideration. This principle is so elementary that it is surprising that it should have been overlooked by . . . defendants.”).

BJGWD has a reasonable belief that SWC may have violated Idaho law by diverting water out of the basin during the 2021 season.<sup>1</sup> This action is inconsistent with section 1(e) of the Agreement which provides that it is an objective of the Agreement to “[i]ncrease compliance with all elements and conditions of all water rights and increase enforcement when there is not compliance.”

Diverting water outside the basin appears to have been done in violation of Idaho law, and thus, inconsistent with the objectives of section 1(e). By diverting water outside the basin and overusing water, the SWC also was not trying to conserve water, minimize impacts, etc., as the Agreement has as an objective. The SWC also was not acting in good faith by holding IGWA to a higher standard of compliance. Therefore, SWC breached its duty to perform the terms of the Agreement in good faith.

SWC also violated their implied covenant of good faith and fair dealing by disingenuously arguing the Agreement does not contain averaging. As is the case with every agreement, the Settlement Agreement places this duty on SWC. A breach of contract occurs when a party fails to perform any promise that is part of a contract. *Independence Lead Mines Co. v. Hecla Mining Co.*, 143 Idaho 22, 29, 137 P.3d 409, 416 (2006). In every contract, there is an implied duty to perform, in good faith, the obligations required in the contract. *Steiner v. Ziegler Tamura, Co.*, 138 Idaho 238, 242, 61 P.3d 595, 599 (2002) (citations omitted). Such a duty exists even when it involves some events that are beyond the control of the obliging party and are even considered a condition precedent to complete the agreement. *Wade Baker & Sons Farms v. Corp. of Presiding Bishop of*

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<sup>1</sup> This was admitted to at a Steering Committee Meeting earlier this year, and such violations included, but are not limited to Idaho Code §§ 42 203A(5)(g), 42-222(1), 42-240(5), 42-1763, and/or 42-226.

*Church of Jesus Christ of Latter-Day Saints*, 136 Idaho 922, 925, 42 P.3d 715, 718 (Idaho Ct. App. 2002).

SWC's actions in pursuing breach against IGWA violate that duty because they knew and certainly had reason to know that averaging was contemplated as being part of the Agreement, even in documents filed with the Department. *See* IGWA Response for further treatment. Yet, it now expressly denies that averaging was part of the agreement, and seemingly misrepresents their knowledge to the Department. Arguably, SWC is estopped from arguing against averaging. But the record clearly shows that SWC is advancing opposition to a concept it knowingly supported and represented to the Department.

Because SWC is now arguing no averaging is part of the agreement, they are either being untruthful or attempting to exploit IGWA by making disingenuous breach claims. Either way, a question of fact exists as to whether SWC is entitled to alleged breach in violation of its duty of good faith and fair dealing. Having breached the Agreement itself, the SWC cannot come before any adjudicative body with clean hands.

#### **D. No Damages**

SWC cannot establish that it sustained damages from over-pumping in 2021. The elements for a claim for breach of contract are: (a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages.” *Mosell Equities, LLC v. Berryhill & Co.*, 154 Idaho 269, 278, 297 P.3d 232, 241 (2013). “The burden is upon the plaintiff to prove not only that it was injured but that its injury was the result of the defendant's breach; both amount and causation must be proven with reasonable certainty.” *Harris, Inc. v. Foxhollow Const. & Trucking, Inc.*, 151 Idaho 761, 770, 264 P.3d 400, 409 (2011) (Quoting *Griffith v. Clear Lakes Trout Co., Inc.*, 143 Idaho 733, 740, 152 P.3d 604, 611 (2007)).

A breach of contract claims fails if the plaintiff fails to prove causation or damages with reasonable certainty. *Harris*, 151 Idaho at 770, 264 P.3d at 409 (“Accordingly, Harris’ breach of contract claim against Johnson fails for lack of proper proof of damages.”) *See Melaleuca, Inc. v. Foeller*, 155 Idaho 920, 924, 318 P.3d 910, 914 (2014) (“Furthermore, even if the plaintiff establishes that he “has been legally wronged, he may not recover damages unless he has been economically ‘injured.’”) (quoting *Bergkamp v. Martin*, 114 Idaho 650, 653, 759 P.2d 941, 944 (Ct. App. 1988)).

SWC has not shown any evidence that they sustained damages. Even so, any damages sustained in 2021 are offset by the additional water provided to the SWC through increased pumping reductions, recharge, and other forms of mitigation provided in the years proceeding 2021 IGWA. In other words, IGWA and its members mitigated their water over use in the 2021 season by over-reducing their use in the previous years and SWC already received the benefits from IGWA’s increased reductions. SWC benefitted from additional water in the years past and they cannot claim damage during the 2021.

#### **IV. CONCLUSION**

The foregoing demonstrates that SWC has not met its burden to show that there are no disputed facts and that it is entitled to judgment as a matter of law pertaining the IGWA, and its members,’ alleged breach of the Agreement. Even if the Director is inclined to find that a breach occurred, IGWA and BJGWD have affirmative legal defenses that undermine SWC’s claims. As such, SWC’s Motion should be denied, and an evidentiary hearing should be conducted pursuant to Idaho Code 42-1701A(3) permitting IGWA and BJGWD to challenge the *Final Order Regarding Compliance with Approved Mitigation Plan*.



DATED: January 4, 2023

OLSEN TAGGART PLLC

/s/ Skyler C. Johns

SKYLER C. JOHNS

**CERTIFICATE OF SERVICE**

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

/s/ Skyler C. Johns

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