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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-DC-2010-001 Docket No. CM-MP-2016-001 **SURFACE WATER COALITION'S REPLY IN SUPPORT OF SUMMARY JUDGMENT MOTION**
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 submit the following reply in support of the motion for summary judgment. This reply addresses points raised in *IGWA's Response in Opposition to SWC's Motion for Summary Judgment* ("*IGWA Resp.*").

I. Introduction

The Coalition's motion asks for an efficient and dispositive ruling in this case. The Director's Final Order approving the mitigation plan was issued almost seven years ago. IGWA's present petition is simply an attempt to improperly alter, amend, or set aside that decision. Further, IGWA wrongly believes this is a "contract" case. To the contrary, this matter concerns a mitigation plan and the Director's enforcement of his own order approving that plan. Whereas IGWA has enjoyed years of safe harbor in conjunctive administration, it cannot rewrite the terms of its long term obligations now. The plain terms of the Agreement, Stipulated Mitigation Plan, and Final Order dictate the result the Director has reached and should now confirm as a matter of law. *See generally*, Compliance Order.

Issuing a final order that can be decided as a matter of law is not simply "rubber-stamping" the prior decision, it is what is required by Idaho law. While IGWA claims that its obligation is something other than what is stated, and asks for the opportunity to average its obligation, no reasonable person would read those documents in the manner IGWA suggests. Consequently, the parties can avoid further weeks of protracted litigation and costs, and should instead devote valuable time and resources preparing for the 2023 irrigation season, including evaluating the 2023 benchmark. The Director has the authority to grant the Coalition's motion and hold IGWA to its stated promises. The Coalition's motion simply asks the Director to confirm what is required by Idaho law in this case.

II. IGWA Does Not Dispute the Facts in the Coalition's Motion.

Critically, IGWA does not dispute the underlying material facts set forth in the Coalition's *Memorandum in Support of Motion for Summary Judgment* ("*SWC Memo*"). *See SWC Memo* at 2-4. Pursuant to Rule 56, if IGWA were to assert a fact is "genuinely disputed," it has a requirement to support that assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

I.R.C.P. 56(c).

Nothing in the *IGWA Response* or the *First Declaration of Jaxon Higgs* ("*Higgs Dec.*") disputes the seminal facts that: 1) the parties entered into a Settlement Agreement; 2) the parties submitted a Stipulated Mitigation Plan to IDWR; 3) the Director approved that plan by the 2016 Final Order; and, 4) IGWA did not perform its obligations in 2021. Notably, IGWA's *Response* contains no "facts" section, but instead only offers the conclusory claim that "[t]here 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 Resp.* at 3. IGWA's bare assertion that there are "many" issues of fact is insufficient, instead it must show there are such disputes. *See Gordon v. U.S. Bank National Assn.*, 166 Idaho 105, 121, 455 P.3d 374, 390 (2019) ("Mere conclusory allegations will not raise a genuine issue of material fact").

Mr. Higgs does not contend the terms "annually" or "240,000 af" are ambiguous. Although Mr. Higgs provides paragraphs of discussion as to how IGWA determined to "allocate the 240,000 acre-feet among the ground water districts and irrigation districts" his discussion

does not address the plain terms of the Settlement Agreement, the Stipulated Mitigation Plan, or the Director's Final Order that would create a genuine issue of material fact. Consequently, IGWA's conclusory claim and the *Higgs Declaration* do not create a genuine issue of material fact. Therefore, the Director should grant the Coalition's motion as a matter of law. *See Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984) ("If a motion for summary judgment is supported by a particularized affidavit, the opposing party may not rest upon bare allegations or denials in his pleadings. He must set forth 'specific facts' showing a genuine issue. I.R.C.P. 56(e). If he does not, summary judgment, if appropriate, shall be entered against him. Summary judgment is 'appropriate' if the facts shown by the moving party are undisputed and establish a right to judgment as a matter of law"); *see also*, *Shacocass v. Arrington Constr. Co.*, 116 Idaho 460, 463, 776 P.2d 469, 472 (Ct. App. 1989) ("a court cannot hypothecate facts which are absent from the record"). Since IGWA has not disputed the salient facts pertinent to the Coalition's motion, its petition requesting a hearing can be dismissed as a matter of law.[1]

Further, nothing in the Second Addendum requires the Director to proceed to a hearing in the face of a proper summary judgment motion here. IGWA wrongly claims that section 2.c.iv of the Agreement "obligates" the Director to consider "all available information" when determining when a breach occurs. *IGWA Resp.* at 3. The paragraph cited by IGWA states that if the Steering Committee does not agree that a breach has occurred "the Steering Committee will report the same to the Director and request that the Director evaluate all available information . . ." *Id.* Nothing obligates the Director to take a particular course of action, such as holding an

[1] Since the Director, not a jury, will be the fact finder in this case, he "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." *See P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007).

unnecessary evidentiary hearing. Indeed, in his order approving the amended mitigation plan, the Director purposely found "[a]pproval 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 (emphasis added). IGWA's argument on this point ignores the plain language of the 2017 Order that is final and binding on IGWA. As such, the Director should reject this argument.

II. The Statute Does Not Require an Unnecessary Evidentiary Hearing

IGWA contends that the Coalition's motion should be denied because it is "statutorily entitled to a hearing under Idaho Code § 42-1701A(3)." *IGWA Resp.* at 3. IGWA misreads the statute and the Idaho Administrative Procedures Act, (Idaho APA), I.C. §§ 67-5201 *et seq*.

First, section 42-1701A(3) provides for a right to a hearing before the director to contest the action. The statute provides that the hearing shall be held and conducted in accordance with provisions of subsection (1) and (2). *See* I.C. § 42-1701A(3). Subsection (1) states that all hearings shall be conducted "in accordance with the provisions of chapter 52, title 67, Idaho Code, and the rules of procedure promulgated by the director." I.C. § 42-1701A(3). Under Idaho's APA, IGWA's petition requesting a hearing created a "contested case." I.C. § 67-5240. The Department's Rules of Procedure allow for summary judgment disposition of contested cases before it. *See* IDAPA 37.01.01.220.03. Just because an "aggrieved party" requests a hearing as provided in section 42-1701A(3), does not mandate the agency to proceed to an evidentiary hearing where one is unnecessary as a matter of law. Stated another way, if the facts are undisputed and a petition requesting a hearing can be decided as a matter of law, there is no basis to proceed with protracted and expensive litigation. That is the very reason for summary judgment motions in the first place. *See Lipe v. Javelin Tire Co., Inc.*, 97 Idaho 805, 806, 554

P.2d 1302, 1303 (1976) ("The purpose of summary judgment is to eliminate groundless claims and paper issues in cases which would end in directed verdict or other rulings of law").

In this case the parties would be forced to travel hundreds of miles to Boise simply to identify undisputed facts. That is, there is no reason to have parties spend their resources and hold a hearing on unambiguous documents for a case that can be decided as a matter of law.

The fact IGWA erroneously petitioned for judicial review while this administrative case was pending does not change this result. If the law does not require an evidentiary record, i.e. where an agreement and prior mitigation plan are unambiguous, section 42-1701A(3) does not override granting summary judgment under IDWR's procedural rules.

III. IGWA's Allocation Argument is Misplaced and Does Not Counter the Unambiguous Terms of the Agreement and Stipulated Mitigation Plan.

Oddly, while IGWA claims on one hand that "[t]here are many genuine issues of material fact," on the other it asks the Director to grant partial summary judgment on the method of determining the conservation obligation for each district. *Compare IGWA Resp.* at 3 *with* at 4. This request is beyond the scope of the Coalition's motion which simply asks the Director to rule on the plain terms of the Agreement, Stipulated Mitigation, and Final Order concerning the signatory parties' annual reduction obligation, which is 240,000 acre-feet. How IGWA divided that unambiguous annual obligation amongst its members is irrelevant for purposes of the Coalition's motion.

IGWA's entire argument on this point is based on the erroneous assertion that the Agreement "does not assign this obligation to IGWA or its member districts specifically." *IGWA Resp.* at 4. IGWA further believes that "total" groundwater use refers to everyone pumping from the ESPA, not just its signatory members. *See id.* at 5.

The plain terms of the Agreement identify "Long Term Practices" that are the responsibility of the signatory districts. The terms "Each Ground Water and Irrigation District with members pumping from the ESPA" refers to the signatory ground water districts and irrigation district (i.e. Fremont-Madison). IGWA believes this "long term practice" applies to all non-parties, but not A&B and Southwest.[2] *See IGWA Resp.* at 4. However, IGWA's witness identifies other districts that pump groundwater in the ESPA. *See Higgs Dec.* at 2, ¶ 7 (i.e. Raft River, Falls). IGWA's own theory fails because if the long term obligation (i.e. 240,000 acre-feet) applies to every pump in the ESPA, what in the Agreement supports limiting that to only A&B and Southwest? The answer is easy, nothing. Moreover, IGWA's argument fails as a matter of law <u>as it expressly agreed</u> with A&B that the obligations in this paragraph do not apply to A&B's groundwater use. *See* A&B Agreement at 1 ("The obligations of the Ground Water Districts set forth in Paragraphs 2 – 4 of the *Settlement Agreement* do not apply to A&B and its ground water rights"); *see also*, Compliance Order at 12. Rather than acknowledge the agreement it signed with A&B, IGWA ignores this document entirely.

There is no dispute that IGWA's signatory districts only conserved 122,784 acre-feet in 2021. *See SWC Memo* at 4. Which district conserved what is irrelevant for the Director's ruling on the present summary judgment motion. While "IGWA readily agrees that only the signatory districts are obligated to conserve groundwater under the Agreement," it completely misses the mark by alleging that determining "how to calculate the conservation obligations" is an issue for the Director to decide in this case. While IGWA mistakenly included non-parties in its own internal calculations, that does not change the fact that the signatory districts <u>did not achieve</u>

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[2] IGWA cannot square its claim that the Agreement's use of the term "total" refers to all pumping in the ESPA, yet then cherry-pick two users to argue that its obligation should be reduced. Further, IGWA wrongly claims that A&B and Southwest "are required to implement and report groundwater conservation under the terms of the Agreement." *IGWA Resp.* at 5. Again, nothing binds non-parties to the Agreement. *See* Compliance Order at 12.

240,000 acre-feet of conservation in 2021. Therefore, even if the Director were to grant partial summary judgment in IGWA's favor, the signatory members did not perform the 205,000 acre-feet they allege is all they are obligated to provide. Regardless, such a ruling is precluded as it is contrary to the plain terms of the Agreement, Stipulated Mitigation Plan, and Final Order.

IV. There is No Ambiguity in the Agreement.

In opposing the Coalition's motion IGWA continues down the road to claim the Agreement is either "patently" or "latently" ambiguous. *See IGWA Resp.* at 6-7. A contract is ambiguous only if there are two different "reasonable" interpretations of the term. *See Swanson v. Beco Const. Co.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007). Making that initial call is a question of law for the Director to decide. *See Horton v. Horton*, 171 Idaho 60, 64, 518 P.3d 359, 373 (2022). Where a contract is clear and unambiguous, a court or agency "cannot revise the contract in order to change or make a better agreement for the parties." *Id.*

There is no "patent" ambiguity on the face of the Agreement. No reasonable person would conclude that the long-term practices apply to "non-parties," or only to certain "non-parties" as IGWA contends (i.e. A&B and Southwest). Any interpretation that a contract can bind non-parties to that contract is patently absurd and is not a "reasonable" interpretation. Nothing on the face of the Agreement suggests the signatory districts' conservation obligation is something other than "240,000 af." Nothing on the facts of the Agreement suggests that obligation is something other than every year. Accordingly, IGWA' patent ambiguity argument fails as a matter of law.

There is no "latent" ambiguity either. IGWA's sole theory to find a latent ambiguity is "because the Agreement does not explain how each district's proportionate share is to be calculated." *IGWA Resp.* at 7. In *Porcello v. Estate of Porcello*, 167 Idaho 412, 424, 470 P.3d

1221, 1233 (2020), the Idaho Supreme Court found: "it is clear that a latent ambiguity in a contract must ultimately be tied to the language of the instrument itself." IGWA's argument is not tied to the language of the Agreement but is based upon its claim as to what the Agreement does not say. *See IGWA Resp.* at 7 ("because the Agreement does not explain how each district's proportionate share is to be calculated"). Accordingly, IGWA cannot create a "latent" ambiguity where no such ambiguity in the Agreement exists.

IGWA finally argues that its annual conservation obligation can be "averaged" and that this somehow contributes to its "latent" ambiguity theory. *See IGWA Resp.* at 7. IGWA spends considerable time explaining how water is pumped year to year and that its member's groundwater diversions would have fluctuated between 2010 and 2014. *See id.* at 8-10. However, IGWA ignores the baseline that it set for purposes of implementing the Agreement. *See Higgs Dec.* at 4, ¶ ("IGWA selected, a five-year average from 2010-2014 to use as the baseline for the purpose of determining each district's groundwater conservation obligation under the Settlement Agreement"). IGWA cannot rewrite history and the baseline it established to measure compliance with the Agreement. Further, the idea of what IGWA "might" have done does not create any ambiguity in the Agreement. Nothing in IGWA's discussion changes the fact that the Agreement does not provide for "averaging" the long term conservation obligation over a series of years.[3] The terms "annual" and "240,000 af" are unambiguous. As a result the Director's findings on these issues can be confirmed and IGWA's petition can be resolved as a matter of law. *See generally*, Compliance Order.

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[3] The proposed order attached to the Stipulated Mitigation Plan was not adopted by the Director and did not amend the Settlement Agreement. *See Settlement Agreement* at 5, ¶ 9 ("Entire Agreement"). The proposed order does not change the plain terms of the Agreement and the Final Order approving the Stipulated Mitigation Plan.

V. The Agreement is Integrated and IGWA cannot rely on extrinsic evidence to alter the intent of the Agreement.

The Coalition argues that because the Agreement includes a "merger clause" the "parties intent 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). The Agreement includes 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.

Settlement Agreement at 5 (bold in original). SWC contends that Idaho law is clear and that when "a written contract contains a merger clause, it is an integrated agreement for purposes of the parol evidence rule," and that "[t]he parol evidence rule bars the use of extrinsic evidence when a court interprets a written contract." *AED, Inc. v. KDC Invs.*, LLC, 155 Idaho 159, 165, 307 P.3d 176, 182 (2013). Specifically, the Coalition maintains that the parties' <u>intent</u> to the Agreement may only be determined from the language of the Agreement.

IGWA contends that the merger clause has no relevance when the terms of a contract are ambiguous and that "[t]he 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." IGWA Response at 7. IGWA however, fails to provide a single legal citation in support of its claim that "case law is clear" and that extrinsic evidence can be used to determine the parties' <u>intent</u> for the Agreement.

IGWA argues that the Agreement is ambiguous. As discussed *supra* however, the Agreement is not ambiguous and the plain language of the Agreement fully resolves the question of IGWA's signatory districts' obligations. Moreover, IGWA ignores the importance of the merger clause. "The purpose of a merger clause is to establish that the parties have agreed that the contract contains the parties' entire agreement." *Howard v. Perry*, 141 Idaho 139, 142, 106 P.3d 465, 468 (2005).

IGWA now contends that the intent of the Agreement was not for its members to reduce diversions, but that the Agreement only requires total diversions from any source must be 240,000 acre-feet annually. The merger clause precludes this argument. "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." *Valley Bank v. Christensen*, 119 Idaho 496, 498, 808 P.2d 415, 417 (1991) (emphasis added). Here, the Agreement is integrated. IGWA does not contend otherwise. Idaho law is clear, because the contract is integrated, IGWA cannot rely on extrinsic or parol evidence to "vary, alter, or contradict the terms of the instrument or the legal effect of the terms used." *Cannon v. Perry*, 144 Idaho 728, 731, 170 P.3d 393, 396 (2007).

The Coalition does not take the position that a merger clause precludes any reference to extrinsic evidence in the event a contract term is ambiguous. But, the merger clause does preclude IGWA from presenting parol evidence that the intent of the contract is something other than what is manifest from the Agreement itself.

VI. IGWA is Not Entitled to Summary Judgment on its Affirmative Defenses and the Compliance Order Need Not be Withdrawn.

IGWA asks the Director to withdraw the Compliance Order regardless of the disposition of SWC's summary judgment motion, "[if] the Director denies the Motion with respect to either

finding, then he must also withdraw his ruling that a breach occurred in 2021," and "[e]ven if the Director were to grant the Motion, he must withdraw his ruling that a breach occurred in 2021." *IGWA Response* at 10.

If the Director denies the Coalition's summary judgment, IGWA argues, the Director must withdraw the Compliance Order because the Compliance Order "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." *Id.* This position puts the cart before the horse. If SWC's present motion is denied, the Director will proceed with an evidentiary hearing, at the request of IGWA, to reconsider, review, and potentially withdraw the Compliance Order. Only if IGWA is successful in its *Petition for Reconsideration* would it be appropriate for the Director to withdraw the Compliance Order, not before.

IGWA also argues that it is entitled to have the Compliance Order withdrawn because an alternative measure of compliance has not been determined. *Id.* IGWA states that "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," and that because "averaging is not allowed for purposes of compliance" IGWA can no longer use the 2010-2014 average as a baseline. *Id.* IGWA misstates the bases of the Director's finding of noncompliance. The Director did not predicate his finding that a breach occurred on the premise the Agreement requires compliance be measured from a fixed baseline based on average diversions from 2010-2014. In fact, the Director found the opposite. The 2010-2014 "averaging process is not described in the Settlement Agreement . . Under the plain and unambiguous terms

of the Mitigation Plan, IGWA has an obligation to reduce total ground water diversion by 240,000 acre-feet every year." Compliance Order at 11. The Director did not tell IGWA it could not use the 2010-2014 baseline average. The Director found that IGWA had an obligation to reduce diversions without averaging those diversions, regardless of the baseline process adopted by IGWA. The Director recognized that a baseline was not described in the Settlement Agreement and that IGWA "calculated and reported annual reduction based on its own adopted baseline process." *Id.* IGWA is free to employ the 2010-2014 average as a baseline, it simply cannot use an average to determine diversion compliance within any given year.

IGWA argues further that it is entitled to have the Compliance Order withdrawn because "IGWA has not yet had an opportunity to present affirmative defenses to the SWC's breach claim." *Id.* IGWA forgets the filings and hearing held prior to the issuance of the Compliance Order. On August 3, 2022, IGWA filed *IGWA's Response to Surface Water Coalition's Notice* in which IGWA presented arguments related to SWC's breach claim. On August 5, 2022, a status conference was held to discuss SWC's breach claim, IGWA participated. On August 12, 2022, IGWA filed *IGWA's Supplemental Response to Surface Water Coalition's Notice of Steering Committee Impasse* and expanded on its five-year-rolling-average argument as well as presenting procedural arguments. After the Director issued a *Notice of Intent to Take Official Notice of IGWA's 2021 Settlement Agreement Performance Report and Supporting Spreadsheet*, IGWA filed an objection on August 23, 2022. Finally, on September 22, 2022, IGWA submitted its *Petition for Reconsideration and Request for a Hearing*. Given this history, it is disingenuous for IGWA to now claim it has not had an opportunity to present defenses to SWC's claim.

Nonetheless, IGWA presents two new affirmative defenses to SWC's breach claim. The Director should ignore these new arguments are they are outside the scope of the Coalition's

summary judgment motion. IGWA cites *Harwood v. Talbert* for the proposition that the Director can grant summary judgment for the non-moving party, "even if the party has not filed its own motion with the court." *IGWA Response* at 3 (citing *Harwood v. Talbert*, 136 Idaho 672, 677, 39 P.3d 612, 617 (2001). But, "[a] motion for summary judgment allows the court to rule <u>on the issues placed before it</u> as a matter of law; the moving party runs the risk that the court will find against it." *Id.* (emphasis added). To wit, "a district court <u>may not decide an issue not raised in the moving party's motion for summary judgment</u>." *Harwood*, 136 Idaho at 678, 39 P.3d at 618 (emphasis added).

Here, IGWA argues that the affirmative defense of substantial performance, unclean hands, or "other affirmative defenses" provide the Director grounds to grant summary judgment and withdraw the Compliance Order. *IGWA Response* at 10. However, the Coalition's summary judgment matter only asks the Director to dismiss IGWA's petition on the grounds that the Mitigation Plan and the Director's Orders approving the plan are unambiguous with respect to who is responsible for mitigation obligations and as to a yearly rather than rolling-average calculation for mitigation. The Coalition does not raise the issue of breach at all, merely asking for summary judgment that the Mitigation Plan terms are unambiguous. As such, IGWA's request for summary judgment on those affirmative defenses asks the Director to decide issues not raised in the moving party's motion for summary judgment, and the Director may not decide those issues.

If IGWA believes it has affirmative defenses to the Director's finding that it breached the Mitigation Plan, it should have included those arguments in its petition. Alternatively, IGWA is entitled to file its own summary judgment motion containing those defenses and the factual bases on which they are made. This possibility will provide the Coalition adequate opportunity to

respond. "The party against whom the judgment will be entered must be given adequate advance notice and an opportunity to demonstrate why summary judgment should not be entered." *Idaho Endowment Fund Inv. Board v. Crane*, 135 Idaho 667, 671, 23 P.3d 129, 133 (2001).

Even if the Director considers IGWA's affirmative defenses for summary judgment, "the burden at all times is upon the moving party to prove the absence of a genuine issue of material fact." *See Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 868 452 P.2d 362, 365 (1969). "If the moving party 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 v. Idaho Power Co.*, 130 Idaho 597, 600, 944 P.2d 1360, 1363 (1997) (cleaned up). Here, IGWA does not provide the elements of its defenses, proffering only cursory or conclusory definitions. *See IGWA Response* at 10. Furthermore, IGWA provides only a single sentence in support or analysis of its defenses. *See id.* IGWA has therefore failed to provide the elements of its defenses and failed to present evidence that no genuine issue of material fact exists in relation to its defenses. As such, IGWA's request for summary judgment based on affirmative defenses should be denied.

Regardless of the final disposition of SWC's present motion, it is inappropriate for the Director to withdraw the Compliance Order at this time or to grant IGWA summary judgement on its affirmative defenses.

VII. Conclusion

For the reasons set forth herein, the Coalition requests the Director to grant the motion for summary judgment and dismiss IGWA's petition as a matter of law.

//signature page to follow//

DATED this 11th day of January, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

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