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DEPARTMENT OF
WATER RESOURCES

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**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

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| 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<br>Docket No. CM-MP-2016-001 |
| IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN | **SURFACE WATER COALITION'S REPLY TO IGWA'S RESPONSE** |

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 reply in response to *IGWA's Response to Surface Water Coalition's Notice of Steering Committee Impasse* (August 3, 2022) (hereinafter "*Response*").

**REPLY**

IGWA does not dispute its 2021 performance under the Settlement Agreement (i.e. 122,784 acre-feet). *Response* at 5. IGWA does however dispute whether this underperformance results in a breach of the Agreement and compliance with its approved Mitigation Plan. Consequently, the parties are at an impasse and the Director is left to determine whether this performance was short of what was required by the Agreement and the approved Mitigation Plan. IGWA argues that its underperformance is acceptable based upon an erroneous interpretation of the Settlement Agreement. Rather than point to actual language in the agreement, IGWA bases its claims on unstated intent and internal calculations and theory. As explained below, IGWA's efforts to justify its performance based upon a misreading of the Agreement should be denied.

## I. Ground Water Districts' 240,000 AF Annual Consumptive Use Volume Reduction.

IGWA attempts to persuade the Director that its signatory ground water districts did not breach the Settlement Agreement in 2021 on the theory that: 1) other non-parties have a share of the 240,000 acre-feet annual reduction; and 2) the reduction is evaluated based upon a five-year rolling average. *Response* at 2-5. Both of these arguments have no support in the actual Agreement and should be rejected on their face.

First, the Settlement Agreement was executed by the seven Coalition members and the eight ground water districts and Fremont-Madison Irrigation District. *See* Settlement Agreement signature pages. IGWA's attempt to inject non-parties into this issue is contrary to basic contract interpretation and should rejected. *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). In short, non-parties are not responsible for the districts' annual obligation under the Agreement.

Next, the Settlement Agreement includes the following "Long Term Practices" that commenced in 2016:

> a. *Consumptive Use Volume Reduction*
>
> *i.* Total ground water diversion shall be reduced by 240,000 ac-ft annually.
>
> *ii.* Each Ground Water District 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. Private recharge activities cannot rely on the Water District 01 common Rental Pool or credits acquired from third parties, unless otherwise agreed to by the parties.

Settlement Agreement at 2, ¶ 3.a.

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). 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 Agreement simply requires the signatory districts to reduce their total ground water diversion by 240,000 acre-feet per year.[1] There is no basis to construe the Agreement or examine IGWA's intent and its version of history leading up to the Agreement's execution. *See Seward v. Musick Auction, LLC*, 164 Idaho 149, 158 (2018) ("A

[1] How IGWA allocated its member signatory districts' proportionate share of the 240,000 acre-feet is not relevant for purposes of this issue before the Director. *See Response* at 3-4. The fact IGWA erroneously included other non-parties as part of that calculation is its unilateral internal mistake based upon a misreading of the Agreement.

party's subjective, undisclosed intent is immaterial to the interpretation of a contract"). What IGWA believed and intended concerning other non-party ground water users is irrelevant to the Agreement that it signed and has a duty to perform.

Moreover, there is nothing in the Agreement that indicates IGWA's "Long Term Practices" are the obligations of non-parties. Since the term "Each Ground Water District and Irrigation District" refers to the nine signatory districts, it is obvious IGWA did not allocate any share of that reduction to its other listed non-signatory members (i.e. "Anhueser-Busch, United Water, Glanbia Cheese . . ."). *See* Agreement at 1, n. 2. Further, as admitted by IGWA, the separate settlement agreement with the A&B Irrigation District as to its ground water rights supports the fact that the long-term practices apply solely to the ground water districts, not other non-parties. *See A&B Settlement Agreement* at 1, ¶ 2 ("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"). IGWA's attempt to use this separate agreement to mean that other non-parties would share in the 240,000 acre-feet reduction is non-sensical. The agreement plainly states otherwise.

The plain language of the Settlement Agreement requires the signatory districts to reduce their total groundwater diversions by 240,000 acre-feet annually. Any attempt to interpret the Agreement as stating anything else is flat wrong and should be rejected.

## II. IGWA's Diversion Reduction Compliance is an Annual Requirement, Not Based on a Five-Year Rolling Average.

IGWA cannot escape the plain language of Paragraph 3.a.i which requires "Total ground water diversion shall be reduced by 240,000 ac-ft annually." The term "annually" is an unambiguous term of art and is defined as follows:

> In annual order or sucession; 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 of year.

*Black's Law Dictionary*, p. 58 (6th Ed. 1991) (emphasis added).

Annually does not mean a five-year rolling average. IGWA ignores the plain language and argues that it is compliance with the 240,000 acre-feet annual diversion reduction requirement on the theory that "since groundwater diversions naturally fluctuate from year-to-year, diversions must be compared over a multi-year period if the comparison is to be reliable." *Response* at 5. IGWA then claims since reductions may be reduced or removed if the ground water level goal is achieved for a five-year rolling average, then that means the annual reduction can be similarly judged. *Id.* Again, IGWA's efforts to construe the Agreement to say something that it doesn't are misplaced and should be rejected. There is simply no reason to conclude that the signatory ground water districts have the ability to "average" their diversion reduction requirement over a five-year period. The Director should deny IGWA's argument accordingly.

## CONCLUSION

The Director should evaluate IGWA's performance for 2021 and determine whether it complied with the Agreement and Mitigation Plan. Whereas the data and plain language of the Agreement shows a clear breach of that obligation, the Director should reject IGWA's arguments to the contrary.

DATED this 4th day of August, 2022.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2022, I served a true and correct copy of the foregoing *Surface Water Coalition's Reply to IGWA's Response* on the following by the method indicated:

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