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DEPARTMENT OF
WATER RESOURCES

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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 **IGWA's Supplemental Response to Surface Water Coalition's Notice of Steering Committee Impasse**
IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN	

Idaho Ground Water Appropriators, Inc. ("IGWA")[1] submits this supplemental response to the Surface Water Coalition's Notice of Impasse / Request for Status Conference ("SWC Notice") filed July 21, 2022, in this matter.

The SWC Notice asks the Director of the Idaho Department of Water Resources ("IDWR" or "Department") to address certain issues related to IGWA's compliance with the IGWA-SWC Settlement Agreement. In response, the Director issued a Notice of Status Conference on July 26, 2022, and held a status conference on August 5, 2022. The Notice of Status Conference did not request briefing, affidavits, or oral argument. On August 3, 2022, IGWA filed a written response to the SWC Notice to better inform the Director of the issues before him. IGWA's response reserved the right to provide supplemental information following

[1] IGWA is an umbrella organization that represents the interests of the nine ground water districts who are parties to the IGWA-SWC Settlement Agreement: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Henry's Fork Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

the conference.

IGWA submits this supplemental response primarily to show that the rules of procedure of the Department preclude the Director from making a decision on the issues raised in the SWC Notice until the SWC files a proper motion and the parties file briefs and supporting affidavits.

Should the Director elect to decide the issues without a motion, briefs, and affidavits, this supplemental response provides additional information to demonstrate that compliance with section 3.a of the Agreement should be measured on a five-year rolling average based on the plain language of the Agreement. If the Director finds that the plain language does not warrant a five-year average, then the Agreement is ambiguous and parol evidence must be introduced to determine the intent of the parties as to how compliance is measured. This must be done before the Director can take action on the SWC Notice.

Lastly, IGWA submits supplemental information to address an issue that was not listed in the SWC Notice but was raised by the Director at the August 5 status conference; namely, whether a breaching party must be given an opportunity to cure the breach. If the Director determines that a breach occurred, the Agreement explicitly requires that the breaching party be given 90 days to cure the breach.

A. IDWR rules of procedure require the SWC to file a motion, and that parties be permitted to submit briefs and supporting affidavits, before the Director decides the issues listed in the SWC Notice.

The SWC Notice asked that the Director set a "status conference" to address five issues listed in the SWC Notice. Accordingly, the Director scheduled a "status conference." The designation of the August 5 meeting as a status conference is significant because status conferences are not typically used to make decisions on the merits of a case; they are used to address procedural matters and stipulations of the parties in accordance with rules 510 and 511 of the Department's rules of procedure. Decisions on contested matters are typically made after the filing of briefs, affidavits, and a hearing in accordance with rules 550-562.

Since the August 5 meeting was designated a status conference, IGWA did not anticipate that the Director would take formal argument and issue a decision on the issues listed in the SWC Notice. However, the Director solicited oral argument at the status conference and stated that he intended to issue a written decision in 2-3 weeks.

For the Director to decide the issues listed in the SWC Notice, the SWC Notice must be treated as a "motion" under the rules of procedure. Rule 220 defines "motion" as "a request to the agency to take an action in a contested case." (IDAPA 37.01.01.220.) The SWC Notice does not qualify as a motion because it does not contain the information required by rule 300.02, which requires the moving party to fully state "the facts upon which it is based" and "the relief sought," among other things. (IDAPA 37.01.01.220.) The SWC did not submit affidavits setting forth facts in support of the SWC Notice, nor does the SWC Notice state the relief sought; it simply asks the Director to "address" the issues listed. Since the SWC Notice does not qualify as a motion under rule 220, the director cannot take action on the issues listed in the SWC Notice.

Even if the SWC Notice qualified as a motion, the Director cannot issue a decision without following the procedures required by rule 220.02, including the filing of briefs and supporting affidavits by the SWC, the filing of briefs and supporting affidavits by responding parties, the filing of a reply brief by the SWC, and oral argument if requested. In this case, no supporting brief or affidavit was filed by the SWC, the status conference was held prior to the deadline set forth in the rules for filing responsive briefs and affidavits, and no party was advised that the

Director intended to take action on the SWC Notice.

Therefore, IGWA respectfully requests that the Director decline to take action on the issues listed in the SWC Notice for failure to comply with applicable rules of procedure.

If the Director elects to take action without requiring a motion, briefs, and affidavits, the Director should consider the information provided below.

B. Compliance with section 3.a of the Settlement Agreement must be measured on a five-year rolling average based on the plain language of the Agreement.

The SWC Notice asks whether IGWA's conservation obligation under section 3.a of the Settlement Agreement is measured annually or on an average. (SWC Notice, p. 4.) Section 3.a.i reads: "Total ground water diversion shall be reduced by 240,000 ac-ft annually." It does not state how the reduction (commonly referred to as "conservation") is to be measured.

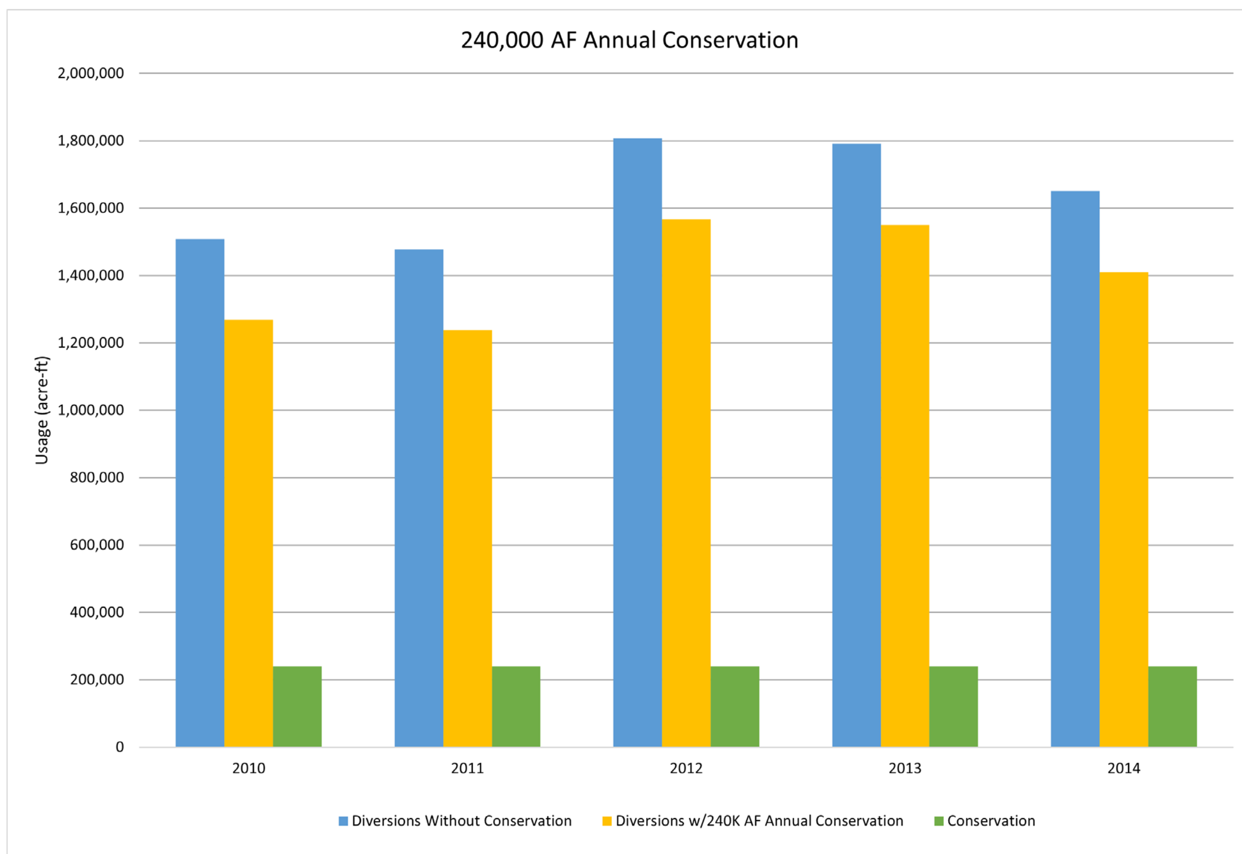
There is no dispute that section 3.a.i of the Agreement contemplates 240,000 acre-feet of groundwater conservation "annually." The question is how to measure annual conservation. IGWA and the SWC have presented two different methods by which compliance with section 3.a could be measured. IGWA contends that compliance should be determined on a five-year rolling average. The SWC contends that compliance should be measured by taking average groundwater diversions from 2010-2014, reducing the average by 240,000 acre-feet, and treating the reduced average as a fixed diversion cap.

When interpreting a contract, it must be read "as a whole, not by an isolated phrase." *McFarland v. Liberty Ins. Corp.*, 164 Idaho 611, 618 (2019) (quoting *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 663 (2005)). "Although reading a term or provision in isolation can create an ambiguity, reading the [contract] as a whole can remove the ambiguity by rendering one of the possible interpretations unreasonable." *Id.*

As explained below, use of a five-year average as proposed by IGWA is grounded in the plain language of the Agreement. The SWC's fixed cap proposal is not, and it leads to a result that contradicts the plain language of the Agreement.

Looking backward, we know how much groundwater would have been pumped if 240,000 acre-feet were conserved annually in the years leading up the Agreement, because we know how much groundwater was diverted during those years without conservation. The following chart shows actual diversions from 2010-2014 versus diversions that would have occurred with 240,000 acre-feet of conservation annually:[2]

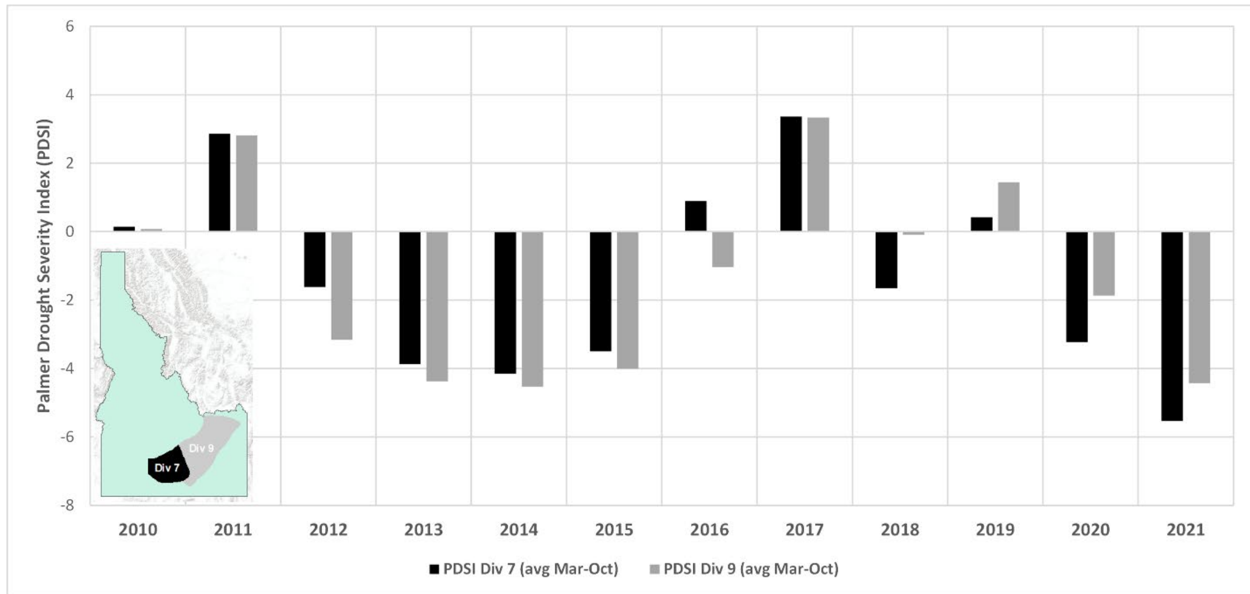
[2] Diversion volumes exclude usage from 192 wells in Madison Ground Water District and Henry's Fork Ground Water District that were not under measurement orders during the 2010-2014 time period. To account for null values within the WMIS database, an averaging factor was applied. Adjustments were made to some diversions to correct errors, as identified in IGWA's annual performance reports submitted to the SWC and IDWR.



The above chart shows that groundwater diversions fluctuate considerably based on climatic conditions. When the Agreement was signed in 2015, the parties could not foretell how much snow, rain, wind, and heat would occur in future years, and they knew that groundwater diversions would continue to fluctuate post-Agreement. Had groundwater users opted to achieve groundwater conservation solely by drying up farmland, groundwater diversions post-Agreement would continue to follow a pattern similar to what is shown by the yellow bars in the chart.

As expected, climatic conditions have varied considerably since the Settlement Agreement was signed in 2015, as shown by the Palmer Drought Severity Index for the Eastern Snake River Plain:[3]

[3] The Palmer Drought Severity Index (PDSI; Palmer, 1965) is a common measure of agricultural water supply conditions and is prominently used for drought monitoring. The PDSI incorporates current and precedent hydrologic components including precipitation, temperature, potential evaporative demand, and water-holding capacity of soils to determine the cumulative departure in the surface water balance. Negative values of the PDSI reflect drier-than-normal conditions and positive values reflect wetter-than-normal conditions. A value of -2.0 or lower is considered moderate drought, -3.0 and lower is considered severe drought, and values lower than -4.0 are considered extreme drought. The National Oceanic and Atmospheric Administration (NOAA) divides the lower 48 states into 344 divisions for the calculation of the PDSI. Climate Divisions 7 and 9 cover the Eastern Snake River Plain.

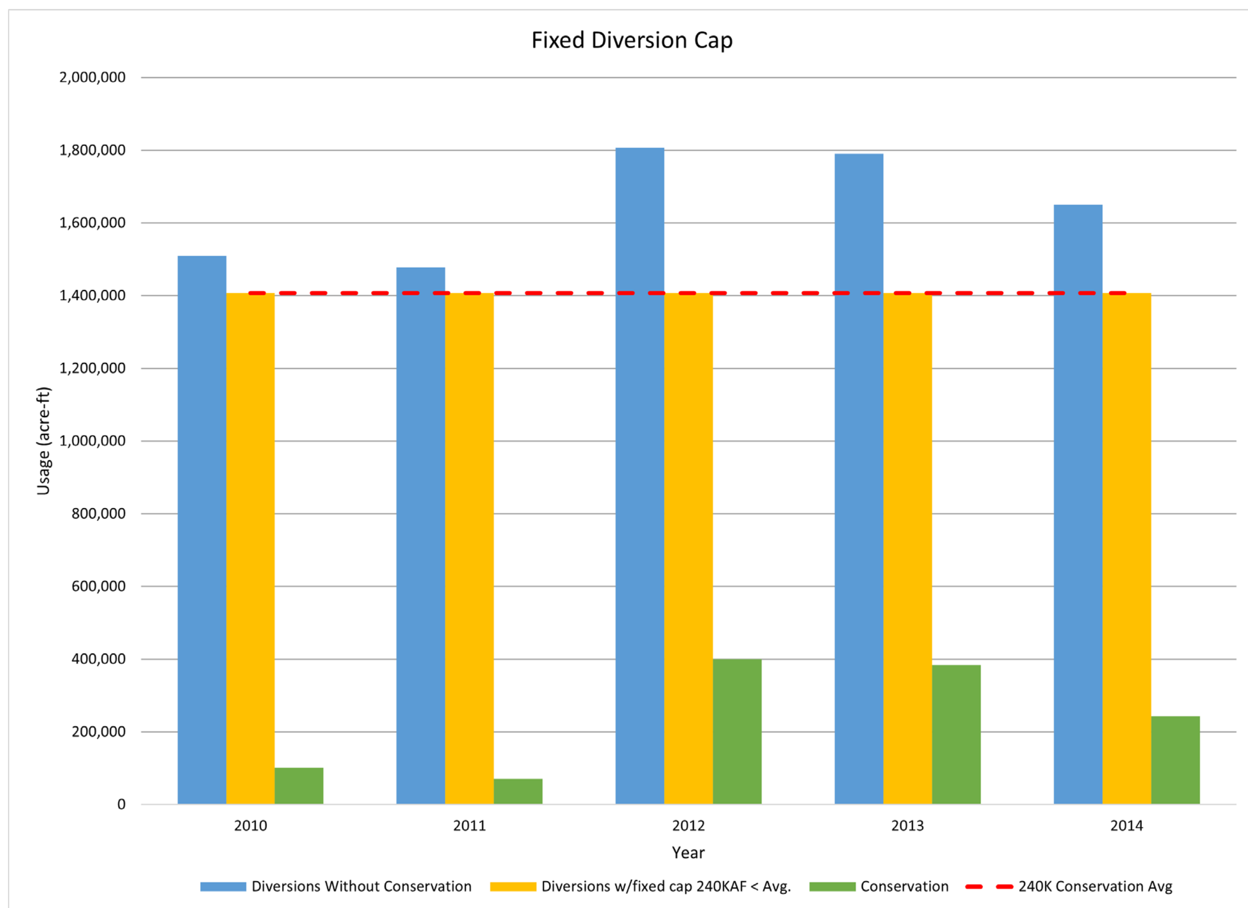


When the Settlement Agreement was signed in 2015, neither IGWA nor the SWC could foresee what climatic conditions would occur in future years. And it is impossible to measure groundwater conservation prospectively by comparing diversions both with and without taking conservation actions, because farmers cannot farm the same land in the same year both with and without conservation actions. An alternative method of measuring compliance is necessary.

The SWC has proposed that compliance be measured by using average diversions from 2010-2014 time period to establish a fixed diversion cap that is 240,000 acre-feet less than the average. While such a method is possible, it is incompatible with the plain language of the Agreement in two important respects.

First, the Agreement does not state in any way, shape, or form that average diversions from 2010-2014 would be utilized to impose a fixed diversion cap. Had that been the intent of the parties, section 3.a of the Agreement should say something like: "Total ground water diversions shall be reduced by 240,000 acre-feet annually from average diversions during the time period 2010-2014." Instead, it states simply: "Total ground water diversions shall be reduced by 240,000 acre-feet annually."

Second, imposing a fixed diversion cap contradicts the expectation that 240,000 acre-feet of conservation occur "annually." The fixed cap method proposed by the SWC would require IGWA to conserve far more than 240,000 acre-feet in some years and far less than 240,000 acre-feet in other years. To illustrate, had the SWC's method been imposed from 2010-2014, only 71,033 acre-feet of conservation would have been required to comply with the Agreement in year 2011, whereas 400,125 acre-feet of conservation would have been required in year 2012 to comply with the Agreement, as shown in the table below. This is incompatible with the plain language requiring 240,000 acre-feet of conservation "annually."



In practice, the fixed cap method would be much more drastic if applied prospectively because it would force groundwater irrigators to make planting decisions every year based on the hottest and driest summer possible. When farmers make planting decisions in the spring, they have no idea how much rain will fall, how much wind will blow, and what air temperatures will be in May, June, July, or August. If they are required to assume the worst-case scenario every year, they will be forced to conserve far more than 240,00 acre-feet most years in order to squeak by with 240,000 acre-feet of conservation on the driest and hottest of years. This is not what they agreed to. They agreed to conserve their proportionate share of 240,000 acre-feet "annually."

IGWA's proposed method for measuring compliance more accurately reflects annual conservation and is grounded in the plain language of the Agreement. IGWA proposes that conservation be measured by comparing pre-Agreement diversions with post-Agreement diversions. Since groundwater diversions naturally fluctuate from year-to-year based on climatic conditions, the comparison must occur over a multi-year period to be reliable.

IGWA utilized average diversions during the five-year period immediately preceding the Agreement (2010-2014) to define the baseline against which post-Agreement conservation will been measured because the Agreement calls for compliance to be measured on a five-year average. The purpose of conserving 240,000 acre-feet under section 3.a is to "reverse the trend of declining ground water levels and return ground water levels to a level equal to the average of the aquifer levels from 1991-2001" as set forth in section 3.e.i. The Agreement provides that compliance with the groundwater level goal will be measured on "a five-year rolling average." Because the groundwater level goal and groundwater conservation are interlinked, compliance

with the conservation obligation must be congruently measured on a five-year average. This is the only method of compliance that is grounded in the plain language of the Agreement.

Therefore, if the Director elects to decide whether IGWA is in compliance with section 3.a of the Agreement without requiring a motion from the SWC or briefs or affidavits from the parties, IGWA respectfully requests that he determine that compliance be measured on a five-year rolling average in accordance with the plain language of the Agreement. Based on a five-year average, each ground water district is currently in compliance as shown in the table below:

MITIGATION BALANCE (2021) 5-Year Average	
American Falls-Aberdeen	27,449
Bingham	9,506
Bonneville-Jefferson	11,342
Carey	2,747
Jefferson-Clark	22,299
Henry's Fork / Madison	41,469
Magic Valley	11,485
North Snake	15,525

C. If the Director determines that the plain language does not provide for a five-year rolling average, then the Agreement is ambiguous and parole evidence must be introduced to determine the intent of the parties.

As stated above, the compliance method proposed by the SWC is nowhere to be found in the plain language of the Agreement. If the Director determines that a five-year rolling average is also not grounded in the plain language of the Agreement, then the Agreement is ambiguous as to how compliance is determined.

A contract is ambiguous if, after reading the agreement as a whole, there are "two different reasonable interpretations of the term." *Swanson v. Beco Const. Co*., 145 Idaho 59, 62 (2007). Ambiguity may be patent or latent. *Id*. "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)). "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)).

The parties have presented two different methods by which compliance with section 3.a may be determined. If the Director finds that the Agreement prescribes neither method, then IGWA and the SWC must be given an opportunity to introduce parol evidence to demonstrate the parties' intent at the time the Agreement was entered into. *Simons v. Simons*, 134 Idaho 824, 828 (2000). IGWA will present evidence to show that, in addition to being consistent with the plain language of the Agreement, (a) individual IGWA members understood from the beginning that compliance would be based on an average, (b) the SWC acknowledged explicitly that compliance would be based on an average, (c) IGWA has provided far more than 240,000 acre-feet of conservation most years (compared to the baseline) with the expectation that the excess would carry forward via averaging, (d) a five-year average is used to measure compliance with diversion restrictions in critical ground water areas in the Oakley Valley, and (e) a five-year

average is used to measure compliance under the Cities' Settlement Agreement. The SWC acknowledged explicitly that compliance would be based on an average in the Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order filed March 9, 2016, which includes a proposed order stating that compliance with the 240,000 acre-feet obligation will be "based on a 3-year rolling average." The Director did not incorporate this into his order approving the mitigation plan, and IGWA ultimately implemented a five-year average based on the plain language of the Agreement and IGWA's determination that a five-year average more reliably reflects historic pumping levels than a three-year average. Had IGWA utilized a three-year average, the baseline would have been significantly higher; thus, the five-year average has benefitted the SWC by defining a lower baseline from which conservation is measured. Most importantly, the proposed order demonstrates that the parties contemplated from the beginning that compliance with section 3.a would be based on an average and not on the fixed cap method proposed by the SWC.

If parol evidence clarifies the intent of the parties, then the Director must construe the Agreement in accordance with that intent. *Id*. If parol evidence demonstrates that the parties did not reach agreement on a material term, then the Agreement is voidable: "where a contract is too vague, indefinite, and uncertain as to its essential terms, and not merely ambiguous, there has been no 'meeting of the minds' which is necessary for contract formation and courts will 'leave the parties as they found them.'" *Silicon Int'l Ore, LLC v. Monsanto Co.,* 155 Idaho 538, 551 (2013) (quoting *Griffith v. Clear Lakes Trout Co.,* 143 Idaho 733, 737 (2007)); *Brunobuilt, Inc. v. Strata, Inc*., 166 Idaho 208, 217-18 (2020) (citation omitted). Parol evidence may also demonstrate that the Agreement is unenforceable because it is "a mere agreement to agree." *Id*. (quoting *Spokane Structures, Inc. v. Equitable Inv., LLC*, 148 Idaho 616, 621 (2010)).

Therefore, if the Director elects to take action without a motion, briefs, and affidavits, and if the Director determines that a five-year average is not called for by the plain language of the Agreement, he must solicit parol evidence to determine the intent of the parties before determining whether a breach has occurred.

D. If the Director determines that a breach occurs, the breaching party must be given 90 days to cure the breach.

At the August 5 status conference, the Director questioned whether he has authority to undertake curtailment if he finds that a breach occurred. Under section 2.c.iii of the Second Addendum to Settlement Agreement, if a breach occurs "the Steering Committee shall give ninety (90) days written notice of the breach to the breaching party specifying the actions that must be taken to cure such breach." In this instance, the Steering Committee reached an impasse as to whether a breach occurred, and no 90-day notice has been given. If the Director determines that a breach occurred, the matter must be remanded to the Steering Committee to determine what actions must be taken to cure the breach and then give the breaching party 90 days written notice to cure the breach. If the Director does not remand the matter to the Steering Committee, the Director must give 90 days written notice to the breaching party specifying actions that must be taken to cure the breach. One way or another, the Settlement Agreement entitles the breaching parties to 90 days notice and an opportunity to cure. The Director is not in a position to undertake curtailment until that happens.

It bears mentioning that an attempt to implement immediate curtailment would be catastrophic because the Department would be attempting to curtail groundwater irrigators who are almost all in compliance with the mitigation programs implemented by their respective

ground water district. The reason why IGWA pumped considerably more water in 2021 than in prior years is not because individual patrons refused to comply with their district's mitigation program; it is because every district's program includes averaging, and most patrons had accrued excess conservation in prior years that they were able to draw against in 2021.

The Settlement Agreement is unique because it requires groundwater conservation to occur long-term, both wet years and dry years, by all groundwater users (to differing degrees depending on priority), with each district implementing its own mitigation program tailored to the needs of its particular geographic area and membership. Simply reporting non-compliance to the Department curtailment would result in the wrong users being curtailed in many instances. This is why the Settlement Agreement requires a notice of breach and an opportunity to cure.

DATED this 12th day of August, 2022.

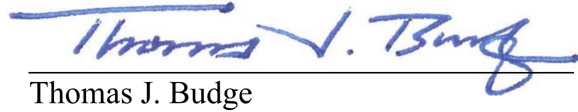
RACINE OLSON, PLLP

Thomas J. Budge

Attorneys for Idaho Ground Water Appropriators, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2022, I served the foregoing document on the persons below via email:



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