

Thomas J. Budge, ISB #7465
RACINE OLSON, PLLP
201 E. Center St. / P.O. Box 1391
Pocatello, Idaho 83204-1391
(208) 232-6101 – phone
tj@racineolson.com

Attorneys for Idaho Ground Water Appropriators, Inc.

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 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 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 requests a status conference to address several issues related to IGWA’s compliance with section 3.a.i. of the IGWA-SWC Settlement Agreement. The SWC Notice was filed pursuant to section 2.c.iv of the Second Addendum to Settlement Agreement which allows the Director to “evaluate all available information, determine if a breach occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.”

On July 26, 2022, the Director issued a Notice of Status Conference granting the SWC’s request and scheduling a status conference on August 5, 2022. The Notice of Status Conference does not ask IGWA file a response to the SWC Notice. Nevertheless, to better inform the Director of the issues before him, IGWA provides this response. IGWA reserves the right to

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.

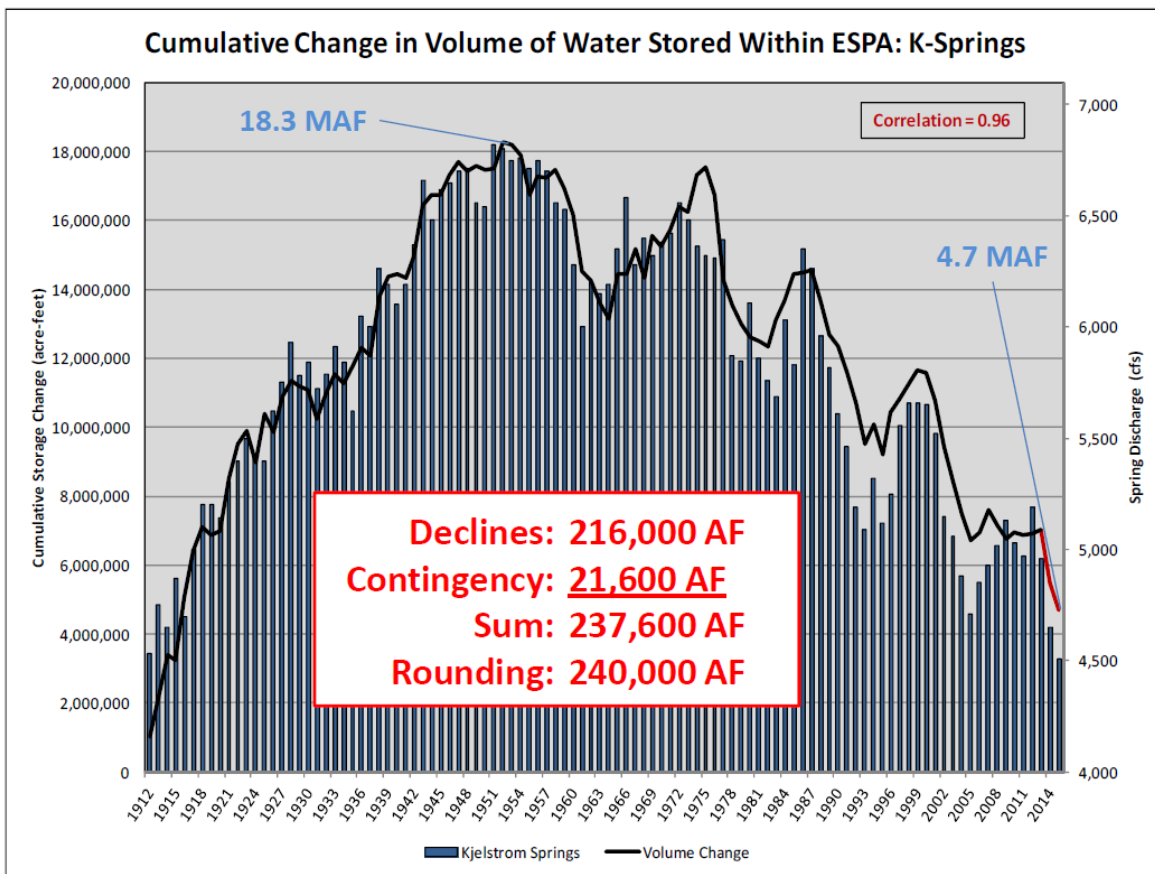
supplement this response based on information presented at the August 5 status conference.

The SWC Notice lists five questions related to IGWA’s compliance with section 3.a.i of the Settlement Agreement. (SWC Notice, p. 4.) Answers to those questions depend on two primary issues: (i) whether the districts represented by IGWA bear responsibility for the full 240,000 acre-feet of groundwater conservation or only their proportionate share, and (ii) whether each district’s diversion reduction is measured on an annual or an average basis.

As explained below, IGWA is in compliance with section 3.a.i because (a) the plain language of the Agreement provides that each participating district is responsible for its “proportionate share” of the 240,000 acre-feet, (b) the Agreement states that compliance will be measured on a five-year rolling average, and (c) each district’s conservation activities have exceeded its proportionate share of 240,000 acre-feet over the last five years.

A. Each ground water district is responsible for its “proportionate share” of the 240,000 acre-feet of groundwater conservation.

The IGWA-SWC Settlement Agreement was entered into after a prolonged period of litigation between the SWC and IGWA. The parties determined that, instead of periodic curtailments under the Methodology Order, a more effective way to provide a secure water supply for the SWC is through a long-term program to reverse the trend of declining ESPA water levels which supply water to the Blackfoot to Minidoka reach of the Snake River. The following chart served as the centerpiece of the settlement negotiations:



In the decades preceding the settlement, the ESPA experienced an average annual decline of 216,000 acre-feet. To arrest this decline and place the ESPA on a path to recovery, the parties agreed that a 240,000 acre-foot change in the water budget was warranted. The State of Idaho stepped up to assist with the recovery by committing to perform at least 250,000 acre-feet of managed aquifer recharge on average.

One point of concern for IGWA was that it did not want to bear responsibility to mitigate for groundwater diversions by non-IGWA members. IGWA expected A&B Irrigation District, Southwest Irrigation District, cities, and others to mitigate for their own water use. Accordingly, section 3.a.i contemplates an aquifer-wide reduction in groundwater use. It reads: “Total ground water diversion shall be reduced by 240,000 ac-ft annually.” It does not read: “IGWA will reduce ground water diversions by 240,000 ac-ft.” This distinction is significant. Other provisions in the Agreement impose obligations on IGWA and its members specifically, including section 2.a (“IGWA on behalf of its member districts will acquire a minimum of 110,000 ac-ft for assignment”), section 3.b.i (“IGWA will provide 50,000 ac-ft of storage water through private leases”), section 3.b.ii (“IGWA shall use its best efforts to continue existing conversions in Water Districts 130 and 140”), and section 3.f (“IGWA’s contributions to the State sponsored recharge program will be targeted for infrastructure and operations above American Falls”). By contrast, section 3.a.i is general in nature. It does not require IGWA to reduce diversions by 240,000 acre-feet because the decline in aquifer storage was the product of all groundwater diversions from the ESPA, not just IGWA’s diversions, and the parties expected that all groundwater users would be required to provide mitigation, not just IGWA.

Section 3.a.ii of the Agreement confirms that the districts represented by IGWA are responsible only for their “proportionate share” of the aquifer recovery goal: “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.” (Emphasis added.) Because IGWA districts do not account for all pumping from the ESPA, they are responsible for mitigating for only their proportionate share. The parties contemplated that A&B Irrigation District, Southwest Irrigation District, cities, and other non-IGWA members would be required to provide additional mitigation, above and beyond the mitigation provided by IGWA, to aid in recovering the ESPA.

And that’s what happened. The SWC entered into separate settlement agreements with A&B Irrigation District, Southwest Irrigation District, and the Coalition of Cities. The A&B agreement states that “[t]he obligations of Ground Water Districts set forth in paragraph 2-4 of the Settlement Agreement do not apply to A&B and its ground water rights.” This does not mean that IGWA is responsible to mitigate for A&B’s proportionate share of the 240,000 acre-feet; it means that A&B would provide its own mitigation via conversions under the terms of its settlement agreement. The Coalition of Cities agreement similarly states that “aquifer enhancement activities performed by the Signatory Cities under this Agreement shall be in addition to aquifer enhancement activities performed by IGWA under the IGWA-SWC Settlement Agreement or by the IWRB under Idaho Senate Concurrent Resolution no. 136 (2016).” While many of the cities are members of IGWA districts or are located within the boundaries of IGWA districts, the mitigation provided by the Coalition of Cities would be in addition to, and would not be credited toward, IGWA’s mitigation under the IGWA-SWC Settlement Agreement.

Consistent with the foregoing, IGWA has from the outset allocated to its members a proportionate share of the 240,000 acre-feet. To calculate IGWA’s proportionate share, IGWA

deducted groundwater diversions within A&B Irrigation District, Southwest Irrigation District, and Falls Irrigation District, as set forth in IGWA’s first performance report in 2016:

2016 Performance Summary Table		
(all values in acre-feet)		
	Diversion Baseline	Target Conservation
Aberdeen - American Falls GWD	271,989	33,595
Bingham GWD	282,476	34,890
Bonneville - Jefferson GWD	147,337	18,198
Carey Valley GWD	5,671	700
Jefferson - Clark GWD	438,634	54,178
Fremont-Madison ID/Madison GWD ¹	43,491	5,372
Magic Valley GWD	261,877	32,346
A&B ID ³	174,735	21,582
North Snake GWD ²	205,501	25,382
Southwest ID ³	104,417	12,897
Falls ID ³	6,968	861
Total:	1,943,096	240,000

At the time, IGWA had not queried diversion data for cities and other non-IGWA members who make up a small percentage of diversions from the ESPA. In hindsight, such other use should also have been allocated a proportionate share of the 240,000 acre-feet.

In 2017 the SWC asked IGWA to remove A&B, Southwest, and Falls from the 240,000 acre-feet allocation because they were not signatory to the Settlement Agreement. IGWA agreed to remove Falls because its diversions are relatively small, partly outside the ESPA boundary, and under very old priority dates. IGWA refused to remove A&B or Southwest because their pumping contributes significantly to SWC reach gains, and section 3.a.ii protects IGWA from having to mitigate for non-IGWA members.

IGWA’s performance reports have continuously allocated to IGWA districts a proportionate share of the 240,000 acre-feet. To now require IGWA to bear responsibility for the full 240,000 acre-feet would undermine the basis of the bargain and contradict the plain language of the Settlement Agreement and the parties’ course of dealings.

B. The Settlement Agreement provides that compliance with section 3.a.i will be measured on a five-year rolling average.

While section 3.a.i of the Agreement clearly requires each district to reduce its diversions by a proportionate share of 240,000 acre-feet, it does not explain how those reductions will be measured. It would be simple if the amount of groundwater pumped from the ESPA were static, but it is not—more water is naturally pumped during hot and dry years than in cool and wet years. Reducing groundwater diversions by 240,000 acre-feet (approximately 12% of total groundwater use) would still result in IGWA pumping more water in dry years and less water in wet years—it would simply be 12% less than would have otherwise been pumped.

In an ideal world we would know how much groundwater would be diverted in a given year without conservation measures in place, and then compare that with actual diversions to

determine whether each district conserved its proportionate share of 240,000 acre-feet. Of course, that’s impossible because farmers cannot farm the same land in the same year both with and without conservation measures in place.

The only way to determine whether IGWA is conserving water is to compare diversions before the Settlement Agreement with diversions after the Settlement Agreement. And 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. Fortunately, section 3.e.iv of the Agreement does explain how this will be done. It states: “When the ground water level goal is achieved for a *five-year rolling average*, ground water diversion reductions may be reduced or removed, so long as the ground water level goal is sustained.”² (Emphasis added.)

Since compliance is measured on a five-year average, IGWA used a five-year average for the period 2010-2014 to define the pre-Settlement Agreement baseline from which groundwater conservation will be measured. The five-year average used to define the baseline has been reported to the SWC and to IDWR from the outset of the Settlement Agreement.

C. Each ground water district’s conservations efforts exceeded its proportionate share of 240,000 acre-feet over the five-year period 2017-2021.

IGWA’s collective share of 240,000 acre-feet is 205,397 acre-feet. For the five-year period 2017-2021, IGWA’s average conservation was 347,220 acre-feet per year—an excess of 141,823 acre-feet. Individually, each ground water district exceeded its proportionate share of the 240,000 acre-feet by at least 27 percent as shown in the table below. While 2021 was especially challenging due to lack of rain, exceptionally dry weather, a constrained surface water supply, and other factors, each IGWA district remains in compliance with section 3.a.i of the Settlement Agreement.

IGWA Conservation 2017-2021								
	Target Conservation	2017	2018	2019	2020	2021	Average	% of Target
American Falls-Aberdeen	33,715	95,851	66,779	78,288	50,335	14,569	61,164	181%
Bingham	35,015	84,437	48,161	66,316	38,728	-15,036	44,521	127%
Bonneville-Jefferson	18,264	68,346	32,365	33,133	11,033	3,155	29,606	162%
Carey	703	4,535	4,284	4,787	2,308	1,335	3,450	491%
Jefferson-Clark	54,373	126,756	86,656	59,755	67,457	42,737	76,672	141%
Henry's Fork / Madison	5,391	33,661	57,021	60,537	67,892	15,189	46,860	869%
Magic Valley	32,462	36,872	45,295	67,501	34,726	35,341	43,947	135%
North Snake ³	25,474	44,925	42,436	56,420	35,720	25,494	40,999	161%
A&B ⁴								
Southwest ID ⁴								
Total:	205,397	495,383	382,997	426,737	308,199	122,784	347,220	


² A five-year average is also used to measure compliance under the Cities Settlement Agreement and to measure compliance with ground water management plans in the Oakley Valley.

CONCLUSION

For the foregoing reasons, IGWA respectfully requests that the Director confirm that each participating ground water district is responsible for its “proportionate share” of the 240,000 acre-feet, that compliance is measured on a five-year rolling average, and that IGWA is in compliance with the Settlement Agreement for the period 2017-2021.

DATED this 3rd day of August, 2022.

RACINE OLSON, PLLP

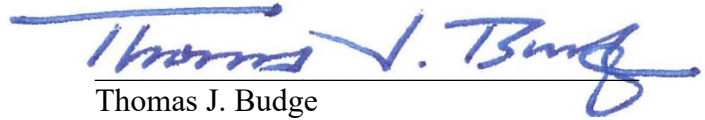


Thomas J. Budge

*Attorneys for Idaho Ground Water
Appropriators, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2022, I served the foregoing document on the persons below via email:


Thomas J. Budge

Idaho Department of Water Resources	file@idwr.idaho.gov
John K. Simpson Travis L. Thompson Michael A. Short BARKER ROSHOLT & SIMPSON, LLP P. O. Box 63 Twin Falls, ID 83303-0063	jks@idahowaters.com flt@idahowaters.com nls@idahowaters.com mas@idahowaters.com
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	wkf@pmt.org
Kathleen Marion Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706	kathleenmarion.carr@sol.doi.gov
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202	david.gehlert@usdoj.gov
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234	mhoward@usbr.gov
Sarah A Klahn Somach Simmons & Dunn 2033 11th Street, Ste 5 Boulder, Co 80302	sklahn@somachlaw.com dthompson@somachlaw.com
Rich Diehl	rdiehl@pocatello.us

<p>City of Pocatello P.O. Box 4169 Pocatello, ID 83205</p>	
<p>Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83 702</p>	<p>cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>
<p>Robert E. Williams WILLIAMS, MESERVY, & LOTH SPEICH, LLP P.O. Box 168 Jerome, ID 83338</p>	<p>rewilliams@wmlattys.com</p>
<p>Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405</p>	<p>rharris@holdenlegal.com</p>
<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405</p>	<p>rfife@idahofallsidaho.gov</p>
<p>Corey Skinner IDWR-Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033</p>	<p>corey.skinner@idwr.idaho.gov</p>
<p>Tony Olenichak IDWR-Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402</p>	<p>Tony.Olenichak@idwr.idaho.gov</p>
<p>William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318</p>	<p>wparsons@pmt.org</p>