BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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-MP-2016-001 **FINAL ORDER REGARDING COMPLIANCE WITH APPROVED MITIGATION PLAN**
IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN	

This Final Order resolves a dispute over the requirements of an approved mitigation plan in the above-captioned matter. In addition, this Final Order determines that there was a breach of the approved mitigation plan in 2021, and recognizes certain terms in a recent settlement between the parties as an appropriate remedy for that breach. It is only because of this negotiated remedy that curtailment is not necessary to address the 2021 breach.

BACKGROUND

On March 9, 2016, the Surface Water Coalition ("SWC")[1] and certain members of the Idaho Ground Water Appropriators, Inc. ("IGWA") [2] submitted to the Director of the Idaho Department of Water Resources ("Department") the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* ("Request for Order").

Attached to the Request for Order as Exhibits B and C respectively were the *Settlement Agreement Entered into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc.* ("SWC-IGWA Agreement"), and the *Addendum to Settlement Agreement* ("First Addendum"). Attached

[1] The SWC is comprised 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.

[2] For purposes of this Final Order, references to IGWA include only the following eight ground water districts and one irrigation district, which are the signatories to the Mitigation Plan: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Fremont Madison Irrigation District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

to the Request for Order as Exhibit D was the October 7, 2015 *Agreement* ("A&B-IGWA Agreement") between A&B Irrigation District ("A&B") and the same IGWA members that entered into the SWC-IGWA Agreement. The SWC and IGWA submitted the SWC-IGWA Agreement, the First Addendum, and the A&B-IGWA Agreement (collectively, "2015 Agreements") as a stipulated mitigation plan in response to the SWC delivery call (Docket No. CM-DC-2010-001). *Request for Order* at 3.

Through the SWC-IGWA Agreement, the SWC and IGWA members agreed, among other things, that "[t]otal ground water diversion shall be reduced by 240,000 ac-ft annually." *SWC-IGWA Agreement* § 3.a.i.

The SWC and IGWA stipulated "that the mitigation provided by participating IGWA members under the [2015] Agreements is, provided the [2015] Agreements are implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member." *Request for Order* ¶ 8. The SWC and IGWA agreed "[n]o ground water user participating in this [SWC-IGWA] Agreement will be subject to a delivery call by the SWC members as long as the provisions of the [SWC-IGWA] Agreement are being implemented." *SWC-IGWA Agreement* § 5.

On May 2, 2016, the Director issued the *Final Order Approving Stipulated Mitigation Plan* ("First Final Order"). The First Final Order approved the 2015 Agreements as a mitigation plan subject to conditions, including: "a. All ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan."; and "b. The ground water level goal and benchmarks referenced in the Mitigation Plan are applicable only to the parties to the Mitigation Plan." *First Final Order* at 4.

On February 7, 2017, the SWC and IGWA submitted to the Department the *Surface Water Coalition's and IGWA's Stipulated Amended Mitigation Plan and Request for Order* ("Second Request for Order"). Attached to the Second Request for Order as Exhibit A was the *Second Addendum to Settlement Agreement* ("Second Addendum") entered into on December 14, 2016, between the SWC and IGWA.

The Second Addendum amended the SWC-IGWA Agreement by providing "further details concerning implementation of the agreement addressing Sections 3.a (Consumptive Use Volume Reduction); 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a. (Adaptive Water Management)." *Second Request for Order* ¶ 4. The SWC and IGWA requested the Director issue an order approving the Second Addendum as an amendment to the mitigation plan. *Id*. ¶ 6.

On May 9, 2017, the Director issued the *Final Order Approving Amendment to Stipulated Mitigation Plan* ("Second Final Order"), approving the Second Addendum as an amendment to the parties' mitigation plan subject to the following conditions:

a. While the Department will exert its best efforts to support the activities of IGWA and the SWC, approval of the Second Addendum does not obligate the Department to undertake any particular action.

b. Approval of the Second Addendum does not limit the Director's enforcement discretion or otherwise commit the Director to a particular enforcement approach.

Second Final Order at 5.

Today, the mitigation plan stipulated by the SWC and IGWA and approved by the Director consists of four agreements: (1) the SWC-IGWA Agreement, (2) the First Addendum, (3) the A&B-IGWA Agreement, and (4) the Second Addendum. These four documents are collectively referred to in this order as the "Mitigation Plan."

Section 2.c.iv of the Second Addendum states:

> If the Surface Water Coalition and IGWA do not agree that a breach has occurred or cannot agree upon actions that must be taken by the breaching party to cure the breach, the Steering Committee will report the same to the Director and request that the Director evaluate all available information, determine if a breach has 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 21, 2022, the SWC filed with the Department the *Surface Water Coalition's Notice of Steering Committee Impasse/Request for Status Conference* ("Notice"). In the Notice, the SWC alleged that in 2021 IGWA's members did not comply with the Mitigation Plan's requirement that IGWA reduce total ground water diversion by 240,000 acre-feet annually. *Notice* at 2–3. The SWC stated that the allegations of noncompliance have been reviewed by the steering committee, as required by the Mitigation Plan, and that the SWC and IGWA disagree on whether there has been a breach and the Steering Committee was at an impasse. *Id*. at 3–4. The SWC requested the Director schedule a status conference to discuss the allegations of noncompliance. *Id*. at 4. The SWC also requested a status conference to discuss discrepancies between the numbers in IGWA's 2021 Settlement Agreement Performance Report and the Department's verification report. *Id*. On July 26, 2022, the Director issued a *Notice of Status Conference* granting the SWC's request for a status conference and scheduled the status conference for August 5, 2022.

On August 3, 2022, IGWA filed *IGWA's Response to Surface Water Coalition's Notice of Impasse* ("Response"). The Response argues there was no breach in 2021 because each IGWA member met its proportionate share of the 240,000 acre-foot reduction obligation—as measured on a five-year rolling average and assuming that A&B and Southwest Irrigation District ("Southwest") are responsible for portions of the 240,000 acre-foot total.

On August 4, 2022, the SWC filed the *Surface Water Coalition's Reply to IGWA's Response* ("Reply"). The Reply contends that IGWA's arguments "have no support in the actual [SWC-IGWA] Agreement and should be rejected on their face." *Reply* at 2. Specifically, the Reply argues that non-parties, such as A&B and Southwest, are not responsible for any portion of the 240,000 acre-foot reduction obligation, and that the 240,000 acre-foot reduction obligation is an annual requirement, not based on a five-year rolling average. *Id*. at 3–5.

On August 5, 2022, the Director held the status conference. Among other topics covered, counsel for the SWC and IGWA presented arguments as to whether IGWA breached the Mitigation Plan in 2021. During the status conference, the Director referenced Section 2.c.iv of the Second Addendum, which states that if the Director determines a breach, there is an expectation that the Director will "issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment." The Director initiated a discussion with counsel for the parties regarding possible curative remedies should the Director find a breach. The only concrete proposal, suggested by an attorney for the SWC, was an increase in diversion reduction in 2022 equal to the 2021 deficiency.

On August 12, 2022, IGWA filed *IGWA's Supplemental Response to Surface Water Coalition's Notice of Steering Committee Impasse* ("Supplemental Response"). In addition to expanding IGWA's five-year-rolling-average argument, the Supplemental Response raises two new procedural arguments. First, IGWA argues the Director should not act on the SWC's Notice until the SWC files a motion under the Department's rules of procedure. *Supplemental Response* at 2–3. Second, IGWA argues that, if the Director finds a breach of the Mitigation Plan, he must provide the breaching party 90 days' notice and an opportunity to cure. *Id*. 8–9.

On August 18, 2022, the Director issued a *Notice of Intent to Take Official Notice of IGWA's 2021 Settlement Agreement Performance Report and Supporting Spreadsheet*. Pursuant to Rule 602 of the Department's rules of procedure (IDAPA 37.01.01.602), this notice explained that the Director intended to take official notice of IGWA's 2021 Settlement Agreement Performance Report and supporting spreadsheet (collectively, "2021 Performance Report") and gave the parties one week to object in writing. IGWA filed *IGWA's Objection to Notice of Intent to Take Official Notice of IGWA's 2021 Settlement Agreement Performance Report and Supporting Spreadsheet; and Request for Hearing* ("Objection") on August 23, 2022.

Also on August 18, 2022, the Director issued the *Order Revising July 2022 Forecast Supply (Methodology Steps 7–8)* ("2022 Step 7–8 Order") in the SWC delivery call matter (Docket No. CM-DC-2010-001). The Director curtailed ground water users not covered by an approved mitigation plan whose ground water rights bear a priority date junior to March 25, 1981. *2022 Step 7–8 Order* at 12.

On September 7, 2022, the Department received a Settlement Agreement ("Remedy Agreement"), signed by IGWA and the SWC, that seeks to ensure "the Director does not curtail certain IGWA members during the 2022 irrigation season." *Remedy Agreement* ¶ E. To accomplish this, the Remedy Agreement sets forth a stipulated remedy for the breach alleged in the SWC's Notice:

> **2021 Remedy.** As a compromise to resolve the parties' dispute over IGWA's compliance with the Settlement Agreement and Mitigation Plan in 2021, and not as an admission of liability, IGWA will collectively provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year. Such amounts will be in addition to the long-term obligations set forth in section 3 of the Settlement Agreement and approved Mitigation Plan. IGWA agrees to take all

> reasonable steps to lease the quantities of storage water set forth above from non-SWC spaceholders. If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA will make up the difference by either (a) leasing storage water from the SWC as described in section 2, or (b) undertaking diversion reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River. For example, if by April 1, 2023, IGWA has secured contracts for only 25,000 acre-feet of storage water, IGWA will either (a) lease 5,000 acre-feet of storage from the SWC, or (b) undertake 5,000 acre-feet of diversion reductions. The remedy described in this section shall satisfy IGWA's obligation under the Settlement Agreement for 2021 only.

Remedy Agreement § 1. The SWC and IGWA agreed to submit the Remedy Agreement to the Director "as a stipulated plan to remedy the alleged shortfall regarding IGWA's 2021 groundwater conservation obligation as set forth in the SWC Notice." *Id*. § 3. The Remedy Agreement contemplates that the Director will incorporate the terms of the 2021 remedy provision "as the remedy selected for the alleged shortfall in lieu of curtailment, and shall issue a final order regarding the interpretive issues raised by the SWC Notice." *Id*.

APPLICABLE LAW

Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, states:

> The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

Idaho Code § 42-1805(8) authorizes the Director to "promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department."

Idaho Code § 42-603 grants the Director authority to adopt rules governing water distribution.

Pursuant to Chapter 52, Title 67, Idaho Code, and Sections 42-603 and 42-1805(8), Idaho Code, the Department promulgated the Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"), effective October 7, 1994. IDAPA 37.03.11.000–001.

The CM Rules "prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply." IDAPA 37.03.11.001.

Under CM Rule 40.01, once the Director finds that material injury is occurring, he "shall" either:

> a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment; or
>
> b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

IDAPA 37.03.11.040.01.

CM Rule 42.02 states:

> The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.

IDAPA 37.03.11.042.02.

Under Idaho law, a settlement agreement "stands on the same footing as any other contract and is governed by the same rules and principles as are applicable to contracts generally." *Budget Truck Sales, LLC v. Tilley*, 163 Idaho 841, 846, 419 P.3d 1139, 1144 (2018) (internal quotation omitted). The interpretation of a contract starts with the language of the contract itself. "The meaning of an unambiguous contract should be determined from the plain meaning of the words. Only when the language is ambiguous, is the intention of the parties determined from surrounding facts and circumstances." *Clear Lakes Trout Co. v. Clear Springs Foods, Inc.*, 141 Idaho 117, 120, 106 P.3d 443, 446 (2005) (citations omitted).

FINDINGS OF FACT

The Mitigation Plan is comprised of four agreements between IGWA and certain members of the SWC. IGWA and all of the SWC members except A&B are signatories to the SWC-IGWA Agreement, the First Addendum, and the Second Addendum. Only IGWA and A&B are parties to the A&B-IGWA Agreement.

A&B and members of the Southwest Irrigation District ("Southwest") both pump ground water. Southwest did not sign the SWC-IGWA Settlement Agreement or any of the subsequent addendums. A&B participates in the Mitigation Plan only as a member of the SWC. *See A&B-IGWA Agreement* ¶ 2.

A&B and Southwest each agreed to separate settlements with the SWC, and the Department has approved the settlements as mitigation plans under the CM Rules. The separate settlements between the SWC, A&B, and Southwest are not at issue here.

Under the Mitigation Plan, a Steering Committee comprised of representatives of the SWC, IGWA, and the State meets at least once annually. *See SWC-IGWA Agreement* § 3.m. One of the responsibilities of the Steering Committee is to review progress on implementation and achieving benchmarks and the ground water goal set out in the Mitigation Plan. *Id*. The Steering Committee also reviews technical information from the Department and technical reports by SWC or IGWA consultants. *Second Addendum* § 2.c.i. The Steering Committee began meeting annually in 2016 and has met at least annually every year since. At these Steering Committee meetings, IGWA has prepared and presented a report summarizing compliance with annual reduction obligations. *See Second Addendum* § 2.a.i.

In its annual reports to the Steering Committee, IGWA has assigned to A&B and to Southwest a proportionate percentage and quantity of the 240,000 acre-feet reduction obligation agreed upon in the SWC-IGWA Agreement. *Response* at 3–4. Assigning portions of the 240,000 acre-foot total to A&B and Southwest effectively reduces the obligations of the IGWA signatories to the Mitigation Plan by 14.4%—more than 34,000 acre-feet. *See Response* at 4.

On April 1, 2021, IGWA's counsel sent copies of IGWA's 2021 Performance Report to representatives of the SWC and the Department. While the report was sent to the Department, it did not automatically become part of the agency record for this proceeding. On August 18, 2022, the Department provided notice to the parties that the Director intended to take official notice of IGWA's 2021 Performance Report.[3] A spreadsheet included in the 2021 Performance Report summarizes IGWA's, A&B's, and Southwest's mitigation efforts during 2021. IGWA's summary spreadsheet is reproduced as Table 1 on the following page.

[3] IGWA's Objection to taking official notice of the 2021 Performance Report is addressed below in subsections 5.a and 5.b of the Analysis and Conclusions of Law.

TABLE 1

2021 Performance Summary Table							
	Target Conservation	Baseline	2021 Usage	Diversion Reduction	Accomplished Recharge	Total Conservation	2021 Mitigation Balance
American Falls-Aberdeen	33,715	286,448	291,929	-5,481	20,050	14,569	-19,146
Bingham	35,015	277,011	302,020	-25,009	9,973	-15,036	-50,052
Bonneville-Jefferson	18,264	156,287	158,212	-1,925	5,080	3,155	-15,109
Carey	703	5,671	4,336	1,335	0	1,335	632
Jefferson-Clark	54,373	441,987	405,131	36,856	5,881	42,737	-11,636
Henry's Fork[1]	5,391	73,539	65,323	8,216	3,000	15,189	9,798
Madison[2]		81,423	77,449	3,973			
Magic Valley	32,462	256,270	231,474	24,795	10,546	35,341	2,879
North Snake[3]	25,474	208,970	194,778	14,192	11,301	25,494	20
A&B[4]	21,660	-	-	-	-	21,660	0
Southwest ID[4]	12,943	-	-	-	-	12,943	0
Total:	**240,000**	1,787,604	1,730,652	56,953	65,831	157,387	-82,613
Notes:							
(1) Includes mitigation for Freemont-Madison Irrigation District, Madison Ground Water District and WD100. Mitigating by alternative means.							
(2) Madison baseline is preliminary estimate, see note on district breakdown.							
(3) North Snake GWD baseline includes annual average of 21,305 acre-feet of conversions.							
(4) A&B ID and Southwest ID Total Conservation is unknown and assumed to meet target.							

The parties to the Mitigation Plan have adopted a process under which the Steering Committee may resolve an alleged breach or noncompliance with the Mitigation Plan. *See Second Addendum* § 2.c.iii. Alternatively, if the SWC and IGWA do not agree that a breach has occurred, the Director may determine if a breach occurred and issue an order specifying actions the breaching party must take to cure the breach or be subject to curtailment. *Id*. § 2.c.iv.

On April 29, 2022, the SWC requested a status conference in this proceeding to discuss, among other matters, IGWA's compliance with the Mitigation Plan. SWC's Req. for Status Conf. at 2–3. The SWC alleged "IGWA and its junior priority ground water right members are not operating in accordance with the approved plan and are failing to mitigate the material injury to the [SWC] members." *Id*. at 3. Specifically, the SWC alleged, based on IGWA's 2021 Performance Report, that IGWA had not met its obligation under the Mitigation Plan to reduce total ground water diversion by 240,000 acre-feet in 2021. *Id*. at 2–3. On May 5, 2022, the Director issued a response, declining to immediately address the allegations until the Steering Committee had a chance to meet and review the technical information. Resp. to Req. for Status Conf.; Notice of Status Conf. at 2.

The Steering Committee met and reviewed technical information, including IGWA's 2021 Performance Report, on May 18, June 27, and July 13, 2022.

As noted in the background section above, on July 21, 2022, the SWC filed its Notice that the Steering Committee met and was at an impasse on whether IGWA had breached the Mitigation Plan in 2021. IGWA also concedes "the Steering Committee reached an impasse as to whether a breach occurred . . . ." *Supplemental Response* at 8. The parties to the Mitigation Plan, therefore, do not dispute that the Steering Committee's principal members—the SWC and IGWA—do not agree that a breach of the Mitigation Plan occurred in 2021. Accordingly, the Director finds no further notice from the Steering Committee is required before he may consider whether a breach of the Mitigation Plan occurred in 2021 and, if so, the remedy.

The SWC and IGWA's Remedy Agreement establishes a mutually agreed upon "compromise to resolve the parties' dispute over IGWA's compliance with the Settlement Agreement and Mitigation Plan in 2021." Among other things, IGWA agreed to collectively supply the SWC "an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year." *Remedy Agreement* § 1. Additionally:

> If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA will make up the difference by either (a) leasing storage water from the SWC as described in section 2, or (b) undertaking diversion reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River.

Id. The parties further agreed this remedy "shall satisfy IGWA's obligation under the [2015] Settlement Agreement for 2021 only." *Id*.

ANALYSIS AND CONCLUSIONS OF LAW

Because the SWC and IGWA disagree on whether a breach has occurred, the Director should evaluate the available information, determine if a breach of the Mitigation Plan has occurred, and determine an appropriate remedy for any such breach. *See Second Addendum* § 2.c.iv; *see also Remedy Agreement* § 3 ("The Director shall incorporate the terms of section 1 above as the remedy selected for the alleged shortfall in lieu of curtailment, and shall issue a final order regarding the interpretive issues raised by the SWC Notice."). This is necessary to assess whether each IGWA member district's "use of water under the[ir] junior-priority right[s] is covered by an approved and *effectively operating* mitigation plan." IDAPA 37.03.11.042.02 (emphasis added); *see also SWC-IGWA Agreement* § 5 ("No ground water user participating in this Settlement Agreement will be subject to a delivery call by the SWC members as long as the provisions of the Settlement Agreement are being implemented.").

1. The Mitigation Plan obligates IGWA to reduce total ground water diversions by 240,000 acre-feet every year.

The Mitigation Plan obligates IGWA to reduce total ground water diversions, or conduct equivalent private recharge, by 240,000 acre-feet annually. Subsection 3.a of the SWC-IGWA Agreement states:

i. Total ground water diversion shall be reduced by 240,000 ac-ft annually.

ii. 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. 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.

The SWC argues that "240,000 ac-ft annually" in section 3.a.i means that the Mitigation Plan requires IGWA's "signatory districts to reduce their total ground water diversion by 240,000 acre-feet per year." *Reply* at 3. IGWA concedes that section 3.a.i "contemplates 240,000 acre-feet of groundwater conservation 'annually.'" *Supplemental Response* at 3. However, IGWA argues its diversion reduction obligation is measured on a five-year rolling average. *Response* at 4–5; *Supplemental Response* at 3–7. If the mitigation obligation was measured as IGWA argues, then a year in which IGWA reduces ground water diversion by less than 240,000 acre-feet, such as 2021, would not necessarily constitute a breach of the obligation under section 3.a.i. *Id*.

IGWA's argument is contrary to the plain language of the Mitigation Plan. The phrase "shall be reduced by 240,000 ac-ft annually" is unambiguous and must be enforced according to its plain terms. *See Clear Lakes*, 141 Idaho at 120, 106 P.3d at 446. The adverb "annually" derives from the adjective "annual," which means "of or measured by a year" or "happening or appearing once a year; yearly." *Annual*, Webster's New World Dictionary (3d coll. ed. 1994). As a legal term of art, "annually" has the same essential meaning:

> In annual order or succession; yearly, every year, year by year. At the 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 in a year.

Black's Law Dictionary 58 (6th ed. 1991). The Mitigation Plan's plain language, therefore, requires IGWA to reduce its ground water diversions by 240,000 acre-feet every year.

This understanding is reinforced by other Mitigation Plan provisions that use the word "annually." For example, section 2.a.i of the Second Addendum requires IGWA to submit certain data to the Steering Committee "[p]rior to April 1 annually." IGWA has done so every year. Likewise, section 2.c.v of the Second Addendum obligates the Steering Committee, which includes IGWA representatives, to "submit a report to the Parties and the Department prior to May 1 annually" on certain enumerated subjects. The Department receives these reports every year. Nothing in the Mitigation Plan suggests that the parties intended a different meaning for "annually" in section 3.a.i of the SWC-IGWA Agreement.

IGWA argues section 3.e.iv of the SWC-IGWA Agreement requires its obligation under section 3.a.i to be measured on a five-year rolling average. Section 3.e.iv 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." (emphasis added). Under section 3.e.i of the SWC-IGWA Agreement, the ground water level

goal is to "return ground water levels to a level equal to the average of the aquifer levels from 1991-2001" as measured in certain mutually agreed upon wells using mutually agreed upon techniques. Considering the measurements contemplated by section 3.e.i, section 3.e.iv simply means that a five-year rolling average of *those measurements* will be used to determine if the ground water level goal is achieved. Section 3.e.iv does not say or imply that the ground water diversion reductions required under section 3.a.i are to be measured on a five-year rolling average. As explained above, the plain language of section 3.a.i imposes an annual—i.e., every year—obligation and thus does not allow for averaging over multiple years.

IGWA also argues that a five-year rolling average is required because it has averaged its annual diversions for the five years of 2010–2014 to determine historical annual diversion quantities as a baseline for the 240,000 acre-feet diversion reduction. But this averaging process is not described in the Settlement Agreement. IGWA calculated and reported annual reduction based on its own adopted baseline process. It cannot replace the clear requirement of an annual 240,000 acre-feet reduction with its own averaging process. 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.

IGWA contends that the SWC, by arguing the reduction obligation applies every year, is seeking to establish a "fixed diversion cap." *Supplemental Response* at 3–6. They claim 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." *Id*. at 5. This claim is a strawman. Nothing in the SWC's filings in this matter states or implies they are seeking anything more (or less) than compliance with the annual 240,000 acre-foot diversion reduction obligation unambiguously set forth in the Mitigation Plan. Likewise, nothing in this order should be read to suggest that IGWA's obligation under section 3.a.i of the SWC-IGWA Agreement is anything other than reducing total ground water diversion "by 240,000 acre-feet annually."

2. The 240,000 acre-foot diversion reduction obligation is the sole responsibility of IGWA members participating in the Mitigation Plan.

As shown in Table 1 above, IGWA included conservation activities by A&B and Southwest in its calculation of "Total Conservation" for 2021. IGWA's inclusion of A&B and Southwest in sharing the 240,000-acre feet reduction obligation is based on IGWA's interpretation of the Section 3.ii of the SWC-IGWA Agreement, which reads: "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." IGWA assumes that A&B and Southwest share in the reduction obligation because A&B and Southwest are both "'Irrigation District[s] with members pumping from the ESPA.'" *Response* at 3 (quoting *SWC-IGWA Agreement* § 3.a.ii).

Based on that assumption, IGWA's performance reports have included volumetric diversion reduction obligations for A&B and Southwest. "IGWA has from the outset allocated to its members a proportionate share of the 240,000 acre-feet" after it "deducted groundwater diversions within A&B Irrigation District, Southwest Irrigation District," and, for one year,

another irrigation district. *Response* at 3–4. This deduction, in effect, shifts a portion of the 240,000 acre-foot reduction obligation to A&B and Southwest, lowering IGWA's aggregate share of the obligation by 14.4%—more than 34,000 acre-feet.

The basis for IGWA's deduction is unclear. There are no reported data for diversion reductions for A&B and Southwest in any of IGWA's reports. A&B and Southwest are subject to their own mitigation plans approved by the Department. Southwest is not a party to the Mitigation Plan at issue here. Additionally, in the A&B-IGWA Agreement, IGWA recognized that A&B was only a party to the Mitigation Plan as a surface water user, not as a ground water user. *A&B-IGWA Agreement* ¶ 2.

The SWC argues IGWA's deduction is "an attempt to inject non-parties into this issue" and "is contrary to basic contract interpretation." *Reply* at 3. The Director agrees.

The Mitigation Plan is comprised of a series of settlement agreements, which are construed in the same manner as contracts. *Budget Truck*, 163 Idaho at 846, 419 P.3d at 1144. "Non-parties are generally not bound by contracts they did not enter into." *Greater Boise Auditorium Dist. v. Frazier*, 159 Idaho 266, 273 n.6, 360 P.3d 275, 282 n.6 (2015). Indeed, the SWC-IGWA Agreement specifically states it does not cover non-participants: "Any ground water user not participating in this Settlement Agreement or otherwise have [sic] another approved mitigation plan will be subject to administration." *SWC-IGWA Agreement* § 6. Moreover, the Director's First Final Order approved the 2015 Agreements as a mitigation plan subject to the following condition: "All ongoing activities required pursuant to the Mitigation Plan *are the responsibility of the parties to the Mitigation Plan*." *First Final Order* at 4 (emphasis added). Moreover, the A&B-IGWA Agreement specifically provides that "[t]he obligations of the [IGWA] Ground Water Districts set forth in Paragraphs 2 – 4 of the [SWC-IGWA] *Agreement* do not apply to A&B and its ground water rights." *A&B-IGWA Agreement* ¶ 2. The 240,000 acre-foot reduction obligation is among the obligations referenced in that provision. *SWC-IGWA Agreement* § 3.a.i.

Against this backdrop, it is untenable for IGWA to argue non-parties are included in the phrase "[e]ach Ground Water and Irrigation District" in section 3.a.ii of the SWC-IGWA Agreement. IGWA's argument not only lacks support in the unambiguous language of the Mitigation Plan, it also violates an express condition in the Director's approval of the 2015 Agreements. *First Final Order* at 4. Accordingly, when the agreement language assigns an obligation to "[e]ach" of the ground water districts and irrigation districts, it means each IGWA member district that signed the agreement is obligated for their proportionate share of the 240,000 acre-feet reduction. *SWC-IGWA Agreement* § 3.a.ii.

Therefore, the 240,000 acre-foot diversion reduction obligation is IGWA's sole responsibility. A&B and Southwest are not responsible for any portion of the 240,000 acre-foot diversion reduction obligation. It follows that IGWA members participating in the Mitigation Plan "shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity." *Id*.

3. Certain IGWA members breached the Mitigation Plan in 2021.

Based on the foregoing, each IGWA member participating in the Mitigation Plan is obligated to reduce total ground water diversion (or provide equivalent private recharge) by each member's proportionate share of 240,000 acre-feet every year. *SWC-IGWA Agreement* § 3.a.

Table 2 below shows IGWA's 2021 summary spreadsheet (Table 1) with yellow-highlighted columns added. The "Re-proportioning" column redistributes the 14.4% of "[IGWA] Target Conservation" that IGWA had assigned to A&B and Southwest. The yellow-highlighted "Target Conservation" column uses the re-proportioned shares of the total to compute proportionate obligations consistent with the plain language of the Mitigation Plan. The yellow-highlighted target conservation values are then compared to IGWA's 2021 reduction activities. Negative values in the yellow-highlighted "2021 Mitigation Balance" column identify IGWA members that did not fulfill their proportionate share of the 240,000 acre-foot reduction obligation in 2021.

TABLE 2

2021 Performance Summary Table

	IGWA Proportioning	[IGWA] Target Conservation	Re-proportioning	Target Conservation	Baseline	2021 Usage	Diversion Reduction	Accomplished Recharge	Total Conservation	[IGWA] 2021 Mitigation Balance	2021 Mitigation Balance
American Falls-Aberdeen	14.0%	33,715	16.4%	39,395	286,448	291,929	-5,481	20,050	14,569	-19,146	-24,826
Bingham	14.6%	35,015	17.0%	40,914	277,011	302,020	-25,009	9,973	-15,036	-50,052	-55,951
Bonneville-Jefferson	7.6%	18,264	8.9%	21,341	156,287	158,212	-1,925	5,080	3,155	-15,109	-18,185
Carey	0.3%	703	0.3%	821	5,671	4,336	1,335	0	1,335	632	513
Jefferson-Clark	22.7%	54,373	26.5%	63,533	441,987	405,131	36,856	5,881	42,737	-11,636	-20,796
Henry's Fork[1]	2.2%	5,391	2.6%	6,299	73,539	65,323	8,216	3,000	15,189	9,798	8,890
Madison[2]					81,423	77,449	3,973				0
Magic Valley	13.5%	32,462	15.8%	37,931	256,270	231,474	24,795	10,546	35,341	2,879	-2,590
North Snake[3]	10.6%	25,474	12.4%	29,765	208,970	194,778	14,192	11,301	25,494	20	-4,272
A&B[4]	9.0%	21,660	--	--	-	-	-	-	21,660	0	--
Southwest ID[4]	5.4%	12,943	--	--	-	-	-	-	12,943	0	--
Total:	100%	**240,000**	100%	**240,000**	1,787,604	1,730,652	56,953	65,831	157,387	-82,613	

Notes:

(1) Includes mitigation for Freemont-Madison Irrigation District, Madison Ground Water District and WD100. Mitigating by alternative means.

(2) Madison baseline is preliminary estimate, see note on district breakdown.

(3) North Snake GWD baseline includes annual average of 21,305 acre-feet of conversions.

(4) A&B ID and Southwest ID Total Conservation is unknown and assumed to meet target.

Madison Ground Water District, Fremont Madison Irrigation District, and Carey Ground Water District satisfied their proportionate 2021 mitigation obligations in 2021. Based on the analysis in Table 2, Table 3 on the following page identifies the IGWA ground water districts that did not fulfill their proportionate share of the total annual ground water reduction and the volume of each district's deficiency.

TABLE 3

Ground Water District	Deficiency (acre-feet)
American Falls-Aberdeen	24,826
Bingham	55,951
Bonneville-Jefferson	18,185
Jefferson-Clark	20,796
Magic Valley	2,590
North Snake	4,272
Total	**126,620**

4. The IGWA members in Table 3 are not covered by an effectively operating mitigation plan and IGWA must implement the 2021 remedy in the Remedy Agreement.

In a delivery call under the CM Rules, out-of-priority diversion of water by junior priority ground water users is allowable only "pursuant to a mitigation plan that has been approved by the Director." IDAPA 37.03.11.040.01.b. Junior-priority ground water users "covered by an approved *and effectively operating* mitigation plan" are protected from curtailment under CM Rule 42. IDAPA 37.03.11.042.02 (emphasis added). In other words, only those junior ground water users who are in compliance with an approved mitigation plan are protected from curtailment.

The Director has approved several mitigation plans when the joint administration of ground water and surface water has been imminent. Some of these approved mitigation plans have been contested by holders of senior priority water rights. In this case, however, because of the stipulated Mitigation Plan, the Director allowed significant latitude to the agreeing parties in accepting the provisions of the Mitigation Plan. Nonetheless, the courts have defined the Director's responsibilities if the holders of junior priority water rights do not comply with the mitigation requirements.

In the *Rangen* case, Judge Eric Wildman addressed the Director's responsibility when a mitigation plan fails. Mem. Decision & Order*, Rangen, Inc. v. Idaho Dep't of Water Res.*, No. CV-2014-4970 (Twin Falls Cnty. Dist. Ct. Idaho June 1, 2015) [hereinafter "Rangen June 1, 2015 Decision"]. A mitigation plan that allows out-of-priority diversions must supply water to the holders of senior priority water rights during the time-of-need. The Court stated: "When the Director approves a mitigation plan, there should be certainty that the senior user's material injury will be mitigated throughout the duration of the plan's implementation. This is the price of allowing junior users to continue their offending out-of-priority water use." *Rangen June 1, 2015 Decision* at 8. Judge Wildman previously held in an earlier case that the compensation for underperformance of the requirements of the mitigation plan cannot be delayed. *See* Mem. Decision & Order at 10*, Rangen, Inc. v. Idaho Dep't of Water Res.*, No. CV-2014-2446 (Twin Falls Cnty. Dist. Ct. Idaho Dec. 3, 2014). Furthermore, without mitigation at the time-of-need, the holders of junior ground water rights could materially injure senior water rights by diverting out-of-priority with impunity.

Here, the Mitigation Plan obligates IGWA to undertake total diversion reductions or equivalent recharge of 240,000 acre-feet every year. Each IGWA member is annually responsible for their proportionate share of that total. But the Mitigation Plan is unique in that it contemplates delays in analyzing IGWA's mitigation efforts. These delays are inherent in the Steering Committee process the parties agreed to in the Second Addendum.

For example, section 2.a.i of the Second Addendum requires IGWA to submit, "[p]rior to April 1 annually," ground water diversion and recharge data (i.e., the types of data in the 2021 Performance Report) to the Steering Committee for the previous irrigation season. Further, the parties agreed to a process by which the Steering Committee evaluates IGWA's data from the previous irrigation season to assess whether a breach occurred in the previous season. *Second Addendum* § 2.c.i–.iv. Because IGWA is not obligated to submit its data to the Steering Committee until April 1 every year, the Steering Committee process necessarily begins well after the actions or inactions constituting a breach. Moreover, the process does not involve the Director until the Steering Committee finds a breach or, as here, reaches an impasse. *Id*. While the Director believes this process was developed and has been implemented by all parties in good faith, it nevertheless means that any breach will be addressed many months after it occurs.

A mitigation plan that depends on a prediction of compliance must include a contingency plan to mitigate if the predictive mitigation plan is not satisfied:

> If junior users wish to avoid curtailment by proposing a mitigation plan, the risk of that plan's failure has to rest with junior users. Junior users know, or should know, that they are only permitted to continue their offending out-of-priority water use so long as they are meeting their mitigation obligations under a mitigation plan approved by the Director. IDAPA 37.03.11.040.01.a,b. If they cannot, then the Director must address the resulting material injury by turning to the approved contingencies. If there is no alternative source of mitigation water designated as the contingency, then the Director must turn to the contingency of curtailment. Curtailment is an adequate contingency if timely effectuated. In this same vein, if curtailment is to be used to satisfy the contingency requirement, junior uses are on notice of this risk and should be conducting their operation so as to not lose sight of the possibility of curtailment.

Rangen June 1, 2015 Decision at 9.

In this case, certain holders of junior-priority water rights failed to satisfy their mitigation obligation in 2021. Out-of-priority diversions by the IGWA members in Table 3 above were not "pursuant to a mitigation plan that has been approved by the Director." IDAPA 37.03.11.040.01.b. The approved Mitigation Plan was not "effectively operating" with respect to those IGWA members in 2021. IDAPA 37.03.11.042.02. Consequently, the holders of senior water rights have been and are being materially injured by the failure of the juniors to fully mitigate during the 2021 irrigation season.

The CM Rules contemplate that out-of-priority diversions by junior-priority ground water users will be curtailed absent compliance with an approved mitigation plan. IDAPA 37.03.11.040.01. But curtailment may be avoided if an adequate, alternative source of mitigation water is designated as a contingency. *Rangen June 1, 2015 Decision* at 9. Therefore, the Director must determine if there is an adequate contingency for IGWA members' 2021 noncompliance with the Mitigation Plan.

The Mitigation Plan itself does not include a contingency in the event IGWA did not meet the 240,000 acre-foot reduction obligation, but it does contemplate the Director will "issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment." *Second Addendum* § 2.c.iv. The Director concludes the SWC and IGWA's Remedy Agreement provides a cure for the breach and constitutes an adequate contingency for IGWA members' noncompliance in 2021. Specifically, in section 1 of the Remedy Agreement, IGWA agrees to "collectively provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year." Moreover, the Remedy Agreement details IGWA's options in the event it cannot lease the necessary water from non-SWC spaceholders:

> If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA will make up the difference by either (a) leasing storage water from the SWC as described in section 2, or (b) undertaking consumptive use reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River.

Remedy Agreement § 1. The SWC and IGWA agree their stipulated 2021 remedy should be the "remedy selected for the alleged [2021] shortfall in lieu of curtailment." *Id*. § 3. The Director agrees. The parties' remedy constitutes an appropriate contingency for IGWA members' noncompliance of the Mitigation Plan in 2021. Therefore, in lieu of curtailment, the Director will order that IGWA must implement the 2021 remedy in section 1 of the Remedy Agreement.

5. IGWA's procedural and evidentiary objections lack merit.

IGWA has raised procedural and evidentiary objections in connection with this matter. For the reasons stated below, these objections lack merit.

a. IGWA's request for a pre-decision hearing is denied.

In its Objection, IGWA requests the Director "refrain from interpreting or enforcing the [SWC-IGWA] Agreement without first holding a hearing and allowing IGWA and the SWC to present evidence concerning the matter." *Objection* at 6. IGWA argues such a hearing is required by due process clauses in the United States Constitution and the Idaho Constitution, the Idaho Administrative Procedure Act, and the Department's rules of procedures. *Id*. 2–6. The Director disagrees that a pre-decision hearing is required in the circumstances of this case.

i. *The Remedy Agreement moots IGWA's due process argument*.

In general, due process requires notice and an opportunity to be heard when governmental action results in a deprivation of property. Water rights are property rights, so this general rule applies when water rights are curtailed. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 814, 252 P.3d 71, 95 (2011). However, due process "does not necessarily require a hearing before property is taken." *Id*. This is because "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (cleaned up). The Idaho Supreme Court has set out three requirements for the Director to consider before curtailing water rights before a hearing:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Clear Springs, 150 Idaho at 814, 252 P.3d at 95 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972)).[4] "Whether or not curtailment of water use can be ordered without prior notice or an opportunity for a hearing depends upon whether the three requirements are met under the circumstances of a particular delivery call or curtailment." *Id*. at 815, 252 P.3d at 96. All three requirements may be satisfied here, but the Director need not decide the issue because the Remedy Agreement makes curtailment unnecessary.

The due process issue raised in IGWA's Objection—which was filed weeks before the parties entered into the Remedy Agreement—presumes the Director would be ordering curtailment. The SWC and IGWA entered into the Remedy Agreement for the express purpose of avoiding curtailment during the 2022 irrigation season. *Remedy Agreement* ¶ E. As discussed above, the Remedy Agreement is an appropriate contingency and cure for IGWA members' noncompliance with the Mitigation Plan in 2021, and thus renders curtailment unnecessary. Indeed, IGWA agreed to "not seek review of the remedy" established in section 1 of the Remedy Agreement and incorporated into this order. *Id*. § 3. It follows that this order does not deprive IGWA of any property right. Because IGWA's argument depends on the Director curtailing IGWA's water rights, the due process issues presented in the Objection are moot in light of the

[4] Despite recognizing the applicability of *Clear Springs* in this case, IGWA argues a different three-part test for determining whether a legal procedure satisfies due process. *Objection* at 3 (quoting *LU Ranching Co. v. U.S.*, 138 Idaho 606, 608, 67 P.3d 85, 87 (2003)). That test, which derives from the U.S. Supreme Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), is generalized, and the Idaho Supreme Court applied it in a case challenging the constitutionality of the procedures for claiming and adjudicating rights in the Snake River Basin Adjudication. *LU Ranching*, 138 Idaho 606, 67 P.3d 85. When faced with the specific due process question presented by IGWA (the propriety of curtailment before a hearing), the Idaho Supreme Court has applied the three requirements from *Fuentes*—both before and after it decided *LU Ranching* in 2003. *Clear* Springs, 150 Idaho at 814, 252 P.3d at 95; *Nettleton v. Higginson,* 98 Idaho 87, 92, 558 P.2d 1048, 1053 (1977).

Remedy Agreement. *See Farrell v. Whiteman*, 146 Idaho 604, 610, 200 P.3d 1153, 1159 (2009) ("An issue is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome.")

ii. *Idaho Administrative Law does not require a hearing before the Director acts.*

IGWA argues that a pre-decision hearing is required under the Idaho Administrative Procedure Act and the Department's rules of procedure. Regarding the Administrative Procedure Act, IGWA argues a hearing must be held in accordance with Idaho Code § 67-5242(3), except when immediate action without a hearing is authorized under Idaho Code § 67-5247. *Objection* at 5. This argument overlooks the statute governing hearings before the Director, which provides in pertinent part:

> Unless the right to a hearing before the director . . . is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.

I.C. § 42-1701A(3). Section 42-1701A(3) is specific to "hearing[s] before the director" and entitles aggrieved persons to a hearing *after* the Director makes "any decision, determination, order or other action, including action upon any application for a[n] . . . approval . . . or similar form of permission required by law to be issued by the director." *Id*.

The determination of IGWA's compliance with its approved Mitigation Plan in this order is an action on a form of permission required by law to be issued by the director, and therefore § 42-1701A(3) governs. *See Valiant Idaho, LLC v. JV L.L.C.*, 164 Idaho 280, 289, 429 P.3d 168, 177 (2018) ("A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general. Thus, the more general statute should not be interpreted as encompassing an area already covered by one which is more specific."). Section 42-1701A(3) allows for a post-decision hearing, and no statute otherwise provides for a hearing to determine compliance with a previously approved mitigation plan.

In addition, the Department's rules of procedure do not require a pre-decision hearing. The various rules IGWA cites do not dictate *when* a hearing must be held. *Objection* at 5 (citing IDAPA 37.01.01.550–.553, .558, .600, .650.01). Those rules either provide procedures and evidentiary standards *for* a hearing, or require decisions to be based on the official record maintained by the Department. The Director is taking official notice of the 2021 Performance Report for the purpose of deciding this matter on the official record. With that record, the Director may, consistent with Idaho Code § 42-1701A, determine the meaning of the unambiguous Mitigation Plan and determine whether IGWA's 2021 Performance Report demonstrates compliance with the Mitigation Plan without first holding an evidentiary hearing. However, to the extent it is a "person aggrieved," IGWA would be entitled to a hearing on this final order pursuant to Idaho Code § 42-1701A(3) if it requests one.

b. It is appropriate for the Director to take official notice of IGWA's 2021 Performance Report.

IGWA's Objection also argues the Director cannot take official notice of IGWA's 2021 Performance Report under the standards in Rule 602 of the Department's rules of procedure. *Objection* at 5–6 (quoting IDAPA 37.01.01.602). IGWA claims that Rule 602 allows the Director to take official notice but only "within in the context of a contested case hearing." *Objection* at 5. But Rule 602 is not so limited. "The presiding officer may take official notice of any facts that could be judicially noticed in the courts of Idaho, of generally recognized technical or scientific data or facts within the agency's specialized knowledge and records of the agency." IDAPA 37.01.01.602. However, "[p]arties must be given an opportunity to contest and rebut the facts or material officially noticed." *Id*. Accordingly, the presiding officer must first "notify the parties of specific facts or material noticed and the source of the material noticed," and such "notice should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed." *Id*.

The rule does not, as IGWA claims, preclude official notice outside the context of a hearing. Rather, the presiding officer may take official notice after notifying the parties, and the notice to the parties must occur, at the latest, before issuance of any order based on the officially noticed facts or material. That is what occurred here. The Director notified all parties that he intended to take official notice of the 2021 Performance Report on August 18, 2022, and IGWA filed its objection pursuant to that notice on August 24. The Director properly notified the parties before the issuance of this final order, and IGWA had the requisite opportunity to contest and rebut the facts and material officially noticed.

Instead of contesting or rebutting the 2021 Performance Report, IGWA simply argues the report does not qualify as "generally recognized technical or scientific data or facts within the agency's specialized knowledge and records of the agency" under Rule 602. *Objection* at 6 (quoting IDAPA 37.01.01.602). The Director disagrees for two reasons. First, IGWA created the 2021 Performance Report for the specific purpose of documenting its compliance with an approved mitigation plan in a long-running and ongoing delivery call proceeding under the CM Rules. *See Second Addendum* § 2.a.i; *see also* IDAPA 37.03.11.040.01.b (allowing for "out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director"). The 2021 Performance Report contains ground water diversion and recharge data, which certainly are within the Director's and Department's specialized knowledge. *See, e.g.,* I.C. § 42-1701(2). Second, and independently, the 2021 Performance Report constitutes "records of the agency" because IGWA submitted it to the Department on April 1, 2022, so that the Department could perform the verification required under section 2.b.iii of the Second Addendum. IDAPA 37.01.01.602. IGWA has not argued the 2021 Performance Report is inaccurate or unreliable, nor has it offered anything to rebut the report's clear showing that certain IGWA members failed to comply with the Mitigation Plan in 2021. It is therefore appropriate for the Director to take official notice of the 2021 Performance Report.

c. A motion is not necessary for the Director to determine compliance with a previously approved Mitigation Plan.

IGWA argues the Director cannot address the issues raised in the SWC's July 21 Notice of the Steering Committee impasse because the Notice does not qualify as a motion under Rule 220 of the Department's rules of procedure. *Supplemental Response* at 2 (citing IDAPA 37.01.01.220). Specifically, IGWA contends that the SWC's Notice is not supported by an affidavit setting forth the facts on which it is based and does not state the relief sought. *Id*.

The Director "liberally construe[s]" the Department's rules of procedure "to ensure just, speedy, and economical determinations of all issues presented to the agency." IDAPA 37.01.01.051. Accordingly, "[t]he agency may permit deviation from these rules when it finds that compliance with them is impracticable, unnecessary or not in the public interest." *Id*.

In this case, formal motion practice is unnecessary and not in the public interest. The SWC has filed two briefs and IGWA has filed three, defining their positions on the breach question and various other matters. *See generally Notice*; *Response*; *Reply*; *Supplemental Response*; *Objection*. The information necessary to evaluate IGWA's compliance with the Mitigation Plan in 2021 consists of the Mitigation Plan and IGWA's 2021 Performance Report. All this information is in the record. In fact, the parties have known of IGWA's deficient performance at least since IGWA reported it to the Steering Committee on April 1, 2022. This occurred because the Mitigation Plan expressly requires IGWA to submit its performance reports and supporting data to the Steering Committee "annually," and the Department, in turn, "annually" reviews that information. *Second Addendum* §§ 2.a.i, 2.c.v. In this context, a motion supported by an affidavit containing information the SWC, IGWA, and the Department have had since April 1, 2022 is unnecessary, and the delay associated with such a procedure is not in the public interest.

Motion practice also is not necessary, nor in the public interest, for ascertaining the relief the SWC seeks. The SWC has been candid and consistent in its view that IGWA did not comply with the Mitigation Plan. *E.g.*, *SWC's Request for Status Conference* at 3 (Apr. 29, 2022) ("IGWA and its junior priority ground water right members are not operating in accordance with the approved plan and are failing to mitigate the material to the Coalition members."); *Reply* at 5 ("the data and plain language of the Agreement shows a clear breach . . . ."). Furthermore, the SWC and IGWA have, through the Remedy Agreement, stipulated to the relief necessary to remedy the SWC's concerns.

Clearly, the SWC seeks a determination that IGWA did not comply with the Mitigation Plan in 2021. And both the SWC and IGWA have agreed on a remedy for that noncompliance. *Remedy Agreement* § 1. Requiring these matters to be set forth, again, in a motion would serve no purpose but delay. Here, delay is not in the public interest because of the time that has already elapsed since IGWA's deficient mitigation during 2021.

d. The 90-day cure period is inapplicable when the Steering Committee does not agree that a breach has occurred.

Delay is also inherent in IGWA's claim that it must be granted an additional 90 days to cure the breach. *See Supplemental Response* at 8–9. But the Mitigation Plan does not require the Director to provide a cure period when he determines a breach has occurred.

As IGWA notes, section 2.c.iii of the Second Addendum states that "*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." (emphasis added). That provision is inapplicable where, as here, there is an impasse on whether a breach occurred. Rather, when the SWC and IGWA do not agree a breach has occurred, the Mitigation Plan contemplates that the Director "evaluate all available information, determine if a breach has occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment." *Second Addendum* § 2.c.iv. Moreover, the Director approved the Second Addendum on the express condition that the "[a]pproval . . . does not limit the Director's enforcement discretion or otherwise commit the Director to a particular enforcement approach." *Second Final Order* at 5. The plain text of both the Second Addendum and the Director's Second Final Order undermine IGWA's claim that it is entitled to a 90-day cure period now that the matter is before the Director.

More significantly, the Remedy Agreement shows that the SWC and IGWA do not need additional time to identify a cure. The parties not only agree the 2021 remedy "shall satisfy IGWA's obligation under the [2015] Settlement Agreement," they also agreed to "not seek review of the remedy agreed to and incorporated into the Director's Order." *Remedy Agreement* §§ 1, 3. Through the Remedy Agreement, the parties have stipulated to a cure for the breach. An additional 90-day cure period is neither required nor necessary in these circumstances.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that:

(1) The Director takes official notice of IGWA's 2021 Performance Report.

(2) To remedy noncompliance with the Mitigation Plan in 2021 only, IGWA must collectively supply to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year. Such amounts will be in addition to the long-term obligations set forth in section 3 of the 2015 Settlement Agreement and approved Mitigation Plan. IGWA must take all reasonable steps to lease the quantities of storage water set forth above from non-SWC spaceholders. If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA must make up the difference by either (a) leasing storage water from the SWC as described in section 2 of the Remedy Agreement, or (b) undertaking diversion reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River.

(3) Except as necessary to implement paragraph (2) above, nothing in this order alters or amends the Mitigation Plan or any condition of approval in the Director's First Final Order or Second Final Order in this matter.

DATED this 8th day of September 2022.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of September 2022, the above and foregoing was served by the method indicated below and addressed to the following:

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EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.