

**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

**AMENDED FINAL ORDER  
REGARDING COMPLIANCE  
WITH APPROVED MITIGATION  
PLAN**

IN THE MATTER OF IGWA’S SETTLEMENT AGREEMENT MITIGATION PLAN

This order resolves a dispute over the requirements of an approved mitigation plan in the above-captioned matter. This order amends and replaces the *Final Order Regarding Compliance with Approved Mitigation Plan* issued on September 8, 2022. In this order, the Director concludes that the Idaho Ground Water Appropriators, Inc.’s approved mitigation plan unambiguously requires it to reduce its ground water diversions by 240,000 acre-feet (“ac-ft”) each year—meaning that averaging is prohibited. The Director also concludes that the Idaho Ground Water Appropriators, Inc.’s mitigation plan unambiguously prohibits it from apportioning A&B Irrigation District or Southwest Irrigation District a percentage of its annual reduction obligation.<sup>1</sup>

**BACKGROUND**

**A. The SWC-IGWA Agreement, Subsequent Amendments, and the Approved Mitigation Plan.**

In 2015, the Surface Water Coalition (“SWC”)<sup>2</sup> and certain members of the Idaho Ground Water Appropriators, Inc. (“IGWA”)<sup>3</sup> entered into the *Settlement Agreement Entered*

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<sup>1</sup> The parties also refer to the annual reduction obligation as a “conservation obligation” because the parties have agreed to count certain recharge activities towards IGWA’s diversion reduction obligation. In this order, reduction obligation is synonymous with conservation obligation.

<sup>2</sup> 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.

<sup>3</sup> For purposes of this 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.

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”).

In October of 2015, the SWC and IGWA entered into an *Addendum to Settlement Agreement* (“First Addendum”). Also, in October of 2015, the A&B Irrigation District (“A&B”) and IGWA entered into a separate agreement (“A&B-IGWA Agreement”).

On March 9, 2016, the SWC and IGWA submitted the *Surface Water Coalition’s and IGWA’s Stipulated Mitigation Plan and Request for Order* (“Request for Order”) to the Director of the Idaho Department of Water Resources (“Department”). Attached to the Request for Order as Exhibits B, C, and D were the SWC-IGWA Agreement, the First Addendum, and the A&B-IGWA Agreement. These documents were submitted as a stipulated mitigation plan in response to the SWC’s delivery call (Docket No. CM-DC-2010-001). *Request for Order* at 3.

In 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 also 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* (“Order Approving Mitigation Plan”), which approved the parties’ mitigation plan subject to conditions including the following: “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.” *Order Approving Mitigation Plan* at 4.

On December 14, 2016, the SWC and IGWA entered into the *Second Addendum to Settlement Agreement* (“Second Addendum”). The *Second Addendum* amended the *SWC-IGWA Agreement* by providing additional details concerning the implementation of certain sections, most notably 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). *Compare SWC-IGWA Agreement* §§ 3–4, with *Second Addendum* § 2. The *Second Addendum* also articulated the process by which the Steering Committee would address alleged breaches and further advised that if the parties couldn’t agree whether a breach had occurred, the Director was tasked with resolving the dispute and fashioning a remedy. *Second Addendum* § 2.c.iii-iv.

On February 7, 2017, the SWC and IGWA submitted the *Surface Water Coalition’s and IGWA’s Stipulated Amended Mitigation Plan and Request for Order* (“Second Request for

Order”). The SWC and IGWA requested that the Director issue an order approving the Second Addendum as an amendment to the mitigation plan. *Second Request for Order* ¶ 6.

On May 9, 2017, the Director issued the *Final Order Approving Amendment to Stipulated Mitigation Plan* (“Order Approving Amendment to Mitigation Plan”), 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.

*Order Approving Amendment to Mitigation Plan* at 5.

During the 2021 irrigation season, IGWA’s obligations were set forth in six documents, collectively referred to herein as the “Mitigation Plan,” which were admitted by stipulation at the hearing held February 8, 2023:

- (1) the SWC-IGWA Agreement (Exhibit 1);
- (2) the A&B-IGWA Agreement (Exhibit 4);
- (3) the First Addendum (Exhibit 2);
- (4) the Order Approving Mitigation Plan (Exhibit 36);
- (5) the Second Addendum (Exhibit 3); and
- (6) the Order Approving Amendment to Mitigation Plan (Exhibit 37).<sup>4</sup>

#### **B. IGWA’s 2021 breach of the Mitigation Plan.**

On April 1, 2022, IGWA’s counsel sent *IGWA’s 2021 Performance Report* to representatives of the SWC and the Department.

On May 18, June 27, and July 13, 2022, the joint SWC/IGWA steering committee referenced in the SWC-IGWA Agreement, and the Second Addendum met to review technical information, including *IGWA’s 2021 Performance Report*.

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<sup>4</sup> Rule 43.02 of the Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11) (“CM Rules”) states that upon receiving a proposed mitigation plan the Director will “consider the plan under the procedural provisions of Section 42-222, Idaho Code . . . .” Idaho Code § 42-222 states that the Director shall “examine all the evidence and available information and shall approve the change in whole, or in part, or *upon conditions*, provided no other water rights are injured thereby. . . .” (emphasis added). Accordingly, the Director can approve a mitigation plan “upon conditions.” The Director imposed conditions of approval in his Order Approving Mitigation Plan and Order Approving Amendment to Mitigation Plan and those conditions became part of the Mitigation Plan.

On July 21, 2022, the SWC filed *Surface Water Coalition's Notice of Steering Committee Impasse / Request for Status Conference* ("Notice"). In the Notice, the SWC alleged IGWA's members failed to reduce total ground water diversions by 240,000 ac-ft in 2021 as mandated under the Mitigation Plan. *Notice* at 2–3. The SWC further advised that the allegations of noncompliance were reviewed by the steering committee as required by the Mitigation Plan, that the SWC and IGWA disagreed on whether there was a breach, and that the Steering Committee was at an impasse. *Id.* at 3–4.

On July 26, 2022, the Director granted 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"). In the Response, IGWA argued there was no breach in 2021 because each IGWA member met its proportionate share of the 240,000 ac-ft. reduction obligation. *Response* at 4–5. This conclusion, however, was based on IGWA's contention that the annual reduction obligation was measured on a five-year rolling average and that A&B and Southwest Irrigation District ("Southwest") were each responsible for a portion of the 240,000 ac-ft. reduction. *Id.*

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

On August 5, 2022, the Director held a status conference and advised the parties that, in the event of a breach, section 2.c.iv of the *Second Addendum* required him to "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 raised two new procedural arguments. First, IGWA argued 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 argued that, if the Director finds a breach of the Mitigation Plan, he must provide the breaching party with 90 days' notice and an opportunity to cure. *Id.* at 8–9.

### C. Stipulated Remedy.

On September 7, 2022, the SWC and IGWA executed another settlement agreement (“Remedy Agreement”). The Remedy Agreement addressed the breach alleged in the SWC’s notice and sought to ensure that “the Director d[id] not curtail certain IGWA members during the 2022 irrigation season.” *Remedy Agreement* ¶ E. To accomplish this, the parties stipulated:

**2021 Remedy.** As a compromise to resolve the parties’ dispute over IGWA’s compliance with the [SWC-IGWA] 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 [SWC-IGWA] 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 [SWC-IGWA] Agreement for 2021 only.

*Id.* § 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 reduction 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.* Additionally, both parties waived their right to appeal the stipulated remedy. *Id.*

On September 8, 2022, the Director issued a *Final Order Regarding Compliance with Approved Mitigation Plan* (“Compliance Order”), wherein the Director concluded that certain IGWA members breached the Mitigation Plan during the 2021 irrigation season and approved the parties’ Remedy Agreement as an appropriate contingency in lieu of curtailment for the breach. *Compliance Order* at 13–16.

### D. Post Compliance Order Filings.

On September 22, 2022, IGWA timely filed a *Petition for Reconsideration and Request for Hearing* requesting that the Director amend the Compliance Order to “withdraw those parts . . . that adjudicate IGWA’s contractual obligations under the [SWC-IGWA] Agreement . . .” or

in the alternative, set the matter for a merits hearing. *IGWA's Pet. for Reconsideration and Hearing* at 7.<sup>5</sup>

On October 13, 2022, the Director issued an order granting IGWA's request for a hearing. *Order Grant'g Req. for Hr'g; Notice of Prehr'g Conf.* at 1–2. The Director concluded IGWA's petition for reconsideration was moot since the Director was granting IGWA's request for a hearing. *Id.* at 2. The Director also set a prehearing conference for November 10, 2022. *Id.*

The prehearing conference was held as scheduled on November 10, 2022. On December 7, 2022, the Director issued an order scheduling a three-day hearing for February 8–10, 2023. *Order Authorizing Disc.; Notice of Hr'g* at 1–2.

On November 30, 2022, the Director issued the *Final Order Establishing 2022 Reasonable Carryover (Methodology Step 9)* (“2022 Step 9 Order”) in the SWC delivery call matter (Docket No. CM-DC-2010-001). The 2022 Step 9 Order gave ground water users 14 days to establish their ability to mitigate for their proportionate share of the reasonable carryover shortfall. *2022 Step 9 Order* at 6. On December 14, 2022, the Director issued the *Final Order Curtailing Ground Water Rights Junior to May 31, 1989* (“2022 Curtailment Order”). The 2022 Curtailment Order curtailed ground water users junior to May 31, 1989, who failed to establish their ability to mitigate for their share of the reasonable carryover shortfall. *2022 Curtailment Order* at 3. This curtailment order remains in place today.

On December 21, 2022, the SWC filed a *Motion for Summary Judgment* and a *Memorandum in Support of Motion for Summary Judgment* (“SWC Memorandum”). The SWC argued an evidentiary hearing was unnecessary and further argued the Director should grant summary judgment because no material facts were in dispute. *SWC Memorandum* at 5. The SWC framed the issue solely as a contract interpretation inquiry. *Id.* at 10.

On January 4, 2023, IGWA filed its *Response in Opposition to SWC's Motion for Summary Judgment* (“Response to SWC Motion”). IGWA argued a hearing was required because the *SWC-IGWA Agreement* was ambiguous and that it was entitled to a hearing pursuant to Idaho Code § 42-1701(A)(3). *Response to SWC Motion* at 11.

Also on January 4, 2023, the Bonneville-Jefferson Ground Water District (“BJGWD”) filed a *Petition to Intervene* (“BJGWD's Petition”) and a *Response in Opposition to SWC's Motion for Summary Judgment* (“BJGWD's Response to SWC Motion”). BJGWD requested intervention “to preserve and not waive certain legal arguments and defenses not raised in IGWA's Response Brief.” *BJGWD's Petition* at 1–2. More specifically, BJGWD sought intervention to raise a variety of breach of contract defenses, including unjust enrichment, legal impracticality, unclean hands, and lack of damages. *BJGWD's Response to SWC Motion* at 3–8.

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<sup>5</sup> In addition to requesting a hearing with the Department, on October 24, 2022, IGWA also filed a *Petition for Judicial Review* on October 24, 2022. See *IGWA v. Idaho Dep't of Water Res.*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho). The district court dismissed IGWA's petition for lack of jurisdiction on December 8, 2022.

On January 9, 2023, the SWC filed its *Opposition to Bonneville-Jefferson Ground Water District’s Motion to Intervene / Motion to Strike Response*.

On January 11, 2023, the SWC filed its *Reply in Support of Summary Judgment Motion*.

On January 17, 2023, BJGWD filed its *Reply and Objection to SWC’s Opposition to Bonneville-Jefferson Ground Water District’s Motion to Intervene / Motion to Strike*.

On January 25, 2023, IGWA’s counsel of record filed a *Notice of Conditional Withdrawal of Representation of Bonneville-Jefferson Ground Water District*.

On January 27, 2023, the Director issued an *Order Denying SWC’s Motion for Summary Judgement & Conditionally Granting BJGWD’s Petition to Intervene*.

#### **E. Hearing on February 8, 2023.**

The hearing IGWA requested began on February 8, 2023. The hearing was scheduled for three days but took only one. Thirty-nine common exhibits were admitted by stipulation (Exhibits 1–39).<sup>6</sup> IGWA introduced seven additional exhibits, marked as Exhibits 101, 107, 109, 114, 118, 119, and 120. The SWC introduced two exhibits, marked as Exhibits 200 and 201. IGWA called two witnesses, Jaxon Higgs and Timothy Deeg. Mr. Higgs is a professional geologist, has a master’s degree in hydrology, and is a consultant for IGWA. Mr. Deeg was the Chairman of IGWA’s Board for over twenty years. Mr. Deeg is also the Director of the Aberdeen-American Falls Groundwater District.

Neither the SWC nor BJGWD called any witnesses. At the conclusion of the hearing, BJGWD moved to adopt IGWA’s arguments. All parties waived post-hearing briefing.

#### **FINDINGS OF FACT**

1. The SWC-IGWA Agreement mandates that “[t]otal ground water diversions shall be reduced by 240,000 ac-ft annually.” *SWC-IGWA Agreement* § 3.a.i.
2. All members of the SWC except for A&B Irrigation District executed the SWC-IGWA Agreement. *A&B-IGWA Agreement* at 1.
3. The A&B-IGWA Agreement states in pertinent part that “A&B agrees to participate in the [SWC-IGWA] Agreement as a surface water right holder only. The obligations of Ground Water Districts set forth in Paragraphs 2-4 of the [IGWA-SWC] Settlement Agreement do not apply to A&B and its ground water rights.” *A&B-IGWA Agreement* ¶ 2.
4. Southwest Irrigation District (“Southwest”) did not sign the SWC-IGWA Agreement or any of the subsequent addendums. *SWC-IGWA Agreement* at 25.

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<sup>6</sup> Among these were IGWA’s 2021 Performance Report (Exhibit 20) and summation of IGWA’s 2021 Report (Exhibit 27).

5. The Order Approving Mitigation Plan approved the SWC-IGWA Agreement as a mitigation plan subject to the following conditions:

- a. All ongoing activities required pursuant to the Mitigation Plan *are the responsibility of the parties to the Mitigation Plan.*
- b. The ground water level goal and benchmarks referenced in the Mitigation Plan *are applicable only to the parties to the Mitigation Plan.*

*Order Approving Mitigation Plan* at 4 (emphasis added).

6. No party sought judicial review of the Order Approving Mitigation Plan.

7. The Second Addendum articulates the process by which the Steering Committee is to address alleged breaches, and further states that, if the parties cannot agree whether a breach had occurred, the Director is tasked with resolving the dispute and fashioning a remedy. *Second Addendum* § 2.c.iii-iv.

8. Section 2.a.i. of the Second Addendum required IGWA to annually submit to the Steering Committee its diversion and recharge data from the previous irrigation season. IGWA submitted the data each year from 2016 through 2021. *Compare id.* § 2.a.i., with IGWA’s Performance Reports [2016-2021], Exs. 15–20.

9. The Order Approving Amendment to Mitigation Plan approved 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.

*Order Approving Amendment to Mitigation Plan* at 5.

10. The *Second Final Order* further states that “[t]he parties to the Mitigation Plan should be responsible for these activities and *the ground water level goal and benchmarks are only applicable to the parties to the Mitigation Plan as specified in the Mitigation Plan.*” *Id.* at 4 (emphasis added).

11. No party sought judicial review of the Second Final Order.

12. On April 1, 2022, IGWA’s sent its 2021 Performance Report to the SWC and the Department. IGWA’s 2021 Performance Reports, Ex. 20.



13. A spreadsheet included in the 2021 Performance Report summarizes IGWA’s, A&B’s, and Southwest’s mitigation efforts during 2020. 2020 Performance Summary Table, Ex. 26. IGWA’s summary spreadsheet is reproduced as Table 1 below. Important to the Director’s consideration here, IGWA apportioned A&B and Southwest a share of the 240,000 ac-ft reduction obligation.

**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 <sup>1</sup>	5,391	73,539	65,323	8,216	3,000	15,189	9,798
Madison <sup>2</sup>		81,423	77,449	3,973			
Magic Valley	32,462	256,270	231,474	24,795	10,546	35,341	2,879
North Snake <sup>3</sup>	25,474	208,970	194,778	14,192	11,301	25,494	20
A&B <sup>4</sup>	21,660	-	-	-	-	21,660	0
Southwest ID <sup>4</sup>	12,943	-	-	-	-	12,943	0
<b>Total:</b>	<b>240,000</b>	<b>1,787,604</b>	<b>1,730,652</b>	<b>56,953</b>	<b>65,831</b>	<b>157,387</b>	<b>-82,613</b>
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.							

14. Table 2 illustrates IGWA’s 2020 Performance Summary Table with yellow highlighted columns added by the Director. The “Re-proportioning” column in Table 2 redistributes the 34,603 ac-ft IGWA assigned to A&B and Southwest. The yellow highlighted “Target Conservation” column evidences the reduction obligations of each IGWA member after the 34,603 ac-ft were re-proportioned to IGWA members who were parties to the Mitigation Plan.

**Table 2:**

2021 Performance Summary Table												
	IGWA	[IGWA] Target	Re-	Target							[IGWA] 2021	2021
	Proportioning	Conservation	proportioning	Conservation	Baseline	2021 Usage	Diversion	Accomplished	Total	Conservation	Mitigation	Mitigation
							Reduction	Recharge			Balance	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 <sup>1</sup>	2.2%	5,391	2.6%	6,299	73,539	65,323	8,216	3,000	15,189	9,798	8,890	
Madison <sup>2</sup>					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 <sup>3</sup>	10.6%	25,474	12.4%	29,765	208,970	194,778	14,192	11,301	25,494	20	-4,272	
A&B <sup>4</sup>	9.0%	21,660	--	--	-	-	-	-	21,660	0	--	
Southwest ID <sup>4</sup>	5.4%	12,943	--	--	-	-	-	-	12,943	0	--	
<b>Total:</b>	<b>100%</b>	<b>240,000</b>	<b>100%</b>	<b>240,000</b>	<b>1,787,604</b>	<b>1,730,652</b>	<b>56,953</b>	<b>65,831</b>	<b>157,387</b>	<b>-82,613</b>	<b>-117,216</b>	
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.												

15. The spreadsheets summarizing IGWA’s performance from 2016 to 2021 do not include diversion reduction data for A&B or Southwest. [2017-2022] Settlement Agreement Performance Report Spreadsheet, Exs. 22–27.

16. Despite the lack of diversion reduction data in its 2022 Performance Report, IGWA nevertheless assigned A&B a reduction target of 21,660 ac-ft and Southwest a reduction target of 12,943 ac-ft—a reduction of 14.4% or 34,603 ac-ft. 2022 Settlement Agreement Performance Report Spreadsheet, Ex. 27; see also supra Tables 1 & 2.

17. When A&B and Southwest are collectively apportioned 34,603 ac-ft of IGWA’s conversation obligation, IGWA were 82,613 ac-ft short of its reduction obligation in 2021. 2022 Settlement Agreement Performance Report Spreadsheet, Ex. 27; see also supra Tables 1 & 2.

18. When A&B and Southwest are not apportioned 34,603 ac-ft, IGWA were 117,216 ac-ft short of its reduction obligation in 2021. See supra Table 2.

19. Based on the analysis in Table 2, American Falls-Aberdeen, Bingham, BJJWD, Jefferson-Clark, Magic Valley, and North Snake failed to satisfy their respective reduction requirements in 2021.

20. Seeking to avoid curtailment, IGWA and the SWC signed and submitted the Remedy Agreement, which requires IGWA to “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.” *Remedy Agreement* at 2.

21. The parties affirmatively waived their rights to appeal the stipulated remedy. *Remedy Agreement* ¶3, at 2–3.

22. On February 8, 2023, a hearing was held during which IGWA called two witnesses: Jaxon Higgs, a professional geologist with a master’s degree in hydrology and a IGWA consultant; and Timothy Deeg, who served as chairman of IGWA’s Board for 22 years and is currently IGWA’s Treasurer.

23. Mr. Higgs testified that in addition to IGWA, he also served as a consultant for Southwest.

24. Referencing the SWC-IGWA Agreement, Mr. Higgs admitted that while Southwest was listed as an IGWA member in a footnote, he was aware Southwest had never signed the SWC-IGWA Agreement. *See SWC-IGWA Agreement* at 22.

25. Mr. Higgs testified that Southwest did not sign the SWC-IGWA Agreement because it already had an interim agreement with the SWC and was waiting to finalize a long-term agreement with the SWC once the IGWA-SWC Agreement was finalized.

26. Mr. Higgs testified that Southwest has been performing under the separate agreement it entered with the SWC.

27. Mr. Deeg testified that he was involved in negotiating the SWC-IGWA Agreement but admitted that, with hindsight, the SWC-IGWA Agreement could have been written with greater specificity.

28. Mr. Higgs testified that he was not involved in negotiating the SWC-IGWA Agreement but did assist IGWA in implementing the SWC-IGWA Agreement.

29. Mr. Higgs testified that he began working with IGWA in the summer of 2015, and at that time, IGWA had not yet determined how the SWC-IGWA Agreement’s reduction obligation would be apportioned.

30. Referencing IGWA’s Exhibit 107, Mr. Higgs testified that he presented information to IGWA’s Board in July of 2015 concerning how to apportion the reduction requirements among the various districts, and that during that presentation, he apportioned A&B and Southwest a percentage of the 240,000 ac-ft. *See Ex. 107* at 10.

31. Mr. Higgs also testified that, in September of 2015, the Department presented information to various ground water districts, and at that time, IGWA had not yet determined how to apportion the 240,000 ac-ft reduction. *See Ex. 109* ¶7, at 2.

32. Mr. Higgs testified that he chose to apportion A&B and Southwest a share of the 240,000 ac-ft. because they are ground water pumpers in the ESPA, and he assumed A&B and Southwest were required to contribute to the 240,000 ac-ft reduction obligation.

33. Mr. Higgs conceded, however, that there were other ESPA ground water users, for which he did not apportion a share of the 240,000 ac-ft reduction requirement.

34. Mr. Deeg also testified that it was his opinion the 240,000 would be apportioned among all ESPA groundwater users, not just IGWA members, and that the possibility some ground water users might not be included in the 240,000 ac-ft obligation was a real “sore spot” among some ground water districts.

35. Mr. Higgs also admitted that the SWC-IGWA Agreement did not specifically articulate how the 240,000 ac-ft obligation would be apportioned.

36. Mr. Higgs further conceded that, while he was not tasked with interpreting the SWC-IGWA Agreement, the SWC-IGWA Agreement did not specifically state that IGWA would only be responsible for 205,000 ac-ft of reductions.

37. Mr. Higgs also admitted that the SWC-IGWA Agreement did not specifically authorize averaging.

38. Mr. Deeg likewise testified that the SWC-IGWA Agreement did not specify how the 240,000 ac-ft reduction obligation would be apportioned.

39. Mr. Deeg also testified that while his ground water district (Aberdeen-American Falls) allowed individual users to average their respective reduction requirements over a four-year period, the District itself did not average its yearly reduction obligation.

40. Mr. Higgs also conceded that, to his knowledge, the SWC had never agreed with IGWA’s contention that A&B and Southwest were responsible for a portion of the 240,000 ac-ft reduction obligation.

41. Mr. Higgs admitted knowing that the SWC had repeatedly objected to IGWA’s attempts to assign A&B and Southwest a portion of the 240,000 ac-ft reduction requirement. *See* April 14, 2017 Letter from SWC’s Counsel to IGWA’s counsel, Ex. 200; April 20, 2017 Letter from IGWA’s Counsel to SWC’s Counsel, Ex. 201.

42. Mr. Higgs also conceded he did not adjust his calculations concerning IGWA’s reduction obligations after the Director issued the Order Approving Mitigation Plan; indeed, Mr. Higgs conceded he never read the Director’s Order approving the Mitigation Plan.

43. Neither Mr. Higgs nor Mr. Deeg testified that the Order Approving Mitigation Plan or the Order Approving Amendment to Mitigation Plan were ambiguous or otherwise unclear concerning the apportionment of the 240,000 ac-ft reduction obligation.

## ANALYSIS AND CONCLUSIONS OF LAW

### A. The Mitigation Plan unambiguously requires IGWA to conserve 240,000 ac-ft each year—meaning averaging is prohibited.

The interpretation of a settlement agreement 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 and requires viewing the contract as a whole and in its entirety. *Clear Lakes Trout Co. v. Clear Springs Foods, Inc.*, 141 Idaho 117, 120, 106 P.3d 443, 446 (2005). “The meaning of an unambiguous contract should be determined from the plain meaning of the words.” *Id.* “Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact.” *Porcello v. Est. of Porcello*, 167 Idaho 412, 421, 470 P.3d 1221, 1230 (2020) (internal citations and quotations omitted). “Only when the language is ambiguous, is the intention of the parties determined from surrounding facts and circumstances.” *Clear Lakes Trout Co.*, 141 Idaho at 120.

Here, the *SWC-IGWA Agreement* states that the “[t]otal ground water diversion shall be reduced by 240,000 ac-ft annually.” *SWC-IGWA Agreement* § 3.a.i. (Emphasis added). IGWA contends the term “annually” is ambiguous because it “does not prescribe how annual groundwater conservation will be measured[.]” *IGWA’s Resp. in Opp. to SWC’s Mot. for Summ. J.* at 7. IGWA further contends that the 240,000 ac-ft conservation requirement is based on a multi-year rolling average. *Id.* at 7–10. Were IGWA’s argument to prevail, IGWA’s failure to conserve 240,000 ac-ft in one year would not necessarily constitute a breach of § 3.a.i. as the reduction obligation deficit could be recouped by reducing more than 240,000 ac-ft in other years. The Director rejects IGWA’s arguments because they are contrary to the plain and unambiguous language of the Mitigation Plan.

First, the term “annually” is unambiguous. 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); *see also* Black’s Law Dictionary 58 (6<sup>th</sup> ed. 1991) (The term annually means “[i]n 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.”). Accordingly, the phrase “shall be reduced by 240,000 ac-ft annually” unambiguously requires IGWA to reduce ground water diversions by 240,000 ac-ft each and every year. *Clear Lakes*, 141 Idaho at 120, 106 P.3d at 446.

This understanding is reinforced by how the word “annually” is used in other provisions of the Mitigation Plan. For example, § 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 complied with this requirement each and every year. *See* IGWA’s 2016-2021 Performance Reports & Summaries, Exs. 15–20, 22–27.

To support its averaging argument, IGWA points to § 3.e.iv of the SWC-IGWA Agreement which 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). The problem with IGWA’s argument is that § 3.e.iv. simply states that a five-year rolling average will be used to determine whether IGWA has achieved the *ground water level goal* in § 3.e. Section 3.e.iv does not state or imply that IGWA’s 240,000 ac-ft *annual reduction obligation* found in § 3.a can be averaged over multiple years. To the contrary, the fact that § 3.e.iv references a five-year rolling average actually cuts against IGWA’s argument, as it demonstrates the parties knew how to draft a rolling-average provision had they intended § 3.a.i. to include one.

IGWA also argues its 240,000 ac-ft reduction should be averaged because IGWA used averaging to set its so-called “baseline.” *IGWA’s Resp. in Opp. to SWC’s Mot. for Summ. J.* at 7. Yet IGWA concedes its averaging process was not described or mandated in the SWC-IGWA Agreement. *Id.* at 9. The fact that IGWA chose to employ averaging when establishing a baseline so that it could apportion the 240,000 ac ft obligation among its members did not amend the SWC-IGWA Agreement’s unambiguous requirement that IGWA conserve 240,000 ac ft *annually*.

IGWA also contends it should be allowed to employ averaging because it conserves more than 240,000 ac-ft during cool wet years, meaning it should be allowed to conserve less in hot and dry years. *Id.* at 8–9. The fact that IGWA may conserve more than 240,000 ac-ft in cool wet years does not change its unambiguous obligation to conserve 240,000 ac-ft *annually*. Nor has IGWA pointed to any language in the Mitigation Plan authorizing this type of surplus & deficit accounting.

In sum, averaging is not permitted because the SWC-IGWA Agreement unambiguously requires IGWA to conserve 240,000 ac-ft each and every year.

**B. The Mitigation Plan unambiguously prohibits IGWA from apportioning A&B and Southwest a percentage of its annual reduction obligation.**

IGWA next asserts that the 240,000 ac-ft. reduction requirement under § 3.a.i. is not IGWA’s responsibility alone, but rather a shared responsibility amongst all groundwater users in the ESPA, including A&B and Southwest. *IGWA’s Resp. in Opp. to SWC’s Mot. for Summ. J.* at 4–6. Were IGWA’s argument to prevail, IGWA members who signed the Mitigation Plan would only be required to annually conserve 205,397 ac-ft—not 240,000 ac-ft—a reduction of 14.4% or 34,603 ac-ft. IGWA’s 2021 Performance Summary, Ex. 27.

To buttress this position, IGWA points to § 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’s Resp. in Opp. to SWC’s Mot. for Summ. J.* at 4–5. IGWA argues that because A&B and Southwest pump groundwater in the ESPA, they must share in the 240,000 ac-ft reduction obligation. *Id.*

IGWA’s focus on § 3.ii of the SWC-IGWA Agreement is misguided. In construing a written instrument, the court must start with the language of the contract itself and requires

viewing the contract as a whole and in its entirety. *Clear Lakes Trout Co.*, 141 Idaho at 120. The court must “give meaning to all the provisions of the writing to the extent possible.” *Magic Valley Radiology Assocs., P.A. v. Pro. Bus. Servs., Inc.*, 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991). In this case, § 6 of the SWC-IGWA Agreement specifically states it does not cover non-participants: “Any ground water user not participating in this Settlement Agreement or otherwise hav[ing] another approved mitigation plan will be subject to administration.” *SWC-IGWA Agreement* § 6. Southwest never signed the SWC-IGWA Agreement, and A&B participated in the Mitigation Plan only as a member of the SWC: “A&B agrees to participate in the [SWC-IGWA] Settlement Agreement as a surface water right holder only. The obligations of Ground Water Districts set forth in Paragraphs 2-4 of the [IGWA-SWC] Settlement Agreement do not apply to A&B and its ground water rights.” *A&B-IGWA Agreement* ¶ 2.

Additionally, § 2.d.i. of the Second Addendum states that “[t]he terms of the Settlement and the Director’s Final Order approving the same as a mitigation plan” will control and satisfy any mitigation obligations. Both the Director’s Order Approving Mitigation Plan and Order Approving Amendment to Mitigation Plan are unequivocal that “[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibilities of the parties to the Mitigation Plan,” and that “[t]he ground water level goal and benchmarks referenced in the Mitigation Plan are applicable only to the parties to the Mitigation Plan.” *Order Approving Mitigation Plan* at 4; *Order Approving Amendment to Mitigation Plan* at 2.

In sum, the Mitigation Plan—when read as a whole and in its entirety—unambiguously excludes any ground water user that is not a party to the agreement from any obligation related to the annual 240,000 ac ft reduction target. The Mitigation Plan requires IGWA members alone to conserve 240,000 ac-ft each and every year. *Clear Lakes Trout Co.*, 141 Idaho at 120.

### **C. IGWA’s latent ambiguity argument also fails.**

IGWA argues in the alternative that the SWC-IGWA Agreement is latently ambiguous concerning whether IGWA alone is responsible for reducing 240,000 ac-ft. *IGWA’s Resp. in Opp. to SWC’s Mot. for Summ. J.* at 6–10. More specifically, IGWA contends a latent ambiguity exists concerning the 240,000 ac-ft reduction obligation under § 3.ii because the SWC-IGWA Agreement failed to explain how each district’s proportionate share of the 240,000 ac-ft reduction requirement would be calculated. *Id.* at 7.

“A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist.” *Porcello v. Est. of Porcello*, 470 P.3d 1221, 167 Idaho 412, 424 (2020) (internal citation and quotations omitted). To determine whether a latent ambiguity exists, the written instrument must be examined along with “other writings incorporated into the instrument” to determine whether an ambiguity exists and the reasonableness of the alternative meanings suggested by the parties. *Sommer, LLC*, 511 P.3d at 845. A latent ambiguity must be tethered to language in the written instrument. *Porcello*, 167 Idaho at 424. Parole evidence may be considered to “determine whether *language within the instrument* is reasonably susceptible of more than one meaning.” *Sommer*, 511 P.3d at 845 (emphasis in original).

The flaw in IGWA’s argument is that not every phrase in a contract must be defined, nor is a contract rendered ambiguous by an undefined term. *Mut. Of Enumclaw v. Wilcox*, 123 Idaho 4, 8, 843 P.2d 154, 158 (1992). The SWC-IGWA Agreement is not ambiguous merely because it failed to articulate how IGWA must apportion the 240,000 ac-ft among its members. The absence of apportionment instructions does not substantiate IGWA’s claim that it “reasonably accounted for diversions from A&B and Southwest in determining each of the signatory districts’ proportionate groundwater conservation obligations.” *IGWA’s Resp. In Opp. to Summ. J.* at 7.

Section 6 of the SWC-IGWA Agreement expressly states that “[a]ny ground water user not participating in this Settlement Agreement or otherwise hav[ing] another approved mitigation plan will be subject to administration.” *SWC-IGWA Agreement* § 6. IGWA’s Agreement with A&B was likewise explicit that “A&B agrees to participate in the [SWC-IGWA] Settlement Agreement as a surface water right holder only. The obligations of Ground Water Districts set forth in Paragraphs 2-4 of the [IGWA-SWC] Settlement Agreement *do not apply to A&B* and its ground water rights.” *A&B-IGWA Agreement* ¶ 2 (emphasis added). Additionally, the Director’s orders approving the first and second mitigation plans clearly stated that “[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibilities of the parties to the Mitigation Plan.” *Order Approving Mitigation Plan* at 4; *Order Approving Amendment to Mitigation Plan* at 2.

IGWA offered neither evidence nor argument that the Mitigation Plan—when read as a whole and in its entirety—was ambiguous concerning IGWA’s obligation to conserve 240,000 ac-ft. IGWA’s own witnesses undermined IGWA’s latent ambiguity argument. For example, Mr. Higgs testified that IGWA was aware that A&B and Southwest each agreed to separate settlements with the SWC. Mr. Higgs also testified that he did not adjust his calculations in 2016 after the Director issued his Order Approving Mitigation Plan, which was explicit that “[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibilities of the parties to the Mitigation Plan.” *Order Approving Mitigation Plan* at 4; *see also* Higgs Test..

The plain reading of the six documents that make up the Mitigation Plan renders IGWA’s latent ambiguity argument untenable.

#### **D. 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 ac-ft. every year. *SWC-IGWA Agreement* § 3.a.

Based on Table 2 as shown in Finding of Fact 14 above, Madison Ground Water District, Fremont Madison Irrigation District, and Carey Ground Water District satisfied their proportionate 2021 mitigation obligations in 2021 and would not be subject to curtailment. *See SWC-IGWA Agreement* § 3.a.ii (Each member “shall be responsible for reducing their proportionate share . . .”). Based on the analysis in Table 2, Table 3 below 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:**

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

**E. 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 a curtailment order.

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 reduce total diversions or recharge the equivalent of 240,000 ac-ft 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 users 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. Nevertheless, 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 ac-ft reduction obligation, but the plan 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.

The parties affirmatively waived their rights to appeal the stipulated remedy. *Remedy Agreement* ¶3, 2–3. Neither party challenged the remedy at hearing.

#### **F. IGWA's procedural and evidentiary objections lack merit.**

The primary issues discussed at hearing were the issues of averaging and whether A&B and Southwest were to be included in the reduction calculation. However, prior to the hearing, IGWA raised a handful of procedural and evidentiary objections in connection with this matter. The Director stands by the analysis in the Compliance Order and adopts, by reference, the discussion in Section 5 of the Compliance Order. See *IGWA v. Idaho Dep't of Water Res.*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho).

## ORDER

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

1. 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 SWC-IGWA 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.
2. Except as necessary to implement paragraph 2 above, nothing in this order alters or amends the parties' Mitigation Plan or any condition in the Director's Order Approving Mitigation Plan or Order Approving Amendment to Mitigation Plan.
3. Failure to comply with the Mitigation Plan may result in curtailment.

DATED this 24th day of April 2023.

  
GARY SPACKMAN  
Director

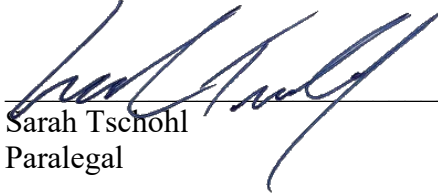
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of April 2023, the above and foregoing was served by the method indicated below and addressed to the following:

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Sarah Tschohl  
Paralegal

## **EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER**

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
  - (a) The petition for reconsideration is disposed of; or
  - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.



(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, 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.

### **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: a) of 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.