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RECEIVED

Feb 12, 2024

DEPARTMENT OF
WATER RESOURCES

*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company, and Twin Falls
Canal Company*

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF
WATER TO VARIOUS WATER RIGHTS
HELD BY OR FOR THE BENEFIT OF
A&B IRRIGATION DISTRICT,
AMERICAN FALLS RESERVOIR
DISTRICT #2, BURLEY IRRIGATION
DISTRICT, MILNER IRRIGATION
DISTRICT, MINIDOKA IRRIGATION
DISTRICT, NORTH SIDE CANAL
COMPANY, AND TWIN FALLS CANAL
COMPANY

Case No. CM-MP-2016-001

**DECLARATION OF TRAVIS L.
THOMPSON IN SUPPORT OF
SURFACE WATER COALITION'S
MOTION FOR SUMMARY JUDGMENT**

IN THE MATTER OF IGWA'S
SETTLEMENT AGREEMENT
MITIGATION PLAN

I, Travis L. Thompson, declare as follows:

1. I am duly licensed to practice law in the State of Idaho, and I am an attorney with the firm of Marten Law LLP. I am over the age of 18 and make this declaration based

upon my personal knowledge. I am an attorney representing A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company in this matter.

2. Attached hereto as Exhibit A is a true and correct copy of the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order*, March 9, 2016.
3. Attached hereto as Exhibit B is a true and correct copy of the *Final Order Approving Stipulated Mitigation Plan*, May 2, 2016.
4. Attached hereto as Exhibit C is a true and correct copy of the *Surface Water Coalition's and IGWA's Stipulated Amended Mitigation Plan and Request for Order*, February 7, 2017.
5. Attached hereto as Exhibit D is a true and correct copy of the *Final Order Approving Amendment to Stipulated Mitigation Plan*, May 9, 2017.
6. Attached hereto as Exhibit E is a true and correct copy of the *Coalition of Cities et al. Joint Mitigation Plan*, February 25, 2019 (CM-MP-2019-001).
7. Attached hereto as Exhibit F is a true and correct copy of the *Response to Request for Status Conference, Notice of Status Conference*, May 5, 2022.
8. Attached hereto as Exhibit G is a true and correct copy of the *Final Order Regarding Compliance with Approved Mitigation Plan*, September 8, 2022.
9. Attached hereto as Exhibit H is a true and correct copy of the *Settlement Agreement*, September 7, 2022.
10. Attached hereto as Exhibit I is a true and correct copy of the *Memorandum Decision and Order on Petition for Judicial Review*, Rangen, Inc. v. IDWR, Twin Falls County,

Case No. CV-2014-2446 (Idaho 5th Dist. Ct. 2015), December 3, 2014.

11. Attached hereto as Exhibit J is a true and correct copy of the *Amended Final Order Regarding Compliance with Approved Mitigation Plan*, April 24, 2023.
12. Attached hereto as Exhibit K is a true and correct copy of the *Letter to the Director Regarding Impasse on IGWA's 2022 Mitigation Report*, April 13, 2023.
13. Attached hereto as Exhibit L is a true and correct copy of the *Final Order Regarding IGWA's 2022 Mitigation Plan Compliance*, August 2, 2023.

I declare under penalty of perjury under the laws of the state of Idaho that the foregoing is true and correct to the best of my knowledge.

RESPECTFULLY submitted this 12th day of February, 2024.

MARTEN LAW LLP



Travis L. Thompson

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2024, I served a true and correct copy of the foregoing *Declaration of Travis L. Thompson in Support of Surface Water Coalition's Motion for Summary Judgment* on the following by the method indicated:

<p>Hearing Officer Roger S. Burdick Garrick Baxter Sarah Tschohl State of Idaho Dept. of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail roburd47@gmail.com garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov file@idwr.idaho.gov</p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only mhoward@usbr.gov</p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only tony.olenichak@idwr.idaho.gov</p>
<p>T.J. Budge Elisheva Patterson Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only tj@racineolson.com elisheva@racineolson.com</p>	<p>Sarah A. Klahn Max C. Bricker Veva Francisco Somach Simmons & Dunn 2033 11th St., Ste. 5 Boulder, CO 80302 *** service by electronic mail only sklahn@somachlaw.com mbricker@somachlaw.com vfrancisco@somachlaw.com</p>	<p>David Gehlert ENRD – DOJ 999 18th St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only david.gehlert@usdoj.gov</p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only rdiehl@pocatello.us</p>	<p>William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only wparsons@pmt.org</p>	<p>Corey Skinner IDWR – Southern Region 650 Addison Ave W, Ste. 500 Twin Falls, ID 83301-5858 *** service by electronic mail only corey.skinner@idwr.idaho.gov</p>
<p>W. Kent Fletcher Fletcher Law Offices P.O. Box 248 Burley, ID 83318 *** service by electronic mail only wkf@pmt.org</p>	<p>Kathleen Carr U.S. Dept. Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway, Ste. 400 Boise, ID 83706 *** service by electronic mail only kathleenmarion.carr@sol.doi.gov</p>	<p>Candice McHugh Chris M. Bromley McHugh Bromley, PLLC 380 South 4th Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>
<p>Robert E. Williams Williams, Meservy & Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only rewilliams@wmlattys.com</p>	<p>Robert L. Harris Holden, Kidwell, Hahn & Crapo, PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only rharris@holdenlegal.com</p>	<p>Michael A. Kirkham City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only mirkham@idahofallsidaho.gov</p>

<p>Skyler Johns Steven Taggart Nathan Olsen Olsen Taggart PLLC P.O. Box 3005 Idaho Falls, ID 83403 *** service by electronic mail only sjohns@olsentaggart.com staggart@olsentaggart.com nolsen@olsentaggart.com</p>	<p>Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, ID 83440 *** service by electronic mail only dylan@dylanandersonlaw.com</p>	
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/s/ Travis L. Thompson
Travis L. Thompson

Exhibit

A

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Irrigation District*

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION
OF WATER TO VARIOUS WATER
RIGHTS HELD BY AND FOR THE
BENEFIT OF A&B IRRIGATION
DISTRICT, AMERICAN FALLS
RESERVOIR DISTRICT #2, BURLEY
IRRIGATION DISTRICT, MILNER
IRRIGATION DISTRICT, MINIDOKA
IRRIGATION DISTRICT, NORTH SIDE
CANAL COMPANY, AND TWIN FALLS
CANAL COMPANY

IN THE MATTER OF IGWA'S
SETTLEMENT AGREEMENT
MITIGATION PLAN

Docket No. CM-MP-2016-_____

**Surface Water Coalition's and IGWA's
Stipulated Mitigation Plan and
Request for Order**

A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively the "Surface Water Coalition" or "SWC"), and Idaho Ground Water Appropriators, Inc. ("IGWA") hereby stipulate and move the Director to enter the proposed *Order Approving IGWA's Mitigation Plan* attached hereto as **Exhibit A** under Rule 43 of the Department's Rules for Conjunctive Management of Surface and Ground Water Resources ("CMR").

STIPULATION

1. The Eastern Snake Plain Aquifer (ESPA) supplies groundwater to approximately one million irrigated acres and to numerous cities, businesses, dairies, factories and homes; and

2. The ESPA is hydraulically connected to the Snake River and discharges to the Snake River via tributary springs, which supply surface water for multiple beneficial uses, including aquaculture, hydropower, and the irrigation of approximately one million acres; and

3. Since 1952 the total volume of water stored in the ESPA has decreased due to increasing direct diversions of ground water, increasingly efficient surface water irrigation practices, and other factors; and

4. Current ESPA water levels and total storage content, after more than six decades of decline, are inadequate to provide a reasonably safe supply of water for sustainable surface and groundwater irrigation, hydropower, aquaculture, municipal and industrial uses, the curtailment of which would cause severe economic harm to the State of Idaho

5. In 2015, historic settlement agreements, identified herein, were entered into between the following surface water right holders: A & B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company, collectively known as the Surface Water Coalition (SWC); and the following ground water right holders: Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Groundwater District, Fremont-Madison Irrigation District, Anheuser-Busch, United Water, Glanbia Foods, City of Blackfoot, City of American Falls, City of Jerome, City of Rupert, City of Heyburn, City of Paul, City of Chubbuck and City of Hazelton, collectively known as the Idaho Ground Water Appropriators, Inc.; (IGWA) for the purpose of resolving pending water delivery calls and provide for on-going management of the ESPA to address the current hydrologic conditions identified in paragraphs nos. 3 and 4;

6. Attached hereto as **Exhibits B and C** respectively are true and correct copies of 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. and Addendum to Settlement Agreement* (collectively the "SWC-IGWA Settlement Agreement").

7. Attached hereto as *Exhibit D* is a true and correct copy of the *Agreement* dated October 7, 2015 between A&B Irrigation District and the IGWA members who entered into the SWC-IGWA Settlement Agreement (the “A&B-IGWA Agreement”).

8. The parties hereby incorporate and submit the SWC-IGWA Settlement Agreement and the A&B-IGWA Agreement (collectively, the “Agreements”) as a stipulated mitigation plan in reference to the Surface Water Coalition delivery call (IDWR Docket No. CM-DC-2010-001). The Coalition stipulates that the mitigation provided by participating IGWA members under the Agreements is, provided the 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.

9. With respect to the 2015 obligation identified in the SWC-IGWA Agreement (Paragraph 2.a), on May 8, 2015, the SWC and IGWA filed the *Surface Water Coalition and IGWA Stipulation and Joint Motion Regarding April as Applied Order and Third Methodology Order* in IDWR Docket No. CM-DC-2010-0001, pursuant to which the Director entered an *Order Approving Stipulation and Granting Joint Motion* dated May 8, 2015 (“May 8, 2015 Order”).

10. IGWA fully satisfied its 2015 obligation(SWC-IGWA Settlement Agreement, Paragraph 2.a) and the May 8, 2015 Order by leasing and assigning 110,000 acre feet of storage water to the SWC through the Water District 01 Rental Pool procedures.

11. With respect to the long term obligations identified in the SWC-IGWA Agreement (Paragraph 3), IGWA is proceeding to implement those actions commencing in 2016. Participating IGWA members providing the stipulated mitigation to the SWC are not subject to curtailment under the SWC delivery call, IDWR Docket No. CM-DC-2010-001, provided actions are implemented and performed as set forth in the SWC-IGWA Settlement Agreement. Junior ground water right holders who are not protected from curtailment under the Agreements and who do not otherwise have an approved Rule 43 mitigation plan will be subject to conjunctive administration pursuant to the Director’s orders under IDWR Docket No. CM-DC-2010-001.

12. IGWA, on behalf of its participating members identified in the Agreements, stipulates and acknowledges the obligations, benchmarks and goal identified in Paragraphs 1 and 4 of the SWC-IGWA Settlement Agreement. Provided the obligations identified in the SWC-IGWA Settlement Agreement are performed, the parties stipulate this mitigation plan is effectively operating pursuant to CM Rules 40.01.b, 40.05 and 43.

13. The parties stipulate and request that the Director issue the attached Order approving the SWC-IGWA Settlement Agreement and the A&B-IGWA Agreement together as a mitigation plan under CMR 43 (“IGWA’s Settlement Agreement Mitigation Plan”).

14. Groundwater users who are not presently protected under IGWA’s Mitigation Plan may participate on an equitable basis by joining an IGWA Ground Water District or Irrigation District that entered into the SWC-IGWA Settlement Agreement and the A&B-IGWA Agreement and by complying with such District’s obligations under IGWA’s Settlement

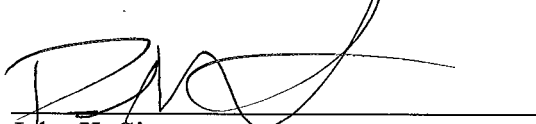
Agreement Mitigation Plan; or, secure Director approval of an individual mitigation plan which complies with CMR 43 and provides adequate mitigation to help achieve the groundwater level goal and benchmarks set forth in the SWC-IGWA Settlement Agreement.

Therefore, the parties request that the Director:

- (a) Publish notice of IGWA's 2015 Mitigation Plan in accordance with CMR 43.02; and
- (b) Approve the SWC-IGWA Settlement Agreement and the A&B-IGWA Agreement together as a complete mitigation plan under CMR 43.
- (c) Take the necessary management actions to address declining ESPA groundwater levels, water supply and sustainability issues in order that the benefits contemplated in the SWC-IGWA Settlement Agreement are realized.

DATED this ____ day of March, 2016.

BARKER ROSHOLT & SIMPSON LLP



John K. Simpson
Travis L. Thompson
Paul L. Arrington

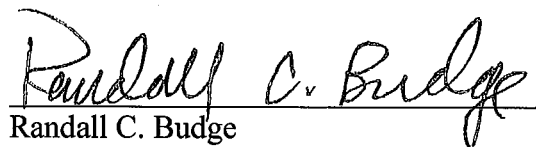
*Attorneys for A&B Irrigation District,
Burley Irrigation District, Milner Irrigation
District, North Side Canal Company, and
Twin Falls Canal Company*

FLETCHER LAW OFFICE



*Attorneys for Minidoka Irrigation
District and American Falls
Reservoir District #2*

RACINE OLSON NYE BUDGE & BAILEY, CHTD.



Attorneys for Idaho Ground Water Appropriators, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of March, 2016, I served a true and correct copy of the foregoing *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* on the following by the method indicated:

<p>Director Gary Spackman c/o Deborah Gibson State of Idaho Dept of Water Resources 322 E Front St Boise, ID 83720-0098 *** service by electronic mail</p> <p>facsimile – 208-287-6700 gary.spackman@idwr.idaho.gov v deborah.gibson@idwr.idaho.gov v</p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234</p> <p>*** service by electronic mail only</p> <p>mhoward@pn.usbr.gov emcgarry@pn.usbr.gov</p>	<p>IDWR – Eastern Region 900 N. Skyline Dr., Suite A Idaho Falls, ID 83402-1718</p> <p>*** service by electronic mail only lyle.swank@idwr.idaho.gov</p>
<p>Randy Budge T.J. Budge Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only</p> <p>rbc@racinelaw.net tjb@racinelaw.net</p>	<p>Sarah A. Klahn Mitra Pemberton White & Jankowski, LLP 511 Sixteenth Street, Suite 500 Denver, CO 80202 *** service by electronic mail only facsimile – 303-825-5632 sarahk@white-jankowski.com mitrap@white-jankowski.com</p>	<p>David Gehlert ENRD – DOJ 999 18th St. South Terrace, Suite 370 Denver, CO 80202 *** service by electronic mail only</p> <p>david.gehlert@usdoj.gov</p>
<p>A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only</p> <p>facsimile – 208-234-6297 dtranmer@pocatello.us</p>	<p>William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318</p> <p>*** service by electronic mail only</p> <p>wparsons@pmt.org</p>	<p>IDWR – Southern Region 1341 Fillmore St., Suite 200 Twin Falls, ID 83301-3380</p> <p>*** service by electronic mail only allen.merritt@idwr.idaho.gov v cindy.yenter@idwr.idaho.gov v</p>

<p>Michael C Creamer Jeffrey C. Fereday Givens Pursley 601 W Bannock St Ste 200 P.O. Box 2720 Boise, ID 83701-2720 *** service by electronic mail only mcc@givenspursley.com jcf@givenspursley.com</p>	<p>Kathleen Carr US Dept Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway, Ste 400 Boise, ID 83706 *** service by electronic mail only facsimile – 208-334-1918 kathleenmarion.carr@sol.doi.gov <u>v</u></p>	
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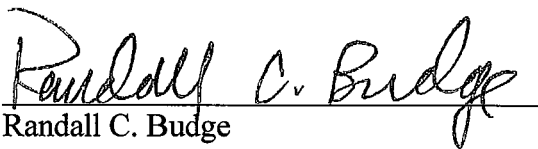

 Randall C. Budge

EXHIBIT A

Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION
OF WATER TO VARIOUS WATER
RIGHTS HELD BY AND FOR THE
BENEFIT OF A&B IRRIGATION
DISTRICT, AMERICAN FALLS
RESERVOIR DISTRICT #2, BURLEY
IRRIGATION DISTRICT, MILNER
IRRIGATION DISTRICT, MINIDOKA
IRRIGATION DISTRICT, NORTH SIDE
CANAL COMPANY, AND TWIN FALLS
CANAL COMPANY

IN THE MATTER OF IGWA'S
SETTLEMENT AGREEMENT
MITIGATION PLAN

Docket No. CM-MP-2016-_____

FINAL ORDER

Based upon and consistent with the Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order filed herein, and good cause appearing therefore,

IT IS HEREBY ORDERED as follows:

The IGWA Settlement Agreement Mitigation Plan is APPROVED upon the following conditions:

1. The parties will work cooperatively in implementing the terms of the Agreement, to wit: Sections 3 (Long Term Practices, Commencing 2016), 3.m ("Steering Committee"), and 4.a ("Adaptive Water Management"). The parties will undertake the following actions to begin implementation:
 - a. Section 3. Long Term Practices, Commencing 2016:
 - Pursuant to 3.a of the Settlement Agreement, prior to April 1, 2016, the participating Districts will submit to the Steering Committee their proposed actions to be taken for the upcoming irrigation season, together with supporting information compiled by the Districts' consultants.
 - Pursuant to 3.e.i of the Agreement, IDWR will collect, process, archive and submit sentinel well data to the Steering Committee within 30 days of collection.

- Pursuant to 3.e. of the Agreement, the parties and their consultants will use a groundwater level index at the sentinel wells and mutually agreed upon calculation techniques (“3e Calculation Technique”) to determine if the ground water level benchmarks and goal are met by June 1. This information shall be provided for use by the Steering Committee.
- IDWR will verify each District’s well measurement and other diversion reduction data (recharge, CREP, conversions, end-gun removals, etc.) to confirm the accuracy of the data. This IDWR analysis shall be provided to the Steering Committee by _____ annually. IDWR will not take additional action following the analysis for non-conformance unless requested by the obligated District.
- Any District may elect to report to the Department and request enforcement against a member that is not in compliance with any mitigation plan or activity implemented by the District to comply with the Settlement Agreement. Such members will not be protected under the Settlement Agreement. The Director will evaluate the breach and if a breach is found to exist provide notice of violation and opportunity to cure to the breaching member. If the member fails to cure the breach the Director will issue an order against the breaching member requiring action to cure the breach or be subject to curtailment. .

b. Section 3.m. Steering Committee:

- The Steering Committee will review the technical information supplied by IDWR together with technical reports compiled by the parties’ consultants. This information will be reviewed at least bi-annually.
- If, based on the information reported and available, the Steering Committee finds that the Long Term Practices as set forth in paragraph 3 of the Agreement have been performed but the ground water level benchmarks or goal set forth in 3.e.ii have not been met, the Steering Committee shall recommend additional actions to be undertaken by the Districts pursuant to 3.m.iii of the Settlement Agreement. If the Steering Committee does not agree upon additional actions prior to March 1 of the following year, the Director shall issue an order requiring additional actions to be undertaken by the Districts to achieve the benchmarks or goal not met.

- If, based on the information reported and available, the Steering Committee finds any breach of the Long Term Practices as set forth in paragraph 3 of the Agreement, 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. If the breaching party refuses or fails to take such actions to cure the breach, the Steering Committee shall report the breach to the Director with all supporting information, with a copy provided to the breaching party. If the Director determines based on all available information that a breach exists which has not been cured, the Director shall issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.

If the Steering Committee does not agree that a breach has occurred or upon actions that must be taken by the breaching party to cure the breach, the same will be reported to the Director who will evaluate all available information and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.

- The Steering Committee will submit a report to the parties and the Department prior to April 1 annually reporting on: (a) progress on implementation and achieving the benchmarks and goals of the Settlement Agreement, (b) performance of the Long Term Practices set forth in paragraph 3 of the Settlement Agreement, (c) the status and resolution of any breaches, and (d) adaptive water management measures recommended and implemented pursuant to paragraph 4 of the Settlement Agreement.

c. Section 4. Adaptive Water Management Measures:

- The intent of the Adaptive Management Provision is to provide a forum for the parties to resolve implementation issues without a party seeking an enforcement order from IDWR or a district court. The terms of the Settlement Agreement and this order approving the same as a mitigation plan control and satisfy any mitigation obligations imposed by the Methodology Order on the parties to the Settlement Agreement. IDWR involvement in the described annual actions and enforcement will be limited to those actions described herein. If the Agency is required by law to conduct additional oversight, the parties would engage the IDWR in the necessary actions.

2. On-going measures:

- a. Total groundwater diversions from the ESPA shall be reduced by 240,000 acre-feet annually starting in 2016 and based on a 3-year rolling average going forward. This diversion reduction has been allocated pro-rata by agreement between the Districts.
 - b. IGWA shall provide 50,000 acre-feet of storage through private leases from the Upper Snake Reservoir system to the SWC twenty-one (21) days after the date of allocation (as set by the Water District 01 Watermaster).
 - c. IGWA shall use its best efforts to continue existing conversions in Water Districts 130 and 140.
 - d. IGWA's participating members shall not irrigate sooner than April 1 or later than October 31 in any year.
 - e. IGWA's participating members shall install approved closed conduit flow meters on all remaining unmeasured and power consumptive coefficient measured ground water diversions by the beginning of the 2018 irrigation season. The parties will determine the sequence to phase in this condition by ground water district each year. If an adequate measurement device is not installed by the beginning of the 2018 irrigation season, a power consumption coefficient methodology will be utilized to evaluate and verify the individual consumptive groundwater use reduction condition.
 - f. The parties intend based on modeling results that the foregoing actions, coupled with the State's commitment to 250,000 AF of annual recharge, will return the groundwater level to the average aquifer level of 1991-2001 in mutually agreed upon wells using mutually agreed upon calculation techniques. A preliminary list of 19 wells has been agreed upon and will be used (Exhibit A), recognizing that the list may be modified based on additional technical information. The groundwater level benchmarks and goal are as follows:
 - i. Benchmark 1: The ground water levels at the identified wells must be stabilized by April 2020 to 2015 ground water levels.
 - ii. Benchmark 2: The ground water levels at the identified wells must increase by April 2023 to a point halfway between 2015 ground water levels and the 1991-2001 average. (Benchmark 2)
3. Recovery Goal: The ground water levels at the identified wells must increase by April 2026 to the 1991-2001 average. No groundwater user who belongs to and is in good standing with an IGWA member who is participating in the SWC-IGWA Settlement Agreement will be subject to curtailment so long as the obligations under the SWC-IGWA Settlement Agreement identified herein are being performed. Junior ground water right holders who are not protected from curtailment under the SWC-IGWA Settlement Agreement and who do not otherwise have an approved Rule 43 mitigation plan which

complies with CMR will be subject to conjunctive administration pursuant to the Director's orders under IDWR Docket No. CM-DC-2010-001, consistent with Conjunctive Management Rules, including, but not limited to 40.05.

4. This is a FINAL ORDER of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.
5. 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 Idaho Code § 42-1701A(3).
6. Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter 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 a hearing was held, the final agency action was taken, the party seeking review of the order resides, or 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) of an order denying a petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.
7. Nothing in this Order shall modify or change the rights of the parties to the settlement agreement between the Surface Water Coalition and the participating groundwater districts, dated June 30, 2015. This Order and mitigation plan deal with the rights and obligations of the parties to the Agreement only.

Dated this _____ day of March, 2016.

GARY SPACKMAN
Director

EXHIBIT B

Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order

SETTLEMENT AGREEMENT ENTERED INTO JUNE 30, 2015 BETWEEN PARTICIPATING MEMBERS OF THE SURFACE WATER COALITION¹ AND PARTICIPATING MEMBERS OF THE IDAHO GROUND WATER APPROPRIATORS, INC.²

IN SETTLEMENT OF LITIGATION INVOLVING THE DISTRIBUTION OF WATER TO THE MEMBERS OF THE SURFACE WATER COALITION, THE PARTIES AGREE AS FOLLOWS:

1. Objectives.

- a. Mitigate for material injury to senior surface water rights that rely upon natural flow in the Near Blackfoot to Milner reaches to provide part of the water supply for the senior surface water rights.
- b. Provide “safe harbor” from curtailment to members of ground water districts and irrigation districts that divert ground water from the Eastern Snake Plain Aquifer (ESPA) for the term of the Settlement Agreement and other ground water users that agree to the terms of this Settlement Agreement.
- c. Minimize economic impact on individual water users and the state economy arising from water supply shortages.
- d. Increase reliability and enforcement of water use, measurement, and reporting across the Eastern Snake Plain.
- e. Increase compliance with all elements and conditions of all water rights and increase enforcement when there is not compliance.
- f. Develop an adaptive groundwater management plan to stabilize and enhance ESPA levels to meet existing water right needs.

¹ The Surface Water Coalition members (“SWC”) are A&B Irrigation District (A&B), American Falls Reservoir District No. 2 (AFRD2), Burley Irrigation District (BID), Milner Irrigation District (Milner), Minidoka Irrigation District (MID), North Side Canal Company (NSCC), and Twin Falls Canal Company (TFCC). The acronym “SWC” in the Settlement Agreement is used for convenience to refer to all members of the Surface Water Coalition who are the actual parties to this Settlement Agreement.

² The Idaho Ground Water Appropriators, Inc. (“IGWA”) are Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, Southwest Irrigation District, and Fremont-Madison Irrigation District, Anheuser-Busch, United Water, Glambia Cheese, City of Blackfoot, City of American Falls, City of Jerome, City of Rupert, City of Heyburn, City of Paul, City of Chubbuck, and City of Hazelton. The acronym “IGWA” in the Settlement Agreement is used for convenience to refer to all members of the Idaho Ground Water Appropriators, Inc. who are the actual parties to this Settlement Agreement.

2. Near Term Practices.

- a. For 2015 IGWA on behalf of its member districts will acquire a minimum of 110,000 ac-ft for assignment as described below:
 - i. 75,000 ac-ft of private leased storage water shall be delivered to SWC;
 - ii. 15,000 ac-ft of additional private leased storage water shall be delivered to SWC within 21 days following the date of allocation;
 - iii. 20,000 ac-ft of common pool water shall be obtained by IGWA through a TFCC application to the common pool and delivered to SWC within 21 days following the date of allocation; and
 - iv. Secure as much additional water as possible to be dedicated to on-going conversion projects at a cost not to exceed \$1.1 million, the cost of which will be paid for by IGWA and/or the converting members.
- b. The parties stipulate the director rescind the April 16 As-Applied Order and stay the April 16 3rd Amended Methodology Order, and preserve all pending rights and proceedings.
- c. "Part a" above shall satisfy all 2015 "in-season" mitigation obligations to the SWC.
- d. This Settlement Agreement is conditional upon approval and submission by the respective boards of the Idaho Ground Water Appropriators, Inc. ("IGWA") and the Surface Water Coalition ("SWC") to the Director by August 1.
- e. If the Settlement Agreement is not approved and submitted by August 1 the methodology order shall be reinstated and implemented for the remainder of the irrigation season.
- f. Parties will work to identify and pass legislative changes needed to support the objectives of this Settlement Agreement, including, development of legislation memorializing conditions of the ESPA, obligations of the parties, and ground water level goal and benchmarks identified herein.

3. Long Term Practices, Commencing 2016.

- a. *Consumptive Use Volume Reduction.*
 - 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.
- b. *Annual storage water delivery.*
 - i. IGWA will provide 50,000 ac-ft of storage water through private lease(s) of water from the Upper Snake Reservoir system, delivered to SWC 21 days after the date of allocation, for use to the extent needed to meet irrigation

requirements. Any excess storage water will be used for targeted conversions and recharge as determined by SWC and IGWA.

ii. IGWA shall use its best efforts to continue existing conversions in Water Districts 130 and 140.

c. *Irrigation season reduction.*

Ground water users will not irrigate sooner than April 1 or later than October 31.

d. *Mandatory Measurement Requirement.*

Installation of approved closed conduit flow meter on all remaining unmeasured and power consumption coefficient (PCC) measured ground water diversions will be completed by the beginning of the 2018 irrigation season. Measurement device installation will be phased in over three years, by ground water district, in a sequence determined by the parties. If an adequate measurement device is not installed by the beginning of the 2016 irrigation season, a cropping pattern methodology will be utilized until such measuring device is installed.

e. *Ground Water Level Goal and Benchmarks.*

i. Stabilize and ultimately reverse the trend of declining ground water levels and return ground water levels to a level equal to the average of the aquifer levels from 1991-2001. Utilize groundwater levels in mutually agreed upon wells with mutually agreed to calculation techniques to measure ground water levels. A preliminary list of 19 wells has been agreed to by the parties, recognizing that the list may be modified based on additional technical information.

ii. The following benchmarks shall be established:

- o Stabilization of ground water levels at identified wells by April 2020, to 2015 ground water levels;
- o Increase in ground water levels by April 2023 to a point half way between 2015 ground water levels and the ground water level goal; and
- o Increase of ground water levels at identified wells by April 2026 to the ground water level goal.

iii. Develop a reliable method to measure reach gain trends in the Blackfoot to Milner reach within 10 years.

iv. 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.

v. If any of the benchmarks, or the ground water level goal, is not achieved, adaptive measures will be identified and implemented per section 4 below.

f. *Recharge.*

Parties will support State sponsored managed recharge program of 250 KAF annual-average across the ESPA, consistent with the ESPA CAMP and the direction in HB

547. IGWA's contributions to the State sponsored recharge program will be targeted for infrastructure and operations above American Falls.

g. *NRCS Programs.*

Parties will support NRCS funded permanent water conservation programs.

h. *Conversions.*

IGWA will undertake additional targeted ground water to surface water conversions and/or fallow land projects above American Falls (target near Blackfoot area as preferred sites).

i. *Trust Water Rights.*

The parties will participate and support the State in initiating and conducting discussions regarding long-term disposition of trust water rights and whether trust water rights should be renewed or cancelled, or if certain uses of trust water rights should be renewed or cancelled.

j. *Transfer Processes.*

Parties agree to meet with the State and water users to discuss changes in transfer processes within or into the ESPA.

k. *Moratorium Designations.*

State will review and continue the present moratoriums on new applications within the ESPA, including the non-trust water area.

l. *IDWR Processes.*

Develop guidelines for water right applications, transfers and water supply bank transactions for consideration by the IDWR.

m. *Steering Committee.*

- i. The parties will establish a steering committee comprised of a representative of each signatory party and the State.
- ii. Steering committee will be formed on or before September 10, 2015 and will meet at least once annually.
- iii. The Steering Committee will develop an adaptive management plan for responding to changes in aquifer levels and reach gain trends, review progress on implementation and achieving benchmarks and the ground water goal.
- iv. A technical work group ("TWG") will be created to support the Steering Committee. The TWG will provide technical analysis to the Steering Committee, such as developing a better way to predict and measure reach gains and ground water levels, to assist with the on-going implementation and adaptive management of the Settlement Agreement.

4. Adaptive Water Management Measures.

- a. If any of the benchmarks or the ground water level goal is not met, additional recharge, consumptive use reductions, or other measures as recommended by the

Steering Committee shall be implemented by the participating ground water parties to meet the benchmarks or ground water level goal.

- b. The SWC, IGWA and State recognize that even with full storage supplies, present (2015) reach gain levels in the Near Blackfoot to Milner reach (natural flows) are not sufficient to provide adequate and sustainable water supplies to the SWC.

5. Safe Harbor.

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.

6. Non-participants.

Any ground water user not participating in this Settlement Agreement or otherwise have another approved mitigation plan will be subject to administration.

7. Term.

This is a perpetual agreement.

8. Binding Effect.

This Agreement shall bind and inure to the benefit of the respective successors of the parties.

9. Entire Agreement.

This Agreement sets forth all understandings between the parties with respect to SWC delivery call. There are no other understandings, covenants, promises, agreements, conditions, either oral or written between the parties other than those contained herein. The parties expressly reserve all rights not settled by this Agreement.

10. Effect of Headings.

Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text.

11. Effective Date.

This Agreement shall be binding and effective when the following events have occurred:

- a. This Agreement is approved and executed by the participating parties consistent with paragraph 2.e. above; and
- b. IGWA has assigned all of the storage water required by paragraph 2.a.i. , ii., and iii. to the SWC by July 8, 2015.

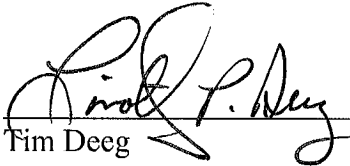
The parties have executed this Agreement on the date following their respective signatures.

RACINE OLSON NYE BUDGE AND BAILEY, CHARTERED

Randall C Budge 7/1/15
Randall C. Budge Date

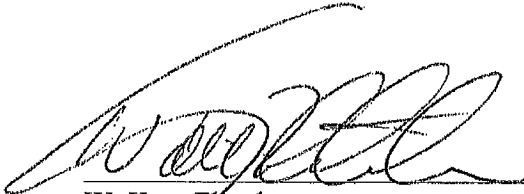
Attorney for Idaho Ground Water Appropriators, Inc.

IDAHO GROUND WATER APPROPRIATORS, INC.

 7/1/2015
Tim Deeg / Date

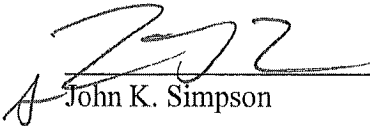
President

FLETCHER LAW OFFICE

 7-2-15
W. Kent Fletcher Date

On Behalf of the Surface Water Coalition

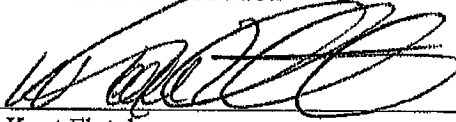
BARKER ROSHOLT AND SIMPSON LLP

 7/7/15
John K. Simpson Date

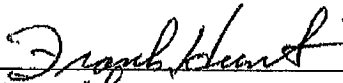
On Behalf of the Surface Water Coalition

**The following signature pages are
for the August 1 Deadline**

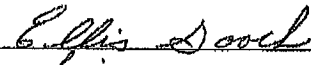
FLETCHER LAW OFFICE


W. Kent Fletcher _____ Date 7-7-15

MINIDOKA IRRIGATION DISTRICT

BY: 
Title: Chairman Date 7-7-15

AMERICAN FALLS RESERVOIR DISTRICT NO. 2

BY: 
Title: Chairman Date 7-1-15

BURLEY IRRIGATION DISTRICT

BY: Dean Edgan
Title: President Date: July 14, 2015

Attested by:
Lana K. Pincock
Lana K. Pincock
Secretary / Treasurer

MILNER IRRIGATION DISTRICT

BY: Scott Bradley
Title: BOARD Chairman Date: 7/23/2015


NORTH SIDE CANAL COMPANY

BY: John Beubers
Title: Chairman Date: 7/20/15

TWIN FALLS CANAL COMPANY

BY: *Jan N. Schumaker*
Title: *Chair. BOB* Date: *July 22, 2015*

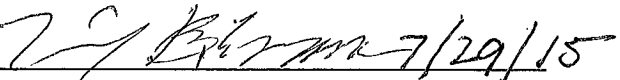
ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT

 7-16-15

Nick Behrend Date

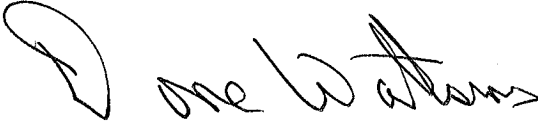
Chairman

BINGHAM GROUND WATER DISTRICT

 7/29/15
Craig Evans Date

Chairman

BONNEVILLE-JEFFERSON GROUND WATER DISTRICT

 7/29/15

Dane Watkins

Date

Chairman

CAREY VALLEY GROUND WATER DISTRICT

Leta Hansen *7/27/15*

Leta Hansen Date

Chairman

JEFFERSON CLARK GROUND WATER DISTRICT

Kirk Jacobs

Date

Chairman

MADISON GROUND WATER DISTRICT

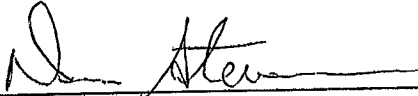
Jason Webster 7-23-15

Jason Webster

Date

Chairman

MAGIC VALLEY GROUND WATER DISTRICT

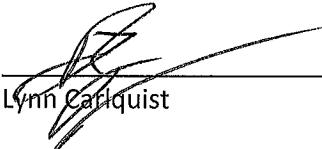
 7/14/2015

Dean Stevenson

Date

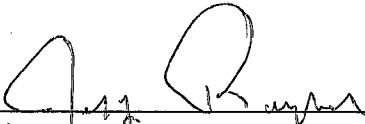
Chairman

NORTH SNAKE GROUND WATER DISTRICT



Lynn Carlquist 7/22/2015 Date
Chairman

FREMONT MADISON IRRIGATION DISTRICT



Dale L. Swenson Date
Jeff Raybould
Manager Chairman

EXHIBIT C

Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order

ADDENDUM TO SETTLEMENT AGREEMENT

This Addendum To Settlement Agreement (“*Addendum Agreement*”) is entered into between the parties to the *Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of Idaho Ground Water Appropriators, Inc.*, (“*Settlement Agreement*”).

RECITALS

WHEREAS, all members of the Surface Water Coalition, excepting A&B Irrigation District, and all eight Ground Water Districts and Fremont-Irrigation District, executed the *Settlement Agreement* (Ex. A) by August 1, 2015; and

WHEREAS, all parties wish to clarify certain issues related to the settlement discussions;

WHEREAS, the parties wish to address and resolve this issue in this *Addendum Agreement*.

COVENANTS

NOW THEREFORE, in consideration of the above recitals and the mutual agreements contained herein, the parties to the *Settlement Agreement* further agree as follows:

- 1. Incorporation of Recitals.** The Recitals set forth above are an integral part of this *Addendum Agreement* and are fully incorporated herein by this reference.
- 2. Area of Common Groundwater Supply.** All parties in the *Settlement Agreement* reserve the right to participate in any administrative or other proceeding to establish a new area of common groundwater supply if the existing Conjunctive Management Rule 50 boundary is rescinded.
- 3. Legislation.** As contemplated in the *Settlement Agreement*, all parties have a right to fully participate in the drafting and passage of any legislation proposed to implement the *Settlement Agreement*.
- 4. Binding Effect.** This Agreement shall bind and inure to the benefit of the respective successors of the parties.
- 5. Entire Agreement.** This Agreement and the *Settlement Agreement* set forth all understandings between the parties. There are no other understandings, covenants, promises, agreements, conditions, either oral or written between the parties other than those contained herein and in the Agreement between A&B and IGWA dated _____. The parties expressly reserve all rights not settled by this Agreement.

convenience and reference and shall not be construed as interpretations of the text.

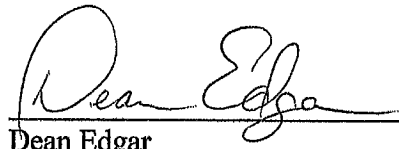
The parties have executed this Agreement on the date following their respective signatures.

SURFACE WATER COALITION:

American Falls Reservoir District No. 2

Ellis Gooch 10-1-15
Ellis Gooch Date
President

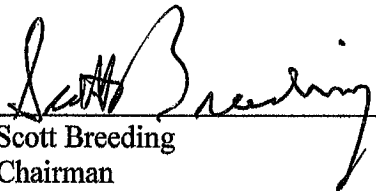
Burley Irrigation District



Dean Edgar
Chairman

10/13/2015
Date

Milner Irrigation District

 10/14/15

Scott Breeding Date
Chairman

Minidoka Irrigation District

Frank Hunt Oct 13-2015
Frank Hunt Date
Chairman

North Side Canal Company

A handwritten signature in cursive script, appearing to read "John Beukers", written over a horizontal line.

John Beukers
Chairman

Date

Twin Falls Canal Company

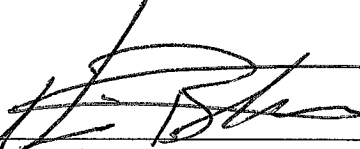
Dan Shewmaker 10-13-15

Dan Shewmaker
Chairman

Date


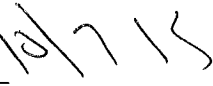
IDAHO GROUNDWATER APPROPRIATOR'S, INC.:

ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT



Nick Behrend Date 10-7-15
Chairman

BONNEVILLE-JEFFERSON GROUND WATER DISTRICT

Dane Watkins
Chairman

Date

CAREY VALLEY GROUND WATER DISTRICT

Leta Hansen 10/7/15
Leta Hansen Date
Chairman

MADISON GROUND WATER DISTRICT

Jason Webster 10-19-15
Jason Webster Date
Chairman

MAGIC VALLEY GROUND WATER DISTRICT

 10/7/2015

Dean Stevenson
Chairman

Date

NORTH SNAKE GROUND WATER DISTRICT

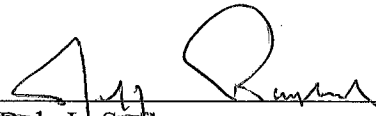


Lynn Carlquist
Chairman

10/7/2015

Date

FREMONT MADISON IRRIGATION DISTRICT



Date: ~~Er Swenson~~ Date
Manager: Jeff Raybould
Chairman

EXHIBIT D

Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order

AGREEMENT

This Agreement is made this 7th day of October, 2015, by and between A&B Irrigation District (“A&B”) and the Idaho Ground Water Appropriators, Inc., Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, and Fremont-Madison Irrigation District (referred to collectively herein as the “Ground Water Districts”).

RECITALS

WHEREAS, all members of the Surface Water Coalition, except A&B Irrigation District, and all eight Ground Water Districts and Fremont-Irrigation District, executed the *Settlement Agreement* (Ex. A) by August 1, 2015; and

WHEREAS, disputes have arisen concerning the scope of A&B’s participation in the *Settlement Agreement*; and

WHEREAS, the parties wish to address and resolve these issues in this Agreement.

COVENANTS

NOW THEREFORE, in consideration of the above recitals and the mutual agreements contained herein, the parties agree as follows:

1. Incorporation of Recitals. The Recitals set forth above are an integral part of this *Agreement* and are fully incorporated herein by this reference.

2. A&B Irrigation District Surface Water Delivery Call. A&B agrees to participate in the *Settlement Agreement* as a surface water right holder only. The obligations of the Ground Water Districts set forth in Paragraphs 2 – 4 of the *Settlement Agreement* do not apply to A&B and its ground water rights. A&B agrees to not make a surface water delivery call against junior-priority ground water rights held by participating members of the Ground Water Districts as set forth in Paragraph 6 of the *Settlement Agreement*.

3. A&B Irrigation District Ground Water Delivery Call. A&B further agrees to not make a ground water delivery call against junior-priority ground water rights held by participating members of the Ground Water Districts.

4. A&B Irrigation District “Soft Conversions.” A&B agrees to implement approximately 3,000 acres of “soft conversions” within its project. A&B has already developed approximately 1,500 acres and is currently in the process of developing an additional 1,500 acres to receive water through a new pumping plant and pipeline project to be completed in the future.

5. **Ground Water Districts' Implementation of Settlement Agreement.** The safe harbor identified above is conditioned upon the Ground Water Districts implementing the *Settlement Agreement* in accordance with its terms.

6. **Ground Water Districts' Delivery Calls.** The safe harbor provided by A&B above shall be null and void against any Ground Water District and/or against any participating member of a Ground Water District that files a surface or ground water delivery call against A&B's ground water rights.

7. **Ground Water Recharge Projects.** A&B and the Ground Water Districts agree to cooperate and work together to identify and implement recharge projects within or near A&B's irrigation project that benefit aquifer levels, and the sentinel wells identified in the *Settlement Agreement*.

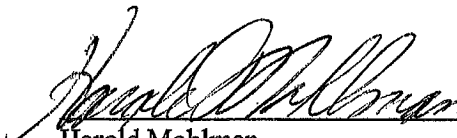
8. **Binding Effect.** This Agreement shall bind and inure to the benefit of the respective successors of the parties.

9. **Entire Agreement.** This Agreement sets forth all understandings between the parties. There are no other understandings, covenants, promises, agreements, conditions, either oral or written between the parties other than those contained herein. The parties expressly reserve all rights not settled by this Agreement.

10. **Effect of Headings.** Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text.

The parties have executed this Agreement on the date following their respective signatures.

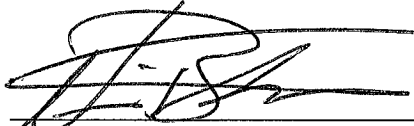
A&B IRRIGATION DISTRICT


Harold Mohlman
Chairman

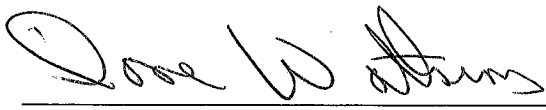

10-12-15
Date

IDAHO GROUNDWATER APPROPRIATOR'S, INC.:

ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT

 10-7-15
Nick Behrend Date
Chairman

BONNEVILLE-JEFFERSON GROUND WATER DISTRICT

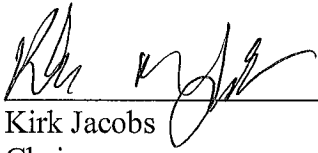
Dane Watkins
Chairman

Date

CAREY VALLEY GROUND WATER DISTRICT

Leta Hansen 10/7/15
Leta Hansen Date
Chairman

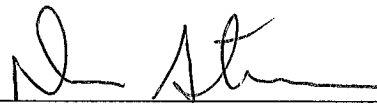
JEFFERSON CLARK GROUND WATER DISTRICT

 10/13/15
Kirk Jacobs Date
Chairman

MADISON GROUND WATER DISTRICT

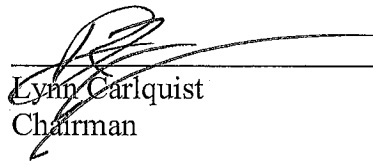
Jason Webster 10-19-15
Jason Webster Date
Chairman

MAGIC VALLEY GROUND WATER DISTRICT

 10/7/2015

Dean Stevenson Date
Chairman

NORTH SNAKE GROUND WATER DISTRICT



Lynn Carlquist
Chairman

10/7/2015
Date

FREMONT MADISON IRRIGATION DISTRICT

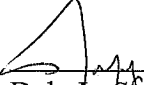
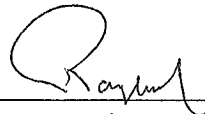
 
Date L. Swenson Date
Manager Jeff Raybould
Chairman

Exhibit B

**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 APPROVING
STIPULATED MITIGATION
PLAN**

IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN

The Director ("Director") of the Idaho Department of Water Resources ("Department") finds, concludes and orders as follows:

FINDINGS OF FACT

1. On March 9, 2016, the Idaho Ground Water Appropriator's Inc. ("IGWA"), and A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to herein as "Surface Water Coalition" or "SWC"), submitted to the Department the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* ("Request for Order").

2. Attached to the Request for Order as Exhibits B and C respectively are the *Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriator's, Inc.* and the *Addendum to Settlement Agreement* (collectively the "SWC-IGWA Settlement Agreement"). Attached to the Request for Order as Exhibit D is the October 7, 2015, *Agreement* between A&B Irrigation District and the IGWA members who entered into the SWC-IGWA Settlement Agreement (the "A&B-IGWA Agreement"). The SWC and IGWA submitted the SWC-IGWA Settlement Agreement and the A&B-IGWA Agreement (collectively, the "Mitigation Plan") as a stipulated mitigation plan in response to the SWC delivery call. *Request for Order* at 3.

3. The Department published notice of the Mitigation Plan in the Idaho Mountain Express and Mountain Home News on March 16th and 23rd, 2016; and the Times News, Post Register, Idaho State Journal, and Idaho Statesman on March 17th and 24th, 2016.

4. The SWC “stipulates that the mitigation provided by participating IGWA members under the [Mitigation Plan] is, provided the [Mitigation Plan is] 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* at 3. The SWC and IGWA agree that “[n]o ground water user participating in the [Mitigation Plan] will be subject to a delivery call by the SWC members as long as the provisions of the [Mitigation Plan] are being implemented.” *Mitigation Plan* at Exhibit B, p. 5.

5. Through the Mitigation Plan, the SWC and IGWA members agree to: (a) a total ground water diversion reduction of 240,000 acre-feet annually, (b) annual delivery of 50,000 acre-feet “of storage water through private lease(s) of water from the Upper Snake Reservoir system, delivered to the SWC 21 days after the date of allocation,” (c) IGWA using “its best efforts to continue existing conversions in Water Districts 130 and 140,” (d) ground water users not irrigating sooner than April 1 or later than October 31, (e) installation of approved closed conduit flow meters on all remaining unmeasured and power consumption coefficient measured ground water diversions by the beginning of the 2018 irrigation season, (f) establishment of a ground water level goal and benchmarks to “[s]tabilize and ultimately reverse the trend of declining ground water levels,” (g) development of a method “to measure reach gain trends in the Blackfoot to Milner reach,” (h) contributions by the SWC and IGWA to the State sponsored managed recharge program, (i) support by the SWC and IGWA of “NRCS funded permanent water conservation programs,” (j) IGWA undertaking “additional targeted ground water to surface water conversions and/or fallow land projects above American Falls,” and (k) “[i]f any of the benchmarks or ground water level goal is not met, additional recharge, consumptive use reductions, or other measures as recommended by” a steering committee established by the SWC and IGWA. *Mitigation Plan* at Exhibit B, p. 2-5.

6. On April 4, 2016, the City of Pocatello (“Pocatello”) and the City of Idaho Falls (“Idaho Falls”) protested the Mitigation Plan.

7. On April 22, 2016, Pocatello and Idaho Falls filed a *Motion for Order Approving Stipulation to Conditionally Withdraw Protests* (“Motion”). Pocatello and Idaho Falls agreed to withdraw their protests to the Mitigation Plan if the Director includes provisions in an order approving the Mitigation Plan: (a) clarifying that the parties to the Mitigation Plan are responsible for the ongoing activities and ground water level goal and benchmarks identified in the Mitigation Plan, and (b) that approval of the plan does not create a ground water management area pursuant to Idaho Code § 42-233b.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602 authorizes the Director to supervise water distribution within water districts:

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.

2. 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.”

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

4. Pursuant to Chapter 52, Title 67, Idaho Code, and Sections 42-603 & 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.

5. 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.

6. 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.

7. CM Rule 43.03 establishes factors the Director may consider “in determining whether a proposed mitigation plan will prevent injury to senior rights.” IDAPA 37.03.11.043.03(a-o).

8. CM Rule 43.03(o) states: “Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.” IDAPA 37.03.11.043.03(o).

9. The SWC and IGWA “have entered into an agreement on [a] . . . mitigation plan” in accordance with CM Rule 43.03(o). The SWC “stipulates that the mitigation provided by participating IGWA members under the [Mitigation Plan] is, provided the [Mitigation Plan] is 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* at 3. The SWC and IGWA agree that “[n]o ground water user participating in the [Mitigation Plan] will be subject to a delivery call by the SWC members as long as the provisions of the [Mitigation Plan] are being implemented.” *Mitigation Plan* at Exhibit B, p. 5.

10. As discussed above, the Mitigation Plan requires numerous ongoing activities, including: (a) annual ground water diversion reductions and storage water deliveries, (b) irrigation season reduction, (c) installation of measurement devices, (d) support of the State sponsored managed recharge program and NRCS funded permanent water conservation programs, (e) efforts to continue existing conversions, (f) additional conversions and/or fallow land projects, and (g) establishment of and oversight by a steering committee and technical work group. *Mitigation Plan* at Exhibit B, p. 2-5. The Mitigation Plan also references a ground water level goal and benchmarks, development of a method “to measure reach gain trends in the Blackfoot to Milner reach,” and additional recharge, consumptive use reductions, or other measures should any of the benchmarks or the ground water level goal not be met. *Id.* at Exhibit B, p. 3-5. The parties to the Mitigation Plan should be responsible for these activities and the ground water level goal and benchmarks should only be applicable to the parties to the Mitigation Plan as specified in the Mitigation Plan.

11. Having reviewed the Mitigation Plan, the CM Rules, and the proceedings herein, the Director will approve the Mitigation Plan.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Mitigation Plan submitted by the SWC and IGWA is APPROVED with 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.
- c. Approval of the Mitigation Plan does not create a ground water management area pursuant to Idaho Code § 42-233b.

DATED this 2nd day of May 2016.



Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of May 2016, the above and foregoing was served on the following by the method(s) indicated below:

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Paul L. Arrington
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Kimi White

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.

Exhibit C

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BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION
OF WATER TO VARIOUS WATER
RIGHTS HELD BY AND FOR THE
BENEFIT OF A&B IRRIGATION
DISTRICT, AMERICAN FALLS
RESERVOIR DISTRICT #2, BURLEY
IRRIGATION DISTRICT, MILNER
IRRIGATION DISTRICT, MINIDOKA
IRRIGATION DISTRICT, NORTH SIDE
CANAL COMPANY, AND TWIN FALLS
CANAL COMPANY

IN THE MATTER OF IGWA'S
SETTLEMENT AGREEMENT
MITIGATION PLAN

Docket No. CM-MP-2016-001

**Surface Water Coalition's and IGWA's
Stipulated Amended Mitigation Plan and
Request for Order**

A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively the "Surface Water Coalition" or "SWC"), and Idaho Ground Water Appropriators, Inc. ("IGWA") hereby stipulate and move the Director to enter an order approving the parties' *Second Addendum to Settlement Agreement* attached hereto as *Exhibit A* under Rule 43 of the Department's Rules for Conjunctive Management of Surface and Ground Water Resources ("CMR").

STIPULATION

1. In 2015, historic settlement agreements, identified herein, were entered into between the following surface water right holders: A & B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company, collectively known as the Surface Water Coalition (SWC); and the following ground water right holders: Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Groundwater District, Fremont-Madison Irrigation District, Anheuser-Busch, United Water, Glanbia Foods, City of Blackfoot, City of American Falls, City of Jerome, City of Rupert, City of Heyburn, City of Paul, City of Chubbuck and City of Hazelton, collectively known as the Idaho Ground Water Appropriators, Inc.; (IGWA) for the purpose of resolving pending water delivery calls and provide for on-going management of the ESPA.

2. Following execution of the agreement the parties filed the *Stipulated Mitigation Plan and Request for Order* with the Director on March 9, 2016. The parties adopt and incorporate that stipulation.

3. The Director approved the stipulated mitigation plan. *See Final Order Approving Stipulated Mitigation Plan* (May 2, 2016).

4. The parties recently executed the *Second Addendum to Settlement Agreement* (Ex. A) which provides 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).

5. The parties hereby incorporate and submit the *Second Addendum to Settlement Agreement* as a proposed amendment to the stipulated mitigation plan filed and approved by the Director last year.


6. The parties stipulate and request that the Director issue an Order approving the *Second Addendum to Settlement Agreement* as an amendment to the previously approved mitigation plan under CMR 43.

Therefore, the parties request that the Director:

- (a) Publish notice of the amendment in accordance with CMR 43.02; and
- (b) Approve the amendment as part of the previously approved mitigation plan together as a complete mitigation plan under CMR 43.
- (c) Take the necessary management actions to address declining ESPA groundwater levels, water supply and sustainability issues in order that the benefits contemplated in the SWC-IGWA Settlement Agreement are realized.

DATED this 7th day of February, 2017.

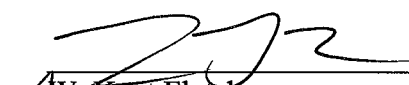
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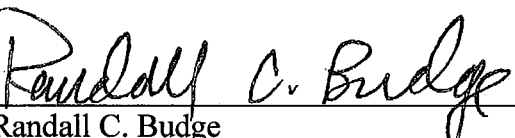
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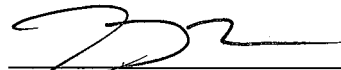
Attorneys for Idaho Ground Water Appropriators, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2017, I served a true and correct copy of the foregoing *Surface Water Coalition's and IGWA's Stipulated Amended Mitigation Plan and Request for Order* on the following by the method indicated:

<p>Director Gary Spackman c/o Deborah Gibson State of Idaho Dept of Water Resources 322 E Front St Boise, ID 83720-0098 *** service by electronic mail</p> <p>facsimile – 208-287-6700 gary.spackman@idwr.idaho.gov deborah.gibson@idwr.idaho.gov</p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234</p> <p>*** service by electronic mail only</p> <p>mhoward@pn.usbr.gov emcgarry@pn.usbr.gov</p>	<p>IDWR – Eastern Region 900 N. Skyline Dr., Suite A Idaho Falls, ID 83402-1718</p> <p>*** service by electronic mail only lyle.swank@idwr.idaho.gov</p>
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Travis L. Thompson

Exhibit

A

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

This Second Addendum dated December 14th, 2016 ("Second Addendum") augments the *Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of Idaho Ground Water Appropriators, Inc.* ("IGWA"), the *Addendum Agreement* between the same entered into October 19, 2015 ("First Addendum"), and the *Agreement* between A&B Irrigation District and participating members of IGWA dated October 7, 2016. The foregoing agreements are referred to collectively herein as the "Settlement Agreement," and the parties thereto are referred to collectively herein as the "Parties."

RECITALS

- A. WHEREAS, on March 9, 2016 the Surface Water Coalition and IGWA submitted to the Idaho Department of Water Resources ("Department") the *Surface Water Coalition and IGWA's Stipulated Mitigation Plan and Request for Order* ("Request for Order"); and
- B. WHEREAS, the parties included as an attachment to the Request for Order a proposed "Final Order" for the purpose of Department approval of the Settlement Agreement as a mitigation plan under rule 43 of the Rules for Conjunctive Management of Surface and Ground Water Resources ("CMR"); and
- C. WHEREAS, the proposed Final Order contained provisions to address, clarify and resolve certain issues relating to the Settlement Agreement; and
- D. WHEREAS, on May 2, 2016 the Director entered a *Final Order Approving Stipulated Mitigation Plan* ("Director's Final Order") approving the Settlement Agreement as a CMR 43 mitigation plan; and
- E. WHEREAS, the Director's Final Order did not include certain provisions set forth in the Parties' proposed Final Order; and
- F. WHEREAS, the Parties now set forth and incorporate into the Settlement Agreement to the provisions set forth in this Second Addendum.

COVENANTS

NOW THEREFORE, in consideration of the above recitals and the mutual agreements contained herein, the parties to the Settlement Agreement agree as follows:

1. **Incorporation of Recitals.** The Recitals set forth above are an integral part of this Second Addendum and are fully incorporated herein by this reference.

2. **Implementation of Settlement Agreement.** The Parties will work cooperatively in implementing the terms of the Settlement Agreement, to wit: 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) as follows:

a. Section 3.a (Consumptive Use Volume Reduction):

i. Prior to April 1 annually the Districts will submit to the Steering Committee their groundwater diversion and recharge data for the prior irrigation season and their proposed actions to be taken for the upcoming irrigation season, together with supporting information compiled by the Districts' consultants.

b. Section 3.e (Ground Water Level Goal and Benchmarks):

i. The Parties and their consultants will work with the Department to collect, process, archive and submit sentinel well data to the Steering Committee within 30 days of collection.

ii. The Parties and their consultants will use the *Technique For Calculating Groundwater Level Index and Determining Compliance with Settlement* ("Calculation Technique") to determine if the groundwater level benchmarks and goal are met by June 1 of the year identified. This information shall be provided for use by the Steering Committee. Following experience with the Calculation Technique the technical working group may recommend amendments for approval by the Steering Committee.

iii. The Parties will request the Department to verify each District's annual diversion volume, and other diversion reduction data (recharge, CREP, conversions, end-gun removals, etc.) to confirm the accuracy of the data. The Department's analysis shall be provided to the Steering Committee no later than July 1 for the previous irrigation season.

iv. Any District may elect to report to the Department and request enforcement against any individual member of that District that is not in compliance with any mitigation plan or activity implemented by the District. Such members will not be protected under the Settlement Agreement. It is the Parties' intent that the Director will evaluate the breach and, if a breach is found to exist, provide notice of violation and opportunity to cure to the breaching member. If the member fails to cure the breach the Parties will request the Director to issue an order

against the breaching member requiring action to cure the breach or be subject to immediate curtailment as provided under CMR 40.05.

c. Section 3.m (Steering Committee):

- i. The Steering Committee will review the technical information supplied by the Department together with technical reports compiled by the Parties' consultants.
- ii. If, based on the information reported and available, the Surface Water Coalition and IGWA find that the Long Term Practices as set forth in paragraph 3 of the Agreement have been performed but the groundwater level benchmarks or goal set forth in 3.e.ii have not been met, the Steering Committee shall recommend additional actions to be undertaken by the Districts pursuant to 3.m.iii of the Settlement Agreement. If the Surface Water Coalition and IGWA do not agree upon additional actions prior to March 1 of the following year, the Steering Committee will request that the Director issue an order requiring additional actions to be undertaken by the Districts to achieve the benchmarks or goal not met.
- iii. If, based on the information reported and available, the Steering Committee finds any breach of the Long Term Practices as set forth in paragraph 3 of the Agreement, 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. If the breaching party refuses or fails to take such actions to cure the breach, the Steering Committee shall report the breach to the Director with all supporting information, with a copy provided to the breaching party. If the Director determines based on all available information that a breach exists which has not been cured, the Steering Committee will request that the Director issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to immediate curtailment pursuant to CM Rule 40.05.
- iv. 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.
- v. The Steering Committee will submit a report to the Parties and the Department prior to May 1 annually reporting on: (a) progress on implementation and achieving the benchmarks and goals of the

Settlement Agreement, (b) performance of the Long Term Practices set forth in paragraph 3 of the Settlement Agreement, (c) the status and resolution of any breaches, and (d) adaptive water management measures recommended and implemented pursuant to paragraph 4 of the Settlement Agreement.

d. Section 4 (Adaptive Water Management Measures):


i. The intent of the Adaptive Management Provision is to provide a forum for the Parties to resolve implementation issues without a party seeking an enforcement order from the Department or a district court. The terms of the Settlement Agreement and the Director's Final Order approving the same as a mitigation plan control and satisfy any mitigation obligations imposed by the Methodology Order on the Parties to the Settlement Agreement.

3. **Binding Effect.** This Second Addendum shall bind and inure to the benefit of the respective successors of the Parties.
4. **Entire Agreement.** This Second Addendum and the Settlement Agreement set forth all understandings between the Parties. There are no other understandings, covenants, promises, agreements, conditions, either oral or written between the Parties other than those contained herein and in the Agreement between A&B and IGWA dated October 7, 2015. The Parties expressly reserve all rights not settled by this Agreement. The parties further reserve all remedies, including the right to judicial action, to enforce the terms of the Settlement Agreement and this Second Addendum.
5. **Effect of Headings.** Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text.

The Parties have executed this Agreement on the date following their respective signatures.

SURFACE WATER COALITION:


BARKER ROSHOLT & SIMPSON LLP



John K. Simpson 1/3/17
Date

Attorneys for A&B Irrigation District, Burley Irrigation District,
Miner Irrigation District, North Side Canal Company, and
Twin Falls Canal Company

FLETCHER LAW OFFICE



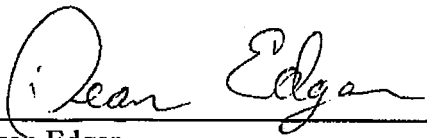
W. Kent Fletcher 1-3-17
Date

Attorney for American Falls Reservoir District #2 and
Minidoka Irrigation District

AMERICAN FALLS RESERVOIR DISTRICT NO. 2

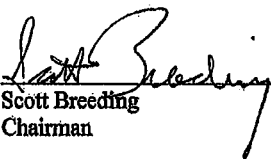
Ellis Gooch 1-3-17
Ellis Gooch Date
President

BURLEY IRRIGATION DISTRICT

 12/13/2014

Dean Edgar Date
Chairman

MILNER IRRIGATION DISTRICT


Scott Breeding
Chairman

12/14/16
Date

MINIDOKA IRRIGATION DISTRICT

Frank Hunt 12-20-16
Frank Hunt Date
Chairman

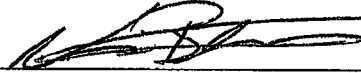
TWIN FALLS CANAL COMPANY

Dan Shewmaker 12-13-16

Dan Shewmaker
Chairman


Date

ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT

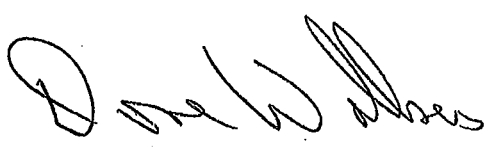


Nick Behrend 12-14-16
Chairman Date

BINGHAM GROUND WATER DISTRICT

 12-14-14
Craig Evans Date
Chairman

BONNEVILLE-JEFFERSON GROUND WATER DISTRICT

 12/14/16

Dane Watkins
Chairman


Date

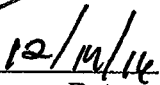
CAREY VALLEY GROUND WATER DISTRICT

Leta Hansen *12/26/16*

Leta Hansen Chairman Date

JEFFERSON CLARK GROUND WATER DISTRICT

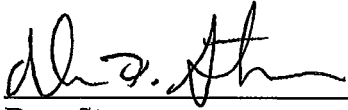

Kirk Jacobs
Chairman


Date

MADISON GROUND WATER DISTRICT

Jason Webster 1-9-17
Jason Webster Date
Chairman

MAGIC VALLEY GROUND WATER DISTRICT

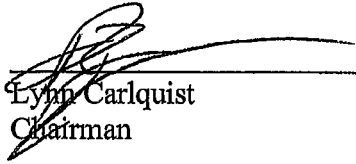


12/14/16

Dean Stevenson
Chairman

Date

NORTH SNAKE GROUND WATER DISTRICT


Lynn Carlquist
Chairman

12/14/16
Date

FREEMONT MADISON IRRIGATION DISTRICT

Dale L. Swenson 12-14-16

Dale L. Swenson
Manager

Date

Exhibit D

**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

IN THE MATTER OF IGWA'S SETTLEMENT
AGREEMENT MITIGATION PLAN

Docket No. CM-MP-2016-001

**FINAL ORDER APPROVING
AMENDMENT TO STIPULATED
MITIGATION PLAN**

The Director ("Director") of the Idaho Department of Water Resources ("Department") finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On March 9, 2016, the Idaho Ground Water Appropriator's Inc. ("IGWA"), and A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to herein as "Surface Water Coalition" or "SWC"), submitted to the Department the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* ("Request for Order").

2. Attached to the Request for Order as Exhibits B and C respectively are the *Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriator's, Inc.*, and the *Addendum to Settlement Agreement* (collectively the "SWC-IGWA Settlement Agreement"). Attached to the Request for Order as Exhibit D is the October 7, 2015, *Agreement* between A&B Irrigation District and the IGWA members who entered into the SWC-IGWA Settlement Agreement (the "A&B-IGWA Agreement"). The SWC and IGWA submitted the SWC-IGWA Settlement Agreement and the A&B-IGWA Agreement (collectively, the "Mitigation Plan") as a stipulated mitigation plan in response to the SWC delivery call. *Request for Order* at 3.

3. The SWC “stipulates that the mitigation provided by participating IGWA members under the [Mitigation Plan] is, provided the [Mitigation Plan is] 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* at 3. The SWC and IGWA agree that “[n]o ground water user participating in the [Mitigation Plan] will be subject to a delivery call by the SWC members as long as the provisions of the [Mitigation Plan] are being implemented.” *Mitigation Plan* at Exhibit B, p. 5.

4. Through the Mitigation Plan, the SWC and IGWA members agree to: (1) a total ground water diversion reduction of 240,000 acre-feet annually, (2) annual delivery of 50,000 acre-feet “of storage water through private lease(s) of water from the Upper Snake Reservoir system, delivered to the SWC 21 days after the date of allocation,” (3) IGWA using “its best efforts to continue existing conversions in Water Districts 130 and 140,” (4) ground water users not irrigating sooner than April 1 or later than October 31, (5) installation of approved closed conduit flow meters on all remaining unmeasured and power consumption coefficient measured ground water diversions by the beginning of the 2018 irrigation season, (6) establishment of a certain ground water level goal and benchmarks to “[s]tabilize and ultimately reverse the trend of declining ground water levels,” (7) development of a method “to measure reach gain trends in the Blackfoot to Milner reach,” (8) contributions by the SWC and IGWA to the State sponsored managed recharge program, (9) support by the SWC and IGWA of “NRCS funded permanent water conservation programs,” (10) IGWA undertaking “additional targeted ground water to surface water conversions and/or fallow land projects above American Falls,” and (11) “[i]f any of the benchmarks or ground water level goal is not met, additional recharge, consumptive use reductions, or other measures as recommended by” a steering committee established by the SWC and IGWA. *Mitigation Plan* at Exhibit B, p. 2-5.

5. On May 2, 2016, the Department issued the *Final Order Approving Stipulated Mitigation Plan* (“Final Order”). The Final Order approved the Mitigation Plan upon 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.

c. Approval of the Mitigation Plan does not create a ground water management area pursuant to Idaho Code § 42-233b.

Final Order at 4.

6. 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”).

7. Attached to the Second Request for Order as Exhibit A is the *Second Addendum to Settlement Agreement* entered into on December 14, 2016, between the SWC and IGWA (“Second Addendum”).

8. The Second Addendum amends the Mitigation Plan by providing “further details concerning implementation of the [Mitigation Plan] 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* at 2. The SWC and IGWA request the Director issue an order approving the Second Addendum as an amendment to the Mitigation Plan. *Id.*

9. The Department published notice of the Second Request for Order and Second Addendum in the Idaho Mountain Express and Mountain Home News on February 22 and March 1, 2017; the Times News, Idaho Statesman, Post Register, and Idaho State Journal on February 23 and March 2, 2017; and the Standard Journal on February 24 and March 3, 2017. No protests were filed.

CONCLUSIONS OF LAW

1. 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.

2. 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.”

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

4. Pursuant to Chapter 52, Title 67, Idaho Code, and Sections 42-603 & 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.

5. 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.

6. 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.

7. CM Rule 43.03 establishes factors the Director may consider “in determining whether a proposed mitigation plan will prevent injury to senior rights.” IDAPA 37.03.11.043.03(a-o).

8. CM Rule 43.03(o) states: “Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.” IDAPA 37.03.11.043.03(o).

9. The Mitigation Plan was entered into between the SWC and IGWA in accordance with CM Rule 43.03(o). Again, the SWC “stipulates that the mitigation provided by participating IGWA members under the [Mitigation Plan] is, provided the [Mitigation Plan] is 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* at 3. The SWC and IGWA agree that “[n]o ground water user participating in the [Mitigation Plan] will be subject to a delivery call by the SWC members as long as the provisions of the [Mitigation Plan] are being implemented.” *Mitigation Plan* at Exhibit B, p. 5.

10. As discussed above, the Mitigation Plan requires numerous ongoing activities, such as annual ground water diversion reductions and storage water deliveries, irrigation season reduction, installation of measurement devices, support of the State sponsored managed recharge program and NRCS funded permanent water conservation programs, efforts to continue existing conversions, additional conversions and/or fallow land projects, and establishment and operation of a steering committee and technical work group. *Mitigation Plan* at Exhibit B, p. 2-5. The Mitigation Plan also includes reference to a certain ground water level goal and benchmarks, development of a method “to measure reach gain trends in the Blackfoot to Milner reach,” and additional recharge, consumptive use reductions, or other measures should any of the benchmarks or the ground water level goal not be met. *Id.* at Exhibit B, p. 3-5. The 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.

11. The Second Addendum “provides further details concerning implementation of the [Mitigation Plan] 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* at 2.

12. The Second Addendum references the Department and requests the Department undertake specific actions in support of the Mitigation Plan and Second Addendum. The Department will exert its best efforts to support the activities of IGWA and the SWC. However, the Department is not a signatory to the Mitigation Plan or Second Addendum, and approval of the Second Addendum should not be construed to obligate the Department to undertake any

particular action. Furthermore, approval of the Second Addendum does not limit the Director's enforcement discretion or otherwise commit the Director to a particular enforcement approach.

13. Having reviewed the Second Request for Order, Second Addendum, Mitigation Plan, CM Rules, and the proceedings herein, the Director will approve the Second Addendum as an amendment to the Mitigation Plan.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Second Addendum is APPROVED as an amendment to the Mitigation Plan with 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.

DATED this 9th day of May 2017.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of May 2017, the above and foregoing was served on the following by the method(s) indicated below:

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Travis L. Thompson
Paul L. Arrington
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Thomas J. Budge
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Kimi White

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.

Exhibit E

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Attorneys for the City of Idaho Falls

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF
WATER TO VARIOUS WATER RIGHTS
HELD BY OR FOR THE BENEFIT OF
A&B IRRIGATION DISTRICT,
AMERICAN FALLS RESERVOIR
DISTRICT #2, BURLEY IRRIGATION
DISTRICT, MILNER IRRIGATION
DISTRICT, MINIDOKA IRRIGATION
DISTRICT, NORTH SIDE CANAL
COMPANY, AND TWIN FALLS CANAL
COMPANY

CM-DC-2010-001

**COALITION OF CITIES, CITY OF
IDAHO FALLS, AND CITY OF
POCATELLO JOINT MITIGATION
PLAN**

IN THE MATTER OF THE JOINT
MITIGATION PLAN FILED BY THE
COALITION OF CITIES, THE CITY OF

CM-MP-2019-001

IDAHO FALLS, AND THE CITY
POCATELLO IN RESPONSE TO THE
SURFACE WATER COALITION
DELIVERY CALL

COME NOW the cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone and Wendell (collectively referred to herein as “Coalition of Cities”), the City of Idaho Falls, and City of Pocatello (collectively referred to herein as “Cities”) by and through their counsels and, pursuant to Rule 43 of the Idaho Department of Water Resources’ (“IDWR”) *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 (“CM Rules”), hereby submit this *Joint Stipulated Mitigation Plan* (“Mitigation Plan” or “Plan”) in response to the Surface Water Coalition (“SWC”) delivery call.¹ This Mitigation Plan is filed consistent with CM Rule 43.03.o and is supported by the attached *Settlement Agreement (“Agreement”) Between The Surface Water Coalition, Participating Members of the Idaho Ground Water Appropriators, Inc. and Signatory Cities* (“Agreement”).

I. COALITION OF CITIES, CITY OF IDAHO FALLS, AND CITY OF POCATELLO JOINT MITIGATION PLAN

The Cities have individually and collectively filed four CM Rule 43 mitigation plans, CM-MP-2015-001, CM-MP-2015-004, CM-MP-2015-005, CM-MP-2016-001, to satisfy their mitigation obligations in response to the SWC delivery call, CM-DC-2010-001. This Joint Mitigation Plan replaces the previously filed plans and in accordance with its terms resolves the Cities’ collective mitigation obligation under the SWC delivery call. To that end, the Cities present the following information in support of this Mitigation Plan.

¹ The Surface Water Coalition is made up of A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, Northside Canal Company, and Twin Falls Canal Company.

A. Name and Address of Applicants to Receive Mitigation Benefits

The Cities referenced above are the applicants to receive mitigation benefits. CM Rule 43.01.a. As established in the Agreement, and as will be discussed below in Part B, other cities that pump ground water from the ESPA may receive the benefit of this Mitigation Plan upon notification to IDWR. *See also* CM Rule 43.03.m. All correspondence regarding this Joint Mitigation Plan should be sent to:

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(720) 279-7868

B. Identification of Water Rights to Receive the Benefit of the Mitigation Plan

It is the Cities' intention to mitigate, through this Joint Mitigation Plan, the impacts from pumping its junior-priority ground water rights that are found to be causing material injury to the senior-priority natural flow, storage, and reasonable carryover held by the SWC, as determined by the Director in the SWC delivery call, CM-DC-2010-001. CM Rule 43.01.b. The terms of mitigation are specified in the attached Agreement. As established in the Agreement, other cities that pump ground water from the ESPA may receive the benefit of this Mitigation Plan upon notification. *See also* CM Rule 43.03.m. A notice of participation will be filed with IDWR by

the above-captioned Cities identifying those cities who pump ground water from the ESPA and who seek to receive the benefit of mitigation.

C. Summary Description of the Mitigation Plan

The nature and extent of the Cities' mitigation obligation and the means by which the Cities will provide this mitigation amount are provided for in Paragraph II to the attached Agreement. The Cities' reporting requirements are provided for in Paragraph III to the attached Agreement. CM Rule 43.01.c.

D. Term of the Mitigation Plan

The term of this Mitigation Plan shall be until the average annual ESPA pumping of the cities referenced in the Agreement reaches 120,000 acre-feet per year as determined by a five-year rolling average, or December 31, 2053, whichever is earlier, as provided for in Paragraph IX to the attached Agreement. CM Rule 43.01.d.

E. Stipulated Mitigation Plan

This Plan is being submitted to the Director as a stipulated mitigation plan, consistent with CM Rule 43.03.o, and as explained in Paragraph VI to the attached Agreement. According to CM Rule 43.03.o, the Director, "in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: . . . [w]hether the petitioners and respondents have entered into an agreement or an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions." CM Rule 43.03.o.

To the extent the Director finds the SWC to suffer material injury under the Methodology provided for in CM-DC-2010-001, and as expressed in Paragraph VI to the attached Agreement, the SWC, as well as the participating members of the Idaho Ground Water Appropriators, Inc.

("IGWA"), stipulate to the Joint Mitigation Plan with the Cities, agreeing that the Plan shall be deemed to fully mitigate all impacts caused by the Cities' out-of-priority ground water pumping in CM-DC-2010-001 for the term of the mitigation plan. Counsel for the Cities has communicated with counsel for IGWA and SWC as to the filing of this Joint Mitigation Plan and can represent IGWA and SWC's support.

II. REQUEST FOR RELIEF

The Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell, the City of Idaho Falls, and the City of Pocatello hereby request that the Director issue a final order approving this Mitigation Plan.

RESPECTFULLY SUBMITTED.

DATED this 25th day of February, 2019.

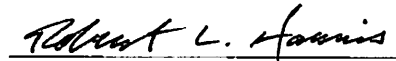
MCHUGH BROMLEY, PLLC



CHRIS M. BROMLEY

Attorneys for the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell

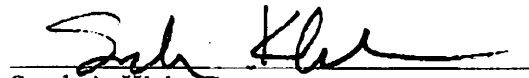
HOLDEN, KIDWELL, HAHN & CRAPO,
PLLC



Robert L. Harris

Attorneys for the City of Idaho Falls

SOMACH SIMMONS & DUNN



Sarah A. Klahn

Attorneys for the City of Pocatello

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of February, 2019, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

Director Gary Spackman IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720	<input type="checkbox"/> US Mail, Postage Paid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand-Delivered <input type="checkbox"/> Electronic Mail
Deputy Attorney General Attn: Garrick L. Baxter IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720-0098 Fax: 208-287-6700 garrick.baxter@idwr.idaho.gov	<input type="checkbox"/> US Mail, Postage Paid <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand-Delivered <input checked="" type="checkbox"/> Electronic Mail
John K. Simpson Travis L. Thompson Barker Rosholt & Simpson, LLP 1010 Jefferson St., Ste. 102 P.O. Box 2139 Boise, ID 83701-2139 jks@idahowaters.com tlr@idahowaters.com	<input type="checkbox"/> US Mail, Postage Paid <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand-Delivered <input checked="" type="checkbox"/> Electronic Mail
W. Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318 wkf@pmt.org	<input type="checkbox"/> US Mail, Postage Paid <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand-Delivered <input checked="" type="checkbox"/> Electronic Mail
Randy Budge TJ Budge Racine Olson, PLLP 201 E. Center St. PO Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net	<input type="checkbox"/> US Mail, Postage Paid <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand-Delivered <input checked="" type="checkbox"/> Electronic Mail
Sarah Klahn Somach Simmons & Dunn 2701 Lawrence St, Ste. 113 Denver, CO 80205 sklahn@somachlaw.com	<input type="checkbox"/> US Mail, Postage Paid <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand-Delivered <input checked="" type="checkbox"/> Electronic Mail

<p>Robert L. Harris Holden, Kidwell, Hahn & Crapo, PLLC PO Box 50130 1000 Riverwalk Dr., Ste. 200 Idaho Falls, ID 83405 rharris@holdenlegal.com</p>	<p><input type="checkbox"/> US Mail, Postage Paid <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand-Delivered <input checked="" type="checkbox"/> Electronic Mail</p>
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CHRIS M. BROMLEY

EXHIBIT 1

Settlement Agreement (“Agreement”) Between The Surface Water Coalition, Participating Members of the Idaho Ground Water Appropriators, Inc. and Signatory Cities

**SETTLEMENT AGREEMENT (“AGREEMENT”) BETWEEN THE SURFACE WATER
COALITION¹, PARTICIPATING MEMBERS OF IDAHO GROUND WATER
APPROPRIATORS, INC.², AND SIGNATORY CITIES³**

WHEREAS, Idaho water rights are constitutional property rights defined by the prior appropriation doctrine; and

WHEREAS, the Idaho Department of Water Resources (“IDWR”) administers ground water and surface water rights under the prior appropriation doctrine, the Conjunctive Management Rules (“CM Rules”; IDAPA 37.03.11 et seq.), statutes, and decisional law; and

WHEREAS, the SWC owns surface water rights for irrigation purposes; and

WHEREAS, IGWA’s members own ground water rights for irrigation and other purposes; and

WHEREAS, IGWA owns spring water rights for fish propagation; and

WHEREAS, the Cities own municipal ground water rights, some of which are junior to water rights owned by the SWC or IGWA; and

WHEREAS, the SWC filed a delivery call in 2005 with IDWR under the CM Rules; and

WHEREAS, ground water rights of the Cities and IGWA members have been subject to IDWR administration, including curtailment, as a result of the SWC delivery call; and

WHEREAS, in the Rangen, Inc. delivery call as part of assessing an individual city’s mitigation obligation, IDWR determined the amount of a city’s pumping that was junior to the curtailment date, if any, based on the city’s 5-year average annual pumping volume less the

¹ The Surface Water Coalition (“SWC”) consists of A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

² The participating members of Idaho Ground Water Appropriators, Inc. are Aberdeen-American Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Henry’s Fork Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, and Southwest Irrigation District. The acronym “IGWA” is used in this Agreement to refer to all of these Districts collectively.

³ The cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Idaho Falls, Jerome, Paul, Pocatello, Richfield, Rupert, Shoshone, and Wendell are referred to in this Agreement individually as a “Signatory City” and collectively as the “Signatory Cities.” The Signatory Cities and additional cities who participate in this Agreement in the future, pursuant to section I.B, are referred to herein individually as a “City” and collectively as the “Cities.” The SWC, IGWA, and Signatory Cities are referred to herein individually at “Party” and collectively as the “Parties.”

maximum annual diversion volume authorized by the city's water rights that were senior to the curtailment date⁴; and

WHEREAS, pursuant to Idaho Code § 42-233(b) IDWR designated the Eastern Snake Plain Aquifer ("ESPA")⁵ as a Ground Water Management Area ("GWMA") on November 2, 2016—the largest GWMA established to date; and

WHEREAS, the Cities perceive substantial uncertainty regarding IDWR's administration of municipal water rights in the ESPA-GWMA; and

WHEREAS, IGWA and the SWC entered into a settlement agreement on June 30, 2015, to mitigate the obligations of IGWA members under the SWC delivery call. This agreement was the subject of addenda on October 19, 2015, and December 14, 2016, and was approved by the Director of IDWR as a CM Rule 43 mitigation plan ("CM Rule 43 Plan") on May 9, 2017. Collectively these documents are referred to herein as the "IGWA-SWC Settlement Agreement"; and

WHEREAS, the Cities are not parties to the IGWA-SWC Settlement Agreement; and

WHEREAS, the Cities desire to implement a long-term resolution to mitigation obligations under both the SWC Delivery Call and the ESPA-GWMA that allows for cities to continue to grow and develop and use additional water;

NOW THEREFORE, in settlement of litigation involving the distribution of water to the members of the SWC and the establishment of the ESPA-GWMA pursuant to Idaho Code § 42-233b, the Parties agree as follows:

I. CITIES OBLIGATED UNDER THIS AGREEMENT:

- A. The cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Idaho Falls, Jerome, Paul, Pocatello, Richfield, Rupert, Shoshone, and Wendell ("Signatory Cities") are obligated to satisfy the terms of this Agreement. In the Signatory Cities' sole discretion, they shall determine the proper distribution of this Agreement's obligations among themselves.
- B. Additional cities that divert water from the ESPA may participate in this Agreement upon written notice to IDWR and the Parties. Such notice must be

⁴ Memorandum from Jennifer Sukow, P.E., P.G. to Director Gary Spackman, *Technical Review of Coalition of Cities' Second Mitigation Plan*, January 2015. Available at <https://idwr.idaho.gov/files/legal/CM-MP-2014-007/CM-MP-2014-007-20150123-Staff-Memo-Cities-2nd.pdf> (last visited August 28, 2018).

⁵ For purposes of this Agreement the ESPA is the aquifer as designated by the IDWR Director's November 2, 2016 ESPA- GWMA Order.

given by January 15 for a city to participate in a given year. These cities are referred to herein individually as a “Participating City” and collectively as the “Participating Cities”. The Signatory Cities at their sole discretion shall establish the terms by which any Participating City, may participate in the obligations of the Signatory Cities under this Agreement.

II. SIGNATORY CITIES' MITIGATION OBLIGATION:

- A. Initial Mitigation Obligation: The Signatory Cities will collectively supply average annual mitigation water in the amount of 7,650 acre-feet per year (“AF/y”), with a minimum requirement to supply 1,000 AF/y, commencing January 1, 2019, with compliance as set forth in section II.C.
1. All mitigation water will be used for aquifer enhancement projects on the ESPA unless the Parties agree otherwise in writing.
 2. The following activities will count 1:1 towards meeting the Signatory Cities’ mitigation obligations:
 - a. Delivery of water to the Idaho Water Resource Board (“IWRB”) for managed aquifer recharge of the ESPA;
 - b. Managed aquifer recharge of the ESPA accomplished by entities other than IWRB provided: (1) a minimum of 50% of the volume is recharged east of the Great Rift; (2) the recharge occurs at any of the sites identified in Table 12 of the McVay Report⁶ or any other recharge site having an average minimum simulated retention period greater than or equal to 17.5% after five years consistent with analysis methods in the McVay Report; and (3) the water to be recharged pursuant to this subsection would not otherwise incidentally recharge the ESPA, excluding municipal wastewater;
 - c. Ground water to surface water conversions within the boundaries of the ESPA;
 - d. Temporary or permanent dry up (i.e. retirement) of irrigated lands within the boundaries of the ESPA; or
 - e. Other activities agreed to by the Parties.
 3. The Signatory Cities’ decisions regarding aquifer enhancement activities described in section II.A.2 is in their sole discretion.

⁶ Michael McVay, P.E., P.G., *Incorporating Recharge Limitation into the Prioritization of Aquifer Recharge Sites Based on Hydrologic Benefits Using ESPAM 2.1*, November 2015.

4. Aquifer enhancement activities performed by the Signatory Cities under this Agreement shall be in addition to aquifer enhancement activities performed by IGWA under the IGWA-SWC Settlement Agreement or by the IWRB under Idaho Senate Concurrent Resolution no. 136 (2016).

B. Changes in Mitigation Obligation:

1. In the event IGWA's required annual mitigation obligation as set forth in paragraph 3.a.i of the IGWA-SWC Settlement Agreement equals or exceeds 340,000 AF/y and the goals as set forth in paragraph 3.e. of the IGWA-SWC Settlement Agreement are not met, the Signatory Cities' collective annual mitigation obligation will increase from 7,650 AF/y to 9,640 AF/y commencing January 1 following notice of the increase.
2. In the event IGWA's annual mitigation obligation equals or exceeds 340,000 AF/y, but then is subsequently reduced below 340,000 AF/y, the Signatory Cities' annual mitigation obligation will be reduced back down to 7,650 AF/y commencing on January 1 following notice of the decrease.

- C. Compliance with Average Annual Mitigation Obligation:** The Cities will be judged to be in compliance with the mitigation requirement set forth herein so long as the five-year rolling average mitigation volume computed each year equals or exceeds the average annual Mitigation Obligation. The Cities will commence reporting under section III beginning in 2020 but compliance with the average annual mitigation obligation will first be assessed in 2024 for the period 2019-2023. Thereafter, compliance with the average annual mitigation obligation will be assessed annually.

- D. Costs of activities:** The Signatory Cities will pay for all costs (i.e., wheeling fees) related to aquifer enhancement projects and recharge.

III. REPORTING AND INFORMATION SHARING:

- A.** Prior to April 1 of each year, the Signatory Cities will compile and share with IGWA, the SWC and IDWR an annual report that includes: (1) the volume of ground water diverted by each City individually and the Cities collectively in each of the prior five calendar years, (2) the average annual volume of ground water diverted by the Cities collectively during the prior five calendar years, (3) a description of the mitigation activities accomplished by the Cities during the prior calendar year, (4) the volume of mitigation water provided by the Cities in each of the prior five calendar years, (5) the average annual volume of mitigation water provided by the Cities during the prior five calendar years, and (6) anticipated mitigation activities to be undertaken by the Cities during the current year.
- B.** The Parties will request that IDWR analyze the data contained in the Signatory Cities' annual report to confirm the accuracy of the data. IDWR's analysis shall be provided to the Parties no later than July 1 following the Signatory Cities' April 1 submittal of the annual report.

- C. For purposes of sharing of information and coordinating aquifer enhancement activities, IGWA and SWC agree to: (1) deliver to the Signatory Cities the IGWA April 1 report required under the Second Addendum to the IGWA-SWC Settlement Agreement (“Report”); (2) deliver IDWR’s review of the Report to the Cities; (3) upon request of any Party, host a meeting to discuss implementation of this Agreement; and (4) invite the Signatory Cities to attend any Steering Committee meeting that discusses increasing IGWA’s mitigation obligation to equal or exceed 340,000 AF/y.

IV. INCORPORATION INTO ESPA GROUND WATER MANAGEMENT PLAN:

- A. The Signatory Cities will withdraw their opposition to the ESPA-GWMA Order that is subject to a contested case before IDWR (Docket No. AA-GWMA-2016-001), provided, however, that all Parties may remain as parties to the contested case to monitor the proceedings and participate as necessary.
- B. At such time as IDWR undertakes to develop a ground water management plan for the ESPA-GWMA, the mitigation obligations set forth in section II of this Agreement will be submitted to IDWR for approval as a ground water management plan for the Cities. The Parties agree to support a ground water management plan that incorporates such obligations.
 - 1. If the ground water management plan imposes mitigation obligations that are materially greater or more burdensome than the obligations set forth in section II of this Agreement, section IV of this Agreement shall be of no force and effect and the cities reserve all right to challenge the ESPA-GWMA ground water management plan.
- C. At such time as IDWR undertakes to develop a ground water management plan for the ESPA-GWMA, the mitigation obligations set forth in the IGWA-SWC Settlement Agreement will be submitted to IDWR for approval as a ground water management plan for IGWA members. The Parties agree to support a ground water management plan that incorporates such obligations.
- D. In the event a ground water management plan is not implemented for the ESPA-GWMA or the ESPA-GWMA is dissolved for any reason, such action or inaction shall have no effect upon this Agreement as an approved CM Rule 43 Plan for the SWC delivery call proceeding.

V. SAFE HARBOR FROM IGWA SPRING RIGHTS:

- A. During the term of this Agreement, IGWA agrees to not assert a delivery call requesting priority administration against any City based on any of IGWA’s spring water rights so long as the Signatory Cities are in compliance with the mitigation obligations set forth in section II of this Agreement.

VI. CM RULE 43 MITIGATION PLAN:

- A. This Agreement will be submitted to IDWR for approval, and will be supported by IGWA and the SWC, as a CM Rule 43 Plan in the SWC delivery call proceedings.
- B. In the event this Agreement is not approved as a CM Rule 43 Plan in the SWC delivery call proceedings, this Agreement shall be of no further effect unless the Parties agree otherwise.

VII. EFFECT ON GROUND WATER DISTRICT ASSESSMENTS:

- A. This Agreement does not waive, cancel, or otherwise affect assessment obligations of any City that belongs to an IGWA ground water district with respect to existing mitigation plans and activities in the Thousand Springs area.
- B. Upon IDWR's approval of this Agreement as a CM Rule 43 Plan, Cities that are members of an IGWA ground water district or that participate in mitigation activities of an IGWA ground water district by contract under Idaho Code § 42-5259 shall have the right to be relieved from future monetary assessments associated with the SWC delivery call while this Agreement is in effect. Each City that desires to be relieved from such assessments shall, if the City is a member of the district, file a petition under Idaho Code § 42-5251, or shall, if the City has contracted with the district, file a written request with the district, to be excluded from the district for all purposes except for existing mitigation plans and activities in the Thousand Springs area, and the board of directors of such district will grant the petition or request. Any City may file such petition in advance of IDWR approval of this Agreement as a CM Rule 43 Plan, with such City's exclusion conditional upon IDWR approval of this Agreement as a CM Rule 43 Plan.
- C. This section VII does not otherwise affect any rights available to Cities under Chapter 52, Title 42, Idaho Code, including but not limited to the right to petition a ground water district to be excluded from existing mitigation plans and activities in the Thousand Springs area, which will be considered by the board of directors of such district on a case by case basis.

VIII. LEGISLATION AND SUPPORT FOR STATE-SPONSORED RECHARGE:

- A. Upon execution, the Parties shall provide this Agreement to Idaho's Senate Resources and Environment Committee. The Parties agree to use their best efforts to seek passage of a Senate Concurrent Resolution to approve this Agreement, similar to *Senate Concurrent Resolution 135 (2016)*.
- B. The Signatory Cities agree to support continued funding of state-sponsored managed aquifer recharge of the ESPA.

IX. TERM:

- A. The term of this Agreement shall be until the average annual ESPA pumping of the Cities reaches 120,000 AF/y as determined by a five-year rolling average, or December 31, 2053, whichever is earlier.
- B. This Agreement does not constitute a multi-year unconditional payment obligation. In the event it is determined that this Agreement does constitute a multi-year unconditional payment obligation, then the Parties agree to add additional language to this Agreement in accordance with State law.

X. DISPUTE RESOLUTION:

- A. Written notice of a dispute arising from or relating to this Agreement, or any alleged breach thereof, shall be provided to all Parties. The Parties shall thereafter attempt to resolve the matter within thirty (30) days of receiving written notice of the dispute through negotiations between the Parties. If the dispute is not resolved through negotiations, the Parties will attempt to resolve the dispute through non-binding mediation with the use of a mediator mutually agreed to by the Parties before resorting to litigation. If the Parties cannot agree to a mediator, the Director of IDWR shall appoint the mediator.

In the event the Parties cannot resolve their dispute via mediation, any one of them may seek judicial relief in district court to seek resolution of the dispute. The provision of this remedy shall not excuse the Parties from participating in good faith negotiations and mediation as set forth above.

XI. GENERAL PROVISIONS:

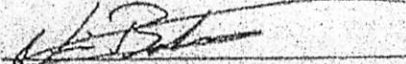
- A. Entire Agreement. This Agreement sets forth all understandings between the Parties with respect to the subject matter hereof. There are no understandings, covenants, promises, agreements, or conditions, either oral or written between the Parties other than those contained herein.
- B. Binding Date; Effective Date. This Agreement shall be binding upon and inure to the benefit of the Parties and their successors and assigns, and shall be effective when it is signed by all of the Parties.
- C. Reservation of Rights. The Parties expressly reserve all rights not modified by this Agreement. In the event this Agreement is terminated, all rights modified by the Agreement will revert to their original condition.
- D. Headings. Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text.
- E. Amendment. This Agreement may be amended at any time in writing signed by all Parties.

- F. Waiver. No term of this Agreement shall be deemed waived and no performance shall be excused hereunder unless prior waiver or consent shall be given in writing signed by the Party against whom it is sought to be enforced. Any waiver of any default by any Party shall not constitute a waiver of the same or different default on a separate occasion.
- G. Counterparts. This Agreement may be executed in counterparts which, when taken together, shall constitute one and the same agreement.
- H. Electronic signatures. Signatures to this Agreement transmitted by facsimile or email shall be valid and effective to bind the Party so signing.

[End of Agreement; Signatures Below]

PARTICIPATING MEMBERS OF
IDAHO GROUND WATER APPROPRIATORS, INC.

ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT

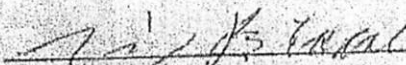


Nick Behrend, Chairman

9-13-18

Date

BINGHAM GROUND WATER DISTRICT

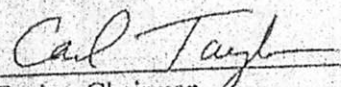


Craig Evans, Chairman

11-20-18

Date

BONNEVILLE-JEFFERSON GROUND WATER DISTRICT

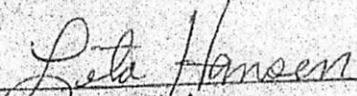


Carl Taylor, Chairman

11/21/18

Date

CAREY VALLEY GROUND WATER DISTRICT

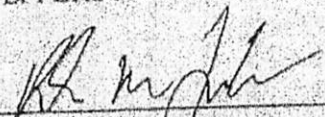


Leta Hansen, Chairman

12/5/18

Date

JEFFERSON CLARK GROUND WATER DISTRICT




Kirk Jacobs, Chairman

11/21/18

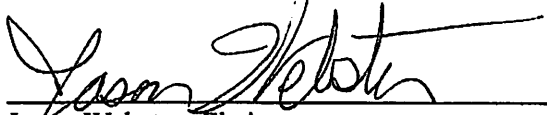
Date

HENRY'S FORK GROUND WATER DISTRICT


Jeff Raybould, Chairman

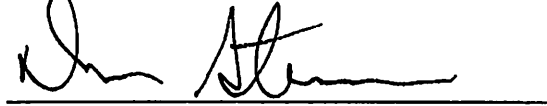
11-21-18
Date

MADISON GROUND WATER DISTRICT


Jason Webster, Chairman

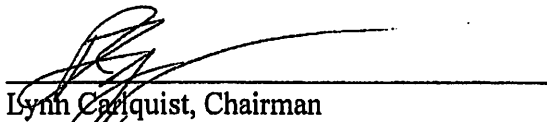
11-20-18
Date

MAGIC VALLEY GROUND WATER DISTRICT


Dean Stevenson, Chairman

9/12/18
Date

NORTH SNAKE GROUND WATER DISTRICT


Lynn Carlquist, Chairman

11/20/18
Date

SOUTHWEST IRRIGATION DISTRICT



Randy Brown, Chairman

11/20/18
Date

AMERICAN FALLS RESERVOIR DISTRICT NO. 2

Ellis Gooch 9-11-18
Ellis Gooch Date
Chairman

A&B IRRIGATION DISTRICT

 9-10-18
Harold Mohlman Date
Chairman

MILNER IRRIGATION DISTRICT

Scott Breeding 9/11/18
Scott Breeding Date
Chairman

MINIDOKA IRRIGATION DISTRICT

Ron Kowitz 9-11-18
Date

Ron Kowitz
Chairman

NORTH SIDE CANAL COMPANY

John Beukers 9-20-18
John Beukers Date
Chairman

TWIN FALLS CANAL COMPANY

Roger Blass 10/9/18
Roger Blass Date
Chairman

SIGNATORY CITIES

Chris Paulik 11-14-18
CITY OF BLISS Date CITY OF IDAHO FALLS Date

CITY OF BURLEY Date CITY OF JEROME Date

CITY OF CAREY Date CITY OF PAUL Date

CITY OF DECLO Date CITY OF POCA TELLO Date

CITY OF DIETRICH Date CITY OF RICHFIELD Date

CITY OF BLISS Date CITY OF RUPERT Date

CITY OF GOODING Date CITY OF SHOSHONE Date

CITY OF HAZELTON Date CITY OF WENDELL Date

CITY OF HEYBURN Date

SIGNATORY CITIES

CITY OF BLISS Date

CITY OF IDAHO FALLS Date

Stan Dussel 12/18/18

CITY OF BURLEY Date

CITY OF JEROME Date

CITY OF CAREY Date

CITY OF PAUL Date

CITY OF DECLO Date

CITY OF POCA TELLO Date

CITY OF DIETRICH Date

CITY OF RICHFIELD Date

CITY OF BLISS Date

CITY OF RUPERT Date

CITY OF GOODING Date

CITY OF SHOSHONE Date

CITY OF HAZELTON Date

CITY OF WENDELL Date

CITY OF HEYBURN Date

SIGNATORY CITIES

CITY OF BLISS _____ Date CITY OF IDAHO FALLS _____ Date

CITY OF BURLEY _____ Date CITY OF JEROME _____ Date

CITY OF CAREY _____ Date CITY OF PAUL _____ Date

CITY OF DECLO _____ Date CITY OF POCA TELLO _____ Date

Don Hanson *11-12-2018*
CITY OF DIETRICH _____ Date CITY OF RICHFIELD _____ Date

CITY OF BLISS _____ Date CITY OF RUPERT _____ Date

CITY OF GOODING _____ Date CITY OF SHOSHONE _____ Date

CITY OF HAZELTON _____ Date CITY OF WENDELL _____ Date

CITY OF HEYBURN _____ Date

SIGNATORY CITIES

CITY OF BLISS _____ Date CITY OF IDAHO FALLS _____ Date

CITY OF BURLEY _____ Date CITY OF JEROME _____ Date

CITY OF CAREY _____ Date CITY OF PAUL _____ Date

CITY OF DECLO _____ Date CITY OF POCA TELLO _____ Date

CITY OF DIETRICH _____ Date CITY OF RICHFIELD _____ Date

CITY OF BLISS _____ Date CITY OF RUPERT _____ Date

 1-7-19
CITY OF GOODING _____ Date

CITY OF SHOSHONE _____ Date

CITY OF HAZELTON _____ Date CITY OF WENDELL _____ Date

CITY OF HEYBURN _____ Date

SIGNATORY CITIES

CITY OF BLISS _____ Date CITY OF IDAHO FALLS _____ Date

CITY OF BURLEY _____ Date CITY OF JEROME _____ Date

CITY OF CAREY _____ Date CITY OF PAUL _____ Date

CITY OF DECLO _____ Date CITY OF POCA TELLO _____ Date

CITY OF DIETRICH _____ Date CITY OF RICHFIELD _____ Date

CITY OF BLISS _____ Date CITY OF RUPERT _____ Date

CITY OF GOODING _____ Date CITY OF SHOSHONE _____ Date

Jason Wether *1/8/19*
CITY OF HAZELTON _____ Date CITY OF WENDELL _____ Date

CITY OF HEYBURN _____ Date

SIGNATORY CITIES

CITY OF BLISS

Date

CITY OF IDAHO FALLS

Date

CITY OF BURLEY

Date

CITY OF JEROME

Date

CITY OF CAREY

Date

CITY OF PAUL

Date

CITY OF DECLO

Date

CITY OF POCA TELLO

Date

CITY OF DIETRICH

Date

CITY OF RICHFIELD

Date

CITY OF BLISS

Date

CITY OF RUPERT

Date

CITY OF GOODING

Date

CITY OF SHOSHONE

Date

CITY OF HAZELTON

Date

CITY OF WENDELL

Date

Cleo Gallinas

CITY OF HEYBURN

11/28/18

Date

SIGNATORY CITIES



CITY OF BLISS

Date

CITY OF IDAHO FALLS

Date

CITY OF BURLEY

Date

CITY OF JEROME

Date

CITY OF CAREY

Date

CITY OF PAUL

Date

CITY OF DECLO

Date

CITY OF POCA TELLO

Date

CITY OF DIETRICH

Date

CITY OF RICHFIELD

Date

CITY OF BLISS

Date

CITY OF RUPERT

Date

CITY OF GOODING

Date

CITY OF SHOSHONE

Date

CITY OF HAZELTON

Date


CITY OF WENDELL

Date

CITY OF HEYBURN

Date

SIGNATORY CITIES

_____ CITY OF BLISS	_____ Date	_____ CITY OF IDAHO FALLS	_____ Date
_____ CITY OF BURLEY	_____ Date	_____ CITY OF JEROME	_____ Date
_____ CITY OF CAREY	_____ Date	_____ CITY OF PAUL	_____ Date
_____ CITY OF DECLO	_____ Date	 _____ CITY OF POCA TELLO	<u>10/4/18</u> _____ Date
_____ CITY OF DIETRICH	_____ Date	_____ CITY OF RICHFIELD	_____ Date
_____ CITY OF BLISS	_____ Date	_____ CITY OF RUPERT	_____ Date
_____ CITY OF GOODING	_____ Date	_____ CITY OF SHOSHONE	_____ Date
_____ CITY OF HAZELTON	_____ Date	_____ CITY OF WENDELL	_____ Date
_____ CITY OF HEYBURN	_____ Date		

SIGNATORY CITIES

CITY OF BLISS _____ Date CITY OF IDAHO FALLS _____ Date

CITY OF BURLEY _____ Date CITY OF JEROME _____ Date

CITY OF CAREY _____ Date CITY OF PAUL _____ Date

CITY OF DECLO _____ Date CITY OF POCA TELLO _____ Date

CITY OF DIETRICH _____ Date *Charles E. B. [Signature]* 11-12-2018
CITY OF RICHFIELD _____ Date

CITY OF BLISS _____ Date CITY OF RUPERT _____ Date

CITY OF GOODING _____ Date CITY OF SHOSHONE _____ Date

CITY OF HAZELTON _____ Date CITY OF WENDELL _____ Date

CITY OF HEYBURN _____ Date

SIGNATORY CITIES

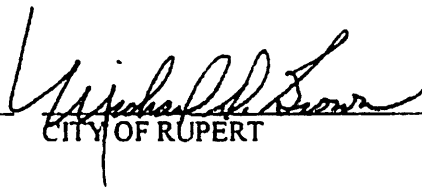
<u>CITY OF BLISS</u>	<u>Date</u>	<u>CITY OF IDAHO FALLS</u>	<u>Date</u>
<u>CITY OF BURLEY</u>	<u>Date</u>	<u>CITY OF JEROME</u>	<u>Date</u>
<u>CITY OF CAREY</u>	<u>Date</u>	<u>CITY OF PAUL</u>	<u>Date</u>
<u>CITY OF DECLO</u>	<u>Date</u>	<u>CITY OF POCATELLO</u>	<u>Date</u>
<u>CITY OF DIETRICH</u>	<u>Date</u>	<u>CITY OF RICHFIELD</u>	<u>Date</u>
<u>CITY OF BLISS</u>	<u>Date</u>	 <u>CITY OF RUPERT</u>	<u>11/22/10</u> <u>Date</u>
<u>CITY OF GOODING</u>	<u>Date</u>	<u>CITY OF SHOSHONE</u>	<u>Date</u>
<u>CITY OF HAZELTON</u>	<u>Date</u>	<u>CITY OF WENDELL</u>	<u>Date</u>
<u>CITY OF HEYBURN</u>	<u>Date</u>		

Exhibit F

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF
WATER TO VARIOUS WATER RIGHTS
HELD BY OR FOR THE BENEFIT OF
A&B IRRIGATION DISTRICT,
AMERICAN FALLS RESERVOIR
DISTRICT #2, BURLEY IRRIGATION
DISTRICT, MILNER IRRIGATION
DISTRICT, MINIDOKA IRRIGATION
DISTRICT, NORTH SIDE CANAL
COMPANY, AND TWIN FALLS CANAL
COMPANY

Docket No. CM-DC-2010-001
Docket No. CM-MP-2016-001

**RESPONSE TO REQUEST FOR STATUS
CONFERENCE; NOTICE OF STATUS
CONFERENCE**

BACKGROUND

On April 29, 2022, the Surface Water Coalition (“SWC”) filed with Idaho Department of Water Resources (“Department”) the *Surface Water Coalition’s Request for Status Conference* (“Request”) in the above-captioned matters.¹ The Request seeks a status conference on three issues.

First, the SWC “requests an update on the status of [the Department’s] and respective water districts’ actions to curtail diversions pursuant to those water rights as ordered [in the January 11, 2022 curtailment order] by the Director.” *Request* at 2.

Second, the SWC seeks a status conference related to the stipulated mitigation plan submitted by the SWC and the Idaho Ground Water Appropriators, Inc. (“IGWA”) and previously approved by the Director. *Id.* The plan committed signatory ground water districts to “a total ground water diversion reduction of 240,000 acre-feet annually.” *Id.* (citation omitted). IGWA’s recent performance report shows that the ground water districts only reduced their diversions by 122,784 acre-feet in 2021. *Id.* The SWC states, “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 [SWC] members.” *Id.* at 3. The SWC asks the Director for a status conference “to address what actions he intends to take in 2022 in response to this non-compliance and enforcement of the order approving the mitigation plan.” *Id.*

Third, the SWC asks the Director to address a developing issue involving in the Water District 01 rental pool procedures. *See Id.* The Idaho Water Resource Board (“IWRB”) has delegated the authority to operate the Water District 01 rental pool to the Committee of Nine. Resol. to Reappoint Rental Pool Local Comm. & Approve Rental Pool Procs., *In re Approving Rental Pool Procs. for the Upper Snake River Rental Pool* (Idaho Water Res. Bd. May 10, 2019).

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.

RESPONSE TO REQUEST FOR STATUS CONFERENCE; NOTICE OF STATUS
CONFERENCE—Page 1

Recently, the Committee of Nine modified its rental pool procedures. Watermaster Tony Olenichak has interpreted the procedures. The SWC takes issue with his interpretation and states “[t]he Watermaster’s interpretation [of the rental pool procedures] has created great uncertainty as to how rented or other non-spaceholder water will be handled for water right administration in 2022.” *Request* at 5. The SWC argues, “Given the pending deadlines for juniors regarding the Director’s Steps 1-3 Order (May 1st) and spaceholders for participation status (May 13th), the Director should address this issue and provide clarification as soon as possible. *See* I.C. 42-602.” *Id.*

RESPONSE

The Director will grant the SWC’s request for a status conference regarding the Department’s curtailment efforts related to the January 11, 2022 curtailment order. The status conference will be set for May 25, 2022, at the time and location described below.

The Director will conditionally grant the SWC’s request for a status conference on the diversion reduction component of the mitigation plan. The SWC and IGWA submitted their June 30, 2015 settlement agreement to the Director for approval as a mitigation plan. *See* Surface Water Coal.’s & IGWA’s Stip. Mitigation Plan & Req. for Order, *In re IGWA’s Settlement Agreement Mitigation Plan*, No. CM-MP-2016-001 (Idaho Dep’t Water Res. March 9, 2016). The settlement agreement has been amended twice and each amendment has been approved by the Director. *See* Final Order Approv. Stip. Mitigation Plan, *In re IGWA’s Settlement Agreement Mitigation Plan*, No. CM-MP-2016-001 (Idaho Dep’t Water Res. May 2, 2016); Final Order Approv. Amend. to Stip. Mitigation Plan, *In re IGWA’s Settlement Agreement Mitigation Plan*, No. CM-MP-2016-001 (Idaho Dep’t Water Res. May 9, 2017). The original settlement agreement established a steering committee to review the signatory ground water districts’ progress towards the practices and goals in the agreement. In the *Second Addendum to Settlement Agreement*, the parties agreed to a specific process for addressing any alleged breach or noncompliance of the mitigation plan. Final Order Approv. Amend. to Stip. Mitigation Plan, *In re IGWA’s Settlement Agreement Mitigation Plan*, No. CM-MP-2016-001, ex. A (Idaho Dep’t Water Res. May 9, 2017) [hereinafter 2nd Addendum].

The first step is to have the steering committee review the available technical information. *2nd Addendum* ¶ 2.c.i. Then, if the steering committee finds a breach of one of the long-term practices of the plan (like the diversion reduction component), the steering committee is required to notify the breaching party in writing. *Id.* ¶ 2.c.iii. If the breaching party fails to cure the breach, the steering committee then reports the breach to the Director. *Id.* If the SWC 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 this to the Director and ask the Director to determine if a breach has occurred. *Id.* ¶ 2.c.iv.

Under either paragraph 2.c.iii or 2.c.iv, any alleged breach should first be addressed by the steering committee and then a report from the steering committee should be submitted to the

Director. The Director understands that the steering committee plans to meet on May 18, 2022, to discuss this topic. The Director understands that time is of the essence and will expeditiously respond to address this issue.

If the parties comply with the process outlined in the 2nd Addendum and if the steering committee submits a report to the Director pursuant to paragraph 2.c.iv. by May 20, 2022, the Director will make this issue a topic of discussion for the May 25, 2022 status conference. If no report is submitted to the Director by May 20, 2022, this issue will not be addressed at the May 25, 2022 status conference.

Finally, the Director will not grant the SWC's request for a status conference on issues involving in the Water District 01 rental pool procedures. The procedures are outside the scope of the SWC delivery call proceeding and the approved mitigation plan. Furthermore, pursuant to Idaho Code § 42-1765 and Rule 40 of the Water Supply Bank Rules, the IWRB has delegated authority to prepare rental pool procedures to the Committee of Nine. The Committee of Nine has exercised its authority and adopted procedures. While the Director reviews the proposed procedures and the Board approves them, the responsibility to interpret the rules falls to the Committee of Nine. The Committee of Nine is the entity that should clarify the intent of their procedures.

NOTICE OF STATUS CONFERENCE

The Director hereby notifies the parties that a status conference in this matter will be held on **May 25, 2022, at 10:00 a.m. (MST)**, at the Department's State Office, located at 322 E. Front Street, 6th Floor, Boise, Idaho. All parties to the matter must be represented at the status conference in person or by video conference. The purpose of the status conference is to discuss the Department's curtailment efforts related to the January 11, 2022 curtailment order. If the parties comply with the process outlined in the 2nd Addendum and if the steering committee submits a report to the Director pursuant to paragraph 2.c.iv. by May 20, 2022, non-compliance with the mitigation plan will be a topic discussed at the status conference.

To join the conference via computer or smartphone, please click the following Webex link, follow the prompts, and wait to be admitted by the meeting host: <https://idahogov.webex.com/idahogov/j.php?MTID=mf5699b0a637a95f944ba4496f0d35a01>.

To join the conference via telephone, please dial 1(415) 655-0001 (US Toll) and enter the following meeting access code when prompted: 2452 356 7400.

The status conference will be held in accordance with the provisions of Chapter 17, Title 42, and Chapter 52, Title 67, Idaho Code, and the Department's Rules of Procedure, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at <https://adminrules.idaho.gov/rules/current/37/index.html>.

The conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations to attend, participate in, or understand the conference, please advise the Department no later than five (5) days before the conference. Inquiries for special accommodations should be directed to Sarah Tschohl, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4815.

Dated this 5th day of May 2022.



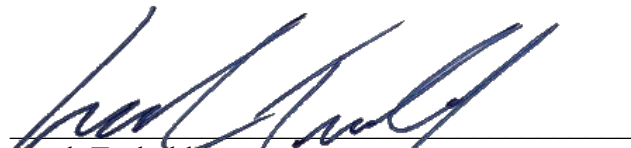
GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of May 2022, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>John K. Simpson Travis L. Thompson BARKER ROSHOLT & SIMPSON, LLP P. O. Box 63 Twin Falls, ID 83303-0063 jks@idahowaters.com flt@idahowaters.com nls@idahowaters.com jf@idahowaters.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Randall C. Budge Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 randy@racineolson.com tj@racineolson.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Kathleen Marion Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 kathleenmarion.carr@sol.doi.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202 david.gehlert@usdoj.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@usbr.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Sarah A Klahn Somach Simmons & Dunn 2033 11th Street, Ste 5 Boulder, Co 80302 sklahn@somachlaw.com dthompson@somachlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>

<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83205 rdiehl@pocatello.us</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83702 cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Robert E. Williams WILLIAMS, MESERVY, & LOTHSPEICH, LLP P.O. Box 168 Jerome, ID 83338 rewilliams@wmlattys.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 rfife@idahofallsidaho.gov</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Tony Olenichak IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 Tony.Olenichak@idwr.idaho.gov</p>	<input checked="" type="checkbox"/> Email
<p>Corey Skinner Nathan Erickson IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 corey.skinner@idwr.idaho.gov nathan.erickson@idwr.idaho.gov</p>	<input checked="" type="checkbox"/> Email
<p>COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 wparsons@pmt.org</p>	<input checked="" type="checkbox"/> Email



Sarah Tschorn
Legal Assistant

Exhibit G

**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-foot 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 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. 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.

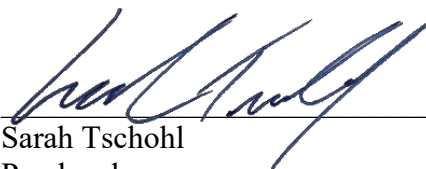

GARY SPACKMAN
Director

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:

<p>John K. Simpson Travis L. Thompson BARKER ROSHOLT & SIMPSON, LLP P. O. Box 63 Twin Falls, ID 83303-0063 jks@idahowaters.com flt@idahowaters.com nls@idahowaters.com jf@idahowaters.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Randall C. Budge Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 randy@racineolson.com tj@racineolson.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Kathleen Marion Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 kathleenmarion.carr@sol.doi.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202 david.gehlert@usdoj.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@usbr.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Sarah A Klahn SOMACH SIMMONS & DUNN 2033 11th Street, Ste 5 Boulder, CO 80302 sklahn@somachlaw.com dthompson@somachlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>

<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83205 rdiehl@pocatello.us</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83702 cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Robert E. Williams WILLIAMS, MESERVY, & LOTHSPREICH, LLP P.O. Box 168 Jerome, ID 83338 rewilliams@wmlattys.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 rfife@idahofallsidaho.gov</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Tony Olenichak IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 tony.olenichak@idwr.idaho.gov</p>	<input checked="" type="checkbox"/> Email
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<p>COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 wparsons@pmt.org</p>	<input checked="" type="checkbox"/> Email



Sarah Tschohl
Paralegal

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.

Exhibit H

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into effective September 7, 2022, between participating members of Idaho Ground Water Appropriators, Inc.¹ (“IGWA”) and participating members of the Surface Water Coalition² (“SWC”). Such participating members may be referred to herein individually as a “party” and collectively as the “parties.”

Recitals

A. On June 30, 2015, IGWA and the SWC entered into the *Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of Idaho Ground Water Appropriators, Inc.* (“Settlement Agreement”) to resolve the SWC delivery call, IDWR Docket No. CM-DC-2010-001, with respect to certain signatory IGWA members. On October 19, 2015, IGWA and the SWC entered into an *Addendum to Settlement Agreement* (“First Addendum”) to clarify certain terms of the Agreement. On October 7, 2015, IGWA and A&B Irrigation District entered into an *Agreement* relating to A&B Irrigation District’s participation in the Settlement Agreement.

B. On March 9, 2016, IGWA and the SWC filed with the Idaho Department of Water Resources (“IDWR” or “Department”) the *Surface Water Coalition’s and IGWA’s Stipulated Mitigation Plan and Request for Order* asking the Department to approve the Agreement, as amended by the First Addendum, as a mitigation plan under rule 43 of the Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”), IDAPA 37.03.11. On May 2, 2016, the Department issued the *Final Order Approving Stipulated Mitigation Plan* approving the Agreement as a mitigation plan under CM Rule 43, IDWR Docket No. CM-MP-2016-001.

C. On December 14, 2016, IGWA and the SWC entered into a *Second Addendum to Settlement Agreement* (“Second Addendum”) amending the Agreement. On February 7, 2017, IGWA and SWC amended filed an *Amended Mitigation Plan and Request for Order* asking the Department to approve the Second Addendum as an amendment to the approved mitigation plan, and on May 9, 2017, the Department issued a *Final Order Approving Amendment to Stipulated Mitigation Plan*.

D. The Settlement Agreement requires IGWA to conserve a certain amount of groundwater through reduced diversions and/or managed aquifer recharge, among other things. IGWA submitted its 2021 performance report on April 1, 2022. On April 27, 2022, the SWC filed *SWC’s Request for Status Conference* (“SWC Notice”) with the Department identifying a shortfall in certain IGWA districts’ 2021 performance as referenced in the performance report. IGWA disputes the SWC’s allegation. The parties’ disagreement hinges on (a) the amount of

¹ The participating members of IGWA are North Snake Ground Water District, Carey Valley Ground Water District, Magic Valley Ground Water District, American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Henry’s Fork Ground Water District, and Madison Ground Water District.

² The participating members of the SWC are 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.

groundwater conservation for which IGWA is responsible under the Agreement, and (b) whether averaging may be used to measure compliance with IGWA's conservation obligation.

E. The parties have been advised that the Director of IDWR has prepared an order that interprets the Settlement Agreement and the approved mitigation plan and orders curtailment of certain IGWA members in 2022. The parties desire to reach a settlement such that the Director does not curtail certain IGWA members during the 2022 irrigation season.

Agreement

Therefore, with the above definitions incorporated herein by reference, and in consideration of the mutual agreements set forth below, the parties agree as follows:

1. 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.

2. Lease of SWC Water. To the extent IGWA is unable to secure the quantities set forth above from non-SWC spaceholders as required by section 1 of this Agreement, the SWC will lease storage water to IGWA as needed to fulfill its obligations under this Agreement, to the extent the SWC has storage available. While final details of such lease have not been reduced to writing, time is of the essence and the parties agree to continue to work in good faith toward finalizing an agreement for IGWA to lease storage water from the SWC as a contingency in case the full balance in 2023 and 2024 is not available from other sources. Nothing in this section shall obligate any SWC spaceholder to contract with IGWA for the lease of storage water and nothing in this section shall be deemed to alter or amend the requirements of section 1.

3. Agreement to be filed with the Director. The parties agree to jointly submit this 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. 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. The parties reserve the right to seek judicial review of the decision by the Director

relating to such interpretive issues but shall not seek review of the remedy agreed to herein and incorporated into the Director's Order.

4. Amendment of Settlement Agreement. The parties will continue to negotiate in good faith to resolve the issues concerning interpretation of the Settlement Agreement and present any agreed upon amendments to the Settlement Agreement to the Director at the earliest date possible but no later than March 1, 2023. If the parties fail to amend the Settlement Agreement, the obligations set forth in section 1 shall continue and shall be in addition to any volume of mitigation water or curtailment ordered by the Department in the absence of this Agreement for subsequent years in accordance with the Settlement Agreement and Mitigation Plan.

5. Reservation of Rights. This Agreement shall not be construed as an admission or waiver of any party's rights or arguments with respect to the Settlement Agreement and Mitigation Plan, except with respect to IGWA's compliance with its 2021 groundwater conservation obligation. The parties reserve the right to pursue administrative and/or judicial action to enforce the terms of the Settlement Agreement, the Mitigation Plan, and/or this Agreement and to seek judicial review of any order issued by the Director as specified in section 3.

6. Entire Agreement; Binding Effect; Assignment. This Agreement sets forth all understandings between the parties concerning the subject matter hereof. This Agreement shall be binding upon and inure to the benefit of parties and their respective successors and assigns; provided, that no party shall assign its interest in this Agreement to another party without the prior written consent of the other parties, which shall not be unreasonably withheld.

BARKER ROSHOLT & SIMPSON LLP

/s/ John Simpson 9/7/22

John Simpson
*Attorneys for A&B Irrigation District,
Burley Irrigation District, Milner Irrigation
District, NSCC and TFCC*

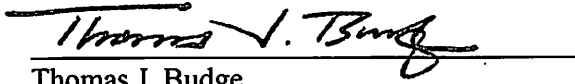
FLETCHER LAW OFFICE

September 7, 2022



W. Kent Fletcher
*Attorneys for Minidoka Irrigation
District and American Falls
Reservoir District #2*

RACINE OLSON, PLLP

A handwritten signature in black ink, appearing to read "Thomas J. Budge", is written over a horizontal line.

Thomas J. Budge
*Attorneys for Idaho Ground Water
Appropriators, Inc.*

Exhibit

I

I.

STATEMENT OF THE CASE

A. Nature of the Case.

This case originated when Rangen, Inc. (“Rangen”) filed a *Petition* in the above-captioned matter seeking judicial review of a final order of the Director of the Idaho Department of Water Resources (“IDWR” or “Department”). The order under review is the Director’s *Amended Order Approving in Part and Rejecting in Part IGWA’s Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* (“*Amended Final Order*”) issued on May 16, 2014, in IDWR Docket Nos. CM-MP-2014-001 and CM-DC-2011-004. The *Amended Final Order* approves in part a mitigation plan submitted by the Idaho Ground Water Appropriators, Inc. (“IGWA”) in response to a delivery call made by Rangen. Rangen asserts that the *Amended Final Order* is contrary to law in several respects and requests that this Court set it aside and remand for further proceedings.

B. Course of Proceedings and Statement of Facts.

The underlying administrative proceeding in this matter concerns a delivery call. The call commenced in 2011, when Rangen filed a petition with the Department requesting curtailment of certain hydraulically connected junior ground water rights. On January 29, 2014, the Director issued his *Curtailment Order* in response to the call.¹ Ex.2042. The Director concluded that Rangen’s senior water right numbers 36-2551 and 36-7694 are being materially injured by junior users. He ordered that certain junior ground water rights bearing priority dates junior to July 13, 1962, be curtailed as a result on or before March 14, 2014. Ex.2042, p.42. However, the Director instructed that the affected junior users could avoid curtailment if they proposed and had approved a mitigation plan that provided “simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen.” *Id.* He further directed that if mitigation is provided by direct flow to Rangen, the mitigation plan “may be phased-in over not more than a five-year period pursuant to Rule 40 of the CM Rules as follows: 3.4 cfs the first

¹ The Director issued his *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“*Curtailment Order*”) on January 29, 2014, in IDWR Docket No. 2011-004. It is included in the agency record as Exhibit 2042. The Director’s *Curtailment Order* is not at issue in this proceeding. However, it was subject to judicial review by this Court in Twin Falls County Case No. CV-2014-1338. This Court entered its *Memorandum Decision and Order and Judgment* in that case on October 24, 2014.

year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year.”² *Id.*

IGWA filed a proposed mitigation plan with the Director on February 11, 2014. R., pp.1-13. The plan set forth various proposals for junior users to meet their mitigation obligations to Rangen. *Id.* Following hearing, the Director issued his *Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order (“Final Order”)*, wherein he approved IGWA’s mitigation plan in part. R., pp.464-489. In so approving, the Director granted IGWA a total mitigation credit of 3.0 cfs. R., p.484. The Director then noted that “the total mitigation credit is 0.4 cfs less than the annual mitigation requirement of 3.4 cfs for the annual period from April 1, 2014 through March 31, 2015.” *Id.* To address the mitigation deficiency, the *Final Order* included a revised curtailment order providing that certain junior ground water rights bearing priority dates junior to July 1, 1983, would be curtailed on or before May 5, 2014. *Id.* Following the filing of motions for reconsideration, the Director issued his *Final Order on Reconsideration* as well as his *Amended Final Order*. The *Amended Final Order* superseded the Director’s *Final Order*, but did not materially change the substantive findings of fact or conclusions of law at issue here.

On June 13, 2014, Rangen filed the instant *Petition for Judicial Review*, asserting that the Director’s *Amended Final Order* is contrary to law in several respects and should be set aside and remanded for further proceedings. The case was reassigned by the clerk of the court to this Court on June 16, 2014.³ On August 6, 2014, the Court entered an *Order* permitting IGWA, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company to appear as intervenors in this proceeding. Rangen and the Department subsequently briefed the issues contained in the *Petition*. The Intervenors did not submit any briefing with respect to the *Petition*. A hearing on the *Petition* was held before this Court on November 13, 2014. The parties did not request the opportunity to submit additional briefing

² The term “CM Rules” refers to Idaho’s *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

³ The case was reassigned to this Court pursuant to the Idaho Supreme Court Administrative Order Dated December 9, 2009, entitled: *In the Matter of the Appointment of the SRBA District Court to Hear All Petitions for Judicial Review From the Department of Water Resources Involving Administration of Water Rights*.

and the Court does not require any in this matter. Therefore, this matter is deemed fully submitted for decision on the next business day or December 14, 2010.

II.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dohson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or,
- (e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265. The petitioner must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the party has been prejudiced. Idaho Code § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.⁴ *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

⁴ Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. See eg. *Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); see also *Evans v. Hara's Inc.* 125 Idaho 473, 478, 849 P.2d 934, 939 (1993).

III. ANALYSIS

The Director's *Curtailement Order* allows for phased-in mitigation. Ex.2042, p.42. It contemplates a first year mitigation obligation of 3.4 cfs from junior users for the annual period commencing April 1, 2014, and ending March 31, 2015 ("2014 Period"). *Id.* Thereafter, it contemplates incremental increases in the mitigation obligation of junior users for each of the following four years. *Id.* To determine the mitigation obligation for each year of the five year phase-in, the Director ran ESPAM 2.1 to establish the benefits that would accrue to Rangen if curtailment was implemented under the *Curtailement Order*. Ex.2043, p.5. The exercise revealed that if curtailment was implemented, the predicted benefit to the Martin-Curren Tunnel during each of the first four years would be 3.4 cfs, 5.2 cfs, 6.0 cfs and 6.6 cfs respectively. *Id.* Those numbers thus represent the respective mitigation obligations of junior users during the first four years of phased-in mitigation. *Id.* With respect to the fifth year, ESPAM 2.1 predicted a curtailment benefit to the Martin-Curren Tunnel of 7.1 cfs. Ex.2043, pp.5-6. However, the Director held that the full obligation of 9.1 cfs would nonetheless be required the fifth year because "the Director can only phase in curtailment over five years per Conjunctive Management Rule 20.04." Ex.2043, p.6.

The mitigation plan proposed by IGWA in this case set forth nine proposals for junior users to meet their mitigation obligations to Rangen. In his *Amended Final Order*, the Director approved IGWA's plan in part. He approved IGWA's first proposal to engage in aquifer enhancement activities, including: (a) conversions from ground water irrigation to surface water irrigation, (b) voluntary "dry-ups" of acreage irrigated with ground water through the Conservation Reserve Enhanced Program or other cessation of irrigation with ground water, and (c) ground water recharge. R., p.616. These activities augment the ground water supply in the ESPA, which in turn increases ESPA discharge to springs in the Hagerman area. He also approved IGWA's second proposal to provide direct delivery of surface water from the Martin-Curren Tunnel to Rangen as a result of an exchange agreement between one of its members, the North Snake Ground Water District ("NSGWD"), and Howard Morris ("Morris Water Exchange Agreement"). *Id.* Morris holds water rights senior to Rangen's that authorize the diversion of water from the Martin-Curren Tunnel. With respect to the remaining seven proposals, the

Director rejected those on the grounds that IGWA failed to carry its evidentiary burden. R., pp. 600 & 617.

In full, the Director granted IGWA a total of 3.0 cfs of transient mitigation credit for the 2014 Period in his *Amended Final Order*. R., p.614. Of that total, 1.2 cfs is attributable to aquifer enhancement activities. *Id.* The remaining 1.8 cfs is attributable to the Morris Water Exchange Agreement. *Id.* On judicial review, Rangen raises issues concerning the legality of the Director's approval of both mitigation proposals.

A. The *Amended Final Order's* approval of IGWA's mitigation proposal based on future aquifer enhancement activities is reversed and remanded for further proceedings as necessary.

Rangen seeks judicial review of the Director's approval of IGWA's mitigation proposal to engage in aquifer enhancement activities. Rangen does not take issue with the Director's approval of mitigation credit attributable to past aquifer enhancement activities (i.e., 2005-2013). However, it argues that under the facts and circumstances present here, the Director's approval of mitigation credit for future aquifer enhancement activities is contrary to law and an abuse of discretion. Rangen contends that the Director's approval places an unlawful risk on it as the senior appropriator that the future enhancement activities will not occur. It asserts "there are no provisions in the Director's *Amended Final Order* to ensure that these future activities will occur," and "there are similarly no contingency provisions if the future activities do not or cannot occur." Rangen *Opening Br.*, p.9. This Court agrees.

When material injury to a senior water right is found to exist, the CM Rules permit the Director to allow out-of-priority water use to occur pursuant to an approved mitigation plan. IDAPA 37.03.11.040.01. In this case, the Director's *Amended Final Order* permits out-of-priority water use in part because of anticipated future aquifer enhancement activities that the Director assumes will occur:

Using the data entered into evidence at the hearing, the Department input data into the model for each year of private party aquifer enhancement activities from 2005 through 2014. The 2005 through 2013 data were compiled from previously documented activities. IDWR Ex. 3001; IGWA Ex. 1025. *For 2014, conversions, CREP, and voluntary curtailment projects were assumed to be identical to 2013, and private party managed recharge was assumed to be zero.* The Department determined the average annual benefit from aquifer enhancement activities predicted to accrue to the Curren Tunnel between April 2014 and March

2015 is 871 acre feet, which is equivalent to an average rate of 1.2 cfs for 365 days.

R., p.604 (emphasis added). While the Director has discretion to approve a mitigation plan based on future mitigation activities, such a mitigation plan “must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.” IDAPA 37.03.11.043.03.c.

This Court finds that the Director’s *Amended Final Order* lacks a contingency provision adequate to protect Rangen’s senior rights in the event the assumed future aquifer enhancement activities do not occur. The future activities contemplated by the plan consist primarily of conversions by junior users from ground water use to surface water use. Ex. 1025. The record establishes that most of the juniors that have converted to a surface water source also maintain their ground water connections as a safety net. Tr., pp.153-154. If for any reason those junior converters are unable to meet their water needs from their surface source, they assert the right to switch back to using ground water at any time.

That such is the case is evidenced by the testimony of Richard Lynn Carlquist (“Carlquist”). Carlquist is the chairman of the NSGWD. Tr., p.74. The NSGWD is an IGWA member. Tr., p.77. Carlquist also sits as a member of IGWA’s executive committee. Tr., p.78. At the hearing before the Director, Carlquist testified that the conversions by junior users are voluntary. Further, that if junior converters do not receive all the water they need from their surface water source, they can and should revert back to using ground water:

Q. [Haemmerle] Now, I want to understand how the conversions might work. You characterized almost all conversions as soft; correct?

A. [Carlquist] Yes.

Q. [Haemmerle] And you described it in such a way that if the people who do those conversions, they have the ability to turn on their pumps if they’re not obtaining surface water; correct?

A. [Carlquist] That’s correct.

Q. [Haemmerle] Would you say that’s a routine practice?

A. [Carlquist] It hasn’t happened much, but we have told them that they need to maintain that as an option because we cannot guarantee that we can lease water every year, year in and year out.

- Q. [Haemmerle] Okay. Have you leased water in the last several years?
- A. [Carlquist] Yes.
- Q. [Haemmerle] Have you been able to deliver that leased water through the entire irrigation season routinely?
- A. [Carlquist] For the most – most of the years we have been able to do that, yes.
- Q. [Haemmerle] Okay. Are there years where you're unable to do that?
- A. [Carlquist] There have been where we haven't been able to get as much as has been requested by the converters.
...
- Q. [Haemmerle] And you in fact expressly tell them that if they're not getting their surface water they need to be able to turn their pumps back on; correct?
- A. [Carlquist] Yes, that's what we've told them. If we can't get the water, that's why they need to maintain that connection.
- Q. [Haemmerle] All right. And so most everyone maintains a connection to their groundwater pumps; correct?
- A. [Carlquist] Yes.
- Q. [Haemmerle] And you agree that they -- you, sitting here today, you agree that they should be able to turn their pumps back on when they need water?
- A. [Carlquist] Yes.

Tr., pp.152-154.

Following the above-quoted exchange, counsel for Rangen further inquired of Carlquist concerning IGWA's understanding of its proposed mitigation plan:

- Q. [Haemmerle] All right. Now, you understand that IGWA is seeking what's called a steady-state credit for these conversions. Do you know what that means?
- A. [Carlquist] Basically, yes, I do. We're asking for credit for the amount of converted water that we have been able to put to use.

- Q. [Haemmerle] And the steady state concept that I'm talking to you about envisions that water remains off for a long period of time where over a period of time water will appear at the Martin-Curren Tunnel. Do you understand that?
- A. [Carlquist] Yes. How the model tells them it will happen.
- Q. [Haemmerle] Okay. And that contemplates that water remains unused for a period of time, more than one year. Do you understand that?
- A. [Carlquist] Yes.
- Q. [Haemmerle] Okay. So it seems to me, Mr. Carlquist, that in order to get credit for the conversions it seems fair that those people who convert cease using their groundwater pumping. Do you agree or disagree?
- A. [Carlquist] I disagree.
- Q. [Haemmerle] Okay. So if in need, people on groundwater pumping can simply resume?
- A. [Carlquist] Yes.

Tr., pp.154-155.

While the Director is assuming that mitigation conversions will continue and be maintained into the future, the testimony of Carlquist establishes that such an assumption is shaky at best. The conversions are voluntary, not compelled. Absent from the Director's *Amended Final Order* is any directive requiring that junior convertors refrain from reverting to ground water use during the implementation of the mitigation plan. As a result, neither the Director nor Rangen has any mechanism to compel compliance with the Director's assumption that mitigation conversions will occur into the future. To the contrary, junior users admit that the conversions will be maintained only so long as IGWA acquires enough surface water to meet their demands. Tr., pp.152-155. IGWA has not always been able to do so. The record establishes that there have indeed been years when IGWA has been unable to secure enough surface water to meet the demands of the convertors. Tr., p.153. When such a scenario arises, IGWA has instructed junior convertors to revert to ground water use to satisfy their water needs. Tr., 153. These instructions persist notwithstanding IGWA's submittal of its mitigation plan. Tr., pp.152-155.

Although the Director has assumed that mitigation conversions will continue into the future, the record establishes there is certainly no guarantee that such will actually be the case. Therefore, the CM Rules require that the mitigation plan include a contingency provision to assure the protection of the Rangen's rights in the event that source of mitigation water (i.e., water accrued to Rangen from ground to surface conversions) becomes unavailable. The Department argues that the *Amended Final Order* contains such a mitigation provision. It provides:

If the proposed mitigation falls short of the annual mitigation requirement, the deficiency can be calculated at the beginning of the irrigation season. Diversion of water by junior water right holders will be curtailed to address the deficiency.

R., p.602.

The Idaho Supreme Court has previously held that the Director abused his discretion in approving a mitigation plan that does not provide an adequate contingency provision. *In the Matter of Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irr. Dist.*, 155 Idaho 640, 654, 315 P.3d 828, 842 (2013). Such is the case here. If junior convertors choose to revert back to ground water use during a given year, the above provision establishes that the Director will take no action with respect to that reversion, and the resulting mitigation deficiency, during that year. It provides only that the Director will address the deficiency at the beginning of the following irrigation season. And, that the Director will then curtail junior water right holders at that time to cure the deficiency. The Court holds such actions do not ensure the protection of Rangen's senior water rights as required by the CM Rules, and as such prejudice and diminish Rangen's substantial rights. They do not address the mitigation deficiency in the year in which it occurs; that is, the year Rangen's senior water rights will suffer injury. Curtailing ground water rights the following irrigation season is too late. The injury to Rangen's rights, and corresponding out-of-priority water use, will have already occurred. Since the Director's *Amended Final Order* does not contain a contingency provision adequate to assure protection of Rangen's senior-priority water rights, it must be set aside and remanded for further proceedings as necessary.

B. The *Amended Final Order's* approval of IGWA's mitigation proposal concerning the Morris Water Exchange Agreement is reversed and remanded in part for further proceedings as necessary.

Rangen next seeks judicial review of the Director's approval of IGWA's second mitigation proposal concerning the Morris Water Exchange Agreement. It argues that the Director's approval of the Agreement as a source of mitigation is contrary to law in several respects and must be reversed and remanded. Rangen sets forth three primary arguments in support of its position. Each will be addressed in turn.

- i. **The Amended Final Order does not violate the prior appropriation doctrine in approving the Morris Water Exchange Agreement as providing a source of mitigation water to Rangen.**

Rangen first argues that the Director's approval of the Morris Water Exchange Agreement runs contrary of the doctrine of prior appropriation and its basic principle of priority administration. Rangen initiated the instant delivery call on the grounds that it is not receiving all the water it is entitled to under water right numbers 36-2551 and 36-7694. Those rights authorize Rangen to divert water from the Martin-Curren Tunnel under a July 13, 1962, and April 12, 1977, priority respectively. Morris holds decreed water rights to divert water from the Martin-Curren Tunnel that are senior to those rights. Ex.1049. In February 2014, Morris entered into the Morris Water Exchange Agreement with the NSGWD. Ex.2032. Under the Agreement, Morris authorizes NSGWD to use his Martin-Curren Tunnel water rights "as needed to provide mitigation water to Rangen . . ." *Id.* In exchange, NSGWD agreed to deliver Morris an equivalent quantity of water via an alternative surface water source referred to as the Sandy Pipeline. *Id.* In his *Amended Final Order*, the Director approved the Morris Water Exchange Agreement as providing a source of mitigation water to Rangen, and granted IGWA 1.8 cfs of mitigation credit for the 2014 Period for the direct delivery of that water to Rangen. R., p.617.

Rangen argues that the Director's approval of the Morris Water Exchange Agreement as mitigation is contrary to the prior appropriation doctrine. It contends that since Morris is not exercising his senior water rights out of the Martin-Curren Tunnel, the prior appropriation doctrine requires that the unused water go to the next user in priority on that source. This Court disagrees. Rangen's argument appears to confuse the concept of one's right as a water right holder to contract with others for the sale or use of water under that right with concepts of forfeiture, abandonment and nonuse. When one forfeits or abandons a water right, the priority of the original appropriator may be lost and junior users on the source may move up the ladder of

priority. *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). However, such is not the case here. In his *Amended Final Order*, the Director did not find that Morris' senior rights had been forfeited or abandoned due to nonuse. To the contrary, the Director found that Morris' senior rights are in fact being used in priority, albeit not by Morris. Pursuant to the plain language of the Morris Water Exchange Agreement, those rights are being used in priority by NSGWD to provide direct delivery of mitigation water to Rangen. Such agreements are commonplace in Idaho, and are often utilized by junior users in delivery calls to provide a source of mitigation water in lieu of curtailment. Therefore, the Court finds Rangen's arguments on this issue are unavailing, and the *Amended Final Order* is affirmed in this respect.

- ii. **The Director's use of flow data associated with an average year to determine the mitigation credits of junior users is reversed and remanded for further proceedings as necessary.**

In determining the amount of mitigation credit to grant IGWA as a result of the Morris Water Exchange Agreement, the Director had to first predict how much water will emanate from the Martin-Curren Tunnel throughout the implementation of the mitigation plan. To do this, the Director relied upon historical flow data associated with average Martin-Curren Tunnel discharge for the years 2002 through 2013. *R.*, pp.605-606. He noted that "[f]rom 2002 through 2013, the average irrigation season flow has varied between 2.3 cfs and 5.7 cfs." *R.*, p.605. He then determined that "[t]he average of the average irrigation season values for each year from 2002 through 2013 is 3.7 cfs." *Id.* The Director thus awarded mitigation credit to IGWA resulting from the Morris Water Exchange Agreement on the assumption that 3.7 cfs will emanate from the Martin-Curren Tunnel each year the mitigation plan is implemented. Rangen argues that the Director's use of flow data associated with an average year fails to protect its senior rights.

The Idaho Supreme Court has held that the Director may utilize a predictive baseline methodology when responding to a delivery call. *In the Matter of Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irr. Dist.*, 155 Idaho at 650, 315 P.3d at 838 (2013) (holding "[t]he Director may, consistent with Idaho law, employ a baseline methodology for management of water resources and as a starting point in administration

proceedings”). Therefore, the Director’s use of a predictive baseline methodology in this context is not inconsistent with Idaho law. However, the Court finds the Director’s application of a baseline that utilizes flow data associated with an average year to be problematic.

This Court recently addressed a similar issue in its *Memorandum Decision and Order* (“*Memo Decision*”) issued in Gooding County Case No. CV-2010-382 on September 26, 2014. That case, like this one, involved a delivery call. In responding to the call, the Director employed a baseline for purposes of his initial reasonable in-season demand determination. *Memo Decision*, p.33. In so employing, the Director did not use data associated with an average year. *Id.* To the contrary, to determine the water demand of the senior users in that case, the Director intentionally used historic data associated years of above average temperatures and evapotranspiration and below average precipitation. *Id.* To determine water supply, the Director intentionally underestimated supply. *Id.* at 35. When responding to the allegations that he should have used demand and supply data associated with an average year, the Director responded that “equality in sharing the risk will not adequately protect the senior priority surface water right holder from injury.” *Id.* at 33. Further, that “the incurrence of actual demand shortfalls by a senior surface water right holder resulting from . . . predictions based on average data unreasonably shifts the risk of shortage to the senior surface water right holder.” *Id.* When juniors users argued on judicial review that the Director was required to use demand and supply data associated with an average year, this Court disagreed. *Id.* at pp.33-35. The Court ultimately upheld the Director’s rationale that the use of data associated with an average year would not adequately protect the seniors’ rights in that case. *Memo Decision*, pp.33-35.

Such is also the case here. The Director’s use of flow data associated with an average year to award mitigation credit to IGWA does not adequately protect Rangen’s senior rights. The mitigation credit is awarded on the assumption that 3.7 cfs will emanate from the Martin-Curren Tunnel during each year the mitigation plan is implemented. That assumption is determined based on historic data associated with an average year. Using data associated with an average year by its very definition will result in an over-prediction of Martin-Curren Tunnel flows half of the time. When that occurs, Rangen’s senior rights will not be protected, resulting in prejudice and the diminishment of Rangen’s substantial rights. This Court agrees with the Director’s prior proclamation in Gooding County Case No. CV-2010-382 that “equality in sharing the risk will not adequately protect the senior priority surface water right holder from

injury.” and that “predictions based on average data unreasonably shifts the risk of shortage to the senior surface water right holder.” Therefore, the Director’s *Amended Final Order* must be set aside in this respect and remanded for further proceedings as necessary.

- iii. **The Director’s use of an annual time period to evaluate the mitigation benefits of the Morris Water Exchange Agreement is reversed and remanded for further proceedings as necessary.**

The mitigation obligations set forth by the Director in his *Curtailment Order* are year-round, 365 days a year, mitigation obligations. The obligations are year-round because water right numbers 36-2551 and 36-7694 authorize Rangen to divert water from the Martin-Curren Tunnel year-round. However, the Morris water rights for which the Director granted IGWA mitigation credit do not authorize year-round use. They only authorize Morris, and thus NSGWD via the Agreement, to divert water from the Martin-Curren Tunnel during the irrigation season.⁵ Indeed, the Director found that “[t]he contribution of water to Rangen by leaving water in the Curren Tunnel that normally would have been diverted by Morris only benefits Rangen during the irrigation season.” *Id.* Notwithstanding, the Director granted IGWA 365 days’ worth of mitigation credit in the amount of 1.8 cfs for delivery of water under the Morris rights. On judicial review, Rangen challenges the Director’s decision in this respect.

Despite the fact that Morris’ senior water rights provide no water to Rangen during the non-irrigation season, the Director’s *Amended Final Order* grants IGWA a year-round mitigation credit for delivery of water under those rights. The Director reasoned that “[a]veraging IGWA’s mitigation activities over a period of one year will establish consistent time periods for combining delivery of the Morris water for mitigation and the average annual benefit provided by aquifer enhancement activities, and for direct comparison to the annual mitigation requirement.” *R.*, p.602. It is reasonable to run ESPAM 2.1 to determine the benefits of aquifer enhancements activities on an annual time period. Conversions from ground water irrigation to surface water irrigation, voluntary “dry-ups,” and ground water recharge all augment the ground water supply in the ESPA. The benefits of those activities accrue to Rangen on an annual time period, and so it reasonable to grant IGWA year-round mitigation credit for those activities.

⁵ The irrigation season is defined under water right numbers 36-134D, 36-134E and 36-135D as “02-15 to 11-30.”

The direct delivery of wet water as mitigation is another story. It is a fiction to conclude that water delivered to Rangen under the Morris Water Exchange Agreement provides mitigation to Rangen on a year-round basis. Since that water is only available to Morris during the irrigation season, it is only available to NSGWD for delivery to Rangen during the irrigation season. In reality, it provides no mitigation water to Rangen during the non-irrigation season. Put differently, during the non-irrigation season, Rangen's rights are senior in priority to receive the water that would otherwise be available to satisfy the Morris Water Exchange Agreement rights during the irrigation season. Therefore, the "foregone diversion" of Morris water during the irrigation season provides no mitigation water to Rangen during the non-irrigation season. Furthermore, Rangen's rights rely on direct flow from the Martin-Curren Tunnel. This is not a situation involving a storage component where the volume of mitigation water delivered during the irrigation season can be mathematically and physically apportioned for use by Rangen over a 365-day period. Absent such a situation, water credited for mitigation during the non-irrigation season is available on paper only. Therefore, the Court holds that the Director abused his discretion in granting IGWA year-round mitigation credit resulting from the Morris Water Exchange Agreement. The Director's decision in this respect prejudices and diminishes Rangen's senior rights and must be reversed and remanded for further proceedings as necessary.

C. Rangen is not entitled to an award of attorney's fees on judicial review.

In its *Petition for Judicial Review*, Rangen seeks an award of attorney fees under Idaho Code § 12-117. While Rangen seeks an award in its *Petition*, it has not supported that request with any argument or authority in its briefing. On that ground, Rangen is not entitled to an award of attorney fees on judicial review, and its request must be denied. *See e.g., Bailey v. Bailey* 153 Idaho 526, 532, 284 P.3d 970, 976 (2012) (providing "the party seeking fees must support the claim with argument as well as authority"). Additionally, the Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, the issues presented to this Court are largely issues of first impression under the CM Rules. The Court holds that the Department has presented legitimate questions for this Court to address, and Rangen's request for attorney fees is alternatively denied on those grounds.

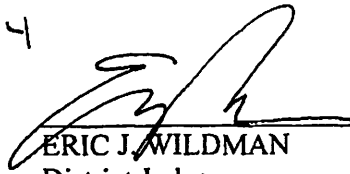
IV.

CONCLUSION AND ORDER OF REMAND

For the reasons set forth above, the Director's *Amended Final Order* is affirmed in part and set aside in part. The *Amended Final Order* is remanded for further proceedings as necessary consistent with this decision.

IT IS SO ORDERED.

Dated December 3, 2014


ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW was mailed on December 04, 2014, with sufficient first-class postage to the following:

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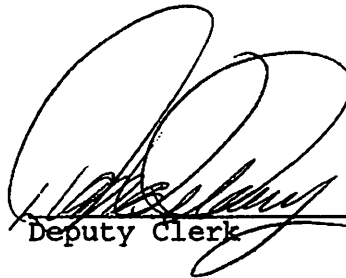


Exhibit J

**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.¹

BACKGROUND

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

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

¹ 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.

² 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.

³ 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).⁴

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*.

⁴ 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 7.⁵

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.

⁵ 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).⁶ 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.

⁶ 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 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.							

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 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	-117,216	
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 (6th 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:

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

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

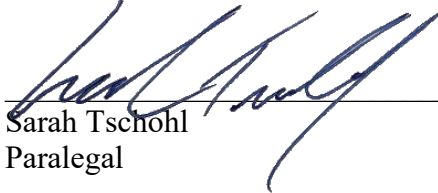
CERTIFICATE OF SERVICE

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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<p>Kathleen Marion Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 kathleenmarion.carr@sol.doi.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
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<p>Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC P.O. Box 3005 Idaho Falls, ID 83403 sjohns@olsentaggart.com nolsen@olsentaggart.com staggart@olsentaggart.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Tony Olenichak IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 Tony.Olenichak@idwr.idaho.gov</p>	<p><input checked="" type="checkbox"/> Email</p>

Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 corey.skinner@idwr.idaho.gov	<input checked="" type="checkbox"/> Email
COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 wparsons@pmt.org	<input checked="" type="checkbox"/> Email



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.

Exhibit K



MARTEN LAW

April 13, 2023

Via U.S. Mail & Email

Director Gary Spackman
Idaho Dept. of Water Resources
322 E. Front St.
P.O. Box 83720
Boise, Idaho 83720-0098

RE: Ground Water Districts' 2022 Performance Report / Steering Committee Meeting

Dear Director Spackman:

I am writing on behalf of our Surface Water Coalition clients (A&B et al.) and am joined by Kent Fletcher on behalf of his Coalition clients (AFRD#2 & MID) and T.J Budge on behalf of his ground water district clients (Districts). This letter pertains to the Coalition's delivery call and the Districts' stipulated mitigation plan (including addendums) that was approved by you by final orders in 2016 and 2017.

For your information, the Districts submitted their 2022 implementation report to the Coalition on April 1, 2023, a copy of which is enclosed as Exhibit A. The Coalition met and reviewed the report, and, based on the conservation obligations set by the Director in the *Final Order Regarding Compliance with Approved Mitigation Plan* issued Sept. 8, 2022 ("Compliance Order"), I submitted a letter on behalf of the Coalition to the Districts' counsel on April 6, 2023, identifying certain Districts that did not meet their 2022 obligations. See Exhibit B.

The Coalition met with the Districts via Zoom on April 12, 2023 pursuant to the Steering Committee procedures identified in the *Second Addendum* and the Director's order approving the same. The Coalition submits that the four Districts identified in my April 6th letter breached the mitigation plan and the Director's order in irrigation season 2022. Pursuant to the *Second Addendum* paragraph 2(c), the Coalition asked the Districts if they agree that a breach occurred.

The Districts are of the position that they can neither agree nor disagree that a breach occurred in 2022, or to the magnitude of the alleged breach, until the Director issues a final decision on their challenge to the *Compliance Order* based on the evidence submitted at the hearing held February 8, 2023. It is the Districts' position that the Director's final decision will in any case affect the manner in which compliance is measured, as explained in the Districts' performance report.



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At the April 12th Steering Committee meeting, the Districts requested that the breach issue be tabled until the Director issues a final decision on the *Compliance Order*. However, the Coalition is not willing to table the matter for an indefinite period. Therefore, the Coalition submits that a breach occurred in 2022 and the Districts' disagree.

Pursuant to the Second Addendum paragraph 2(c)(iv) attached to the *Final Order Approving Amendment to Stipulated Mitigation Plan* dated May 9, 2017, when the parties do not agree that a breach has occurred, 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.

Thank you for your attention to this matter.

Sincerely,

Travis Thompson
Partner

Direct: (208) 735-2227
Email: tthompson@martenlaw.com

cc: W. Kent Fletcher
John K. Simpson
T.J. Budge
Surface Water Coalition

Exhibit

A

SETTLEMENT AGREEMENT PERFORMANCE REPORT

TO: IGWA-SWC Settlement Agreement Steering Committee
FROM: Ground Water Districts
DATE: April 1, 2023
RE: 2022 Performance Report

Introduction

This document reports the ground water districts' year 2022 performance under paragraph 3.a of the IGWA-SWC Settlement Agreement¹ ("Agreement") which requires a 240,000 acre-feet reduction in ESPA ground-water withdrawals or equivalent private recharge. Paragraph 2.a. of the Second Addendum to Settlement Agreement requires the districts to report to the Steering Committee by April 1 annually "their groundwater diversion and recharge data for the prior irrigation season and their proposed actions to be taken for the upcoming irrigation season, together with supporting information compiled by the Districts' consultants."

2022 Performance

The enclosed spreadsheet contains diversion and recharge data for each district. The "summary" tab shows the total volume of groundwater diverted within each district and the total volume of recharge performed by each district. The recharge column includes water delivered directly to the SWC in lieu of recharge.

Unlike IGWA's performance reports in years past, the "summary" tab shows only groundwater diversion and recharge data. It does not contain a table showing a baseline, target conservation, or mitigation balance because the Final Order Regarding Compliance with Approved Mitigation Plan ("Compliance Order") issued on September 8, 2022, necessitates that IGWA and the SWC revisit how compliance will be measured under the Agreement for 2022 and future years, as explained below.

The Agreement requires each district to conserve a proportionate share of 240,000 acre-feet, but it does not prescribe how each district's share will be calculated or how compliance will be measured. Previously, IGWA used the average volume of groundwater diverted within each district over the 5-year period 2010-2014 as the baseline against which conservation will be measured, with the expectation that compliance would likewise be based on an average. However, the Compliance Order has negated the use of averaging to measure compliance.

On July 26, 2022, the SWC filed Surface Water Coalition's Notice of Steering Committee Impasse / Request for Status Conference with the Director, challenging (a) IGWA's use of a 5-year average for measuring compliance with the Agreement, and (b) IGWA's historic practice of accounting for diversions by A&B Irrigation District and Southwest Irrigation District in calculating each district's proportionate share of the 240,000 acre-feet. The Compliance Order ruled that averaging cannot be used to measure compliance, and that diversions by A&B and Southwest cannot be considered in calculating each district's proportionate

¹ The Settlement Agreement consists of the Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of Idaho Ground Water Appropriators, Inc. ("IGWA"), the Addendum Agreement between entered into October 15, 2015, the Agreement between A&B Irrigation District and participating members of IGWA dated October 2, 2016, and the Second Addendum to Settlement Agreement dated December 14, 2016.

share of the 240,000 acre-feet.

Since the Compliance Order was made without the benefit of a full evidentiary record, a hearing was held by the Director on February 8, 2022, to consider additional information relating to the manner of calculating each district's compliance with the Agreement. As of the date of this performance report, no final decision has been issued based on the evidence presented at the hearing.

The Director's final decision will in any case require a new method of measuring compliance. If the decision requires the IGWA districts alone to conserve 240,000 acre-feet, then each district's proportionate share of 240,000 acre-feet will need to be redetermined. The districts will not simply scale up their current obligations. Reallocation will require consideration of modeled impacts and other factors. When the Agreement was first entered into it took the districts more than a year to agree upon an equitable apportionment of the 240,000 acre-feet obligation. Reapportionment will likewise be a considerable undertaking.

If the Director's final decision allows averaging, then both the baseline and compliance should be measured by a corresponding average, such as a 5-year or 3-year average. If the decision does not allow averaging, then an alternative method will need to be developed to compare single-year diversions against a single-year baseline. Comparing single-year diversions against a 5-year baseline is discordant and not appropriate. Potential alternatives include a comparison of single-year diversions against pre-Agreement peak diversions, comparing single-year diversions against diversions in a prior year of similar climatic conditions, a tally system based on cumulative groundwater conservation over time, or other method.

Since the method of measuring compliance will change depending on the outcome of the Director's reconsideration of the Compliance Order, the enclosed spreadsheet does not purport to demonstrate compliance with the Agreement in 2022. However, the "usage analysis" tab on the spreadsheet does contain the same table provided in prior years that shows a baseline, target conservation, and mitigation balance. This table is provided for informational purposes and is not conclusive of each district's compliance with the Agreement because it compares single-year diversions against a 5-year average baseline. IGWA will determine a more appropriate method of measuring compliance once the Director's decision becomes final.

As with IGWA's performance report spreadsheets in prior years, the enclosed spreadsheet has individual tabs for each district that lists the diversion volume of each well by WMIS number. Where challenges or errors were encountered in the data for a particular well, the spreadsheet notes how the district addressed it. For example, diversions that could not be reliably calculated due to broken meters or other factors have been assigned an imputed value based on the power consumption coefficient or historic diversion data for the well. District consultants continue to work with district patrons and IDWR staff to address questions and correct errors as needed.

The "recharge report" tab shows the recharge data for each district, including the volume, source of water, recharge location, and date the recharge was performed. Documentation supporting the recharge data is enclosed.

Questions concerning the collection and reporting of data and compilation of this report may be directed to Jaxon Higgs as the lead consultant who will coordinate with other consultants used by the districts.

2023 Conservation Programs

Until the Director issues a final decision based on the evidence presented at the February 8, 2022, hearing,

the ground water districts' respective conservation obligations under the Agreement, and how compliance will be measured, is uncertain. Depending on the outcome of the Director's final decision, the districts may revisit their proportionate mitigation obligations, the baseline, how compliance will be measured, and whether to continue providing mitigation under the Agreement, provide mitigation under other approved mitigation plans, or accept curtailment risk under the Methodology Order.

In any case, all of the districts intend to continue their efforts to develop a ground water management plan to stabilize the ESPA, and to take additional actions to mitigate injury to the SWC. However, it has become apparent that a one-size-fits-all approach to mitigation is no longer workable. The IGWA board has voted to allow individual districts and groups of districts to work directly with the SWC to develop new mitigation agreements that are tailored to the unique characteristics of each district and its effects on Blackfoot-Minidoka reach gains. We trust the SWC will appreciate the challenges created by a one-size-fits-all approach and hope they will work with districts directly.

IDWR Review

The Second Addendum provides that the parties "will request the Department to verify each District's annual diversion volume, and other diversion reduction data (recharge, CREP, conversions, end-gun removals, etc.) to confirm the accuracy of the data." A copy of this report will be submitted to the Department with a request that it commence verification. The Department's analysis is normally provided to the Steering Committee by July 1.

Sentinel Well Report

Pursuant to section 3.e. of the Settlement Agreement and sections 1.b.i. and ii. of the Second Addendum, the parties' consultants continue to work with the Department to collect, process, archive, and submit sentinel well data to the Steering Committee within 30 days of collection using the Calculation Technique. This process is ongoing by the Department and the Technical Working Group formed under the Agreement.

2022 Usage Analysis

all values in acre-ft

	Target		2022 Usage	Diversion Reduction	Accomplished		2022	
	Conservation	Baseline			Recharge/ Direct Delivery	Total Conservation	Mitigation Balance	
American Falls-Aberdeen	33,715	283,815	269,322	14,494	23,550	38,043	4,328	
Bingham	35,015	277,011	269,088	7,923	516	8,438	-26,577	
Bonneville-Jefferson	18,264	158,133	151,245	6,888	9,249	16,137	-2,127	
Carey	703	5,671	1,889	3,782	5	3,787	3,084	
Jefferson-Clark	54,373	445,393	408,112	37,281	7,647	44,928	-9,444	
Henry's Fork ¹	5,391	69,979	62,381	7,598	3,000	11,774	6,383	
Madison ²		78,095	76,919	1,176				
Magic Valley	32,462	256,188	218,759	37,429	3,378	40,807	8,345	
North Snake ³	25,474	208,795	174,838	33,957	3,395	37,352	11,878	
A&B ⁴	21,660	-	-	-	-	21,660	0	
Southwest ID ⁴	12,943	-	-	-	-	12,943	0	
Total:	240,000	1,783,080	1,632,553	150,527	50,739	235,869	-4,131	

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.

Exhibit B



MARTEN LAW

April 6, 2023

Via Email Only

T.J. Budge
Racine Olsen, PLLP
201 E. Center St.
P.O. Box 1391
Pocatello, Idaho 83240
tj@racineolson.com

RE: Ground Water Districts’ 2022 Performance Report / Steering Committee Meeting

Dear T.J.:

I am writing on behalf of our Surface Water Coalition clients (A&B et al.) and am joined by Kent Fletcher on behalf of his Coalition clients (AFRD#2 & MID). The Coalition met and reviewed the Ground Water Districts’ 2022 Performance Report against the conservation obligations set by the Director in the *Final Order Regarding Compliance with Approved Mitigation Plan* (Sept. 8, 2022).¹ The Coalition appreciates the District’s efforts and conservation actions taken in 2022, including the delivery of additional storage water to the Coalition. Unfortunately, the following Districts did not achieve the required conservation target required by the Mitigation Plan and IDWR’s orders approving the same:

District	Useage	Target	Reduction/Recharge ²	Total	Balance
AB/AF	269,322	39,395	14,494 / 23,550	38,043	-1,352
BING	269,088	40,914	7,923 / 516	8,438	-32,476
BON/JEFF	151,245	21,341	6,888 / 9,249	16,137	-5,204
JEFF/CLK	408,112	63,533	37,281 / 7,647	44,928	-18,605

¹ The Coalition recognizes that the Districts challenged the Director’s order and that it was the subject of a recent contested case hearing. A decision on that hearing has not yet been issued by IDWR. The *Compliance Order* has not been stayed by IDWR or any district court and remains effective as a matter of law.

² Includes direct storage delivery to SWC in lieu of recharge that is above the 50,000 af annual delivery.



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In light of the above non-compliance, the Coalition is taking the position that the above-listed Districts have breached the Long Term Practices set forth in Paragraph 3 of the 2015 Agreement and did not operate in conformance with the Department's Order approving the Mitigation Plan.

The Coalition requests a Steering Committee meeting to address this information as provided for in the *Second Addendum* (Paragraph 2.c) executed by the parties. Given that the irrigation season is fast approaching time is of the essence. Therefore, the Coalition would request a Steering Committee meeting to be held via zoom sometime April 10-13. Preferably we would like to schedule this meeting any time between 3 p.m. and 8 p.m. Please advise as to an acceptable date and time and I will send out a meeting invitation.

Thank you for your immediate attention to this matter please call me if you have any questions.

Sincerely,

Travis Thompson

Travis Thompson
Partner

Direct: (208) 735-2227
Email: tthompson@martenlaw.com

cc: W. Kent Fletcher
John K. Simpson
Surface Water Coalition

Exhibit L

**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
IGWA’S 2022 MITIGATION PLAN
COMPLIANCE**

IN THE MATTER OF IGWA’S SETTLEMENT
AGREEMENT MITIGATION PLAN

This Final Order determines that, during the 2022 irrigation season, certain members of the Idaho Ground Water Appropriators, Inc. (“IGWA”)¹ breached the 2015 Settlement Agreement approved by the Director as a Mitigation Plan in 2016 and are therefore not currently in compliance with the plan. No curtailment order will issue at this time, however, given that the mid-season *July 2023 As-Applied Order* predicted that SWC members would not suffer a demand shortfall during the 2023 irrigation season.

BACKGROUND

A. Procedural history of IGWA’s 2016 Mitigation Plan.

In 2015, the Surface Water Coalition (“SWC”)² and IGWA executed 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”).

In October of 2015, the SWC and IGWA executed 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”).

¹ 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.

² 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.

On March 9, 2016, the SWC and IGWA submitted *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* ("First Stipulated Mitigation Plan") to the Director of the Idaho Department of Water Resources ("Department"). The First Stipulated Mitigation Plan was submitted in response to the SWC's delivery call (Docket No. CM-DC-2010-001). *First Stipulated Mitigation Plan* at 3.

On May 2, 2016, the Director issued the *Final Order Approving Stipulated Mitigation Plan* ("Order Approving Mitigation Plan"), which approved the parties' stipulated 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 executed the *Second Addendum to Settlement Agreement* ("Second Addendum"). The *Second Addendum* amended the SWC-IGWA Agreement by adding 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 explained the process by which the Steering Committee would address alleged breaches and further stated 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 Stipulated Mitigation Plan"). The SWC and IGWA requested that the Director issue an order approving the Second Addendum as an amendment to the mitigation plan. *Second Stipulated Mitigation Plan ¶ 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.

IGWA’s obligations under the 2016 Mitigation Plan are found in the following six documents:

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

B. The SWC’s request to address IGWA’s purported breach in 2022.

On April 13, 2023, the SWC sent a letter (“SWC’s 2022 Breach Letter to IDWR”) to the Director advising that certain IGWA members breached the Mitigation Plan in 2022. *SWC’s 2022 Breach Letter to IDWR* at 1–2. The SWC further advised that the Steering Committee met on April 12 (2023) but was unable to resolve the breach issue. *Id.* at 2.

The SWC requested that the Director evaluate the information, determine whether a breach has occurred, and issue an order specifying what actions the breaching parties must take or be subject to curtailment. *Id.* at 1.

Attached as Exhibit A to the *SWC’s 2022 Breach Letter to IDWR* was a letter IGWA wrote to the Steering Committee on April 1, 2023 (“IGWA’s 2022 Breach Letter to Steering Committee”), which included a spreadsheet, replicated below in Table 1, showing the water usage by IGWA members in 2022:

Table 1:

2022 Usage Analysis
all values in acre-ft

	Target Conservation	Baseline	2022 Usage	Diversion Reduction	Accomplished Recharge/ Direct Delivery	Total Conservation	2022 Mitigation Balance
American Falls-Aberdeen	33,715	283,815	269,322	14,494	23,550	38,043	4,328
Bingham	35,015	277,011	269,088	7,923	516	8,438	-26,577
Bonneville-Jefferson	18,264	158,133	151,245	6,888	9,249	16,137	-2,127
Carey	703	5,671	1,889	3,782	5	3,787	3,084
Jefferson-Clark	54,373	445,393	408,112	37,281	7,647	44,928	-9,444
Henry’s Fork ¹	5,391	69,979	62,381	7,598	3,000	11,774	6,383
Madison ²		78,095	76,919	1,176			
Magic Valley	32,462	256,188	218,759	37,429	3,378	40,807	8,345
North Snake ³	25,474	208,795	174,838	33,957	3,395	37,352	11,878
A&B ⁴	21,660	-	-	-	-	21,660	0
Southwest ID ⁴	12,943	-	-	-	-	12,943	0
Total:	240,000	1,783,080	1,632,553	150,527	50,739	235,869	-4,131

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.

IGWA also expressed in its letter to the Steering Committee that its usage report [Table 1] “does not purport to demonstrate compliance with the Agreement in 2022.” *IGWA’s 2022 Breach Letter to Steering Committee* at 2. The basis for IGWA’s position was that the Director had not yet issued his [*Amended*] *Final Order Regarding IGWA’s 2021 Compliance*, which would provide important interpretations to certain provisions in the 2016 Mitigation Plan germane to the breach issue.³

Meanwhile, on April 21, 2023, the Director issued his *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fifth Methodology Order”), and his *Final Order Regarding April 2023 Forecast Supply* (“April 2023 As-Applied Order”) in the SWC delivery call matter (Docket No. CM-DC-2010-001). The *April 2023 As-Applied Order* predicted a shortfall for Twin Falls Canal Company, which would have resulted in mitigation requirements or curtailment for ground water rights with priority dates junior to December 30, 1953. The Director set the matter for a hearing June 6–10, 2023.

On April 24, 2023, the Director issued his *Amended Final Order Regarding Compliance with Approved Mitigation Plan* (“Amended Final Order Regarding IGWA’s 2021 Compliance”) in Docket No. CM-MP-2016-001. The Director concluded that the 2016 Mitigation Plan unambiguously required IGWA to reduce its ground water diversions by 240,000 acre-feet each year—meaning that averaging was prohibited—and also unambiguously prohibited IGWA from apportioning A&B Irrigation District (“A&B”) or Southwest Irrigation District (“Southwest”) a percentage of its annual reduction obligation. *Amended Final Order Regarding IGWA’s 2021 Compliance* at 1.

On April 28, 2023, a pre-hearing conference was held concerning recent methodology amendments to the Fifth Methodology Order. During the pre-hearing conference the SWC’s counsel raised IGWA’s purported breach in 2022. The Director advised he did not anticipate issuing an order on IGWA’s purported 2022 breach until after the hearing on the Fifth Methodology Order.

On June 6–9, 2023, a hearing was held concerning the Fifth Methodology Order.

On July 19, 2023, the Director issued his *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* as well his *Order Revising April 2023 Forecast and Amending Curtailment Order (Methodology Steps 5 & 6)* (“July 2023 As-Applied”) in the SWC delivery call matter (Docket No. CM-DC-2010-001). The *July 2023 As-Applied Order* predicted that SWC members would not suffer a mid-season shortfall. *July 2023 As-Applied Order* at 9.

³ The Director issued his *Amended Final Order Regarding IGWA’s 2021 Compliance* on April 24, 2023, or 12 days after the Steering Committee met to address IGWA’s purported breach in 2022.

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 Idaho Code §§ 42-603 and 42-1805(8), the Department promulgated the Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”). IDAPA 37.03.11.000.

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.

Out of priority ground water user is proper only when “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.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. During the 2022 irrigation season, IGWA’s obligations were set forth in the following six documents, collectively referred to as the “2016 Mitigation Plan”:

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

2. Of import here, the 2016 Mitigation Plan obligates IGWA members to reduce total diversions or recharge an equivalent volume of 240,000 acre-feet each year. *SWC-IGWA Agreement* § 3.a; *see also Amended Final Order Regarding IGWA’s 2021 Compliance* at 16.

3. The 2016 Mitigation Plan is unique in that it contemplates delays in analyzing IGWA’s mitigation efforts. The delays are inherent in the Steering Committee review process the parties agreed to in the Second Addendum.

4. The 2016 Mitigation Plan authorizes the Steering Committee to resolve alleged breaches. *See Second Addendum* § 2.c.iii. If the Steering Committee is unable to determine whether a breach has occurred, the Director is tasked with deciding and thereafter specifying actions the breaching party must complete to cure the breach or be subject to curtailment. *Id.* § 2.c.iv.

5. On April 12, 2023, the Steering Committee met but was unable to reach a consensus concerning whether IGWA breached the 2016 Mitigation Plan in 2022. *SWC’s 2022 Breach Letter to IDWR* at 2.

6. IGWA explicitly stated in its letter to the Steering Committee that its usage report [Table 1] “does not purport to demonstrate compliance with the Agreement in 2022.” *IGWA’s 2022 Breach Letter to IDWR* at 3. The basis for IGWA’s position was that as of April 1, 2023, the Director had not yet issued his [Amended] Final Order Regarding IGWA’s 2021 Compliance, which interpreted several important provisions of the 2016 Mitigation Plan,

including whether IGWA could assign A&B and Southwest a proportionate share of its 240,000 acre-foot reduction obligation.⁴

7. Table 1 (below) illustrates that, in its 2022 usage report, IGWA assigned A&B and Southwest a proportionate percentage of IGWA’s 240,000 acre-foot reduction obligation:⁵

Table 1:

2022 Usage Analysis
all values in acre-ft

	Target Conservation	Baseline	2022 Usage	Diversion Reduction	Accomplished Recharge/ Direct Delivery	Total Conservation	2022 Mitigation Balance
American Falls-Aberdeen	33,715	283,815	269,322	14,494	23,550	38,043	4,328
Bingham	35,015	277,011	269,088	7,923	516	8,438	-26,577
Bonneville-Jefferson	18,264	158,133	151,245	6,888	9,249	16,137	-2,127
Carey	703	5,671	1,889	3,782	5	3,787	3,084
Jefferson-Clark	54,373	445,393	408,112	37,281	7,647	44,928	-9,444
Henry's Fork ¹	5,391	69,979	62,381	7,598	3,000	11,774	6,383
Madison ²		78,095	76,919	1,176			
Magic Valley	32,462	256,188	218,759	37,429	3,378	40,807	8,345
North Snake ³	25,474	208,795	174,838	33,957	3,395	37,352	11,878
A&B ⁴	21,660	-	-	-	-	21,660	0
Southwest ID ⁴	12,943	-	-	-	-	12,943	0
Total:	240,000	1,783,080	1,632,553	150,527	50,739	235,869	-4,131

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.

8. IGWA’s assignment to A&B and Southwest of a portion of its 240,000 acre-foot reduction obligation reduced the obligations of each IGWA member who signed the Mitigation Plan.

9. The Director concludes that, as addressed in detail in the Amended Final Order Regarding IGWA’s 2021 Compliance, IGWA’s assignment to A&B and Southwest of a proportionate share (34,603 acre-feet) of its 240,000 acre-foot reduction obligation was improper.

10. Table 2 summarizes IGWA’s 2022 performance with yellow highlighted columns added by the Director. The column labeled “IDWR Proportioning” redistributes the 34,603 acre-foot IGWA assigned to A&B and Southwest. The yellow highlighted “Target Conservation” column shows the reduction obligations after reapportioning the 34,603 acre-feet to IGWA members who were parties to the 2016 Mitigation Plan.

⁴ The Director issued the Amended Final Order Regarding IGWA’s 2021 Compliance on April 24, 2023, or 12 days after the Steering Committee met to address IGWA’s purported 2022 breach.

⁵ IGWA also sent its 2022 Performance Report directly to the Department.

Table 2:

2022 Usage Analysis											
all values in acre-ft											
	IGWA	[IGWA] Target	IDWR	IDWR Target	Baseline	2022 Usage	Diversion	Accomplished	Total	[IGWA] 2022	IDWR 2022
	Proportioning	Conservation	Proportioning	Conservation			Reduction	Recharge/ Direct Delivery	Conservation	Mitigation	Mitigation
										Balance	Balance
American Falls-Aberdeen	14.0%	33,715	16.4%	39,395	283,815	269,322	14,494	23,550	38,043	4,328	-1,352
Bingham	14.6%	35,015	17.0%	40,914	277,011	269,088	7,923	516	8,438	-26,577	-32,476
Bonneville-Jefferson	7.6%	18,264	8.9%	21,341	158,133	151,245	6,888	9,249	16,137	-2,127	-5,204
Carey	0.3%	703	0.3%	821	5,671	1,889	3,782	5	3,787	3,084	2,966
Jefferson-Clark	22.7%	54,373	26.5%	63,533	445,393	408,112	37,281	7,647	44,928	-9,444	-18,605
Henry's Fork ¹	2.2%	5,391	2.6%	6,299	69,979	62,381	7,598	3,000	11,774	6,383	5,475
Madison ²	0.0%				78,095	76,919	1,176				0
Magic Valley	13.5%	32,462	15.8%	37,931	256,188	218,759	37,429	3,378	40,807	8,345	2,876
North Snake ³	10.6%	25,474	12.4%	29,765	208,795	174,838	33,957	3,395	37,352	11,878	7,586
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	1,783,080	1,632,553	150,527	50,739	235,869	-4,131	-38,734
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.											

11. The Director finds that, as Table 2 illustrates, when the 34,603 acre-feet are re-apportioned to IGWA members who were parties to the 2016 Mitigation Plan, collectively IGWA was 38,734 acre-feet short of its reduction obligation in 2022.

12. The Director also finds that, as shown in Table 2, Carey Ground Water District, Henry's Fork/ Madison Ground Water District, Fremont Madison Irrigation District, Magic Valley Ground Water District, and North Snake Ground Water District satisfied their proportionate mitigation obligations in 2022.

13. The Director further finds that, as outlined in Table 3, printed below, four IGWA ground water districts failed to satisfy their proportionate share of IGWA's 240,000 acre-feet conservation obligation in 2022. Table 3 also lists the deficiency volume for each of the four IGWA members who failed to satisfy their respective mitigation obligations in 2022.

Table 3:

Ground Water District	Deficiency (acre-feet)
American Falls-Aberdeen	1,352
Bingham	32,476
Bonneville-Jefferson	5,204
Jefferson-Clark	18,605
Total	57,637

14. In a delivery call under the CM Rules, out-of-priority diversions by junior 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; *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.”).

15. Because American Falls-Aberdeen, Bingham, Bonneville-Jefferson, and Jefferson-Clark failed to satisfy their proportionate share of the mitigation obligation in 2022, the 2016 Mitigation Plan does not protect these four IGWA members from a curtailment order.

16. The midseason *July 2023 As-Applied Order* predicted that SWC members would not suffer a demand shortfall during the 2023 irrigation season. *July 2023 As-Applied Order* at 9. Accordingly, curtailing ground water use by American Falls-Aberdeen, Bingham, Bonneville-Jefferson and Jefferson Clark is unwarranted at this time.

ORDER

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

(1) IGWA members Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, and Jefferson Clark Ground Water District failed to satisfy their proportionate share of IGWA’s mitigation obligation in 2022 and are therefore not in compliance with IGWA’s 2016 Mitigation Plan.

(2) Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, and Jefferson Clark Ground Water District will not be entitled to the protection of IGWA’s 2016 Mitigation Plan in response to a curtailment order.⁶

DATED this 2nd day of August 2023.


GARY SPACKMAN
Director

⁶ The Second Addendum call for the Director to also “issue an order specifying actions that must be taken by the breaching party to cure the breach . . .” *Second Addendum* at 3. The parties have failed to provide the Director with sufficient information to make this determination at this time.

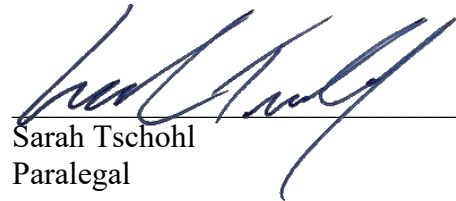
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of August 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>John K. Simpson MARTEN LAW LLP P.O. Box 2139 Boise, ID 83701-2139 jsimpson@martenlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Travis L. Thompson MARTEN LAW LLP P.O. Box 63 Twin Falls, ID 83303-0063 tthompson@martenlaw.com jnielsen@martenlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Thomas J. Budge Elisheva M. Patterson RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 tj@racineolson.com elisheva@racineolson.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202 david.gehlert@usdoj.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@usbr.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Sarah A Klahn Maximilian C. Bricker Somach Simmons & Dunn 1155 Canyon Blvd, Ste. 110 Boulder, CO 80302 sklahn@somachlaw.com mbricker@somachlaw.com dthompson@somachlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>

<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83205 rdiehl@pocatello.us</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83702 cmchugh@mchughbromley.com cbromley@mchughbromley.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Robert E. Williams WILLIAMS, MESERVY, & LOTHSPREICH, LLP P.O. Box 168 Jerome, ID 83338 rewilliams@wmlattys.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 rfife@idahofallsidaho.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC P.O. Box 3005 Idaho Falls, ID 83403 sjohns@olsentaggart.com nolsen@olsentaggart.com staggart@olsentaggart.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, Idaho 83440 dylan@dylanandersonlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Tony Olenichak IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 Tony.Olenichak@idwr.idaho.gov</p>	<p><input checked="" type="checkbox"/> Email</p>

Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 corey.skinner@idwr.idaho.gov	<input checked="" type="checkbox"/> Email
COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 wparsons@pmt.org	<input checked="" type="checkbox"/> Email



Sarah Tschohl
Paralegal

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.