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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

**SURFACE WATER COALITION'S  
MOTION FOR SUMMARY JUDGMENT  
/ SUPPORTING POINTS &  
AUTHORITIES**

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT  
MITIGATION PLAN

COME NOW, 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 (hereafter collectively referred to as the "Surface

Water Coalition”, “Coalition”, or “SWC”), by and through their undersigned counsel of record, and pursuant to Department Rule of Procedure 220.03 and I.R.C.P. 56 hereby move for summary judgment in the above-captioned matter.

This motion is supported by the *Declaration of Travis L. Thompson* and the exhibits<sup>1</sup> attached thereto, as well as the Department’s *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11 et seq.) (commonly referred to as Conjunctive Management Rules or “CMR”).

### INTRODUCTION

This motion addresses ongoing issues related to the impasse reached by IGWA<sup>2</sup> and SWC regarding the 2022 breach of the *2016 Mitigation Plan*. After failing to settle the issue informally, a hearing is now scheduled for March 2024. However, in light of the extensive documentation, prior orders, CMR, and applicable caselaw, summary judgment is appropriate on the following issues identified in the *Scheduling Order* dated December 29, 2023:

- 1) Did the Director error by not issuing an order specifying the actions needed to cure the 2022 breach of the *2016 Mitigation Plan* by certain ground water districts?
- 2) Did the Director error by not immediately issuing an order curtailing ground water districts that breached the *2016 Mitigation Plan* in 2022?
- 3) Can the *2009 Mitigation Plan* be used to cure the ground water districts’ 2022 breach of the *2016 Mitigation Plan*?

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<sup>1</sup> The documents attached as exhibits to the *Thompson Dec.* are all part of the existing record in this proceeding and are being filed with this motion for the Hearing Officer’s convenience and for ease of reference.

<sup>2</sup> As used herein “IGWA” is a shorthand reference for the eight signatory ground water districts and one irrigation district (Fremon-Madison Irr. Dist.) that filed the pertinent stipulated mitigation plan in 2016.

## BACKGROUND

In March 2016, the parties to this case filed the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* ("2016 Mitigation Plan"), which included the *First Addendum to the Mitigation Plan*. See Ex. A to *Thompson Dec.* The Director approved the stipulated plan by issuing the *Final Order Approving Stipulated Mitigation Plan* in May 2016. See Ex. B to *Thompson Dec.* The parties then stipulated to amendments to the *Mitigation Plan* and submitted *SWC's and IGWA's Stipulated Amended Mitigation Plan and Request for Order* in February 2017 ("Second Addendum"). See Ex. C to *Thompson Dec.* The Director approved the request for amendment in the *Final Order Approving Amendment to Stipulated Mitigation Plan* in May 2017 ("2017 Final Order"). See Ex. D to *Thompson Dec.*

A brief summary of the provisions of the *2016 Mitigation Plan* that pertain to the issues at hand, as amended and as approved by orders issued by IDWR, provides the framework for the present motion:

1 – The objectives stated in the *2016 Mitigation Plan* include mitigation for material injury to senior surface water rights, safe harbor from curtailment to members of ground water districts that divert ground water from the ESPA, minimize economic impact on individual water users and the state economy arising from water supply shortage, increase reliability and enforcement of water use, measurement and reporting across the Easter Snake Plain, increase compliance with all elements and conditions of all water rights, increase enforcement when there is not compliance, and develop an adaptive groundwater management plan to stabilize and enhance ESPA levels to meet existing water right needs.

2 – The long term practices, starting in 2016, include total ground water diversion reductions of 240,000 acre feet annually, 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 equivalent private recharge activity, IGWA will provide 50,000 acre feet of storage water to the SWC and IGWA will use its best efforts to continue converting ground water irrigated lands to surface water irrigation.

3 – The *2016 Mitigation Plan* established goals to stabilize ground water levels and return ground water levels to the average of the aquifer levels from 1991-2001. A series of benchmark deadlines were established, and the ground water level goal is to be achieved by April 2026.

4 – Paragraph 5 of the *2016 Mitigation Plan* states: “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.”

5 – When the Director adopted and approved the *Mitigation Plan* in the *Final Order* entered May 2, 2016, he stated: All ongoing activities required pursuant to the *Mitigation Plan* are the responsibility of the parties to the *Mitigation Plan*, the ground water level goal and benchmarks referenced in the *Mitigation Plan* are applicable only to the parties to the *Mitigation Plan* and approval of the *Mitigation Plan* does not create a ground water management area.

6 – The *Second Addendum* established the framework for the annual reports submitted by IGWA to SWC and the Steering Committee and is discussed in more detail in this Motion. When the Director adopted and approved the *Second Addendum* in the *2017 Final Order*, he stated: “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,” and “Approval of the *Second Addendum* does not limit the Director’s enforcement discretion or otherwise commit the Director to a particular enforcement approach.”

7 – Mitigation plans are required to “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. The contingency plan set forth in the *Second Addendum* was that in the event of a breach, if the parties could not agree on a remedy, the matter would be referred to the Director and the Director would craft a remedy for the breach or order curtailment.

It is important to note that the *2016 Mitigation Plan* is not a mitigation plan that addresses annual injury as determined by the Director pursuant to the Methodology Order. Instead, it is a plan that requires long term actions by IGWA and the participating ground water districts and seeks to restore water supplies to the SWC, i.e. ESPA water levels which in turn help supply tributary reach gains to the Snake River. The stipulated nature of this plan made it clear that the Coalition was not requiring annual storage volumes to meet forecasted or actual demand shortfalls. In exchange for the Coalition agreeing to lesser quantities of storage in certain years, IGWA agreed to take annual aquifer conservation actions. As a result, it is often referred to as an aquifer restoration mitigation plan.<sup>3</sup>

IGWA submitted its *2021 Mitigation Report* to the SWC in April 2022 that showed member Ground Water Districts failed to comply with the mitigation requirements of the *2016 Mitigation Plan*. SWC then submitted its *Request for Status Conference* to the Idaho Department of Water Resources (“IDWR”). The Director issued a *Response to Request for Status Conference; Notice of Status Conference* in May 2022 in which he noted that the *2016*

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<sup>3</sup> Following execution of the IGWA Agreement and *2016 Mitigation Plan*, the parties stipulated to a mitigation plan with a group of cities across the ESPA. See generally, Ex. E to *Thompson Dec., Coalition of Cities et al. Joint Mitigation Plan* (Feb. 25, 2019) (CM-MP-2019-001). The Cities’ stipulated plan is similarly designed to assist in restoration of the ESPA as the annual mitigation obligation is used for “aquifer enhancement projects on the ESPA.” See *Joint Mitigation Plan*, Ex. 1 at 3. Although the Cities have delivered some storage water for direct use by the SWC in certain years, that was specifically agreed to by the Cities in SWC recognizing the unique circumstances in those particular irrigation seasons. Notably, all parties to the Cities’ Agreement, including IGWA, agreed to submit the respective mitigation plans and required actions to IDWR for purposes of developing a groundwater management plan. See *Joint Mitigation Plan*, Ex. 1 at 5.

*Mitigation Plan* established a steering committee to review the signatory Ground Water Districts' progress toward the practices and goals in the agreement. *See* Ex. F to *Thompson Dec.* Further, he acknowledged that, in the *Second Addendum*, the parties “agreed to a specific process for addressing any alleged breach or noncompliance of the mitigation plan.” The Director explicitly laid out the steps agreed to by the parties in the case of noncompliance, explaining that the first step is to have the Steering Committee review the available technical information, then, if the Steering Committee finds a breach of one of the long-term practices of the plan, the Steering Committee is required to notify the breaching party in writing. If the breaching party fails to cure the breach, the Steering Committee reports the breach to the Director. If the Parties do not agree that breach has occurred or cannot agree upon actions that must be taken by the breaching party to cure the breach, the Steering Committee reports that to the Director and asks the Director to determine whether a breach occurred. The Director unequivocally stated that, “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.” *See* Ex. F to *Thompson Dec.*

The required procedures were followed by the Parties regarding the 2021 breach, and it eventually fell to the Director to determine the result after the Steering Committee had reached an impasse on the matter of breach. The Director issued a *Final Order Regarding Compliance with Approved Mitigation Plan* in September 2022 (“2022 Compliance Order”) in which he found that there was a breach of the *Mitigation Plan* in 2021. *See* Ex. G to *Thompson Dec.* The Director rejected IGWA’s argument that it could measure its performance on a rolling average finding it was “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.” In the *2022 Compliance Order* the Director also recognized that the terms of the *Settlement Agreement* dated September 7, 2022 (“Settlement Agreement”) between the Parties was an appropriate remedy for that breach, stating that it was only because of the negotiated remedy in the Settlement Agreement that curtailment was unnecessary to address the 2021 breach. *See* Ex. H to *Thompson Dec.* The Settlement Agreement, as approved in the *2022 Compliance Order*, required IGWA to supply SWC with an additional 30,000 ac-ft of storage water in 2023 and an additional 15,000 ac-ft of storage water in 2024 to compensate for the 2021 breach. The parties recognized that if storage water was unavailable, the Ground Water Districts would undertake additional reductions in areas where the prior reductions fell short. *See id.*; *Settlement Agreement* at 2, ¶ 1. Specifically, the Districts agreed to additional ground water 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 Director cited the district court’s decision in *Rangen, Inc. v. Idaho Dept of Water Res.*, No. CV-2014-2446 (Idaho 5<sup>th</sup> Dist. Ct. 2015) (“*Rangen 2015*”) in his *2022 Compliance Order*, referencing the case’s holding that junior users know or should know that they are only permitted to continue diverting out-of-priority so long as they meet the mitigation obligations of a mitigation plan approved by the Director. *See* Ex. I to *Thompson Dec.* If junior groundwater users do not comply with a mitigation plan, the Director must address the resulting material injury by turning to the approved contingencies. Further, if no alternative source of mitigation was designated as a contingency, the Director must resort to curtailment. *See Rangen 2015* at 7-10; Ex. I to *Thompson Dec.*

The Director further quoted language from the *Second Addendum* that stated, where the Parties do not agree that a breach occurred, the 2016 Mitigation Plan requires 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.” (emphasis added); *Final Order* at 3; Ex. G to *Thompson Dec.*

In April 2023, the Director issued the *Amended Final Order Regarding Compliance with Approved Mitigation Plan* (addressing the 2021 breach of the *2016 Mitigation Plan*) and affirmed and clarified each member Ground Water District’s annual obligation. See Ex. J to *Thompson Dec.* The Director concluded that IGWA’s approved mitigation plan “unambiguously required it to reduce its ground water diversions by 240,000 acre-feet each year—meaning that averaging is prohibited” and confirmed that, if parties cannot meet their mitigation obligations, then the Director must address the resulting material injury by turning to the approved contingencies. He reiterated that, “If there is no alternative source of mitigation water designated as the contingency, then the Director must turn to the contingency of curtailment.” See *Amended Final Order* at 18 (quoting *Rangen*); Ex. J to *Thompson Dec.*

IGWA submitted its *2022 Mitigation Report* to the SWC in April 2023, revealing that it did not comply with the *Mitigation Plan* again in 2022. As required by the *Second Addendum*, the Steering Committee met in early April via virtual conference and reached an impasse on IGWA’s 2022 compliance with the *2016 Mitigation Plan*. See Ex. K to *Thompson Dec.* The Parties then submitted a letter to the Director reporting the impasse and turning the matter over to the Director for further action as required by the *2016 Mitigation Plan* and *2022 Compliance Order*. See Ex. K to *Thompson Dec.*

The Director issued the *Final Order Regarding IGWA’s 2022 Mitigation Plan Compliance* dated August 2, 2023 (“2023 Compliance Order”) and found that four ground water districts did not comply with the *Mitigation Plan*: “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.” See Ex. L to *Thompson Dec.*

The *2023 Compliance Order* states: “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.” Contrary to the provisions of the *Second Addendum*, even though the Director found that a breach occurred, the Director failed to “issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.” Rather, in footnote 6 of the *2023 Compliance Order* the Director stated, “The parties have failed to provide the Director with sufficient information to make this determination at this time.” The Director did not elaborate on what information was required for the Director to comply with the requirements of the *Second Addendum* or when he planned on taking action if information was provided. It is this agency error that is subject to a recommended correction in this proceeding, including by granting this motion as a matter of law.

Aberdeen-American Falls Ground Water District (“AAFGWD”) and the SWC reached an agreement to settle AAFGWD’s 2022 breach and filed documents with IDWR evidencing that settlement. See *Notice of Filing of Agreement – Satisfaction of AFA 2022 Mitigation Deficit* dated November 3, 2023, and *Notice of Satisfaction of American Falls – Aberdeen Ground Water District 2022 Mitigation Obligation* dated November 7, 2023. It is the position of the SWC that only Bingham Ground Water District, Bonneville-Jefferson Ground Water District, and Jefferson Clark Ground Water District (“Breaching GWDs”) remain in breach of the *2016 Mitigation Plan* and orders entered by IDWR for the 2022 irrigation season.

SWC filed *Surface Water Coalition's Petition for Reconsideration and Request for Hearing* on August 16<sup>th</sup>, 2023. On September 6, 2023, the Director issued an *Order Granting Request for Hearing; Notice of Scheduling Conference*. The hearing was set in March in the *Order Authorizing Discovery, Scheduling Order, Order Suspending IDAPA 37.01.01.354, Notice of Prehearing Conference and Hearing*, as amended, through which the following issues were identified for hearing:

1. Did the Director error by not issuing an order specifying the actions needed to cure the 2022 breach of the 2016 Mitigation Plan by certain ground water districts?
2. Did the Director error by not immediately issuing an order curtailing ground water districts that breached the 2016 Mitigation Plan in 2022?
3. Can the 2009 mitigation plan be used to cure the ground water districts' 2022 breach of the 2016 Mitigation Plan?
4. What action must be taken by the ground water districts to cure their 2022 breach of the 2016 Mitigation Plan?

### **MOTION**

Pursuant to Orders issued by IDWR in this action approving the *Mitigation Plan*, as amended, the Director's *2022 Compliance Order* and other orders entered, and the CMR, the SWC moves the Hearing Officer to grant summary judgment as a matter of law on 3 of the 4 issues identified for hearing. Since IGWA's member Ground Water Districts have the clear and unambiguous obligation to reduce 240,000 acre-feet per year pursuant to the terms of the stipulated *2016 Mitigation Plan* and the Director's *2022 Compliance Order*, and the Breaching GWDs remain in breach of the *Mitigation Plan*, the only issue of fact is what actions must be taken by the Breaching GWDs to cure the 2022 breaches, or, in the alternative, curtailment must be ordered.

## STANDARD OF REVIEW

IDWR's Rules of Procedure authorize the filing of motions for summary judgment. Rule 220.03. Such motions are governed by I.R.C.P. 56.

Under Rule 56(a) the Department must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *See Martin v. Thelma V. Garrett Living Trust*, 170 Idaho 61, 506 P.3d 237, 241 (2022). The burden of proving the absence of material facts is on the moving party and the Department must liberally construe facts in the existing record in favor of the nonmoving party and draw all reasonable inferences from the record in favor of the nonmoving party. *See id.* When an action is tried before an agency without a jury (in this case the Hearing Officer), the Department can rule upon summary judgment despite the possibility of conflicting inferences arising from undisputed evidentiary facts. *See Nettleton v. Canyon Outdoor Media, LLC*, 163 Idaho 70, 73, 408 P.3d 68, 71 (2017).

Summary judgment is appropriate in this case because the Director found junior users are not in compliance with an IDWR approved mitigation plan and the non-compliance has not been cured. The *2016 Mitigation Plan* is not an injury-based mitigation plan, rather it requires long term annual actions to improve the ESPA with the goal of improving water supplies to the SWC. Non-compliance with the *2016 Mitigation Plan* cannot be cured by a conditional delivery of storage water pursuant to an earlier injury-based mitigation plan (i.e. 2009 Storage Mitigation Plan). There is no disputed issue of fact concerning these issues and pursuant to well-established precedent, the orders entered by IDWR, and the CMR, the Hearing Officer can grant the Coalition's motion for summary judgment.

## ARGUMENT

### **I. The Director erred by failing to issue an order specifying the actions needed to cure the 2022 breach of the 2016 Mitigation Plan by certain ground water districts.**

The Director found that the Breaching GWDs were not in compliance with the *2016 Mitigation Plan* but did not craft a remedy or order curtailment. The Director's lack of action clearly violated the process agreed to and approved in the *2017 Final Order* and was contrary to the findings of the *2022 Compliance Order*. Therefore, the SWC asserts that the *Mitigation Plan* framework should be followed, and an order be entered requiring the Breaching GWDs to take additional actions to cure their 2022 breaches if IDWR wants to enforce the provisions of the *Mitigation Plan* and require the Breaching GWDs to take actions to restore the aquifer as required by that Plan.

As noted above, the *2017 Final Order* reiterated that the *2016 Mitigation Plan* provides the participating ground water districts and their water users safe harbor: "no 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." The April 2023 report concerning actions taken in 2022 clearly showed that the Breaching GWDs were out of compliance with the *2016 Mitigation Plan*. The Director found the same in his final order issued in August 2023. *See Final Order* at 8; Ex. L to *Thompson Dec.*

In 2023, the parties followed the plan and order's approved process to be taken in the event of an alleged breach occurring during the 2022 irrigation season as outlined in the *Second Addendum*. The parties reached an impasse concerning the breach issue in the Steering Committee in April and submitted a joint letter to the Director reporting the impasse to the Director. *See Ex. K to Thompson Dec.* At that point the Director was required, as he stated in the *2022 Compliance Order*, without further notice, to determine whether a breach occurred and

provide a remedy. The Director found that a breach existed but did not exercise the contingency in the *2016 Mitigation Plan* and order the Breaching GWDs to cure the breach. Therefore, pursuant to the process agreed to by SWC and IGWA, and adopted by IDWR in its orders, the Director erred by failing to issue an order addressing a remedy for the 2022 breach, claiming he had insufficient information “to make this determination at this time” and failing, at any time thereafter, to make that determination. This error further reduced the water supply available to the SWC in 2023 and future years as it delayed any remedy to an indefinite future date. When actions are taken to cure the breach, the timing of those actions will be several months after what could have been ordered by the Director when he first was aware of the 2022 breach and impasse by the Steering Committee in April 2023.

In sum, the Director’s action does not follow what he previously found and ordered in the *2022 Compliance Order*. Consequently, the Hearing Officer should find that once the Director received notice of the Steering Committee’s impasse, he should have issued an order to remedy that breach.

**II. The Director erred by not immediately issuing an order curtailing the Ground Water Districts that breached the *2016 Mitigation Plan* in 2022.**

If it is determined that IDWR does not want to enforce the terms of the *2016 Mitigation Plan* and its orders approving the plan and that the wording of the *2017 Final Order* do not require him to enforce the remedy provisions of the plan, then the Director had no choice but to curtail the Breaching GWDs for failure to have an effectively operating mitigation plan in 2022.

The CMR are clear on this issue:

**04. Actions of the Watermaster Under a Mitigation Plan.** Where a mitigation plan has been approved as provided in Rule 42, the watermaster may permit the diversion and use of ground water to continue out of priority order within the water district **provided the holder of the junior-priority ground water right operates in accordance with such approved mitigation plan.**

IDAPA 37.03.11.040.04 (emphasis added)

**05. Curtailment of Use Where Diversions Not in Accord With Mitigation Plan or Mitigation Plan Is Not Effective.** Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such approved plan or the plan fails to mitigate the material injury resulting from diversion and use of water by holders of junior-priority water rights, the watermaster will **notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefiting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights.**

IDAPA 37.03.11.040.05 (emphasis added)

These provisions have been upheld as facially constitutional by the Idaho Supreme Court. *See AFRD#2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007). Further, in *Rangen, Inc. v. IDWR*, No. CV 2014-4970 (Idaho 5<sup>th</sup> Dist. 2015), Rangen was failing to receive the full quantity of mitigation for its senior rights, a fact the Director acknowledged. *Rangen 2015* at 3-4; *Ex. I to Thompson Dec.* The Director failed to curtail offending junior users, leading Rangen to file a petition for judicial review asserting that the Director exceeded his authority by failing to curtail once he determined a mitigation deficiency existed and that juniors were not complying with their approved mitigation plan. *Rangen 2015* at 5. The court agreed that the Director exceeded his authority under the CMR by failing to timely implement the mitigation plan's contingency and found the Director's response to premature exhaustion of the mitigation source did not adequately protect Rangen's senior rights. *Rangen 2015* at 6-7. Further, "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 use." *Rangen 2015* at 8. The opinion went on to say that, if an approved mitigation source fails, the resulting material injury "cannot go

unaddressed to the detriment of the senior. The contingency should be implemented to address the injury.” *Rangen 2015* at 8. Notably, the court determined that, if junior users cannot meet their mitigation obligations, the Director “must address the resulting material injury by turning to the approved contingencies. *Rangen 2015* at 8. If there is no alternative source of mitigation water designated as the contingency, then the Director must turn to the contingency of curtailment.” *Rangen 2015* at 8. Curtailment was found to be an adequate contingency, if timely effectuated. *Rangen 2015* at 8. The court held that the Director exceeded his authority under the CMR by failing to timely implement the Plan’s contingency (i.e., curtailment). *Rangen 2015* at 9.

The *2016 Mitigation Plan* was not an annual injury-based plan but rather required annual actions by the Breaching GWDs to restore the aquifer and water supply to the SWC. Without the annual actions being taken, the goals of the plan cannot be met.<sup>4</sup> As a result, the 2022 breach caused injury to the SWC and a breach of the mitigation plan and IDWR’s orders because the requirements of the *2016 Mitigation Plan* were not met. Stated another way, the Breaching GWDs did not comply with what was required under the approved mitigation plan. The SWC, following the process outlined in the *Second Addendum* then turned to the Director to protect their senior rights, as required. However, the Director failed to act. The contingency in the *2016 Mitigation Plan*, as outlined in the *Second Addendum*, was for the Director to take action and enter an order “specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment”. The Director failed to order the actions that must be taken to cure the

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<sup>4</sup> Again, the annual conservation actions on the aquifer dovetail with the Cities’ stipulated mitigation plan and the stated intent of SWC and IGWA to have those plans sustain and enhance the ESPA by reaching certain groundwater level goals. IGWA’s continued implementation of the mitigation plan was paramount to achieving the sentinel well benchmarks and ultimate goals, something that could not be achieved simply by continuing to use the *2009 Mitigation Plan*.

breach. As a result, as required by *2016 Mitigation Plan*, *2022 Compliance Order*, the CMR and the *Rangen* holding, curtailment is the only other option.

As found in *Rangen*, the Director has no legal right to ignore the breach of a mitigation plan and allow junior users to continue diversion out of priority when they are in breach of their mitigation plan. The Hearing Officer should find that the Director erred as a matter of law by not complying with the previously approved mitigation plan process. The Director's inaction further failed to comply with his *2022 Compliance Order* where the same issue was presented to him. The Coalition respectfully requests the Hearing Officer to grant its motion on this issue.

**III. The 2009 Mitigation Plan cannot be used to cure the ground water districts' 2022 breach of the 2016 Mitigation Plan.**

The *2009 Mitigation Plan* cannot be used to cure a breach of the *2016 Mitigation Plan*. The *2009 Mitigation Plan* is an annual injury-based plan that, on a contingent basis, supplies storage water to mitigate for annual injury to the SWC. The *2016 Mitigation Plan* resulted from IGWA being unable to comply with the *2009 Mitigation Plan* and all parties recognizing that long term actions needed to be taken to restore the aquifer and water supplies to the SWC. Furnishing storage water does not remedy the failure to take annual actions to restore the aquifer as required by the *2016 Mitigation Plan*. Further, in reviewing the remedy for the 2021 breach, the Director never concluded or allowed the breaching Ground Water Districts to remedy that breach by simply adhering to the *2009 Mitigation Plan* instead. *See Ex. G to Thompson Dec.*

After the *2016 Mitigation Plan* was adopted by IDWR, IGWA ignored the *2009 Mitigation Plan* and did not attempt to provide storage water as required by the plan during times of injury. At no time between 2017 and 2022 did IGWA offer to mitigate through its *2009 Mitigation Plan*. When members of IGWA, particularly the Breaching GWDs, decided that they would not comply with the *2016 Mitigation Plan* in 2022 due to hot and dry conditions, they



elected to divert out of priority and not comply with the *2016 Mitigation Plan*. To support this action in 2023, they claimed they were mitigating pursuant to the *2009 Mitigation Plan* while they breached the provisions of the *2016 Mitigation Plan* requiring long term annual actions. The various mitigation plans are not a “choose your own adventure” option, particularly when they agreed with the Coalition to take certain actions every year and follow a specific process if those actions were not implemented. Notably, when forecasted injuries exceeded 50,000 acre-feet in prior years, the Districts did not offer to fully remedy that injury with storage, instead they turned to the *2016 Mitigation Plan* and its capped storage quantity (i.e. 50,000 acre-feet, no more, no less).

The only contingency set forth in the *2016 Mitigation Plan* is the ability of the Director to craft a remedy in the event of a breach, which the Director failed to do following the 2022 breach. The *2009 Mitigation Plan* was not mentioned in the *2016 Mitigation Plan* as an acceptable contingency. Further, the terms of the *2016 Mitigation Plan* and the actions of IGWA following IDWR’s approval of that plan demonstrate that IGWA had no intention to use the *2009 Mitigation Plan* to mitigate or as a contingency to the *2016 Mitigation Plan*. More importantly, the *2016 Mitigation Plan* was a stipulated mitigation plan adopted by IDWR, and the SWC never agreed to allow the *2009 Mitigation Plan* to be used as contingency mitigation for the *2016 Mitigation Plan*.

Further, when one looks at the intent of the *2016 Mitigation Plan* and the annual diversion reduction actions required by that plan, furnishing storage water in lieu of the annual reductions required by the *2016 Mitigation Plan* would render the aquifer restoration goals of the *2016 Mitigation Plan* impossible to achieve. Delivering storage water does not improve the aquifer. In effect, if IDWR will not enforce the provisions of the *2016 Mitigation Plan*, it will

result in a meaningless plan and orders entered by IDWR, as well as a huge waste of resources that have been spent by the State of Idaho, SWC and IGWA to restore the aquifer as outlined in the *2016 Mitigation Plan*. The actions of the Breaching GWDs should not be allowed to extinguish a plan that they, along with all the other members of IGWA agreed to as the best long-term solution to address the continuing problem of aquifer declines.

In addition, the *2016 Mitigation Plan* contains an integration clause that explicitly states: “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 reserve all rights not settled by this agreement.” Therefore, the *2016 Mitigation Plan*, by its terms clearly shows that IGWA agreed to mitigate pursuant to the *2016 Mitigation Plan*, and the *2009 Mitigation Plan* was not a contingency mitigation plan that was part of the *2016 Mitigation Plan*. Both the first and second addendums to the agreement and *2016 Mitigation Plan* contain integration clauses as well. *See Exs. A, C to Thompson Dec.*

IGWA and the participating ground water districts should not be allowed to pick and choose a mitigation plan that suits their needs in a particular year particularly in light of the terms and goals of the *2016 Mitigation Plan* agreed to by the parties. Furnishing storage water will not offset the deficits to the aquifer cause by the Breaching GWDs’ failure to comply with the *2016 Mitigation Plan*. IGWA and the participating ground water users should be required to comply with the *2016 Mitigation Plan* as adopted by IDWR if they want safe harbor from curtailment.

## CONCLUSION

The *2016 Mitigation Plan*, its addendums and the orders entered by IDWR set forth a defined process that should be followed when a breach of the plan occurs. The process was confirmed by the Director in the *2022 Compliance Order* where he recognized absent an agreed to remedy, curtailment was the only approved contingency to implement. After IGWA breached the *2016 Mitigation Plan* in 2022, the parties followed the Steering Committee process again in the spring of 2023. The Director found that the *2016 Mitigation Plan* was breached but failed to order a remedy or curtailment. The Director is not authorized by law to ignore a breach of a mitigation plan and pursuant to the *2016 Mitigation Plan* and the CMR he must order a remedy or curtailment. To not do anything is a clear error as found in *Rangen*.

Finally, attempting to furnish storage water pursuant to the *2009 Mitigation Plan* does not cure the breaches of the *2016 Mitigation Plan*, since delivery of storage does nothing to restore the aquifer as required by the *2016 Mitigation Plan*. The *2016 Mitigation Plan* and order approving the same does not allow the use of the *2009 Mitigation Plan* as a contingency. Whereas the *2016 Mitigation Plan* and its amendments contain integration clauses, IGWA cannot turn to a separate plan not agreed to by the SWC as substitute contingency mitigation. Attempts by the Breaching GWDs to use the *2009 Mitigation Plan* in lieu of the *2016 Mitigation Plan* must be rejected if the aquifer restoration goals of the *2016 Mitigation Plan* and IDWR's orders are to be enforced by IDWR. The SWC requests that the Hearing Officer enter summary judgment as requested above on the grounds set forth.

DATED this 12<sup>th</sup> day of February 2024.

**MARTEN LAW LLP**

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## CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of February 2024, I served a true and correct copy of the foregoing *Surface Water Coalition’s Motion for Summary Judgment / Supporting Points & Authorities* on the following by the method indicated:

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