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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-MP-2016-001 **AMERICAN FALLS-ABERDEEN GROUND WATER DISTRICT'S BRIEF IN RESPONSE TO IGWA'S MOTION FOR SUMMARY JUDGMENT AND IGWA'S MOTION IN LIMINE**
IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN	

COMES NOW American Falls-Aberdeen Ground Water District ("AFAGWD"), by and through its undersigned counsel, pursuant to the *Order Authorizing Discovery; Scheduling Order; Order Suspending IDAPA 37.01.01.354; Notice of Prehearing Conference and Hearing* ("Scheduling Order") dated December 29, 2023, and hereby files this brief to respond to Idaho Ground Water Appropriators, Inc.'s ("IGWA") *Memorandum in Support of IGWA's Motion for Summary Judgment* dated February 12, 2024 ("IGWA's Memo"). Based on the arguments

within, AFAGWD requests that the Hearing Officer deny IGWA's *Motion for Summary Judgment* on three of its four claims for relief. With respect to Issue #3, it appears IGWA agrees with AFAGWD that the breaches of the *2016 Mitigation Plan* in 2022 (or any other breach) cannot be cured by operating under another mitigation plan (*see, IGWA's Memo* at 15), thus summary judgment is proper on that issue.

AFAGWD also asks the Hearing Officer to *decline* to decide IGWA's *Motion in Limine to Exclude Parol Evidence* unless and until it becomes necessary based on IGWA's objections to testimony or evidence offered at hearing.

INTRODUCTION

IGWA's Memo has a "head's I win, tails you lose" quality to it. IGWA effectively asks the Hearing Officer to find that:

- the Director is authorized to approve stipulated mitigation plans that provide "other appropriate compensation" in lieu of redressing injury, *but* that his authority to issue remedial orders when a mitigating party is in breach of the plan is limited to priority administration under the Methodology Order (i.e., only order curtailment once the Director determines they are injuring the Surface Water Coalition ("SWC")). *See IGWA's Memo* at 5-8.
- the 2015 Settlement Agreement, incorporated wholesale into the *2016 Mitigation Plan*, provides an offramp to IGWA members who do not feel like "participating" in the mitigation plan via section 6[1]—if an IGWA member or entity declines to "participate" in

[1] *See 2016 Mitigation Plan* (*Bricker Aff.*, Ex. 1) at 18 (Ex. B at 5, ¶ 6) ("Any ground water user not participating in this Settlement Agreement or otherwise have another approved mitigation plan will be subject to administration.").

a given year they may instead operate under any other approved mitigation plan or roll the dice with priority administration. Their call. *See IGWA's Memo* at 12.

Combine these two interpretations and the *2016 Mitigation Plan* becomes a wholly aspirational and unenforceable document. The Hearing Officer should summarily reject IGWA's arguments on these issues.

ARGUMENT

I. IGWA Cannot Use the *2009 Mitigation Plan* to Attain Safe Harbor from Curtailment Because it was Effectively Rescinded by the *2016 Mitigation Plan*

IGWA is incorrect that the 2015 Settlement Agreement's language clearly and unambiguously "contemplates that mitigation may be provided under other approved plans." *IGWA's Memo* at 12. Rather, its language demonstrates that the parties intended for the *2016 Mitigation Plan* to be the only mitigation plan under which IGWA's members could operate to attain safe harbor. Thus, the *2016 Mitigation Plan* implicitly rescinded, or superseded, the *2009 Mitigation Plan* and any other plans, thereby precluding ground water districts ("GWDs") from using them as alternatives to complying with the *2016 Mitigation Plan*.

A. Agreements and Orders can be Effectively Rescinded by Later Actions of the Parties or the Tribunal.

The *2016 Mitigation Plan* is first and foremost a contract between the SWC and IGWA. *See 2016 Mitigation Plan* at 3.[2] Thus, the Hearing Officer's "primary objective is to discover the mutual intent of the parties at the time they entered the contract." *Stanger v. Walker Land & Cattle, Ltd. Liab. Co.*, 169 Idaho 566, 573 (2021). A contract can "have the effect of complete

[2] "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)."

rescission" of a prior contract—or in this case, a prior mitigation plan—if it deals with the same subject matter "so comprehensively as to be complete within itself and to raise the legal inference of substitution . . . ." *Stiffler v. Hydroblend, Inc.*, 535 P.3d 606, 618 (Idaho 2023); *cf. Cougar Bay Co. v. Bristol*, 100 Idaho 380, 383 (1979) (internal citations omitted).[3] "[A] later instrument [can] rescind an earlier one" if there is "a demonstration of mutual intent" of the parties. *Miller v. Estate of Prater*, 141 Idaho 208, 212 (2005).

Not only can contracts be rescinded by subsequent instruments by operation of law, so can the orders of a tribunal. *See, e.g.*, *Cenlar FSB v. Malenfant*, 151 A.3d 778, 783-84 (Vt. 2016) (finding that a subsequent order "effectively vacated" a prior judgment, thereby avoiding "an irremediable legal limbo," because if an order is "materially inconsistent with earlier order dealing with same subject matter, latter order operates to implicitly vacate prior order, even if latter order does not so expressly provide") (citing *Poston Feed Mill Co. v. Leyva*, 438 S.W.2d 366, 369 (Tex. Civ. App. 1969)).

B. The *2016 Mitigation Plan* Comprehensively Resolved the SWC Delivery Call Between IWGA and SWC and, When the Director Approved it, Effectively Rescinded Prior Mitigation Plans.

The *2016 Mitigation Plan* is rife with language that both parties intended for it to effectively rescind the *2009 Mitigation Plan* and any other plans. For example, under the "Entire Agreement" section, it 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

[3] "[A] subsequent contract completely covering the same subject matter, and made by the same parties, as an earlier agreement, but containing terms inconsistent with the former contract, so that the two cannot stand together, rescinds, supersedes, and is substituted for the earlier contract, and becomes the only agreement of the parties on the subject."

herein." *2016 Mitigation Plan* at 18 (Ex. B at 5, ¶ 9) (emphasis added); *see also id.* at 2[4]; *id.* at 3-4[5]; *id.* at 14 (Ex. B at 1, ¶ 1.f.).[6] The plain language of the document is clear and unambiguous, thus no parol evidence is needed to determine the parties' mutual intent.[7] The *2016 Mitigation Plan* is a comprehensive agreement that addresses the same subject matter as the *2009 Mitigation Plan*: removing IGWA's threat of curtailment from the SWC delivery call. Accordingly, it rescinded the *2009 Mitigation Plan* and became the "only agreement of the parties on the subject," *Cougar Bay Co.*, 100 Idaho at 383, thereby precluding GWDs from operating under the *2009 Mitigation Plan* or any other plan. So, even if the Conjunctive Management Rules (CMR) allow a junior user to have multiple approved mitigation plans, as IGWA asserts,[8] that does not help their cause, as the terms of the *2016 Mitigation Plan* operate to rescind the *2009 Mitigation Plan*, so the latter is not available for them to use in response to a curtailment order.

IGWA also misses the mark when it says that the 2015 Settlement Agreement's plain language does not preclude GWDs from operating under other mitigation plans because the agreement provides that "any ground water user not participating in this Settlement Agreement or otherwise have another approved mitigation plan will be subject to administration." *IGWA's Memo* at 12.[9] This language refers to entities that are not signatories of the Settlement

[4] Describing the 2015 Settlement Agreement as "historic" and meant to "resolv[e] pending water delivery calls and provide for on-going management of the ESPA . . . ."
[5] Providing that other ground water users could gain protection under the plan if they "help[ed] achieve the groundwater level goal and benchmarks" of the plan.
[6]The agreement sought to "increase reliability and enforcement of water use . . ." and "develop an adaptive groundwater management plan to stabilize and enhance ESPA levels . . . ."
[7] There is no need to consider parol evidence when a contract is unambiguous, i.e., there is only one reasonable way to interpret it. *See Sommer v. Misty Valley, Ltd. Liab. Co.*, 170 Idaho 413, 424-26 (2021).
[8] *See IGWA's Memo* at 9-11.
[9] Citing *2016 Mitigation Plan* (*Bricker Aff.*, Ex. 1) at 18 (Ex. B at 5, ¶ 6).

Agreement, not the GWDs that signed the agreement. It is patently absurd to assert that this clause provides GWDs with an offramp to circumvent their obligations under the *2016 Mitigation Plan* and yet retain safe harbor by operating under another mitigation plan.

II. Under the Second Addendum, the Director is Authorized to: a) Interpret the 2015 Settlement Agreement; and b) Immediately Curtail IGWA Members who are in Breach of the *2016 Mitigation Plan*

IGWA asks the Hearing Officer to find that "in the absence of a stipulated remedy," the Director's authority to remediate a breach of the *2016 Mitigation Plan* is limited to subjecting the offending GWDs to priority administration.[10] *IGWA's Memo* at 5-8. Under IGWA's theory, if there is a breach, and the parties to the *2016 Mitigation Plan* cannot agree on a remedy (as they did in 2022 regarding the 2021 breach[11]), the Director has no power to fashion a remedy under the *2016 Mitigation Plan* other than resorting to priority administration under the Methodology Order. This is wrong for several reasons, and IGWA is estopped from making this argument because in prior filings with the Department it adopted a different—and accurate—interpretation of the Director's authority under the *2016 Mitigation Plan*.

A. The Second Addendum Provides The Director With Authority to Impose Immediate Curtailment When IGWA Members are in Breach of the *2016 Mitigation Plan*

Based on the plain language of the Second Addendum to Settlement Agreement at paragraph 2.c.iv.,[12] the parties to the *2016 Mitigation Plan* stipulated that offending GWDs could

[10] The basis for this request appears to be the rhetorical arguments that the Director is not authorized to: a) impose damages for breach of the underlying 2015 Settlement Agreement (*IGWA's Memo* at 5-6); or b) adjudicate a contract dispute. Undersigned is unaware that either relief has been formally requested in the captioned matter. To the extent IGWA's argument is a swipe at the Director's prior orders which interpreted the terms of the 2015 Settlement Agreement, which was incorporated wholesale into the *2016 Mitigation Plan*, this argument is without basis as argued above.

[11] *See* https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-MP-2016-001/CM-MP-2016-001-20220907-Settlement-Agreement.pdf (last visited Feb. 21, 2024).

[12] *Surface Water Coalition's and IGWA's Stipulated Amended Mitigation Plan and Request for Order* (*Bricker Aff.*, Ex. 2) at 9 (Ex. A at 3-4, ¶ 2.c.iv.).

be curtailed if the Director finds a breach but decides not to issue an order "specifying actions that must be taken by the breaching party . . . ." It provides, in the event IGWA and SWC do not agree that a breach of the *2016 Mitigation Plan* occurred, that the Steering Committee will "request that the Director evaluate all available information, determine if the 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*." *Id.* (emphasis added). The plain language of paragraph 2.c.iv. is consistent with the CMR 40.05:

> 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*.

Rule 40.05 does not contemplate that the junior gets to select a different mitigation plan or otherwise take their chances under the Methodology Order: failure to operate pursuant to an approved mitigation plan results in immediate curtailment if the mitigation plan does not provide for other actions that ensure protection of the senior. Here, based on the plain language of the *2016 Mitigation Plan,* the Director should curtail the offending GWDs[13] in the absence of imposing another suitable remedy.

[13] For a list of the offending GWDs, see *American Falls-Aberdeen Ground Water District's Memorandum in Support of Motion for Partial Summary Judgment* at 2 n.2. As described above and in its *Memorandum,* AFAGWD has cured its breach. *See id.* at 3; *see also Surface Water Coalition's Motion for Summary Judgment/Support Points & Authorities* at 9 ("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.")

B. IGWA Should be Estopped from Asserting the Director Lacks Authority to Impose Immediate Curtailment on the Offending GWDs.

In 2021, certain IGWA members also breached the *2016 Mitigation Plan*. The Director indicated his intention to issue a curtailment order to remedy the breach; IGWA and SWC therefore entered into a "Remedy Agreement" to, *inter alia,* avoid the presumed immediate curtailment.[14] With this in mind, AFAGWD went to great lengths—prior to the scheduling conference in this matter—to cure its 2022 breach to avoid any risk of immediate curtailment, as it understood that would be the outcome of failure to cure. Now, IGWA argues that the Director lacks the authority to curtail breaching entities, rendering AFAGWD's efforts to cure its breach a futile (yet expensive) exercise. Accordingly, IGWA's argument should be rejected on quasi-estoppel grounds, which "applies when: (1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party . . . ." *See Day v. Idaho Transp. Dep't*, 533 P.3d 1227, 1238 (Idaho 2023).[15]

CONCLUSION

AFAGWD respectfully request that the Hearing Officer enter an order denying IGWA's *Motion for Summary Judgment*, except for Issue #3, which should be granted, as all parties agree

[14] *See Settlement Agreement* (IDWR Docket No. CM-MP-2016-001, Sep. 7, 2022) at Recital 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.").

[15] "Quasi-estoppel prevents a party from changing its legal position and, as a result, gaining an unconscionable advantage or imposing an unconscionable disadvantage over another. . . . Unlike equitable estoppel, quasi-estoppel does not require an undiscoverable falsehood, and it requires neither misrepresentation by one party nor reliance by the other. . . . Quasi-estoppel applies when: (1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in." (internal citations and quotations omitted).

that the GWDs may not use the *2009 Mitigation Plan*, or any other plan, to cure a breach of the *2016 Mitigation Plan*.

Respectfully submitted this 26th day of February 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of February 2024, I caused a true and correct copy of the foregoing document to be filed and served on the persons below via email:

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