

**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

**ORDER ON MOTIONS FOR PARTIAL  
SUMMARY JUDGMENT**

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT  
MITIGATION PLAN

**BACKGROUND**

The following background regarding IGWA's 2016 Mitigation Plan is taken directly from the Director's *Final Order Regarding IGWA's 2022 Mitigation Plan Compliance* signed by Director Gary Spackman because these facts are un rebutted and were succinctly stated by the Director. There are no disputed facts in this matter and as a result the Hearing Officer resolves the issues raised as a matter of law within his discretion under the Department's Rules of Procedure.

**A. IGWA's 2016 Mitigation Plan**

In 2015, members of the Surface Water Coalition ("SWC")<sup>1</sup> and Idaho Ground Water Appropriators, Inc. ("IGWA")<sup>2</sup> 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.* ("2015 Settlement 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").

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

---

<sup>1</sup> The SWC is comprised of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

<sup>2</sup> For purposes of this order, references to IGWA include only the following eight ground water districts and one irrigation district, which are the signatories to the 2016 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.

Mitigation Plan was submitted in response to the SWC’s delivery call (Docket No. CM-DC2010-001). *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 *2015 Settlement 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 2015 Settlement 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 could not 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.

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

- (1) the 2015 Settlement 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 2022 Compliance Order**

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.<sup>3</sup>

On August 2, 2023, the Director issued a *Final Order Regarding IGWA's 2022 Mitigation Plan Compliance* (“2022 Compliance Order”). In the *2022 Compliance Order*, the Director “determine[d] that, during the 2022 irrigation season, certain members of Idaho Ground Water Appropriators, Inc. (“IGWA”) 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.” *2022 Compliance Order* at 1.

The Director found that collectively IGWA was 38,734 acre-feet short of its reduction obligation in 2022. *2022 Compliance Order* at 8. The Director also found that four IGWA ground water districts individually failed to satisfy their proportionate share of the collective reduction obligation in 2022: (1) American Falls-Aberdeen; (2) Bingham; (3) Bonneville-Jefferson; (4) Jefferson-Clark. *Id.*

Despite determining that certain members were not in compliance with the 2016 Mitigation Plan, the Director declined to issue a curtailment order “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.” *Id.* In addition, in footnote 6 of the *2022 Compliance Order*, the Director explained that “the Second Addendum [to the 2015 Settlement Agreement] call[s] 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.” *Id.* at 9.

On August 16, 2023, the SWC filed *Surface Water Coalition's Petition for Reconsideration & Request for Hearing*, challenging the *2022 Compliance Order*. On September 6, 2023, the Director granted the SWC’s request for hearing on the *2022 Compliance Order*. On December 12, 2023, the Director appointed Roger S. Burdick as the hearing officer in this matter.

On December 12, 2023, Hearing Officer Burdick conducted a scheduling conference during which he directed the parties to submit proposed issue statements and responses. The parties complied. The Hearing Officer held a second scheduling conference on December 28, 2023. After considering the parties’ proposed issue statements and responses, in an exercise of his discretion, the Hearing Officer orally identified four issues for hearing. On December 29, 2023, the Hearing Officer issued an *Order Authorizing Discovery; Scheduling Order; Order Suspending IDAPA 37.01.01.354; Notice of Prehearing Conference and Hearing* (“Scheduling Order”). In the *Scheduling Order*, the Hearing Officer reiterated that the four issues for hearing are:

- 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?

---

<sup>3</sup> As in Section A, these first two paragraphs have been reproduced from the 2022 Compliance Order.

*Scheduling Order* at 4. In the *Scheduling Order*, the Hearing Officer also adopted a prehearing schedule that included discovery deadlines and a deadline for dispositive motions.

On February 12, 2024, the SWC, American Falls-Aberdeen Ground Water District (“AFAGWD”), and IGWA moved for summary judgment. The SWC moved for summary judgment on Issues 1–3, and AFAGWD moved for summary judgment on Issue 3. *SWC’s Mot. for Summ. J.* at 2; *AFAGWD’s Mot. for Partial Summ. J.* at 1-2.<sup>4</sup> IGWA moved for summary judgment on all issues. *IGWA Mem. In. Supp. Of IGWA’s Mot. for Summ. J.* at 5.<sup>5</sup> IGWA also moved the Hearing Officer to take official notice of department documents and to limit “parol evidence” at hearing set for March 14, 2024.<sup>6</sup> Concurrently, counsel for the SWC and counsel for IGWA filed declarations in support of their motions and counsel for AFAGWD filed an affidavit in support.<sup>7</sup>

On February 26, 2024, the SWC, AFAGWD, and IGWA responded to one another’s motions for summary judgment, Bingham Ground Water District filed “*Joinder in Support of IGWA’s Motions for Summary Judgment and Response to SWC and AFAAGWD (sic) Motions for Summary Judgment and Response to AFAGWD’s Motion for Summary Judgment*,” and Bonneville-Jefferson Ground Water District filed “*Joinder in Support of IGWA’s Motions for Summary Judgment and Response to SWC and AFAAGWD (sic) Motions for Summary Judgment and Response to AFAAGWD’s (sic) Motion for Summary Judgment*” accompanied by counsel’s supporting declaration.

The Hearing Officer deems the matter fully submitted and ripe for resolution. Upon consideration of the arguments of counsel, the materials submitted in support of summary

---

<sup>4</sup> AFAGWD asserts:

As “there is no genuine dispute as to any material fact,” AFAGWD “is entitled to judgment as a matter of law” (Idaho Rule of Civil Procedure (“I.R.C.P.”) 56(a)) that IGWA members cannot cure the 2022 breach of IGWA’s 2016 Mitigation Plan by operating under IGWA’s 2009 Mitigation Plan, and further that operation under any mitigation plan other than the 2016 Mitigation Plan is not a basis for “safe harbor” from a curtailment order issued pursuant to the Surface Water Coalition (“SWC”) delivery call.

*AFAGWD’s Mot. for Partial Summ. J.* at 1-2.

<sup>5</sup> IGWA proposes that the four issues can and should be resolved as follows:

A) As to Issue 1, the Director did not err because the Director’s authority to enforce a breach of a mitigation plan is limited to curtailment of out-of-priority water use in accordance with the prior appropriation doctrine, in the absence of a stipulated remedy.

B) As to Issue 2, the Director properly declined to curtail ground districts who complied with IGWA’s Storage Water Plan in 2023.

C) As to Issue 3, IGWA does not contend that its compliance with the Storage Water Plan cured any breach of the 2016 Mitigation Plan that may have occurred in 2022.

D) As to Issue 4, the Director does not have authority to prescribe actions that must be taken to cure any breach of the 2015 Mitigation Plan that may have occurred in 2022, due to the lack of a stipulated remedy.

*IGWA Mem. In. Supp. Of IGWA’s Mot. for Summ. J.* at 5.

<sup>6</sup> The Hearing Officer will address IGWA’s motion in limine and motion to take official notice in an order separate from this decision.

<sup>7</sup> Citations in the Analysis section of this Order are to the exhibits submitted by the parties in support of their motions for summary judgment unless otherwise noted.

judgment, and for the reasons explained below, the Hearing Officer hereby GRANTS the SWC and AFAGWD's motions for partial summary judgment and DENIES IGWA's motion for summary judgment.

## LEGAL STANDARD

The Department's Rules of Procedure, IDAPA 37.01.01, govern the pending motion in this case. Rule of Procedure 220.03 authorizes motions for summary judgment and states that "Rule 56(a), (c), (d), (e), and (f) of the Idaho Rules of Procedure, apply to such motions before the agency." IDAPA 37.01.01.220.03.

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Lee v. Litster*, 161 Idaho 546, 549, 388 P.3d 61, 64 (2017) (quoting *Safaris Unlimited, LLC v. Von Jones*, 158 Idaho 846, 850, 353 P.3d 1080, 1084 (2015)). The burden of establishing the absence of a genuine issue of material fact belongs to the moving party. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

If the movant meets its burden, the movant is entitled to summary judgment unless the nonmovant presents "specific facts that demonstrate the existence of a genuine issue for trial"—a "mere scintilla of evidence" or "slightest doubt as to the facts" will not do. *Haight v. Idaho Dep't of Transp.*, 163 Idaho 383, 387, 414 P.3d 205, 209 (2018). "Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Major v. Sec. Equip. Corp.*, 155 Idaho 199, 202, 307 P.3d 1225, 1228 (2013).

## ANALYSIS

The Director is statutorily vested with a clear legal duty to distribute water. I.C. § 42-602. The details of how the Director chooses to distribute water are largely left to his discretion. *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994). The Legislature has authorized the Director "to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water, and other natural water resources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof." I.C. § 42-603. The Director has done so in the CM Rules, which were approved by the Legislature and became effective on October 7, 1994. Under the CM Rules, the Director has broad discretionary authority to administer water. *See e.g., In Matter of Distribution of Water to Various Water Rights Held by or For Ben. Of A&B Irr. Dist.*, 155 Idaho 640, 652, 315 P.3d 828, 840 (2013) (recognizing the Director has discretionary authority under the CM Rules to develop and implement a pre-season management plan for allocation of water resources that employs a baseline methodology). The administration of water under the CM Rules includes the discretion to approve, implement, and enforce mitigation plans in lieu of curtailment. IDAPA 37.03.11.043; IDAPA 37.03.11.042.02; *In Matter of Distribution of Water to Various Water Rights Held by or For Ben. Of A&B Irr. Dist.*, 155 at 654, 315 P.3d at 842 (when material injury is found to exist in a delivery call, the Director can "either regulate and curtail the diversions causing injury or approve a mitigation plan that permits out-of-priority diversion").

In the related judicial review proceeding regarding the interpretation of the *2016 Mitigation Plan* as it relates to IGWA's compliance in 2021 (CV01-23-7893), the District Court issued a decision reaffirming the Director's actions and interpretations in its March 5, 2024 Order Denying Petition for Rehearing. This Hearing Officer will not second guess the District Court's decisions regarding the proper interpretation of the terms of the *2016 Mitigation Plan*.

Additionally, no party has requested a stay of the District Court's decisions, therefore, this Hearing Officer will treat those issues as decided and will not revisit them here.

Based on the arguments of counsel and the record presented to the Hearing Officer, the Hearing Officer concludes that there are no genuine disputes of material fact regarding Issues 1–3. Accordingly, the Hearing Officer grants summary judgment on those issues as follows:

**1. The Director erred when he did not issue an order specifying the actions needed to cure the 2022 breach of the 2016 Mitigation Plan by certain ground water districts or order curtailment.<sup>8</sup>**

First, the SWC argues that the Director erred when he “found that the Breaching GWDs were not in compliance with the *2016 Mitigation Plan* but did not craft a remedy or order curtailment.” *SWC Mot. for Summ. J.* at 12. Conversely, IGWA argues that the Director did not err “because the Director’s authority to enforce a breach of a mitigation plan is limited to curtailment of out-of-priority water use in accordance with the prior appropriation doctrine, in the absence of a stipulated remedy.” *IGWA Mem. In Supp. Of Mot. for Summ. J.* at 5.<sup>9</sup>

This issue turns on the unique nature of the *2016 Mitigation Plan*. On one hand, IGWA and the Director appear to have considered that the remedies for non-compliance with the *2016 Mitigation Plan* (i.e., ordering specifying actions to cure or ordering curtailment) were practically related to whether the implementation of the SWC Delivery Call Methodology led to a prediction that SWC Members would incur a demand shortfall (i.e., suffer material injury) in a given year. In other words, if the Methodology did not predict that SWC Members would suffer material injury in a given year, the Director would not order IGWA members out of compliance with the *2016 Mitigation Plan* to curtail their water use regardless of their non-compliance.

On the other hand, the SWC and AFAGWD assert the obligations of the *2016 Mitigation Plan* and enforcement of the remedies contained therein to function independently from the Methodology Order’s material injury determination. For example, the SWC argues:

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,

---

<sup>8</sup> This section encompasses Issues 1 and 2 identified by the Hearing Officer. The analysis of the two issues is consolidated in this Order as the two are jointly resolved.

<sup>9</sup> Ostensibly in response to Issue 1, IGWA argues that “in the absence of a stipulated remedy, the Director’s authority to enforce a breach of the 2016 Mitigation Plan is limited to curtailment of out-of-priority water use in accordance with Idaho law.” *IGWA Mem. In Supp. Of Mot. for Summ. J.* at 8. The Hearing Officer disagrees. IGWA stipulated to the 2016 Mitigation Plan and, as such, it has agreed to administration pursuant to its terms. Such an agreement and the Director’s enforcement therewith is not contrary to the prior appropriation doctrine. A party may voluntarily give up their priority date or rights by contract or other agreements. The Director has broad discretionary authority to administer water under the CM Rules, including enforcing the terms of a stipulated mitigation plan. *See e.g. City of Bliss et al. v. Spackman*, Case No. CV-2015-172 (Memorandum Decision and Order, Sep. 8, 2015) at 8-9 (<https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CV-2015-172/CV-2015-172-20150908-Memorandum-Decision-and-Order.pdf>).

IGWA agreed to take annual aquifer conservation actions. As a result, it is often referred to as an aquifer restoration mitigation plan.

*SWC Mot. for Summ. J.* at 5. Likewise, AFAGWD argues that:

IGWA members that satisfy the obligations of the 2016 Mitigation Plan receive safe harbor from a curtailment order issued pursuant to the SWC delivery call—whether or not satisfaction of the terms of the 2016 Mitigation Plan redresses any material injury found by the Director through implementation of the Methodology Order.

*AFAGWD Mem. In Supp. Of Mot. for Partial Summ. J.* at 5.

The Hearing Officer agrees with the SWC and AFAGWD. The *2016 Mitigation Plan* is unique in that it requires ongoing activities to be performed regardless of the Methodology's prediction of material injury in a given year.<sup>10</sup> The activities are ongoing, the compliance therewith is monitored and evaluated disjunctively from the timing of the Methodology's applied orders (e.g., Steps 1-3 in April, Steps 5-6 in July, and Step 9 in November), and curing the breach does not necessarily correlate to redressing material injury predicted by the Methodology. Rather, the *2016 Mitigation Plan* stands alone in its terms and its enforcement.

Section 2.c.iv of the *Second Addendum* provides:

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.*

Bricker Aff. Ex. 2 at 9 (emphasis added). In addition, Conjunctive Management Rule 40.05 states:

**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.*

---

<sup>10</sup> In the Final Order Approving Stipulated Mitigation Plan, the Director summarized the Mitigation Plan's "numerous ongoing activities" as 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. 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.

Bricker Aff. Ex. 5 at 4 (internal citations omitted).

IDAPA 37.03.11.040.05 (emphasis added).

Based on the CM Rules and the plain language of the *Second Addendum* within the *2016 Mitigation Plan*, once the Director determined that a breach occurred, the Director should have either (1) issued an order specifying actions that must be taken by the breaching party to cure the breach; or (2) issue a curtailment order to the breaching party. Here, the Director did neither. As such, the Director erred and the SWC is entitled to summary judgment on Issues 1 and 2.

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

Next, the SWC and AFAGWD argue that IGWA cannot rely on the *2009 Mitigation Plan* to cure the member districts' 2022 breach of the *2016 Mitigation Plan*. IGWA does not contest this issue as it was framed by the Hearing Officer: “While IGWA disputes the SWC’s allegation that a breach occurred in 2022, if a breach did in fact occur, IGWA does not contend that it was cured by IGWA’s provision of mitigation under the Storage Water Plan in 2023.” *IGWA Mem. In Supp. Of Mot. for Summ. J.* at 14.<sup>11</sup> Similarly, IGWA concedes that “the hearing officer can easily dispose of this issue because IGWA does not contend that the districts’ use of the 2009 Storage Water Plan to mitigate injury in 2023 cures any breach that may have occurred in 2022. *IGWA Resp. to the SWC and AFAGWD’s Mot. for Summ. J.* at 3. Therefore, the Hearing Officer concludes that the *2009 Mitigation Plan* cannot be used to cure the ground water districts’ 2022 breach of the *2016 Mitigation Plan*, disposing of Issue 3 as it was framed by the Hearing Officer.

However, in their motions for summary judgment, the parties have requested the Hearing Officer also address whether the *2016 Mitigation Plan* effectively operated to rescind or replace the *2009 Mitigation Plan*. To evaluate this argument, the Hearing Officer must examine the *2016 Mitigation Plan* in its entirety as it is primarily a contract between the SWC and IGWA.

When interpreting a contract, a court's primary objective is to discover the mutual intent of the parties at the time they entered the contract. *Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC*, 157 Idaho 600, 610, 338 P.3d 1204, 1214 (2014). If the terms of the contract are unambiguous, intent can be ascertained as a matter of law by looking to the four corners of the document. *Id.* Subjective, undisclosed intent is immaterial to a contract's interpretation. *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006). Rather, the court gives “‘force and effect to the words of the contract without regard to what the parties to the contract thought it meant or what they actually intended for it to mean.’” *Id.* (quoting 17 Am.Jur.2d, Contracts, § 347 (2004)).

*Stanger v. Walker Land & Cattle, LLC*, 169 Idaho 566, 573, 498 P.3d 1195, 1202 (2021). “It is well settled that the terms of a written contract may be varied, modified, waived, annulled, or wholly set aside by any subsequently executed contract, whether that contract be in writing or parol.” *Stiffler v. Hydroblend, Inc.*, 172 Idaho 630, \_\_\_, 535 P.3d 606, 618 (2023) (quoting *Silver Syndicate, Inc. v. Sunshine Min. Co.*, 101 Idaho 226, 235, 611 P.2d 1011, 1020 (1979)).

To have the effect of complete rescission, the new contract must either explicitly rescind the earlier contract, or deal with the subject matter of the former contract so comprehensively as to be complete within itself and to raise the legal inference of substitution, or it must present such inconsistencies with the first contract that the two cannot in any substantial respect stand together.

---

<sup>11</sup> IGWA did not challenge the Director’s finding that it breached the 2016 Mitigation Plan in 2022—the SWC requested a hearing on the 2022 Compliance Order to clarify the *remedy* for non-compliance.



*Id.*

AFAGWD argues that the plain language of the *2016 Mitigation Plan* is clear and unambiguous, and it 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.” *AFAGWD Br. In Resp. to IGWA Mot. for Summ. J.* at 5. Therefore, AFAGWD asserts, the *2016 Mitigation Plan* “rescinded the 2009 Mitigation Plan and became the ‘only agreement of the parties on the subject’ thereby precluding GWDs from operating under the *2009 Mitigation Plan* or any other plan.” *Id.* (quoting *Cougar Bay Co. v. Bristol*, 100 Idaho 380, 383 (1979) (“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.”))).

Both SWC and AFAGWD argue that the integration clauses in the *2016 Mitigation Plan* (titled “Entire Agreement”) are evidence that both parties intended the *2016 Mitigation Plan* to effectively rescind the *2009 Mitigation Plan*. *AFAGWD Br. In Supp. Of Mot. for Partial Summ. J.* at 12; *SWC Mot. for Summ. J.* at 18. The “Entire Agreement” section in the 2015 Settlement Agreement states in relevant part: “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.” Bricker Aff. Ex. 1 at 18. The *Addendum* to the *2015 Settlement Agreement* and the *Second Addendum* also contain integration clauses. *SWC Response to IGWA Mot. for Summ. J.* at 7; Bricker Aff. Ex. 1 at 40, Ex. 2 at 10. IGWA stipulated to all three documents.

Conversely, IGWA argues: “(1) as a matter [of] law, the Conjunctive Management Rules allow junior priority water users to have multiple approved mitigation plans,<sup>12</sup> (2) IGWA’s Storage Water Plan remains in effect, and (3) the SWC is barred by the applicable statute of limitation from arguing that IGWA’s Storage Water Plan is invalid.” *IGWA Mem. In Supp. Of Mot. for Summ. J.* at 9.

IGWA also argues that the *2009 Mitigation Plan* remains in effect because “the Department has not issued an order terminating or vacating the approval orders.” *Id.* at 11. In addition to the absence of an order vacating or terminating the *2009 Mitigation Plan*, IGWA argues that “[t]here is nothing in the plain language of the Settlement Agreement that terminates prior mitigation plans or precludes IGWA from providing mitigation under prior mitigation plans.” IGWA claims, “[t]o the contrary, the Settlement Agreement contemplates that mitigation may be provided under other approved plans.” IGWA relies on Section 6 of the *2015 Settlement Agreement*, which states:

**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.

*Id.*; Bricker Aff. Ex. 1 at 17. In response to this argument, AFAGWD explains that this language “refers to entities that are not signatories of the Settlement Agreement, not the GWDs that signed the agreement.” *AFAGWD Br. In Resp. to Mot. for Summ. J.* 5-6. The Hearing Officer agrees with AFAGWD.

---

<sup>12</sup> The Hearing Officer agrees that the CM Rules do not prevent a junior user from having multiple approved mitigation plans; however, this does not resolve the issue of whether both the 2009 and 2016 Mitigation Plans remain viable here.

The Hearing Officer finds that the language of the *2016 Mitigation Plan* is clear and unambiguous. The *2016 Mitigation Plan* dealt with the subject matter of the former *2009 Mitigation Plan* so comprehensively as to be complete within itself, and it raised the legal inference of substitution. As was mentioned by AFAGWD, the *2016 Mitigation Plan* removes IGWA's threat of curtailment from a SWC delivery call, as did the *2009 Mitigation Plan*. The plain language of the integration clauses in the *2016 Mitigation Plan* supports the conclusion that the parties intended the *2016 Mitigation Plan* to effectively rescind the *2009 Mitigation Plan*. Therefore, the Hearing Officer finds that the terms of the *2016 Mitigation Plan* operate to rescind the *2009 Mitigation Plan*.

As to IGWA's third argument, IGWA appears to argue that the SWC did not timely exhaust its administrative remedies or seek judicial review of the *2016 Mitigation Plan* regarding its effect on the viability of the *2009 Mitigation Plan*.<sup>13</sup> SWC had no need to raise the issue until this proceeding based upon arguments presented by the parties as there was no case in controversy on the interrelationship of 2016 and 2009 until now. This is not a matter of statutes of limitation. The orders approving the *2016 Mitigation Plan* did not address the issue of whether the *2016 Mitigation Plan* superseded, rescinded, or replaced the *2009 Mitigation Plan*. The SWC is not making an improper collateral attack on those orders. Further, IGWA also requests that the Hearing Officer resolve this issue despite having the same duties (if any) as the SWC to raise the 2016/2009 issue earlier. The Hearing Officer will not allow one party to raise this issue while barring another procedurally similarly situated party from doing so.

The parties also make various estoppel arguments. The Hearing Officer rejects the parties' estoppel arguments because the Hearing Officer does not find the statements and/or conduct of the parties to be unconscionable. The Hearing Officer denies all remaining arguments not specifically addressed by this decision.

## CONCLUSION

In conclusion the Hearing Officer finds:

- (1) The Director erred by not issuing either an order specifying actions needed to cure the 2022 breach of the *2016 Mitigation Plan* by certain ground water districts or an order curtailing the certain ground water districts not in compliance.
- (2) The *2009 Mitigation Plan* cannot be used to cure defaults under the *2016 Mitigation Plan*. The Hearing Officer also finds that the *2016 Mitigation Plan* effectively operates to rescind or replace the *2009 Mitigation Plan*.

## ORDER

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

- (1) The Surface Water Coalition's Motion for Partial Summary Judgment is GRANTED with respect to Issues 1-3.
- (2) American-Falls Aberdeen Ground Water District's Motion for Partial Summary Judgment is GRANTED with respect to Issue 3.

---

<sup>13</sup> IGWA argues "[h]ad the SWC believed that those orders should have terminated the ability of ground water districts to provide mitigation under the Storage Water Plan or the Aquifer Enhancement Plan, the SWC had a duty to timely petition for reconsideration or judicial review." IGWA Mem. In Supp. Of Mot. for Summ. J. at 13.

(3) Idaho Ground Water Appropriators, Inc.'s Motion for Summary Judgment is DENIED.

DATED this 12th day of March 2024.

Handwritten signature of Roger S. Burdick in black ink.

---

ROGER S. BURDICK  
Hearing Officer

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12<sup>th</sup> day of March 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

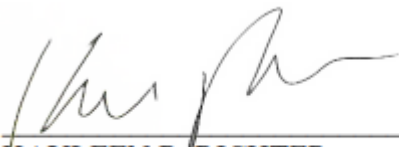
John K. Simpson MARTEN LAW LLP P.O. Box 2139 Boise, ID 83701-2139 <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Travis L. Thompson MARTEN LAW LLP P.O. Box 63 Twin Falls, ID 83303-0063 <a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a> <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 <a href="mailto:wkf@pmt.org">wkf@pmt.org</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Thomas J. Budge Elisheva M. Patterson RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 <a href="mailto:tj@racineolson.com">tj@racineolson.com</a> <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Sarah A Klahn Maximilian C. Bricker SOMACH SIMMONS & DUNN 1155 Canyon Blvd, Ste. 110 Boulder, CO 80302 <a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:mbricker@somachlaw.com">mbricker@somachlaw.com</a> <a href="mailto:vfrancisco@somachlaw.com">vfrancisco@somachlaw.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC P.O. Box 3005 Idaho Falls, ID 83403 <a href="mailto:sjohns@olsentaggart.com">sjohns@olsentaggart.com</a> <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a> <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Dylan Anderson DYLAN ANDERSON LAW PLLC P.O. Box 35 Rexburg, Idaho 83440 <a href="mailto:dylan@dylanandersonlaw.com">dylan@dylanandersonlaw.com</a>	<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  <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a>  <a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
--	---

*Courtesy copies to:*

<p>Robert E. Williams  WILLIAMS, MESERVY, &amp; LOTHSPREICH, LLP  P.O. Box 168  Jerome, ID 83338  <a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>	<input checked="" type="checkbox"/> Email
<p>Robert L. Harris  HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC  P.O. Box 50130  Idaho Falls, ID 83405  <a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>	<input checked="" type="checkbox"/> Email
<p>Michael A. Kirkham  City Attorney, City of Idaho Falls  P.O. Box 50220  Idaho Falls, ID 83405  <a href="mailto:mkirkham@idahofallsidaho.gov">mkirkham@idahofallsidaho.gov</a></p>	<input checked="" type="checkbox"/> Email
<p>Rich Diehl  City of Pocatello  P.O. Box 4169  Pocatello, ID 83205  <a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>	<input checked="" type="checkbox"/> Email
<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  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>	<input checked="" type="checkbox"/> Email
<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234  <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>	<input checked="" type="checkbox"/> Email
<p>Tony Olenichak  IDWR—Eastern Region  900 N. Skyline Drive, Ste. A  Idaho Falls, ID 83402  <a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a></p>	<input checked="" type="checkbox"/> Email

<p>Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 <a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>	<p><input checked="" type="checkbox"/> Email</p>
<p>William A. Parsons PARSONS, LOVELAND, SHIRLEY &amp; LINDSTROM, LLP P.O. Box 910 Burley, ID 83318 <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a> <a href="mailto:wparsons@magicvalley.law">wparsons@magicvalley.law</a></p>	<p><input checked="" type="checkbox"/> Email</p>

  
\_\_\_\_\_  
**KAYLEEN R. RICHTER**  
Deputy Attorney General