

**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

RECOMMENDED ORDER

IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN

BACKGROUND

On March 14–15, 2024, the Hearing Officer presided over an evidentiary hearing in this case. The parties submitted post-hearing briefs on April 8, 2024. However, also on April 8, 2024, IGWA moved to vacate or amend the *Final Order Regarding IGWA's 2022 Mitigation Plan Compliance*, which is the order underlying this case. On May 2, 2024, the Director denied *IGWA's Motion to Vacate or Amend 2022 Compliance Order*. On May 16, 2024, IGWA filed *IGWA's Request for Clarification of Order Denying IGWA's Motion to Vacate or Amend 2022 Compliance Order*. On May 28, 2024, the Director issued an *Order Denying IGWA's Request for Clarification of Order Denying IGWA's Motion to Vacate or Amend 2022 Compliance Order*. As a result, the Hearing Officer considered the matter under advisement and is now free to move forward with issuing this recommended order.

The issues in the proceeding surround a stipulated mitigation plan between members of the Idaho Ground Water Appropriators, Inc. (“IGWA”) and the Surface Water Coalition (“SWC”) known as the *2016 Mitigation Plan*. At the outset, it is necessary to detail the history of the *2016 Mitigation Plan* and the litigation surrounding IGWA's performance in 2021 to provide context for the Hearing Officer's recommendations, explain the law of the case, and to distinguish between the issues already decided, the issues ripe for resolution, and the matters not at issue.

A. The 2016 Mitigation Plan¹

In 2015, in response to the Surface Water Coalition delivery call, certain members of the SWC and IGWA entered into a *Settlement Agreement* to be submitted to the Director of the Idaho

¹ The following background is detailed in Judge Wildman's *Memorandum Decision and Order* on judicial review of IGWA's 2021 breach of the *2016 Mitigation Plan* in *Idaho Ground Water Appropriators, Inc. v. Idaho Department of Water Resources*, No. CV01-23-07893 (Ada Cnty. Dist. Ct. Idaho Nov. 16, 2023) (“Mem. Decision and Order”). Again, by including this background, the Hearing Officer seeks to provide context for the posture of this contested case, to distinguish the live issues from those decided by the District Court, to clarify the narrow scope of this contested case, and to apply the District Court's decisions regarding the proper interpretation of the terms of the *2016 Mitigation Plan*.

Department of Water Resources (“Director” or “Department”) as a proposed mitigation plan in accordance with the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”). Hr’g Ex. 500, at 1; *Mem. Decision and Order*, at 3–4.

The objectives of the *Settlement Agreement* are as follows:

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

Hr’g Ex. 500, at 1. To further these objectives, the participating members of the SWC and IGWA agreed to participate in near term and long term practices including an annual reduction of ground water use by junior ground water pumpers:

- a. Consumptive Use Volume Reduction
 - i. Total ground water diversion shall be reduced by 240,000 ac-ft annually.
 - ii. Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity. Private recharge activities cannot rely on the Water District 01 common Rental Pool or credits acquired from third parties, unless otherwise agreed to by the parties.

Hr’g Ex. 500, at 2 (emphasis added). The agreement calls for the establishment of a steering committee to assist with the implementation of its terms. *Id.* at 4.

The SWC and IGWA jointly submitted the *Settlement Agreement* to the Director as a proposed mitigation plan on March 9, 2016.² On May 2, 2016, under CM Rule 43, the Director entered a *Final Order Approving Stipulated Mitigation Plan*, which adopted the proposed stipulated mitigation plan as an approved mitigation plan with additional conditions.

On December 14, 2016, the parties entered into a *Second Addendum to the Settlement Agreement*. The *Second Addendum* contains the parties’ agreement on additional details implementing various terms of the *Settlement Agreement*. In particular, the *Second Addendum* outlines the process for addressing a potential breach of the *Settlement Agreement*:

² In addition to the *Settlement Agreement*, the parties’ submittal contained an addendum to the *Settlement Agreement*, and an agreement between A&B Irrigation District and IGWA. Hr’g Ex. 501, 503; *Mem. Decision and Order*, at 4 n.4. The language in these documents is not at issue.

If, based on the information reported and available, the Steering Committee finds any breach of the Long Term Practices as set forth in paragraph 3 of the Agreement, the Steering Committee shall give ninety (90) days written notice of the breach to the breaching party specifying the actions that must be taken to cure such breach. If the breaching party refuses or fails to take such actions to cure the breach, the Steering Committee shall report the breach to the Director with all supporting information, with copy provided to the breaching party. If the Director determines based on all available information that breach exists which has not been cured, the Steering Committee will request that the Director issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to immediate curtailment pursuant to CM 40.05.

If the Surface Water Coalition and IGWA 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 will report the same to the Director and request that the Director evaluate all available information, determine if 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.

Hr'g Ex. 502, at 3. On February 7, 2017, the parties submitted the *Second Addendum* to the Director as a proposed amendment to the approved mitigation plan. On May 9, 2017, the Director entered a *Final Order Approving Amendment to Stipulated Mitigation Plan*, which adopted the *Second Addendum* as an amendment to the approved mitigation plan with additional conditions.

Therefore, IGWA's 2016 Mitigation Plan consists of: (1) the *Settlement Agreement*; (2) the *A&B-IGWA Agreement*; (3) the *First Addendum*; (4) the *Final Order Approving Stipulated Mitigation Plan*; (5) the *Second Addendum*; and (6) the *Final Order Approving Amendment to Stipulated Mitigation Plan*.

B. The 2021 Breach and Judicial Review

On April 29, 2022, the SWC requested a status conference before the Director to address IGWA's compliance with the 2016 Mitigation Plan in 2021. *Mem. Decision and Order*, at 5. The SWC argued that IGWA failed to comply with the plan by failing to meet the requirement that total ground water diversion be reduced by 240,000 ac-ft annually. *Id.* The Director declined the request for status conference and directed the parties to first take the compliance issue before the Steering Committee pursuant to the 2016 Mitigation Plan. *Id.* at 6.

The Steering Committee met in May and June of 2022 to determine whether IGWA complied with the 2016 Mitigation Plan. *Id.* IGWA denied the SWC's allegations of non-compliance. "The dispute between the parties hinged on (1) the amount of ground water reduction for which IGWA is responsible under the approved mitigation plan, and (2) whether averaging may be used to measure compliance with IGWA's reduction obligation." *Id.* The Steering Committee was unable to resolve the compliance issue and reached an impasse. *Id.* The SWC returned to the Director and requested a status conference to address the interpretation of the requirements of the 2016 Mitigation Plan. *Id.* The Director granted the request for a status conference, which he held on August 5, 2022. *Id.*

After the status conference, the parties entered into a *Settlement Agreement* dated September 7, 2022 ("*2021 Remedy Settlement Agreement*"). In the *2021 Remedy Settlement Agreement*, IGWA withheld admission of non-compliance with the approved mitigation plan. However, to avoid potential curtailment in 2022, IGWA agreed to a remedy to resolve the dispute regarding its performance in 2021. *Mem. Decision and Order*, at 7. In the *2021 Remedy*

Settlement Agreement, the parties also agreed that the Director “shall issue a final order regarding the interpretive issues” pertaining to the *2016 Mitigation Plan* that the SWC raised in its request for status conference. *Id.*

The Director issued a *Final Order Regarding Compliance with Approved Mitigation Plan* on September 8, 2022 (“*2021 Compliance Order*”). Hr’g Ex. 510. In the *2021 Compliance Order*, the Director concluded that certain IGWA members failed to comply with the requirements of the *2016 Mitigation Plan* in 2021 and approved the *2021 Remedy Settlement Agreement* as an appropriate remedy for the non-compliance. IGWA petitioned for reconsideration of the *2021 Compliance Order* and requested a hearing. The Director granted the request for a hearing. Therefore, on February 8, 2023, Director Spackman held and presided over an evidentiary hearing on the *2021 Compliance Order*. *Mem. Decision and Order*, at 7.

On April 24, 2023, the Director issued his *Amended Final Order Regarding Compliance with Approved Mitigation Plan* (“*Amended 2021 Compliance Order*”). The Director found that the *2016 Mitigation Plan* “unambiguously requires reduction of ground water diversion in the amount of 240,000 acre feet of water each year.” *Mem. Decision and Order*, at 7. The Director also “determined that averaging that reduction requirement over a period of years is not permitted under the plan[,]” and “found the mitigation plan unambiguously prohibits IGWA from apportioning a percentage of the annual reduction requirement under the mitigation plan to A&B Irrigation District and/or Southwest Irrigation District” because A&B and Southwest were not signatories to the Settlement Agreement. *Id.* at 7–8.

On May 15, 2023, IGWA petitioned the district court for judicial review of the *Amended 2021 Compliance Order*. IGWA argued that Section 3.a of the Settlement Agreement was ambiguous to allow IGWA to use averaging when determining compliance, and that the Director should attribute a portion of the 240,000 acre-foot reduction requirement to A&B and Southwest Irrigation Districts consistent with IGWA’s interpretation of the intent of the *Settlement Agreement*. The parties briefed the issues raised and the district court heard oral argument on the petition on October 30, 2023. On November 16, 2023, the district court entered its *Memorandum Decision and Order*, which rejected IGWA’s arguments and affirmed the Director’s *Amended 2021 Compliance Order*.

Specifically, in the *Memorandum Decision and Order*, the district court affirmed the “Director’s determination that the approved mitigation plan unambiguously requires a reduction in groundwater diversions in the amount of 240,000 acre-feet each year” and affirmed the “Director’s determination that the 240,000 acre-foot reduction obligation is the responsibility of the signatory IGWA members[.]” *Id.* at 12.

On November 29, 2023, IGWA filed a Petition for Rehearing of the *Memorandum Decision and Order*. In its petition, “IGWA reassert[ed] challenges to the Director’s enforcement of the approved mitigation plan.” *Order Denying Petition for Rehearing*, at 2–3. The parties briefed the issues and the district court held oral argument on February 15, 2024. On March 5, 2024, the district court entered its *Order Denying Petition for Rehearing*. In its *Order Denying Petition for Rehearing*, the district court rejected IGWA’s challenges and affirmed that the Director acted within his “discretionary authority to approve, implement, and enforce a mitigation plan under the CM Rules and with the plain language of the Settlement Agreement.” *Id.* at 5. Accordingly, the district court affirmed the *Amended 2021 Compliance Order* and denied IGWA’s petition for reconsideration. *Id.* at 6.

IGWA has filed a notice of appeal of the district court’s decisions on judicial review, however, no party has requested a stay of the district court’s decisions. Therefore, the Hearing Officer considers the district court’s decisions regarding the interpretation of certain terms in the *2016 Mitigation Plan* and any issues regarding IGWA’s performance in 2021 to be final for

purposes of this contested case. This recommended order should not be read to challenge or conflict with the district court's decisions and the matters already resolved.

C. The 2022 Breach and Request for Hearing³

a. *The 2022 Compliance Order*

While the above contested case regarding IGWA's 2021 breach and the interpretation of certain terms in the *2016 Mitigation Plan* proceeded, the SWC requested the Director address IGWA's 2022 performance, which the SWC alleged was in breach of the *2016 Mitigation Plan*.

On April 13, 2023, the SWC sent a letter to the Director asserting that certain IGWA members breached the *2016 Mitigation Plan* in 2022 by failing to meet the requirement that total ground water diversion be reduced by 240,000 ac-ft annually. *See* Hr'g Ex. 512, at 3.⁴ The SWC's letter advised that the *2016 Mitigation Plan* Steering Committee met on April 12, 2023, and was unable to resolve the 2022 breach issue. *Id.* Therefore, the SWC requested the Director enforce the *2016 Mitigation Plan* by evaluating the information, determining whether a breach had occurred, and issuing an order specifying what actions the breaching parties must take or be subject to curtailment. *See id.*

In response, on August 2, 2023, the Director issued the *Final Order Regarding IGWA's 2022 Mitigation Plan Compliance* ("*2022 Compliance Order*").⁵ Hr'g Ex. 512. In the *2022 Compliance Order* the Director evaluated the information provided regarding IGWA's 2022 performance to determine whether a breach had occurred. The information the Director evaluated included IGWA's April 1, 2023 Letter to the Steering Committee, which contained a performance report showing the water usage by IGWA members in 2022. Hr'g Ex. 512, at 3; Hr'g Ex. 535. This spreadsheet is replicated below as Table 1:

³ The findings of fact regarding IGWA's 2022 compliance outlined in this decision are the Hearing Officer's findings of fact in this case.

⁴ The SWC filed this letter with the Hearing Officer as Exhibit K to the February 12, 2024 *Declaration of Travis Thompson in Support of the SWC's Motion for Summary Judgment*.

⁵ Between receipt of the SWC's April 13, 2023 letter regarding IGWA's 2022 performance, and the Director's issuance of the *2022 Compliance Order* on August 2, 2023, the Director issued the *Amended 2021 Compliance Order* (April 24, 2023). As explained in the background above, the Director issued the *Amended 2021 Compliance Order* after hearing IGWA's challenge to the *2021 Compliance Order*, wherein the Director first interpreted and enforced the *2016 Mitigation Plan*. Again, the *Amended 2021 Compliance Order* is the Director's order interpreting the *2016 Mitigation Plan* in the context of IGWA's 2021 performance and is the order on which IGWA sought judicial review in CV01-23-07893. While interpretation of the *2016 Mitigation Plan* underlies both the 2021 breach judicial review and the instant 2022 matter, the language of the *2016 Mitigation Plan* at issue here was not ripe for resolution in the 2021 matter. In other words, IGWA's 2022 performance and the Director's response raised issues not present in the context of IGWA's 2021 breach, however, the Director's interpretation and the adjudication of the language relevant to both matters has occurred contemporaneously.

Table 1:

2022 Usage Analysis
all values in acre-ft

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

Notes:

(1) Includes mitigation for Freemont- Madison Irrigation District, Madison Ground Water District and WD100. Mitigating by alternative means.

(2) Madison baseline is preliminary estimate, see note on district breakdown.

(3) North Snake GWD baseline includes annual average of 21,305 acre-feet of conversions.

(4) A&B ID and Southwest ID Total Conservation is unknown and assumed to meet target.

Hr’g Ex. 536. Note that Exhibit 536 contains IGWA’s 2022 performance spreadsheets in their Excel Workbook format, which was submitted to the Director. The relevant table is found in the sheet labeled “Usage Analysis” rather than the sheet labeled “2022 Summary Table.” The “2022 Summary Table” omits several columns of data that were included in IGWA’s previous years’ annual performance spreadsheets, which were similarly identified as being “summary tables.” The columns of data omitted from IGWA’s “2022 Summary Table” that appeared in the previous years’ annual performance report summary tables were Target Conservation, Baseline, Diversion Reduction, Total Conservation, and Mitigation Balance. Conversely, the table on the sheet labeled “Usage Analysis” reports IGWA’s 2022 performance in the same format as previous years’ performance tables in that it includes the columns of data omitted from the “2022 Summary Table.” Therefore, the Director evaluated the information presented in IGWA’s “Usage Analysis” table instead of the “2022 Summary Table” to determine whether a breach had occurred in 2022.

In the 2022 *Compliance Order* the Director recognized that in IGWA’s 2022 performance report IGWA again improperly assigned non-signatories, A&B and Southwest, a proportionate percentage of IGWA’s 240,000 acre-foot reduction obligation.⁶ To determine whether a breach occurred, the Director corrected the proportionate share assignment by redistributing the improperly attributed shares. Hr’g Ex. 512, at 7. Table 2, reproduced below, reflects the IGWA members’ reduction obligations after the Director corrected the target conservation.

⁶ As explained in the background regarding the 2021 breach, in the 2021 *Compliance Order* (September 8, 2022) and the *Amended 2021 Compliance Order* (April 24, 2023), the Director rejected IGWA’s assignment of proportionate shares to A&B and Southwest and redistributed the shares because neither A&B nor Southwest were signatory parties to the Settlement Agreement underlying the 2016 *Mitigation Plan*. The district court affirmed the Director’s redistribution of the improperly attributed shares in its *Memorandum Decision and Order* (November 16, 2023) and its *Order Denying Petition for Rehearing* (March 5, 2024).

Table 2:

2022 Usage Analysis											
all values in acre-ft											
	IGWA Proportioning	[IGWA] Target Conservation	IDWR Proportioning	IDWR Target Conservation	Baseline	2022 Usage	Diversion Reduction	Accomplished Recharge/ Direct Delivery	Total Conservation	[IGWA] 2022 Mitigation Balance	IDWR 2022 Mitigation Balance
American Falls-Aberdeen	14.0%	33,715	16.4%	39,395	283,815	269,322	14,494	23,550	38,043	4,328	-1,352
Bingham	14.6%	35,015	17.0%	40,914	277,011	269,088	7,923	516	8,438	-26,577	-32,476
Bonneville-Jefferson	7.6%	18,264	8.9%	21,341	158,133	151,245	6,888	9,249	16,137	-2,127	-5,204
Carey	0.3%	703	0.3%	821	5,671	1,889	3,782	5	3,787	3,084	2,966
Jefferson-Clark	22.7%	54,373	26.5%	63,533	445,393	408,112	37,281	7,647	44,928	-9,444	-18,605
Henry's Fork ¹	2.2%	5,391	2.6%	6,299	69,979	62,381	7,598	3,000	11,774	6,383	5,475
Madison ²	0.0%				78,095	76,919	1,176				0
Magic Valley	13.5%	32,462	15.8%	37,931	256,188	218,759	37,429	3,378	40,807	8,345	2,876
North Snake ³	10.6%	25,474	12.4%	29,765	208,795	174,838	33,957	3,395	37,352	11,878	7,586
A&B ⁴	9.0%	21,660	--	--	-	-	-	-	21,660	0	--
Southwest ID ⁴	5.4%	12,943	--	--	-	-	-	-	12,943	0	--
Total:	100%	240,000	100%	240,000	1,783,080	1,632,553	150,527	50,739	235,869	-4,131	-38,734
Notes:											
(1) Includes mitigation for Freemont- Madison Irrigation District, Madison Ground Water District and WD100. Mitigating by alternative means.											
(2) Madison baseline is preliminary estimate, see note on district breakdown.											
(3) North Snake GWD baseline includes annual average of 21,305 acre-feet of conversions.											
(4) A&B ID and Southwest ID Total Conservation is unknown and assumed to meet target.											

Hr’g Ex. 512, at 8. When the Director evaluated the information, the Director determined that a breach had occurred: the Director found that “four IGWA ground water districts failed to satisfy their proportionate share of IGWA’s 240,000 acre-feet conservation obligation in 2022.” *Id.* The Director produced a table highlighting his finding, which listed “the deficiency volume for each of the four IGWA members who failed to satisfy their respective mitigation obligations in 2022[,]” reproduced as Table 3 below.

Table 3:

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

Hr’g Ex. 512, at 8.

Therefore, the Director concluded that “[b]ecause American Falls-Aberdeen, Bingham, Bonneville-Jefferson, and Jefferson-Clark failed to satisfy their proportionate share of the mitigation obligation in 2022, the 2016 *Mitigation Plan* does not protect these four IGWA members from a curtailment order.” *Id.* at 9. However, the Director also concluded: “The midseason *July 2023 As-Applied Order* predicted that SWC members would not suffer a demand shortfall during the 2023 irrigation season.... Accordingly, curtailing ground water use by American Falls-Aberdeen, Bingham, Bonneville-Jefferson[,] and Jefferson[-]Clark is unwarranted at this time.” *Id.* Further, in footnote 6, the Director stated: “The Second Addendum

call[s] for the Director to also ‘issue an order specifying actions that must be taken by the breaching party to cure the breach’ The parties have failed to provide the Director with sufficient information to make this determination at this time.” *Id.*

b. *The SWC’s Request for Hearing*

On August 16, 2023, the SWC filed *Surface Water Coalition’s Petition for Reconsideration & Request for Hearing*, challenging the *2022 Compliance Order*. In its petition, the SWC requested the Director reconsider the *2022 Compliance Order* and address specific issues with the enforcement of the *2016 Mitigation Plan* including: (1) “Can Ground Water Districts comply with the provision of the 2010 Storage Mitigation Plan Order,⁷ fail to comply with the requirements of the 2016 [Mitigation Plan] and still receive safe harbor?”; and (2) “Will the Director issue an order setting forth a remedy to cure the 2022 breach as required by the Agreement and order curtailment if compliance does not take place?” *Surface Water Coalition’s Petition for Reconsideration & Request for Hearing* at 6. The SWC also requested a hearing on the *2022 Compliance Order* pursuant to I.C. § 42-1701A(3). No other party requested a hearing on the *2022 Compliance Order*. On September 6, 2023, the Director granted the SWC’s request for hearing on the *2022 Compliance Order* and set a scheduling conference on the matter.

On November 3, 2023, the SWC served the Department with a “Notice of Filing of Agreement–Satisfaction of AF-A-2022 Mitigation Deficit” that notified the Director that the SWC and the American Falls–Aberdeen Ground Water District (“AFAGWD”) had executed an agreement to cure AFAGWD’s 2022 deficit. As a result, the Director no longer considered AFAGWD to be in breach of the *2016 Mitigation Plan*.

D. The Issues and Scope of this Contested Case

At the Director’s scheduling conference on November 7, 2023, the parties and the Director agreed to continue the scheduling conference to allow time for the Director to appoint an independent hearing officer. The Department contacted Roger S. Burdick, former Idaho Supreme Court Justice, and he agreed to serve as the independent hearing officer. Therefore, on December 12, 2023, the Director entered the *Order Appointing Hearing Officer*. The same day, the Director began a continued scheduling conference in the matter and then relinquished the hearing to Hearing Officer Burdick. *See Notice of Second Continued Scheduling Conference; Order Setting Deadlines*, at 1.

Once presiding, the Hearing Officer communicated with the parties, identified a potential conflict of interest, and directed the parties to notify the Department of whether they objected to his appointment as hearing officer due to the potential conflict. *Id.* The Hearing Officer also directed the parties to delineate their proposed issues for hearing by simultaneously submitting proposed issue statements and simultaneous responses. *Id.* The Hearing Officer held a continued scheduling conference on December 28, 2023. During the scheduling conference, having reviewed the parties’ proposed hearing issue statements and responses, in an exercise of his discretion, the Hearing Officer orally identified the issues for hearing, established a hearing schedule, and authorized the parties to conduct and engage in discovery.

To memorialize the matters discussed at the scheduling conference and formally identify the 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*

⁷ What the SWC refers to here as the “2010 Storage Mitigation Plan Order” is the mitigation plan identified as CM-MP-2009-007. The plan has also been referred to as the 2009 Mitigation Plan, the 2009 Storage Water Mitigation Plan, or IGWA’s 2009 Storage Water Delivery Mitigation Plan. For consistency in this Recommended Order, the mitigation plan approved in CM-MP-2009-007 will be referred to as the 2009 Mitigation Plan going forward.

Conference and Hearing (“Scheduling Order”). In the *Scheduling Order*, the Hearing Officer reiterated that the four issues for hearing were:

- 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?

Scheduling Order at 4.

E. Summary Judgment

On February 12, 2024, the SWC, 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. IGWA moved for summary judgment on all issues. *IGWA Mem. In. Supp. Of IGWA’s Mot. for Summ. J.*, at 5. On February 26, 2024, the parties responded to one another’s motions for summary judgment.⁸ The Hearing Officer considered the arguments of counsel and the materials submitted in support of summary judgment and, on March 12, 2024, issued the *Order on Motions for Partial Summary Judgment* (“*Summary Judgment Order*”). In the *Summary Judgment Order* the Hearing Officer granted the SWC and AFAGWD’s motions for partial summary judgment and denied IGWA’s motion for summary judgment. The Hearing Officer hereby adopts the *Summary Judgment Order* in its entirety and incorporates the conclusions of law therein in this recommended order. *See Exhibit A*, attached.

Ultimately, in the *Summary Judgment Order* the Hearing Officer concluded:

- (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.

Id. at 10.

Therefore, the Hearing Officer resolved the first three issues in the *Summary Judgment Order*, leaving only the fourth issue to proceed to hearing: What action must be taken by the ground water districts to cure their 2022 breach of the *2016 Mitigation Plan*?

⁸ Concurrently, 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.

F. The Hearing

The fourth issue proceeded to an evidentiary hearing on March 14–15, 2024. Because the first three issues were resolved in the *Summary Judgment Order* the Hearing Officer limited the scope of the hearing to the final, fourth issue and excluded evidence that was not within the scope of the issue or relevant to the same. Twenty-seven (27) exhibits were admitted by stipulation as common exhibits (Exhibits 500–503, 510, 512, and 517–537).⁹ The SWC introduced two (2) exhibits, marked as Exhibits 1 and 2. IGWA introduced two (2) exhibits marked as Exhibits 142 and 143. Bonneville-Jefferson Ground Water District (“Bonneville-Jefferson” or “BJGWD”) introduced one (1) exhibit, marked as Exhibit 300.

The SWC called one expert witness, David Colvin. Mr. Colvin is a professional geologist, has a master’s degree in Environmental Science and Engineering, and is a consultant for the SWC. IGWA called two expert witnesses, Sophia Sigstedt and Jaxon Higgs, and one fact/lay witness, William (“Bill”) Stoddart. Ms. Sigstedt is a professional hydrologist with a specialty in ground water, has a master’s degree in hydrology, and is a consultant for IGWA. Mr. Higgs is a professional geologist, has a master’s degree in hydrology, and is a consultant for IGWA. Mr. Stoddart is the manager of the Jefferson Clark Ground Water District and is the current treasurer for IGWA. Bonneville-Jefferson called one expert witness on rebuttal, Bryce Contor. Mr. Contor is a hydrologist, has a master’s degree in hydrology, and is a consultant for Bonneville-Jefferson. No other parties called witnesses. At the conclusion of the hearing, the Hearing Officer directed the parties to submit simultaneous post-hearing briefing due within fourteen (14) days of receipt of the hearing transcript. On April 8, 2024, the SWC, IGWA, Bonneville-Jefferson, and Bingham Ground Water District (“Bingham”) filed timely post-hearing briefs.

ANALYSIS AND CONCLUSIONS OF LAW

On April 8, 2024, the SWC, IGWA, Bonneville-Jefferson, and Bingham Ground Water District (“Bingham” or “BGWD”) filed timely post-hearing briefs.

I. The SWC’s Post-Hearing Brief and Proposed Remedy

In the SWC’s post-hearing brief, the SWC emphasizes that the “sole issue at hearing” was the fourth issue identified by the Hearing Officer in the *Scheduling Order*. *SWC Post-Hearing Mem.*, at 2. The SWC argues that it was “the only party to offer evidence on a proposed remedy that could be implemented by the breaching districts and IDWR in 2024.” *Id.* The SWC argues that, rather than present evidence on a proposed remedy, IGWA and the breaching districts “relied on actions taken in prior years to assert that they did not need to fully perform the 2022 annual conservation volume required by the 2016 Mitigation Plan.” *Id.*

As the SWC’s proposed remedy, the SWC requests that the Hearing Officer recommend that the Director:

⁹ Exhibits 518, 521, 524, 527, 530, 533, and 536 in their entirety are Excel Workbooks Supporting IGWA’s Annual Performance Reports, which were provided to IDWR for the record. For ease of use and reference at the hearing, each of these exhibits presented as a single page printout of one spreadsheet, displaying only one of the sheets included in each workbook.

[O]rder the breaching districts [to] undertake conservation actions in the following amounts within their respective districts in 2024 (in addition to the annual required actions in the 2016 Mitigation Plan) or be curtailed for failing to have an effectively operating mitigation plan in place:

Bingham Ground Water District	32,476 acre-feet
Bonneville-Jefferson Ground Water District	5,204 acre-feet
Jefferson-Clark Ground Water District	18,605 acre-feet

Id.; *See* Hr’g Ex. 512, at 8. The SWC defines its meaning of “conservation actions” in footnote 3: “Conservation action means ‘ground water reduction’ or ‘an equivalent private recharge activity’ within the boundary of the breaching district. *See* Ex. 500, at 2. Given the geographical size of a ground water district, the actions taken should be modeled to ensure the mitigation is ‘in-time’ and ‘in-place’ of where the underperformance occurred.” *Id.* at n.2.

The SWC supports its proposed remedy with the testimony of its expert witness, Dave Colvin, and his expert report. *Id.* at 4; *see also* Hr’g Ex. 1, at 7–8. The SWC is highly skeptical of IGWA and the breaching ground water districts’ reliance on past performance as a cure for their non-compliance in 2022. *Id.* at 5. The SWC asserts that “[t]hese parties are essentially asking the Hearing Officer to find no ‘breach’ by ‘crediting’ past actions against a future deficiency that occurred in 2022 and ignoring the fact that under their analyses a District did not comply with the Agreement.” *Id.* Further, the SWC argues that the “2016 Mitigation Plan does not allow the Districts to cure a breach of the annual conservation requirement through a ‘credit’ based upon past actions or overperformance.” *Id.* at 7.

Ultimately, the SWC urges the Hearing Officer to adopt its expert’s proposed remedy and “recommend that the breaching districts make up their 2022 shortfall through additional conservation actions in 2024.” *Id.* at 9.

II. IGWA’s Post-Hearing Brief and Proposed Remedy

Before addressing IGWA’s arguments in its post-hearing brief, the Hearing Officer emphasizes that IGWA did not request a hearing on the *2022 Compliance Order*. In the *2022 Compliance Order* the Director concluded that certain ground water districts did not comply with their annual obligations under the *2016 Mitigation Plan*, but the Director resisted imposing consequences for the members’ non-compliance because the *July 2023 As-Applied Order* predicted that the SWC would not suffer a shortfall. IGWA did not challenge the Director’s conclusion that certain ground water districts breached or by how much. Rather, *the SWC* challenged the Director’s inaction. The Hearing Officer afforded the parties the opportunity to propose their preferred issue statements for hearing and the opportunity to respond. The Hearing Officer considered the scope of his appointment as independent hearing officer, the issues proposed by the parties, and the arguments in opposition. In an exercise of his discretion, the Hearing Officer ruled that the four issues to be heard in this matter were those memorialized in the *Scheduling Order*. The Hearing Officer will not, post-hearing, reconsider the issues that guided these proceedings.

Many of IGWA’s arguments in its post-hearing brief essentially ask the Hearing Officer to reconsider the Director’s determination of breach in the *2022 Compliance Order*, urge the Hearing Officer to reconsider the decisions in the *Summary Judgment Order*, or serve as an attempt to relitigate issues decided by the district court in the 2021 breach proceedings.

In IGWA's post-hearing brief, IGWA makes seven arguments: (i) Ground water districts have been remarkably successful at conserving groundwater. *IGWA Post-Hearing Br.*, at 1–2; (ii) The sentinel well benchmark is irrelevant to this proceeding. *Id.* at 2; (iii) The Director did not err when he declined to specify actions needed to cure the alleged 2022 breach. *Id.* at 3; (iv) The Director correctly declined to order curtailment in August of 2023. *Id.* at 3–5; (v) To the extent there was a groundwater conservation deficit in 2022, the ground water districts remedied the deficit in advance via surplus conservation. *Id.* at 5–6; (vi) The 2016 Plan does not preclude IGWA from providing mitigation under its 2009 mitigation plans. *Id.* at 6–8; and (vii) The hearing officer's selective application of the *res judicata* doctrine is erroneous. *Id.* at 9.

- i. The ground water districts' success at conserving ground water since 2016 does not remedy their deficient performance in 2022.*

First, IGWA argues that ground water districts have been remarkably successful at conserving ground water. This argument purports to rebut the SWC's assertion that "the ground water districts don't really abide by necessarily what the director orders. They don't really care what the district court has said." *IGWA Post-Hearing Br.*, at 1 (quoting Hr'g Tr. Vol. I, 16:12–15). IGWA asserts that "[s]ince implementing the Settlement Agreement, the participating districts have conserved a total of 2,195,103 acre-feet, or 313,586 acre-feet annually on average." *IGWA Post-Hearing Br.*, at 2. IGWA also claims that "[f]rom 2016–2022, the districts performed as much aquifer recharge as possible, believing surplus conservation would carry forward to the following year." *Id.*

The remaining issue at hearing was "[w]hat action must be taken by the ground water districts to cure their 2022 breach of the 2016 Mitigation Plan." *See Summary Judgment Order*, at 3, 10-11. Whether the ground water districts abide by the Director's orders is not at issue here. Likewise, whether ground water districts have been remarkably successful at conserving ground water overall, or on average, since 2016 is not at issue in this contested case and is not relevant. The plain language of the *Settlement Agreement* does not allow for IGWA to use average or overall conservation to determine their compliance with the annual reduction requirement.¹⁰ It is contrary to the plain language of the agreement to allow for average or overall conservation to cure a ground water district's deficient annual performance in a given year. Therefore, the ground water districts' success at conserving water on anything other than an annual basis is not relevant here and does not vitiate the need for a remedy to cure the deficient performance in 2022.

- ii. The sentinel well index was appropriate for an expert to have considered when developing his or her opinion but is not, itself, at issue here.*

Second, IGWA asserts that the "SWC attempted to confuse the issue by presenting evidence that the sentinel well index has not met the 2023 benchmark under section 3.e of the Settlement Agreement" and that the "sentinel well benchmark is irrelevant to this proceeding." *IGWA Post-Hearing Br.*, at 2. However, IGWA also argues that "if the Director elects to identify

¹⁰ For ease of reference, the relevant term in the Settlement Agreement is Section 3.a, which states:

- a. Consumptive Use Volume Reduction
 - i.* Total ground water diversion shall be reduced by 240,000 ac-ft annually.
 - ii.* Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity. Private recharge activities cannot rely on the Water District 01 common Rental Pool or credits acquired from third parties, unless otherwise agreed to by the parties.

Hr'g Ex. 500, at 2 (emphasis added).

actions to cure a breach, the sentinel well index is relevant to the extent it reflects the effect on aquifer water levels from deficit groundwater conservation in 2022, if any, as well as the effect of surplus conservation in prior years which caused a net increase in the sentinel well index.” *Id.*

The SWC’s expert, David Colvin, used the sentinel well index in his expert report to illustrate impacts of the 2022 underperformance to support his opinion on an appropriate remedy for the excess pumping. *See* Hr’g Ex. 1, at 5–6; Hr’g Tr. Vol. I, 55:17–56:10. Mr. Colvin opined that “ESPAM results show that the 2022 underperformance by the Bingham, Bonneville-Jefferson, and Jefferson-Clark Ground Water Districts will cause a total of a 0.29 foot decline in the Sentinel Well Index.” Hr’g Ex. 1, at 8.

IGWA’s expert, Sophia Sigstedt, disagreed with Mr. Colvin’s opinion regarding impacts on the sentinel well index in her rebuttal report. Hr’g Ex. 143, at 4. Ms. Sigstedt opined that “[s]urplus groundwater conservation by the GWDs from 2016–2020 ha[s] resulted in a ... net increase in groundwater levels as measured by the Sentinel Well Index.” Hr’g Ex. 143, at 4.

The impact IGWA’s conservation efforts have on the aquifer, reflected in the analysis of the sentinel well index, is relevant for an expert to consider when developing his or her opinion regarding an adequate remedy for IGWA’s deficient conservation performance in 2022. However, as Mr. Colvin and Ms. Sigstedt’s opinions demonstrate, the experts’ purportedly conflicting opinions are based on different timeframes. It may be correct that when modeled, in isolation the 2022 non-compliance caused a decline in the sentinel well index *and* that the districts’ conservation efforts from 2016–2020 caused a net increase in the sentinel well index.

IGWA argues that the sentinel well benchmarks are irrelevant to this case. To the extent that IGWA refers to a definitive analysis of compliance with the sentinel well benchmarks, IGWA is correct. However, that does not mean that the sentinel well index cannot be used by an expert to form his or her opinion. The Hearing Officer weighs the experts’ use of the sentinel well index as evidence in support of his or her opinion and does not consider the experts’ opinions on the sentinel well index to address whether the sentinel well benchmarks have been reached.¹¹

The issue here is to determine what action must be taken by the ground water districts to cure the 2022 non-compliance. Any allegedly missed benchmarks should be addressed in other proceedings if necessary.

iii. The Director erred when he declined to specify actions needed to cure the 2022 breach.

Third, IGWA argues that the “hearing officer ruled on summary judgment that the Director ‘erred’ by not imposing a remedy or curtailment for the alleged breach in 2022. This ruling presumes the Director has a duty to impose a remedy for non-compliance with the 2016 Plan, which he does not.” *IGWA Post-Hearing Br.*, at 3. As IGWA recognizes, the Hearing Officer ruled on this issue as a matter of law on summary judgment. IGWA failed to meet its burden of persuasion and burden of going forward with the evidence. The Hearing Officer declines to reconsider the summary judgment decision especially because IGWA did not move to reconsider the decision and no party has had the opportunity to respond to IGWA’s new arguments.

¹¹ The Hearing Officer notes that the Director did not rely on or consider the sentinel well benchmarks when he made his breach finding.

- iv. *The Director should have issued an order specifying actions that must be taken by the breaching party to cure the breach or he should have issued a curtailment order to the breaching party.*

Fourth, IGWA claims that the “hearing officer ruled on summary judgment that the Director erred by not ‘issu[ing] a curtailment order to the breaching party’ in August of 2022.” *IGWA Post-Hearing Br.*, at 3. IGWA further asserts that “[t]he summary judgment decision does not explain which groundwater rights should be curtailed, or for how long, but it suggests that the ground water districts ceded the priority dates of their patrons’ water rights by signing the Settlement Agreement.” *Id.*

The Hearing Officer declines to reconsider the ruling on summary judgment but will respond to IGWA’s arguments. IGWA mischaracterizes the Hearing Officer’s ruling on summary judgment. The Hearing Officer’s ruling on summary judgment was:

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.

Summary Judgment Order, at 8. The summary judgment decision does not explain the minutiae of how the Director should execute a curtailment order because that was never the question given to the Director and is not the question presented. Additionally, the Director had not issued a curtailment order for this Hearing Officer to evaluate. However, “[t]he 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).” *Order Denying Petition for Rehearing*, at 5. If the Director concludes that a curtailment order should be entered, the finite decisions of which rights and for how long are under the Director’s broad constitutional and statutory authority. Additionally, the Director has broad discretion to address this issue in a final order based upon the Hearing Officer’s recommendation.

IGWA also claims that the Director does not have the authority to curtail “‘in-priority’ water use due to non-compliance with a mitigation plan.” *IGWA Post-Hearing Br.*, at 4. IGWA asserts that when the *Second Addendum* uses the phrase “subject to curtailment” the phrase means “priority curtailment, consistent with the CM Rules and the safe harbor provision cited above.” *Id.* The *Second Addendum* does not include any definition of “subject to curtailment” including IGWA’s definition.

The relevant language in the *Second Addendum* states:

If the Surface Water Coalition and IGWA do not agree that a breach has occurred or cannot agree upon actions that must be taken by the breaching party to cure the breach, the Steering Committee will report the same to the Director and request that the Director evaluate all available information, determine if a breach has occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.

Hr’g Ex. 502, at 3. IGWA and the SWC negotiated and entered into the contracts underlying the *2016 Mitigation Plan* including the *Settlement Agreement* and the *Second Addendum*. See Hr’g Ex. 500, 502. The parties to the *2016 Mitigation Plan* are the members of the SWC and IGWA

that signed the *Settlement Agreement*. Hr’g Ex. 500, at 1; see *Mem. Decision and Order*, at 13. The members of IGWA who signed the *Settlement Agreement* and became parties to the *2016 Mitigation Plan* are ground water districts not individual water users. Under the *Second Addendum*, if a breach of the plan occurs it must be addressed by the “breaching party” i.e., at the ground water district level. It follows that in the event of a breach, one “subject to curtailment” would be the “breaching party” or the ground water district not in compliance. Therefore, the terms of the *2016 Mitigation Plan* contemplate that the Director has the authority to subject a breaching ground water district to curtailment. Again, IGWA and the SWC negotiated and entered into the *2015 Settlement Agreement* and the *Second Addendum* and agreed to its terms.

IGWA also argues that “[t]he notion that the Settlement Agreement deprived groundwater users of the priority dates of their water rights is extreme and unfounded. Ground water district patrons did not sign the Settlement Agreement, and ground water districts have no legal authority to deprive their patrons of their water right priority dates.” *IGWA Post-Hearing Br.*, at 4. Considering this argument, it is unclear how IGWA foresaw this agreement being enforced, if at all. Compliance is measured on a ground water district level, and, in the event of a breach, a breaching ground water district is responsible for curing the breach or being subject to curtailment. Whether the ground water districts had authority to bind their members to such an agreement is not an issue for this Hearing Officer to decide. By enforcing this agreement, this Hearing Officer and the Director, have done nothing more than what the signatory ground water districts agreed to. If a ground water district’s members feel that by signing this agreement the district has given up their property rights, that issue is between the members and the district. Likewise, the ground water districts have a fiduciary duty to their members and if they entered into an impossible agreement, that is a matter between the members and the district, not the Department.

v. *Ground water districts cannot remedy the 2022 breach by relying on past conservation.*

IGWA’s fifth argument is its proposal to remedy the 2022 breach of the *2016 Mitigation Plan*. IGWA contends that “surplus conservation conducted prior to 2022 is an effective remedy.” *IGWA Post-Hearing Br.*, at 5. Put simply, IGWA proposes that the breaching ground water districts do nothing to cure the 2022 breach because the ground water districts conserved more than the 240,000 acre-feet required by the *2016 Mitigation Plan* in previous years. IGWA pitches this remedy as “remedy[ing] the deficit in advance.” *IGWA Post-Hearing Br.*, at 5. IGWA’s expert, Sophia Sigstedt justifies this position with data and analyses that demonstrate IGWA’s conservation efforts from 2016–2020 had positive impacts on reach gains and the sentinel well index. See Hr’g Ex. 142, 143.¹² Ms. Sigstedt’s testimony at hearing was consistent with her expert report.

IGWA’s proposed remedy functions as an indirect attack on the Director’s finding in the *2022 Compliance Order* that certain ground water districts failed to satisfy their respective mitigation obligations in 2022. None of this evidence or arguments were given to the Director in deciding whether the breach occurred. This is an attempt to rewrite the *2016 Mitigation Plan*.

The *2016 Mitigation Plan* requires the ground water districts to perform 240,000 acre-feet of annual conservation in the form of either annual ground water diversion reduction or conducting an equivalent private recharge activity. Hr’g Ex. 500, at 2. Compliance with this

¹² Ms. Sigstedt’s fifth conclusion in her expert report states: “Excess conservation from IGWA’s mitigation activities 2016-2020 above Settlement Agreement target volumes offset deficits from 2022 activities in accounting of SWC benefits to the near Blackfoot to Minidoka reach.” Hr’g Ex. 142, at 14.

obligation is evaluated annually—not overall, or as a net of previous years. In other words, the plain language of the *2016 Mitigation Plan* contemplates annual evaluation and annual enforcement. It is contrary to the plain language of the *2016 Mitigation Plan* to allow a party that failed to comply with its obligation to avoid remedying the conservation deficiency by rolling forward any benefits of “excess conservation” from previous years. To do so would undermine a finding of breach for any given year. Indeed, excess prior conservation credit is not mentioned or contemplated anywhere in the *2016 Mitigation Plan*. Nor has any credit for excess conservation been considered or calculated in IGWA’s previous years’ performance reports. *See* Hr’g Ex. 517, 518, 520, 521, 523, 524, 526, 527, 529, 530, 532, and 533. In fact, contrary to IGWA’s current argument, in IGWA’s 2021 Performance Report to the Steering Committee, IGWA wrote:

The Settlement Agreement requires groundwater users to conserve water in both wet years and dry years, rather than curtailing pumping during dry years only which would minimally increase surface water flows while creating additional demand for surface water during times when the supply is constrained. The conservation implemented by the Districts during the average and above-average water years from 2016–2020 resulted in surplus mitigation during that period, contributing to increased aquifer levels and Snake River reach gains. Still, the Districts recognize that their total groundwater conservation in 2021 was inadequate, and that they must conserve additional water in future dry years.

Hr’g Ex. 532, at 2 (emphasis added). To restate, IGWA acknowledged that the districts’ conservation during average and above-average water years resulted in surplus mitigation, did not purport to claim any credit for the surplus mitigation balance, and recognized that their annual conservation was deficient.

Ultimately, the plain language of the *2016 Mitigation Plan* requires annual conservation and, if that conservation volume is not met, an annual determination of what actions must be taken to cure the breach. Conservation greater than 240,000 acre-feet in prior years is inadequate to redress underperformance in a later year.

IGWA also argues:

If the Director disregards surplus conservation performed in advance and mandates additional conservation in 2024, this will likely be the death knell for ground water districts whose patrons are expected to rebel if they are told that they will receive no credit for all of the surplus conservation performed previously, and that they will suffer additional curtailment in 2024 despite having complied with their district’s conservation program.

IGWA Post-Hearing Br., at 5. Additional conservation above 240,000 acre-feet is not wasted or meaningless as it benefits the aquifer and meeting the sentinel well benchmarks set forth in the *2016 Mitigation Plan*. Further, it is not clear whether and to what extent the surplus mitigation volume in 2016–2020 was due to member conservation or the above average water years. Regardless, the *2016 Mitigation Plan* does not allow for the obligation to be anything other than measured annually with an annual remedy. Again, by enforcing this agreement, the Hearing Officer and the Director are doing nothing more than what the signatories agreed to when they entered into the agreements within the *2016 Mitigation Plan*.

Accordingly, the Hearing Officer finds and concludes that IGWA failed to present sufficient evidence regarding how to affirmatively cure the 2022 breach other than to undermine the Director’s finding of breach or to rewrite the *2016 Mitigation Plan*.

vi. *The 2016 Mitigation Plan effectively operated to rescind or replace the 2009 Mitigation Plan.*

Sixth, IGWA challenges the Hearing Officer's decision on summary judgment that the *2016 Mitigation Plan* effectively operates to rescind or replace the *2009 Mitigation Plan*. As IGWA recognizes, the Hearing Officer ruled on this issue as a matter of law on summary judgment. IGWA failed to meet its burden of persuasion and burden of going forward with the evidence. The Hearing Officer declines to reconsider the summary judgment decision especially because IGWA did not move to reconsider the decision and no party has had the opportunity to respond to IGWA's new arguments.

IGWA claims that, in the event the Hearing Officer declines to revisit the summary judgment decision, "then clarification of the scope of that ruling is necessary." *IGWA Post Hr'g Br.*, at 8. IGWA states: "It is IGWA's understanding this decision does not address the effect of the 2016 Plan on IGWA's 2009 mitigation plans—*i.e.* whether the 2016 Plan precludes junior groundwater users from filing mitigation plans subsequent to the 2016 Plan. Clarification of the scope of the hearing officer's decision on this issue is important." *Id.* To clarify, the question the Hearing Officer answered in the summary judgment decision was whether the language of the *2016 Mitigation Plan* operated to rescind or replace IGWA's *2009 Storage Water Mitigation Plan*—not whether junior water users could submit future mitigation plans after they became signatories to the *2016 Mitigation Plan*. Whether the language of the *2016 Mitigation Plan* prevents the signatories from submitting future mitigation plans is an issue not ripe for resolution in this case.

IGWA also argues that it was an abuse of discretion for the Hearing Officer to refuse to take official notice of "several IDWR decisions to demonstrate that multiple mitigation plans have been approved in response to other delivery calls, that multiple mitigation plans have operated effectively, and that IGWA and the SWC have in other circumstances stipulated to the termination of existing mitigation plans." *IGWA Post-Hearing Br.*, at 7.

It is within the Hearing Officer's discretion to exclude evidence that is irrelevant. IDAPA 37.01.01.600. In the summary judgment decision, the Hearing Officer found that 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." *Summary Judgment Order*, at 7. Because the *2016 Mitigation Plan* is unique, mitigation plans related to other delivery calls are not relevant to interpreting how to enforce the *2016 Mitigation Plan*. The Hearing Officer determined that the materials IGWA requested to be officially noticed were not relevant and acted within his discretion to exclude them. Additionally, each mitigation plan entered into by water users addresses individual, discrete problems. No two are exactly alike. The replacement of one for another would also be a unique circumstance and the analysis is not necessarily universally applicable.

vii. *The Hearing Officer properly excluded IGWA's new 2022 performance report.*

Last, IGWA challenges the Hearing Officer's decision to prevent IGWA from submitting a "First Addendum to the 2022 Performance Report" that IGWA claims "demonstrate[s] the districts had complied with the Settlement Agreement in 2022." *IGWA Post-Hearing Br.*, at 9. IGWA argues that the Hearing Officer "barred that evidence and testimony on the basis that IGWA did not appeal the 2022 Compliance Order." *Id.* IGWA also claims that when the Hearing Officer did not bar the SWC from challenging the *2016 Mitigation Plan*'s relationship to the *2009 Mitigation Plan* in the summary judgment order that the Hearing Officer "applied the *res judicata* doctrine wrong." *Id.* IGWA does not analyze the *res judicata* doctrine and the Hearing Officer did not apply the *res judicata* doctrine in either instance.

Regarding IGWA’s purported “First Addendum to the 2022 Performance Report,” the Hearing Officer properly excluded the evidence and testimony because the report manipulated the performance calculations for 2022 to attack the Director’s finding that certain member districts failed to conserve their proportionate share in 2022.

The initial 2022 Performance Report was due and submitted to the Steering Committee on April 1, 2023. On April 24, 2023, the Director issued his final post-hearing *Amended 2021 Compliance Order* in the 2021 breach case, which interpreted the unambiguous language of the *2016 Mitigation Plan* to prevent averaging and confirmed that the conservation obligation applied only to signatories. IGWA petitioned for judicial review of the *Amended 2021 Compliance Order* but did not request a stay of the Director’s final order, so the Director proceeded with addressing IGWA’s 2022 performance. The Director reviewed IGWA’s 2022 Performance Report and relied upon the information in his *2022 Compliance Order* entered on August 2, 2023. The SWC requested a hearing on the *2022 Compliance Order*, which initiated these proceedings. As stated throughout this recommended order, IGWA did not challenge the Director’s finding that certain ground water districts failed to satisfy their proportionate share of the mitigation obligation in 2022 or the amounts of the deficiencies. Nevertheless, IGWA generated the “First Addendum to the 2022 Performance Report” in response to these proceedings and Judge Wildman’s decision on the 2021 breach. This new report recalculating IGWA’s performance in 2022 was “submitted in February of this year [2024]” six months after the Director entered the *2022 Compliance Order* and approximately three weeks prior to the hearing. Hr’g Tr. Vol. II, 22:6–8; 42:14–16.

It is absurd to submit a purported addendum to a performance report—nearly a year after the initial report—that manipulates the calculation to attempt to show the ground water districts were in compliance so they can avoid the consequences of non-compliance. Whether the ground water districts breached and by how much is not at issue. The “First Addendum to the 2022 Performance Report” was outside the scope of these proceedings and was not relevant to the remaining question at hearing: how to cure the 2022 breach. Therefore, the Hearing Officer properly excluded the evidence and related testimony.

III. Bonneville-Jefferson’s Post-Hearing Brief and Proposed Remedy

In Bonneville-Jefferson’s post-hearing brief, BJGWD makes five core arguments: (i) *2016 Mitigation Plan* is governed by the Rules for Conjunctive Management, not the rules for Ground Water Management Areas. *BJGWD Post-Hearing Br.*, at 1–2; (ii) The Director is not required to order curtailment of ground water users when SWC does not experience an in-season demand shortfall. *Id.* at 3–4; (iii) The Director is not required to order a remedy to cure the alleged 2022 breach [because] a remedy is only appropriate where SWC has insufficient water supply caused by the breach. *Id.* at 4–6; (iv) The SWC’s proposed method to calculate a remedy is technically flawed. *Id.* at 7–9; and (v) The Settlement Agreement contains another latent ambiguity as to how a remedy for breach of the annual reduction requirement is calculated by the Director. *Id.* at 9–10. The Hearing Officer finds and concludes Bonneville-Jefferson’s arguments are unavailing for the reasons described below and the Hearing Officer observed that Bonneville-Jefferson did not present any evidence regarding how to affirmatively cure the 2022 breach.

- i. The 2016 Mitigation Plan is a mitigation plan based on an agreement and is construed and enforced consistent with the Department’s rules and the negotiated terms.*

BJGWD argues that the *2016 Mitigation Plan* is a mitigation plan not a ground water management plan. BJGWD cites one sentence of Mr. Colvin’s testimony describing the nature of

the *2016 Mitigation Plan* to claim that the *2016 Mitigation Plan* is being misinterpreted in this case. *BJGWD Post-Hearing Br.*, 2. Mr. Colvin is a technical expert who formed an opinion regarding a technical remedy. He is not a legal expert and his opinion on the nature or purpose of the *2016 Mitigation Plan* does not change the plain language of the plan. The *2016 Mitigation Plan* is based on an agreement between the SWC and IGWA, it requires ongoing activities to be performed regardless of the Methodology’s prediction of material injury in a given year, and enforcement of its terms does not necessarily correlate to redressing material injury predicted by the Methodology. *Summary Judgment Order*, at 7.

BJGWD urges the Hearing Officer to “construe the 2016 [Mitigation] Plan consistently with the goals and authority of the Director under the CM Rules governing water Delivery Calls.” *BJGWD Post-Hearing Br.*, at 2. The Hearing Officer agrees that the *2016 Mitigation Plan* is a mitigation plan; however, it is also a unique agreement between junior and senior water users that calls for particular reporting procedures, a new concept of a steering committee, and requests for enforcement pursuant to its stipulated terms. By enforcing the agreement, the Hearing Officer and the Director are doing nothing more than what the signatories agreed to.

- ii. *The Director is required to issue either an order specifying actions needed to cure a breach of the 2016 Mitigation Plan or an order curtailing the certain ground water districts not in compliance.*

Like IGWA, BJGWD argues that “[t]he Director is not required to order curtailment of ground water users when SWC does not experience an in-season demand shortfall. *BJGWD Post-Hearing Br.*, at 3–4. The Hearing Officer ruled on this issue as a matter of law on summary judgment. The Hearing Officer declines to reconsider the summary judgment decision especially because BJGWD did not move to reconsider the decision and no party has had the opportunity to respond to BJGWD’s new arguments.

- iii. *The Director is required to order a remedy to cure the 2022 breach or enter an order curtailing the certain ground water districts not in compliance.*

Third, BJGWD argues that “[t]he Director is not required to order a remedy to cure the alleged 2022 breach” and that “[a] remedy is only appropriate where SWC has insufficient water supply caused by the breach.” *BJGWD Post-Hearing Br.*, at 4. BJGWD claims that “the plain language of the agreement demonstrates that SWC’s water supply must be diminished to support an order requiring actions to cure a breach. *Id.* Despite this assertion, BJGWD provides no citation to any language in the *2016 Mitigation Plan*. Regardless, the Hearing Officer decided this issue as a matter of law on summary judgment and declines to revisit the issue.

- iv. *Mr. Colvin is not a legal expert—his opinion and its rebuttals will be given the weight of technical expert opinions.*

Fourth, BJGWD argues that the “SWC[s] proposed method to calculate a remedy is technically flawed.” *BJGWD Post-Hearing Br.*, at 7. Essentially, BJGWD argues that Mr. Colvin’s interpretation of the *2016 Mitigation Plan* led him to form a “technically incorrect” opinion. BJGWD argues that its expert, Bryce Contor, “testified during the hearing that it is technically incorrect to exclude analysis of past conservation efforts of districts.” *Id.* Again, Mr. Colvin is not a legal expert he is a technical expert. The Hearing Officer gives Mr. Colvin’s testimony the weight it deserves as a technical expert opinion not a legal opinion. Similarly, the Hearing Officer gives Mr. Contor’s testimony the weight it deserves as a technical expert rebuttal opinion and not a legal opinion.

- v. *Mr. Colvin and Mr. Contor's disagreement on the interpretation of the 2016 Mitigation Plan does not create a latent ambiguity.*

Fifth, BJGWD argues that the “Settlement Agreement contains another laten[t] ambiguity as to how a remedy for breach of the annual reduction requirement is calculated by the Director.” *BJGWD Post-Hearing Br.*, at 9. BJGWD states “Mr. Colvin and Mr. Contor both read the same agreement but came to different conclusions as to what guidance it gave them in determining a cure for a breach of the annual reduction obligation.” *Id.* at 10. Mr. Contor and Mr. Colvin were retained as technical experts by opposing parties to this dispute. It is no surprise that their opinions compete, as like any retained expert they likely formed their opinions based on the question they were retained to provide a technical answer to. However, simply because Mr. Contor and Mr. Colvin “conducted different analysis based upon their respective interpretations of the 2016 [Mitigation] Plan” does not mean the plan contains a “latent defect.”¹³ *Id.* Mr. Colvin and Mr. Contor are not legal experts and the Hearing Officer will consider their opinions in the context of their professional expertise.

IV. Bingham Ground Water District's Post-Hearing Brief and Proposed Remedy

In Bingham's post-hearing brief, Bingham argues: (i) Groundwater Districts are entitled to credit from “equivalent” recharge authorized by the Settlement Agreement. *Bingham Post-Hearing Br.* at 1–3; (ii) The Director's August 2, 2023 Compliance Order must be updated with information that was missing. *Id.* at 3; (iii) Even without the “First Addendum,” the Director has the discretion not to order a remedy of curtailment. *Id.* at 4; (iv) The Director has no authority to issue a curtailment other than out-of-priority curtailment. *Id.* at 5–7; and (v) If a remedy is prescribed, such a remedy should be limited to the actual shortfall identified in the Director's order. *Id.* at 7.

- i. *BGWD received 'credit' for its equivalent private recharge activities before the Director concluded it failed to satisfy its proportionate share of the conservation obligation.*

First, BGWD argues that “Groundwater District are Entitled to Credit from ‘Equivalent’ Recharge Authorized by the Settlement Agreement.” *BGWD Post-Hearing Br.*, at 1. BGWD claims that “[i]t is uncontested that the settlement agreement allows ‘equivalent private recharge activity’ as a substitute for reduction.” *Id.* at 2. BGWD therefore concludes that “[e]xcess recharge must be given its ‘equivalent’ reductions in 2022 as authorized by the settlement agreement. When this is done, there is no deficit.” *Id.* at 3.

BGWD's argument amounts to an attack on the Director's conclusion that BGWD failed to satisfy its proportionate share of the mitigation obligation in 2022. The Director's relied on IGWA's performance report to determine compliance in 2022. One of the columns in IGWA's Usage Analysis table accounts for the volume each ground water district performed in “Accomplished Recharge/Direct Delivery” in 2022. Hr'g Ex. 512, at 7–8. Therefore, BGWD did receive ‘credit’ for the “equivalent private recharge activities” that IGWA reported it performed in 2022. BGWD did not request a hearing on the *2022 Compliance Order* and did not challenge the deficiency calculation or the breach determination. Whether the ground water districts breached and by what amount is not at issue in this case.

¹³ Furthermore, even if Mr. Contor and Mr. Colvin's disagreement on which analysis to conduct based on their interpretation of the *2016 Mitigation Plan* revealed a latent ambiguity, the solution would not be for the Hearing Officer to simply “adopt the interpretation posited by Mr. Contor.” *BJGWD Post-Hearing Br.*, at 10.

- ii. *The Hearing Officer properly excluded IGWA’s “First Addendum to the 2022 Performance Report.”*

Second, BGWD argues that “[t]he Director’s August 2, 2023, Compliance Order Must be Updated with Information that was Missing.” *BGWD Post-Hearing Br.*, at 3. BGWD directs the Hearing Officer to footnote 6 to the *2022 Compliance Order*, where the Director stated, “The Second Addendum 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.* (citing Hr’g Ex. 512, at 9). BGWD urges the Hearing Officer to interpret the “information needed by the Director to make this determination” to mean the information IGWA sought to inject into the record by introducing the First Addendum to the 2022 Performance Report, which the Hearing Officer excluded. *Id.* BGWD concludes: “Using the information contained in the First Addendum [to the 2022 Performance Report], the Director must find that no actions are required to cure the breach, and no curtailment is necessary. *Id.* at 4.

The information contained in the First Addendum to the 2022 Performance Report purportedly supplies new performance calculations, which challenge the Director’s finding of breach. The Director did not consider the First Addendum to the 2022 Performance Report when he determined that certain districts breached the *2016 Mitigation Plan* in 2022 because IGWA did not submit its new performance report until February of 2024. The new performance report cannot reasonably be characterized as the information needed by the Director to determine what specific actions must be taken by the breaching party to cure the breach—the new performance report “cures” the breach by manipulating the numbers to claim there is no breach in the first place. As explained above, IGWA’s new performance report is properly excluded as being irrelevant and outside the scope of these proceedings.

- iii. *Pursuant to the plain language of the 2016 Mitigation Plan, once the Director determined a breach occurred in 2022, he should have issued either an order specifying actions needed to cure the 2022 breach or an order curtailing the certain ground water districts not in compliance.*

Third BGWD argues that “the Director has the Discretion not to Order a Remedy of Curtailment.” *BGWD Post-Hearing Br.*, at 4. The Hearing Officer agrees that the Director has the discretion to refrain from ordering curtailment. However, the Director chose to enforce the plain language of the terms of the *2016 Mitigation Plan*, which dictates that 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. *Summary Judgment Order*, at 8. The Hearing Officer decided this issue as a matter of law on summary judgment and refers to the conclusions therein in response to BGWD’s argument.

- iv. *The Director has broad statutory and discretionary authority to administer water including enforcing mitigation plans.*

Fourth, BGWD argues that the “Director has no Authority to Issue a Curtailment Other Than Out-of-Priority Curtailment.” *BGWD Post-Hearing Br.*, at 5. The Director’s statutory and discretionary authority to administer water as well as the plain language of the *2016 Mitigation Plan* give the Director the authority to enforce the terms of the mitigation plan—terms that IGWA negotiated and agreed to. Like IGWA argues above, BGWD claims that “as the ground water districts do not hold any water rights themselves, they would not have the power or authority to enter into any agreement on behalf of its members that would subject them to such a

punitive action beyond statutory authorized curtailment.” *Id.* at 6. Whether BGWD had the power or authority to enter into the Settlement Agreement is between the district and its members, not the Department. Regardless, the Director did not order curtailment here and the Director’s statutory and discretionary authority in addition to the plain language of the *2016 Mitigation Plan* allow the Director to retain the discretion to refrain from ordering curtailment.

- v. *In the 2022 Compliance Order the Director determined the deficiency volume for each of the IGWA members who failed to satisfy their respective mitigation obligations in 2022.*

Finally, once again BGWD attempts to challenge the amount of the breach in the *2022 Compliance Order* by suggesting that the Director should limit a remedy to “the actual breach of the agreement” or the total mitigation balance amount of -38,734 acre-feet listed in Table 2, rather than the sum of the deficiency amounts. *BGWD Post-Hearing Br.*, at 7. To adopt BGWD’s suggestion, the Hearing Officer would be reconsidering the Director’s breach finding. Further, BGWD’s approach ignores that the *Settlement Agreement* requires each ground water district to conserve its proportionate share—the difference between the mitigation balance and the total deficiency amount is the effect of the year’s surplus conservation accomplished by the districts found to have been in compliance. To reduce the remedy required of the ground water districts that did not satisfy their respective mitigation obligations would be to rewrite the *Settlement Agreement’s* requirement that each district is responsible for reducing their proportionate share of the total. The amount of the breach is not at issue.

CONCLUSION

This Hearing Officer finds the *2016 Mitigation Plan* is not ambiguous and calls for a yearly analysis of compliance and remedy including the 240,000 acre-foot reduction by the signatories on a yearly basis. In the *Second Addendum*, the parties to this unique mitigation plan agreed to present information to the Steering Committee and if the Steering Committee cannot decide if a deficiency has occurred, the Director agreed to allow the parties to present evidence to allow the Director to make the decision. Significant opportunities were allowed for both parties, SWC and the signatory ground water districts, to present evidence of contract interpretation as well as technical evidence to the Steering Committee as well as the Director. Pursuant to the plain language of the *2016 Mitigation Plan*, the Director found four ground water districts did not satisfy their proportionate share of IGWA’s mitigation obligation in 2022. It is noted that AFAGWD subsequently cured their deficiency and therefore, only three ground water districts’ deficient performances are at issue here: Bingham Ground Water District, Bonneville-Jefferson Ground Water District, and Jefferson Clark Ground Water District.

This Hearing Officer held proceedings streamlining the issues before him. The parties had the chance to brief a summary judgment. The Hearing Officer entered judgment on three of the streamlined issues leaving only the issue of remedy for the evidentiary hearing. Throughout the proceedings before the Hearing Officer, the signatories have tried to rewrite the original agreement by changing performance reports upon which the Director relied, suggesting previous mitigation plans could be used instead of the *2016 Mitigation Plan*, argued that the Director has no authority in this matter even though they sought the Director’s inclusion, and attempted to inject ambiguity where none exists. Therefore, this Hearing Officer has found the *2016 Mitigation Plan* to not be ambiguous, that its plain terms do not allow previous conservation to be applied to later deficiencies and finds that the deficiencies can be cured by the three offending districts to conduct additional private recharge or additional diversion reduction.

Absent further agreement of the parties, the Hearing Officer makes the recommended order that follows.

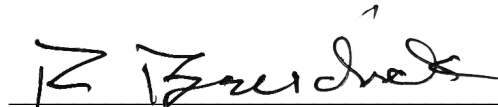
RECOMMENDED ORDER

Based on the Hearing Officer's conclusions of law in the *Order on Motions for Partial Summary Judgment* and the findings of fact and conclusions of law herein, the Hearing Officer recommends the Director find and order:

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*.
3. The 2016 Mitigation Plan effectively operates to rescind or replace the *2009 Mitigation Plan*.
4. IGWA members 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, have not separately cured the breach, and are therefore not in compliance with IGWA's *2016 Mitigation Plan*. To cure the 2022 breach of the *2016 Mitigation Plan*, in addition to the actions already required by the *2016 Mitigation Plan*, Bingham Ground Water District, Bonneville-Jefferson Ground Water District will implement additional conservation actions within their respective districts in 2024. The additional conservation actions must equal the 2022 excessive pumping amounts in each district as set forth below. If a ground water district fails to remedy the 2022 breach to the Director's satisfaction, the ground water district will be subject to curtailment.

Ground Water District	Additional Conservation Actions (acre-feet)
Bingham	32,476
Bonneville-Jefferson	5,204
Jefferson-Clark	18,605
Total	56,285

Dated this 20th day of June 2024.



ROGER S. BURDICK
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of June 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

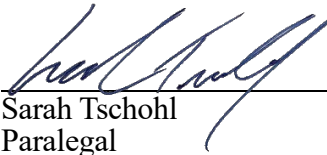
<p>John K. Simpson MARTEN LAW LLP P.O. Box 2139 Boise, ID 83701-2139 jsimpson@martenlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Travis L. Thompson Abigail Bitzenburg MARTEN LAW LLP P.O. Box 63 Twin Falls, ID 83303-0063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

Dylan Anderson DYLAN ANDERSON LAW PLLC P.O. Box 35 Rexburg, Idaho 83440 dylan@dylanandersonlaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83702 cmchugh@mchughbromley.com cbromley@mchughbromley.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email

Courtesy copies to:

Robert E. Williams WILLIAMS, MESERVY, & LOTHSPREICH, LLP P.O. Box 168 Jerome, ID 83338 rewilliams@wmlattys.com	<input checked="" type="checkbox"/> Email
Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com	<input checked="" type="checkbox"/> Email
Michael A. Kirkham City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 mirkham@idahofallsidaho.gov	<input checked="" type="checkbox"/> Email
Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83205 rdiehl@pocatello.us	<input checked="" type="checkbox"/> Email
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202 david.gehlert@usdoj.gov	<input checked="" type="checkbox"/> Email
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@usbr.gov	<input checked="" type="checkbox"/> Email

<p>Craig Chandler IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 craig.chandler@idwr.idaho.gov</p>	<input checked="" type="checkbox"/> Email
<p>Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 corey.skinner@idwr.idaho.gov</p>	<input checked="" type="checkbox"/> Email
<p>William A. Parsons PARSONS, LOVELAND, SHIRLEY & LINDSTROM, LLP P.O. Box 910 Burley, ID 83318 wparsons@pmt.org wparsons@magicvalley.law</p>	<input checked="" type="checkbox"/> Email
<p>Jerry R. Rigby RIGBY, ANDRUS & RIGBY LAW, PLLC PO Box 250 Rexburg, ID 83440 jrigby@rex-law.com</p>	<input checked="" type="checkbox"/> Email
<p>Andrew J. Waldera SAWTOOTH LAW OFFICES, PLLC 1101 W. River Street, Suite 110 Boise, Idaho 83702 andy@sawtoothlaw.com</p>	<input checked="" type="checkbox"/> Email



Sarah Tschohl
Paralegal

**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")¹ and Idaho Ground Water Appropriators, Inc. ("IGWA")² 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

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

² For purposes of this 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 1.³

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?

³ 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 1-2.⁴ IGWA moved for summary judgment on all issues. *IGWA Mem. In. Supp. Of IGWA’s Mot. for Summ. J.* at 5.⁵ IGWA also moved the Hearing Officer to take official notice of department documents and to limit “parol evidence” at hearing set for March 14, 2024.⁶ 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.⁷

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

⁴ 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.

⁵ 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.

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

⁷ 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.⁸

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 5.⁹

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,

⁸ 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.

⁹ 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.¹⁰ 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.*

¹⁰ 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 14.¹¹ 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.

¹¹ 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,¹² (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.

¹² 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*.¹³ 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.

¹³ 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.

A handwritten signature in black ink, appearing to read "R. Burdick". The signature is written in a cursive style with a small number "1" above the letter "i".

ROGER S. BURDICK
Hearing Officer

CERTIFICATE OF SERVICE

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

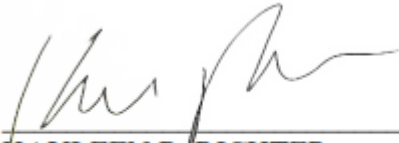
John K. Simpson MARTEN LAW LLP P.O. Box 2139 Boise, ID 83701-2139 jsimpson@martenlaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Travis L. Thompson MARTEN LAW LLP P.O. Box 63 Twin Falls, ID 83303-0063 tthompson@martenlaw.com jnielsen@martenlaw.com	<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 wkf@pmt.org	<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 tj@racineolson.com elisheva@racineolson.com	<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 sklahn@somachlaw.com mbricker@somachlaw.com vfrancisco@somachlaw.com	<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 sjohns@olsentaggart.com nolsen@olsentaggart.com staggart@olsentaggart.com	<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 dylan@dylanandersonlaw.com	<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 cmchugh@mchughbromley.com cbromley@mchughbromley.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
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Courtesy copies to:

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

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



KAYLEEN R. RICHTER
Deputy Attorney General

EXPLANATORY INFORMATION TO ACCOMPANY A RECOMMENDED ORDER

(Required by Rule of Procedure 720.02)

The accompanying order is a "**Recommended Order**" issued by the department pursuant to Section 67-5243, Idaho Code. The provisions of this order will not become effective until the Director issues a final order in this matter.

Each party to these proceedings who appeared at the hearing may file a petition for reconsideration, briefs and exceptions to the recommended order and may request oral argument before the Director of the department as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Section 67-5243(3), Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of a recommended order and may file briefs in support of the party's position on any issue in the proceeding. Written briefs in support of or taking exceptions to the recommended order shall be filed with the Director. Opposing parties shall have fourteen (14) days to respond.

If no party files exceptions to the recommended order with the Director, the Director will issue a final order within fifty-six (56) days after (a) the last day a timely petition for reconsideration could have been filed with the hearing officer, (b) the service date of a denial of a petition for reconsideration by the hearing officer; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration by the hearing officer.

ORAL ARGUMENT

The Director may schedule oral argument in the matter before issuing a final order. Oral argument on exceptions to a recommended order shall be heard at the discretion of the Director. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

Any petition for reconsideration or other motion to the hearing officer shall be served upon all other parties to the proceeding. All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the recommended order shall be served on all other parties to these proceedings in accordance with Rules of Procedure 53 and 202.

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

APPEAL OF FINAL ORDER TO DISTRICT COURT

A party aggrieved by a final order of the Director is entitled to judicial review in compliance with sections 67-5271 through 67-5279, Idaho Code.