

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

IDAHO GROUND WATER APPROPRIATORS,  
INC.,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER  
RESOURCES, and GARY SPACKMAN in his  
capacity as the Director of the Idaho Department  
of Water Resources.

Respondents.

Case No. CV01-23-07893

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

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

**AGENCY RECORD ON APPEAL**

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Judicial Review from the Idaho Department of Water Resources  
Gary Spackman, Director, Presiding

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## TABLE OF CONTENTS

Table of Contents.....	iv
Index .....	xii
Surface Water Coalition’s Request for Status Conference, April 29, 2022.....	1–12
Response to Request for Status Conference; Notice of Status Conference, May 5, 2022 .....	13–18
Surface Water Coalition’s Notice of Steering Committee Impasse/Request for Status Conference, July 21, 2022.....	19–24
Notice of Status Conference, July 26, 2022 .....	25–28
IGWA’s Response to Surface Water Coalition’s Notice of Steering Committee Impasse, August 3, 2022 .....	29–36
Surface Water Coalition’s Reply to IGWA’s Response, August 4, 2022.....	37–43
IGWA’s Supplemental Response to Surface Water Coalition’s Notice of Steering Committee Impasse, August 12, 2022 .....	44–54
Notice of Intent to Take Official Notice of IGWA’s 2021 Settlement Agreement Performance Report and Supporting Spreadsheet, August 18, 2022 (See Officially Noticed Documents).....	55–58
IGWA’s Objection to Notice of Intent to Take Official Notice of IGWA’s 2021 Settlement Agreement Performance Report and Supporting Spreadsheet; and Request for Hearing, August 23, 2022 .....	59–66
Settlement Agreement, September 7, 2022.....	67–70
Final Order Regarding Compliance with Approved Mitigation Plan, September 8, 2022 .....	71–95
Petition for Reconsideration and Request for Hearing, September 22, 2022 .....	96–104
Order Granting Request for Hearing; Notice of Prehearing Conference, October 13, 2022.....	105–108
Notice of Rescheduled Prehearing Conference, November 8, 2022.....	109–112

Disclosure by the Director (“2015 Settlement Agreement” with email attached), November 14, 2022 .....	113–137
Notice of Substitution of Counsel—IGWA, November 15, 2022.....	138–140
Final Order Establishing 2022 Reasonable Carryover (Methodology Step 9), November 30, 2022 .....	141–151
Notice of Service of IGWA’s First Set of Discovery Requests to the SWC, December 5, 2022 .....	152–154
Order Authorizing Discovery; Notice of Hearing, December 7, 2022..	155–158
Notice of Service of First Set of Discovery to the Idaho Ground Water Appropriators, Inc.—Coalition of Cities and City of Pocatello, December 12, 2022 .....	159–161
Final Order Curtailing Ground Water Rights Junior to May 31, 1989, December 14, 2022.....	162–171
Notice of Service of First Set of Discovery to the Members of the Surface Water Coalition—Coalition of Cities and City of Pocatello, December 16, 2022 .....	172–174
Notice of Service of Surface Water Coalition’s First Discovery Requests to Aberdeen-American Falls Ground Water District; Bingham Ground Water District; Bonneville-Jefferson Ground Water District; Carey Valley Ground Water District; Jefferson-Clark Ground Water District; Madison Ground Water District; Magic Valley Ground Water District; North Snake Ground Water District; and Fremont Madison Irrigation District, December 19, 2022.....	175–178
Surface Water Coalition’s Motion for Summary Judgment, December 21, 2022 .....	179–182
Surface Water Coalition’s Memorandum in Support of Motion for Summary Judgment, December 21, 2022.....	183–194
IGWA’s Response in Opposition to SWC’s Motion for Summary Judgment, January 4, 2023 .....	195–207
First Declaration of Jaxon Higgs—IGWA, January 4, 2023 .....	208–261
BJGWD’s Response in Opposition to SWC’s Motion for Summary Judgment, January 4, 2023 .....	262–271

Petition to Intervene—Bonneville-Jefferson Ground Water District, January 4, 2023 .....	272–275
Substitution of Counsel—Bonneville-Jefferson Ground Water District, January 4, 2023 .....	276–278
Notice of Service of Surface Water Coalition’s Responses to IGWA’s Requests for Admission, January 6, 2023 .....	279–282
Surface Water Coalition’s Opposition to Bonneville-Jefferson Ground Water District’s Motion to Intervene / Motion to Strike Response, January 9, 2023.....	283–292
Notice of Service of Surface Water Coalition’s Responses to IGWA’s First Set of Interrogatories and Requests for Production of Documents, January 10, 2023 .....	293–296
Surface Water Coalition’s Reply in Support of Summary Judgment Motion, January 11, 2023 .....	297–314
BJGWD’s Reply and Objection to SWC’s Opposition to Bonneville- Jefferson Ground Water District’s Motion to Intervene/Motion to Strike, January 17, 2023.....	315–325
Notice of Service of Idaho Ground Water Appropriators, Inc.’s Responses to the Coalition of Cities’ First Set of Discovery Requests, January 18, 2023 .....	326–328
Notice of Service of Aberdeen-American Falls Ground Water District’s Responses to the Surface Water Coalition’s First Discovery Requests, January 18, 2023 .....	329–331
Notice of of Service of Bingham Ground Water District’s Responses to the Surface Water Coalition’s First Discovery Requests, January 18, 2023 .....	332–334
Notice of Service of Bonneville-Jefferson Ground Water District’s Responses to the Surface Water Coalition’s First Discovery Requests, January 18, 2023 .....	335–337
Notice of Service of Carey Valley Ground Water District’s Responses to the Surface Water Coalition’s First Discovery Requests, January 18, 2023 .....	338–340
Notice of Service of Fremont Madison Irrigation District’s Responses to the Surface Water Coalition’s First Discovery Requests, January 18, 2023 .....	341–343

Notice of Service of Jefferson-Clark Ground Water District's Responses to the Surface Water Coalition's First Discovery Requests, January 18, 2023 .....	344–346
Notice of Service of Madison Ground Water District's Responses to the Surface Water Coalition's First Discovery Requests, January 18, 2023 .....	347–349
Notice of Service of Magic Valley Ground Water District's Responses to the Surface Water Coalition's First Discovery Requests, January 18, 2023 .....	350–352
Notice of Service of North Snake Ground Water District's Responses to the Surface Water Coalition's First Discovery Requests, January 18, 2023 .....	353–355
Notice of Conditional Withdrawal of Representation of Bonneville-Jefferson Ground Water District, January 25, 2023.....	356–358
Witness and Exhibit Disclosure Stipulation, January 26, 2023 .....	359–365
BJGWD's Witness and Exhibit Disclosure, January 27, 2023 .....	366–369
Notice of Service of Aberdeen-American Falls Ground Water District's Supplemental Responses to the Surface Water Coalition's First Discovery Requests, January 27, 2023 .....	370–372
Notice of Service of Bingham Ground Water District's Supplemental Responses to the Surface Water Coalition's First Discovery Requests, January 27, 2023 .....	373–375
Notice of Service of Idaho Ground Water Appropriators, Inc.'s Supplemental Responses to the Coalition of Cities' First Set of Discovery Requests, January 27, 2023 .....	376–378
Notice of Service of Surface Water Coalition's Responses to Pocatello and Coalition of Cities First Set of Discovery, January 27, 2023 .....	379–382
Order Denying SWC's Motion for Summary Judgment & Conditionally Granting BJGWD's Petition to Intervene, January 27, 2023 .....	383–388
BJGWD's Witness and Exhibit List, February 3, 2023 .....	389–392
IGWA's Witness and Exhibit Disclosure, February 3, 2023 .....	393–398

Notice of Service of Surface Water Coalition’s Witness and Exhibit List, February 6, 2023 .....	399–402
Amended Final Order Regarding Compliance with Approved Mitigation Plan, April 24, 2023 .....	403–427
Notice of Substitution of Counsel for Bingham Ground Water District, May 2, 2023 .....	428–430

## **OFFICIALLY NOTICED DOCUMENTS**

Officially Noticed Document—IGWA’s 2021 Settlement Agreement Performance Report, April 1, 2022 .....	431–434
Officially Noticed Document—IGWA’s 2021 Performance Summary Table, April 2, 2022 (Excel Document) .....	435

## **EXHIBITS OFFERED AND ADMITTED DURING THE AGENCY HEARING February 8, 2023**

Exhibit 1—20150630 IGWA-SWC Settlement Agreement.....	436–460
Exhibit 2—20151014 Addendum to Settlement Agreement .....	461–476
Exhibit 3—20161214 Second Addendum to Settlement Agreement...	477–497
Exhibit 4—20151007 A&B Agreement.....	498–508
Exhibit 5—20160309 SWCs and IGWAs Stipulation Mitigation Plan and Request for Order .....	509–575
Exhibit 6—20160422 Motion for Order Approving Stipulation .....	576–585
Exhibit 7—20170207 Stipulation Amended Mitigation Plan and Request for Order .....	586–612
Exhibit 8—20220726 Notice of Status Conference .....	613–616
Exhibit 9—20220721 SWC’s Notice of Steering Impasse – Request of Status Conference.....	617–622
Exhibit 10—20220803 IGWA’s Response to SWC Notice of Steering Impasse .....	623–630
Exhibit 11—20220812 IGWA's Supplemental Response to SWC Notice of Steering Impasse .....	631–641
Exhibit 12—20220818 Notice of Intent to Take Official Notice .....	642–645

Exhibit 13—20220823 IGWA Objection to Notice of Intent to Take Official Notice .....	646–653
Exhibit 14—20220908 Final Order Re Compliance with Approved Mitigation Plan.....	654–678
Exhibit 15—20170331 Districts Settlement Agreement Implementation Report .....	679–684
Exhibit 16—20180330 Districts 2017 Settlement Agreement Performance Report.....	685–690
Exhibit 17—20190401 Districts 2018 Settlement Agreement Performance Report – 1.....	691–696
Exhibit 18—20200401 Districts 2019 Settlement Agreement Performance Report1 – FINAL.....	697–702
Exhibit 19—20210401 Districts 2020 Settlement Agreement Performance Report.....	703–708
Exhibit 20—20220401 IGWA Performance Report.....	709–712
Exhibit 21—2022 Settlement Performance Report Recharge Documentation 20220401.....	713–839
Exhibit 22—20170401 Settlement Agreement Performance Report v5 (Excel Document).....	840
Exhibit 23—20180330 Settlement Agreement Performance Report Spreadsheet (Excel Document) .....	841
Exhibit 24—20190401 Settlement Agreement Performance Report Spreadsheet1 (Excel Document) .....	842
Exhibit 25—2020 Settlement Agreement Performance Spreadsheet 20200326 (Excel Document).....	843
Exhibit 26—2021 Settlement Agreement Performance Spreadsheet 20210330 (Excel Document).....	844
Exhibit 27—2022 Settlement Performance Report Spreadsheet 20220401 (Excel Document).....	845
Exhibit 28—IDWR review of Cities 2021 Performance Report.....	846–847
Exhibit 29—IDWR review of IGWA 2016 Progress Report_FINAL ...	848–854



Exhibit 30—IDWR review of IGWA 2017 Performance Report_v1.....	855–861
Exhibit 31—IDWR review of IGWA 2018 Performance Report (1) .....	862–867
Exhibit 32—IDWR review of IGWA 2018 Performance Report .....	868–873
Exhibit 33—IDWR review of IGWA 2019 Performance Report .....	874–879
Exhibit 34—IDWR review of IGWA 2020 Performance Report .....	880–887
Exhibit 35—IDWR review of IGWA 2021 Performance Report .....	888–892
Exhibit 36—20160502 Final Order Approving Stipulated Mitigation Plan .....	893–900
Exhibit 37—20170509 Final Order Approving Amendment to Stipulated Mitigation Plan .....	901–909
Exhibit 38—2013 Joint Motion for Approval of Interim Mitigation Agreement.....	910–929
Exhibit 39—20180104 SWID – SWC Agreement Joint Motion for Approval – SWID Agreement_OCR.....	930–951
Exhibit 101—20150528 Weaver Presentation .....	952
Exhibit 102—20150702 Q&A from Legal Counsel to IGWA .....	953–960
Exhibit 107—20150804 Higgs Presentation to IGWA Board.....	961–969
Exhibit 109—20150923 Term Sheet Implementation Agenda.....	970–971
Exhibit 114—20161103 Final Allocation 2016.....	972
Exhibit 118—240k AF Annual Conservation.....	973
Exhibit 119—Baseline Option Example.....	974
Exhibit 120—Fixed Diversion Cap Chart .....	975
Exhibit 200—20170414 Letter from Travis Thompson to Randall Budge Re: Ground Water Districts 2016 Implementation Report .....	976–978
Exhibit 201—20170420 Letter from Randall Budge to Travis Thompson Re: Ground Water Districts’ 2016 Implementation Report.....	979–982

## **AGENCY RECORD CERTIFICATIONS AND NOTICES**

Notice of Lodging the Agency Transcript and Record with the Agency, June 12, 2023 .....	983–985
--	---------

## INDEX

Amended Final Order Regarding Compliance with Approved Mitigation Plan, April 24, 2023 .....	403–427
BJGWD’s Reply and Objection to SWC’s Opposition to Bonneville-Jefferson Ground Water District’s Motion to Intervene/Motion to Strike, January 17, 2023.....	315–325
BJGWD’s Response in Opposition to SWC’s Motion for Summary Judgment, January 4, 2023 .....	262–271
BJGWD’s Witness and Exhibit Disclosure, January 27, 2023 .....	366–369
BJGWD’s Witness and Exhibit List, February 3, 2023 .....	389–392
Disclosure by the Director (“2015 Settlement Agreement” with email attached), November 14, 2022 .....	113–137
Exhibit 1—20150630 IGWA-SWC Settlement Agreement.....	436–460
Exhibit 2—20151014 Addendum to Settlement Agreement .....	461–476
Exhibit 3—20161214 Second Addendum to Settlement Agreement...	477–497
Exhibit 4—20151007 A&B Agreement.....	498–508
Exhibit 5—20160309 SWCs and IGWAs Stipulation Mitigation Plan and Request for Order .....	509–575
Exhibit 6—20160422 Motion for Order Approving Stipulation .....	576–585
Exhibit 7—20170207 Stipulation Amended Mitigation Plan and Request for Order .....	586–612
Exhibit 8—20220726 Notice of Status Conference .....	613–616
Exhibit 9—20220721 SWC’s Notice of Steering Impasse – Request of Status Conference.....	617–622
Exhibit 10—20220803 IGWA’s Response to SWC Notice of Steering Impasse .....	623–630
Exhibit 11—20220812 IGWA's Supplemental Response to SWC Notice of Steering Impasse .....	631–641
Exhibit 12—20220818 Notice of Intent to Take Official Notice .....	642–645

Exhibit 13—20220823 IGWA Objection to Notice of Intent to Take Official Notice .....	646–653
Exhibit 14—20220908 Final Order Re Compliance with Approved Mitigation Plan.....	654–678
Exhibit 15—20170331 Districts Settlement Agreement Implementation Report .....	679–684
Exhibit 16—20180330 Districts 2017 Settlement Agreement Performance Report.....	685–690
Exhibit 17—20190401 Districts 2018 Settlement Agreement Performance Report – 1.....	691–696
Exhibit 18—20200401 Districts 2019 Settlement Agreement Performance Report1 – FINAL.....	697–702
Exhibit 19—20210401 Districts 2020 Settlement Agreement Performance Report.....	703–708
Exhibit 20—20220401 IGWA Performance Report.....	709–712
Exhibit 21—2022 Settlement Performance Report Recharge Documentation 20220401.....	713–839
Exhibit 22—20170401 Settlement Agreement Performance Report v5 (Excel Document).....	840
Exhibit 23—20180330 Settlement Agreement Performance Report Spreadsheet (Excel Document) .....	841
Exhibit 24—20190401 Settlement Agreement Performance Report Spreadsheet1 (Excel Document) .....	842
Exhibit 25—2020 Settlement Agreement Performance Spreadsheet 20200326 (Excel Document).....	843
Exhibit 26—2021 Settlement Agreement Performance Spreadsheet 20210330 (Excel Document).....	844
Exhibit 27—2022 Settlement Performance Report Spreadsheet 20220401 (Excel Document).....	845
Exhibit 28—IDWR review of Cities 2021 Performance Report.....	846–847
Exhibit 29—IDWR review of IGWA 2016 Progress Report_FINAL ...	848–854

Exhibit 30—IDWR review of IGWA 2017 Performance Report_v1.....	855–861
Exhibit 31—IDWR review of IGWA 2018 Performance Report (1) .....	862–867
Exhibit 32—IDWR review of IGWA 2018 Performance Report .....	868–873
Exhibit 33—IDWR review of IGWA 2019 Performance Report .....	874–879
Exhibit 34—IDWR review of IGWA 2020 Performance Report .....	880–887
Exhibit 35—IDWR review of IGWA 2021 Performance Report .....	888–892
Exhibit 36—20160502 Final Order Approving Stipulated Mitigation Plan .....	893–900
Exhibit 37—20170509 Final Order Approving Amendment to Stipulated Mitigation Plan .....	901–909
Exhibit 38—2013 Joint Motion for Approval of Interim Mitigation Agreement.....	910–929
Exhibit 39—20180104 SWID – SWC Agreement Joint Motion for Approval – SWID Agreement_OCR.....	930–951
Exhibit 101—20150528 Weaver Presentation .....	952
Exhibit 102—20150702 Q&A from Legal Counsel to IGWA .....	953–960
Exhibit 107—20150804 Higgs Presentation to IGWA Board.....	961–969
Exhibit 109—20150923 Term Sheet Implementation Agenda.....	970–971
Exhibit 114—20161103 Final Allocation 2016.....	972
Exhibit 118—240k AF Annual Conservation.....	973
Exhibit 119—Baseline Option Example.....	974
Exhibit 120—Fixed Diversion Cap Chart .....	975
Exhibit 200—20170414 Letter from Travis Thompson to Randall Budge Re: Ground Water Districts 2016 Implementation Report .....	976–978
Exhibit 201—20170420 Letter from Randall Budge to Travis Thompson Re: Ground Water Districts’ 2016 Implementation Report.....	979–982

Final Order Curtailing Ground Water Rights Junior to May 31, 1989, December 14, 2022.....	162–171
Final Order Establishing 2022 Reasonable Carryover (Methodology Step 9), November 30, 2022 .....	141–151
Final Order Regarding Compliance with Approved Mitigation Plan, September 8, 2022 .....	71–95
First Declaration of Jaxon Higgs—IGWA, January 4, 2023 .....	208–261
IGWA’s Objection to Notice of Intent to Take Official Notice of IGWA’s 2021 Settlement Agreement Performance Report and Supporting Spreadsheet; and Request for Hearing, August 23, 2022 .....	59–66
IGWA’s Response in Opposition to SWC’s Motion for Summary Judgment, January 4, 2023 .....	195–207
IGWA’s Response to Surface Water Coalition’s Notice of Steering Committee Impasse, August 3, 2022 .....	29–36
IGWA’s Supplemental Response to Surface Water Coalition’s Notice of Steering Committee Impasse, August 12, 2022 .....	44–54
IGWA’s Witness and Exhibit Disclosure, February 3, 2023.....	393–398
Index .....	xii
Notice of Conditional Withdrawal of Representation of Bonneville-Jefferson Ground Water District, January 25, 2023.....	356–358
Notice of Intent to Take Official Notice of IGWA’s 2021 Settlement Agreement Performance Report and Supporting Spreadsheet, August 18, 2022 (See Officially Noticed Documents).....	55–58
Notice of Lodging the Agency Transcript and Record with the Agency, June 13, 2023.....	983–985
Notice of Rescheduled Prehearing Conference, November 8, 2022.....	109–112
Notice of Service of Aberdeen-American Falls Ground Water District’s Responses to the Surface Water Coalition’s First Discovery Requests, January 18, 2023 .....	329–331
Notice of Service of Aberdeen-American Falls Ground Water District’s Supplemental Responses to the Surface Water Coalition’s First Discovery Requests, January 27, 2023 .....	370–372

Notice of Service of Bingham Ground Water District’s Responses to the Surface Water Coalition’s First Discovery Requests, January 18, 2023 .....	332–334
Notice of Service of Bingham Ground Water District’s Supplemental Responses to the Surface Water Coalition’s First Discovery Requests, January 27, 2023 .....	373–375
Notice of Service of Bonneville-Jefferson Ground Water District’s Responses to the Surface Water Coalition’s First Discovery Requests, January 18, 2023 .....	335–337
Notice of Service of Carey Valley Ground Water District’s Responses to the Surface Water Coalition’s First Discovery Requests, January 18, 2023 .....	338–340
Notice of Service of First Set of Discovery to the Idaho Ground Water Appropriators, Inc.—Coalition of Cities and City of Pocatello, December 12, 2022 .....	159–161
Notice of Service of First Set of Discovery to the Members of the Surface Water Coalition—Coalition of Cities and City of Pocatello, December 16, 2022 .....	172–174
Notice of Service of Fremont Madison Irrigation District’s Responses to the Surface Water Coalition’s First Discovery Requests, January 18, 2023 .....	341–343
Notice of Service of Idaho Ground Water Appropriators, Inc.’s Responses to the Coalition of Cities’ First Set of Discovery Requests, January 18, 2023 .....	326–328
Notice of Service of Idaho Ground Water Appropriators, Inc.’s Supplemental Responses to the Coalition of Cities’ First Set of Discovery Requests, January 27, 2023 .....	376–378
Notice of Service of IGWA’s First Set of Discovery Requests to the SWC, December 5, 2022 .....	152–154
Notice of Service of Jefferson-Clark Ground Water District’s Responses to the Surface Water Coalition’s First Discovery Requests, January 18, 2023 .....	344–346
Notice of Service of Madison Ground Water District’s Responses to the Surface Water Coalition’s First Discovery Requests, January 18, 2023 .....	347–349

Notice of Service of Magic Valley Ground Water District's Responses to the Surface Water Coalition's First Discovery Requests, January 18, 2023 .....	350–352
Notice of Service of North Snake Ground Water District's Responses to the Surface Water Coalition's First Discovery Requests, January 18, 2023 .....	353–355
Notice of Service of Surface Water Coalition's First Discovery Requests to Aberdeen-American Falls Ground Water District; Bingham Ground Water District; Bonneville-Jefferson Ground Water District; Carey Valley Ground Water District; Jefferson-Clark Ground Water District; Madison Ground Water District; Magic Valley Ground Water District; North Snake Ground Water District; and Fremont Madison Irrigation District, December 19, 2022 .....	175–178
Notice of Service of Surface Water Coalition's Responses to IGWA's Requests for Admission, January 6, 2023 .....	279–282
Notice of Service of Surface Water Coalition's Responses to IGWA's First Set of Interrogatories and Requests for Production of Documents, January 10, 2023 .....	293–296
Notice of Service of Surface Water Coalition's Responses to Pocatello and Coalition of Cities First Set of Discovery, January 27, 2023 .....	379–382
Notice of Service of Surface Water Coalition's Witness and Exhibit List, February 6, 2023 .....	399–402
Notice of Status Conference, July 26, 2022 .....	25–28
Notice of Substitution of Counsel for Bingham Ground Water District, May 2, 2023 .....	428–430
Notice of Substitution of Counsel—IGWA, November 15, 2022.....	138–140
Officially Noticed Document—IGWA's 2021 Performance Summary Table, April 2, 2022 (Excel Document) .....	435
Officially Noticed Document—IGWA's 2021 Settlement Agreement Performance Report, April 1, 2022 .....	431–434
Order Authorizing Discovery; Notice of Hearing, December 7, 2022..	155–158



Order Denying SWC’s Motion for Summary Judgment & Conditionally Granting BJGWD’s Petition to Intervene, January 27, 2023 .....	383–388
Order Granting Request for Hearing; Notice of Prehearing Conference, October 13, 2022.....	105–108
Petition for Reconsideration and Request for Hearing, September 22, 2022 .....	96–104
Petition to Intervene—Bonneville-Jefferson Ground Water District, January 4, 2023 .....	272–275
Response to Request for Status Conference; Notice of Status Conference, May 5, 2022 .....	13–18
Settlement Agreement, September 7, 2022.....	67–70
Substitution of Counsel—Bonneville-Jefferson Ground Water District, January 4, 2023 .....	276–278
Surface Water Coalition’s Memorandum in Support of Motion for Summary Judgment, December 21, 2022.....	183–194
Surface Water Coalition’s Motion for Summary Judgment, December 21, 2022 .....	179–182
Surface Water Coalition’s Notice of Steering Committee Impasse/Request for Status Conference, July 21, 2022.....	19–24
Surface Water Coalition’s Opposition to Bonneville-Jefferson Ground Water District’s Motion to Intervene / Motion to Strike Response, January 9, 2023.....	283–292
Surface Water Coalition’s Reply in Support of Summary Judgment Motion, January 11, 2023 .....	297–314
Surface Water Coalition’s Reply to IGWA’s Response, August 4, 2022.....	37–43
Surface Water Coalition’s Request for Status Conference, April 29, 2022 .....	1–12
Table of Contents.....	iv
Witness and Exhibit Disclosure Stipulation, January 26, 2023 .....	359–365

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

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

\_\_\_\_\_  
IN THE MATTER OF IGWA'S )  
SETTLEMENT AGREEMENT )  
MITIGATION PLAN )  
\_\_\_\_\_) )

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

**SURFACE WATER COALITION'S  
REQUEST FOR STATUS  
CONFERENCE**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively hereafter referred to as the “Surface Water Coalition”, “Coalition”, or “SWC”), by and through counsel of record, and hereby request a status conference in the above-captioned matters on the issues identified below.

**I. Status of Implementation of January 11, 2022 Curtailment Order**

The Director identified a final carryover injury of 64,647 acre-feet based upon Step 9 of the *Methodology Order*. The Director then issued a curtailment order on January 11, 2022, identifying a list of ground water rights that were to be curtailed beginning on January 13, 2022. The list was later amended on January 12, 2022.

The Coalition requests an update on the status of IDWR’s and the respective water districts’ actions to curtail diversions pursuant to those water rights as ordered by the Director.

**II. Ground Water Districts’ Compliance with Approved Mitigation Plan**

The Director approved the stipulated mitigation plan submitted by SWC and IGWA on May 2, 2016. *See Final Order Approving Stipulated Mitigation Plan*. Pursuant to the plan the signatory<sup>1</sup> ground water districts and their members agreed to “a total ground water diversion reduction of 240,000 acre-feet annually.” *See Order* at 2. On Friday April 1, 2022, counsel for IGWA submitted the districts’ 2021 performance report.<sup>2</sup> As detailed in that report, the signatory ground water districts only performed 56,953 acre-feet in diversion reductions and 65,831 acre-feet in recharge for a total of 122,784 acre-feet.

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<sup>1</sup> The nine signatory ground water districts are Aberdeen-American Falls, Bingham, Bonneville-Jefferson, Carey Valley, Fremont Madison Irrigation District, Jefferson-Clark, Madison, Magic Valley, and North Snake. A&B Irrigation District and Southwest Irrigation District are not part of the districts’ obligation under the settlement agreement or mitigation plan. IGWA has erroneously included A&B and SWID as part of its 240,000 af calculations every year, but until this year the nine districts have exceeded the 240,000 af reduction requirement. The Director should clarify this for IGWA accordingly.

<sup>2</sup> IDWR has until July 1, 2022 to provide its verification report.

The nine signatory ground water districts' 2021 actions were approximately 117,216 acre-feet short of what is required by the stipulated mitigation plan and the Director's order approving the same. Consequently, IGWA and its junior priority ground water right members are not operating in accordance with the approved plan and are failing to mitigate the material injury to the Coalition members. *See* CM Rule 40.05.

The Surface Water Coalition requests the Director to address what actions he intends to take in 2022 in response to this non-compliance and enforcement of the order approving the mitigation plan.

### **III. Water District 01 Rental Pool Procedures / Non-Participants**

The Director is aware of the proposed changes to the Water District 01 2022 Rental Pool Procedures as adopted at the annual meeting on March 1, 2022. As noted by Resolution 21, spaceholders had until April 7, 2022 to opt out of the new procedures. In light of forecasted water supplies, significant changes in how rental water would be supplied, and a "last to fill" condition for that water for 2023, approximately 50% of the contracted space opted out of the new procedures. Certain members of the SWC were part of the list of spaceholders that opted out (A&B, AFRD#2, BID, NSCC, and TFCC).

On April 13, 2022 the Committee of Nine held a special meeting and approved the following changes to the procedures:

- Lowered the quantity of Large Common Pool rental to be supplied in 2022 from 100,000 AF to zero AF.
- Removed the 2023 last-to-fill obligation for participant allocations reduced this year to supply 2021 Common Pool rentals.
- Extended the deadline to May 13<sup>th</sup> for spaceholders to change their participation status in the rental pool process.

*See* **Ex. A** (Water Report April 20, 2022).

At that same meeting the Watermaster indicated that pursuant to his interpretation of the procedures, the water district would likely preclude spaceholders that opt out from having rented water assigned to their points of diversion for delivery in 2022. It is the Watermaster's position that non-participating spaceholders cannot "divert or receive leased/rental storage delivered to their headgate" regardless of the purpose or the lands it is to be used on. *See Ex. B* (Tony Olenichak April 15, 2022 email to John Simpson).

If a Coalition member opts out of participating in the Water District 01 rental pool, the Watermaster may preclude delivery of mitigation water pursuant to IGWA's mitigation plan, or other operating and approved mitigation plans. Whereas the Director has already identified a preliminary injury to certain Coalition members totaling 162,600 acre-feet (*see* Steps 1-3 Final Order issued April 20, 2022), delivery of mitigation water to address that injury is critical for this irrigation season. In addition, the Director required ground water users with priority dates junior to December 25, 1979 to establish how they can mitigate for their share of the demand shortfall by May 1, 2022. With the uncertainty in the Water District 01 rental pool that deadline raises uncertainty and additional questions for junior ground water right holders.

Finally, several Coalition members wheel water for various entities for irrigation and recharge purposes. Notably, Artesian Irrigation Company has wheeled its storage water to shareholders' lands through both Milner Irrigation District and Twin Falls Canal Company for decades. Artesian does not rent this water and has no physical means to deliver its water to its shareholders. Various ground water districts and Southwest Irrigation District have also wheeled water, including rental water, for groundwater conversion projects through American Falls Reservoir District #2, Burley Irrigation District, Twin Falls Canal Company, and Northside Canal Company for decades as well. Finally, various Coalition members have diverted water for

groundwater recharge purposes pursuant to the Idaho Water Resource Board's water rights for several years as well. It is unknown if that program would subject to the same prohibition as is indicated for rented or leased storage water.

The Watermaster's interpretation has created great uncertainty as to how rented or other non-spaceholder water will be handled for water right administration in 2022. Given the pending deadlines for juniors regarding the Director's Steps 1-3 Order (May 1<sup>st</sup>) and spaceholders for participation status (May 13<sup>th</sup>), the Director should address this issue and provide clarification as soon as possible. *See* I.C. 42-602.

### **REQUEST FOR STATUS CONFERENCE**

The Coalition respectfully requests the Director set a status conference to address the above stated issues for the 2022 irrigation season. Given the uncertainty with the rental pool and the Coalition's and others' reliance upon leased water for conversions and other projects, the Coalition would request a status conference be set as soon as possible.

DATED this 27<sup>th</sup> day of April, 2022.

**BARKER ROSHOLT & SIMPSON LLP**



John K. Simpson  
Travis L. Thompson

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

**FLETCHER LAW OFFICE**



for

W. Kent Fletcher

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

## CERTIFICATE OF SERVICE

I hereby certify that on this 27<sup>th</sup> day of April, 2022, I served a true and correct copy of the foregoing *Surface Water Coalition's Request for Status Conference* on the following by the method indicated:

<p>Director Gary Spackman c/o Sarah Tschohl State of Idaho Dept of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail</p> <p><a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a></p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only</p> <p><a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a> <a href="mailto:emcgarry@usbr.gov">emcgarry@usbr.gov</a></p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only</p> <p><a href="mailto:tony.olenichak@idwr.idaho.gov">tony.olenichak@idwr.idaho.gov</a></p>
<p>Randy Budge T.J. Budge Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only</p> <p><a href="mailto:randy@racineolson.com">randy@racineolson.com</a> <a href="mailto:tjb@racineolson.com">tjb@racineolson.com</a></p>	<p>Sarah A. Klahn Dylan Thompson Somach Simmons &amp; Dunn 2033 11<sup>th</sup> Street, Ste. 5 Boulder, CO 80302 *** service by electronic mail only</p> <p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>	<p>David Gehlert ENRD – DOJ 999 18<sup>th</sup> St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only</p> <p><a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only</p> <p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>	<p>Robert E. Williams Williams, Meservy &amp; Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only</p> <p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>	<p>Corey Skinner IDWR – Southern Region 650 Addison Ave. W., Ste. 500 Twin Falls, ID 83301 *** service by electronic mail only</p> <p><a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>
<p>Robert L. Harris Holden, Kidwell, Hahn &amp; Crapo. PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only</p> <p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>	<p>Kathleen Carr US Dept Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway, Ste. 400 Boise, ID 83706 *** service by electronic mail only</p> <p><a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a></p>	<p>Candice McHugh Chris Bromley McHugh Bromley, PLLC 380 South 4<sup>th</sup> Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only</p> <p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a> <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>

Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only <a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a>	<b><i>COURTESY COPY TO:</i></b> William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a>	
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Travis L. Thompson



# Exhibit A

## WATER REPORT – April 20, 2022

The Committee of Nine at their April 13, 2022, meeting decided to re-draft the 2022 Rental Pool Procedures after approximately half of the reservoir system space opted out of participating in the procedures approved at the March 1<sup>st</sup> Water District #1 Annual Meeting. Procedure 5.2.101 said, “If after April 7 less than seventy-five percent (75%) of the contracted storage space is committed to the common pool by participants, the Committee may revise the rental pool procedures as necessary prior to April 21.”

When approximately half of the system space requested not to participate in the 2022 Rental Pool by the April 7<sup>th</sup> deadline, and after listening to criticism by various spaceholders, the Committee made the following revisions to the Rental Pool Procedures to encourage additional participation in this year’s rental pool:

- Lowered the quantity of Large Common Pool rental to be supplied in 2022 from 100,000 AF to zero AF.
- Removed the 2023 last-to-fill obligation for participant allocations reduced this year to supply 2021 Common Pool rentals.
- Extended the deadline to May 13<sup>th</sup> for spaceholders to change their participation status in the rental pool process.

**Spaceholders have until May 13<sup>th</sup> to notify the Water District #1 Office whether they wish to change their participation status concerning the revised rental pool procedures.** If a spaceholder does not send in notification to change their participation status by the May 13<sup>th</sup> deadline, it will be assumed that the spaceholder wishes to continue their status chosen at the previous April 7<sup>th</sup> opt in/out deadline. The revised Rental Pool Procedures have been posted on the [www.waterdistrict1.com](http://www.waterdistrict1.com) webpage under the REPORTS & EVENTS tab and **2022 Rental Pool Procedures Revised** heading.

The whole purpose of revising the procedures and extending the opt in/out deadline is to encourage additional spaceholders to participate supplying flow augmentation and other Common Pool rentals. One of the primary goals of the rental pool procedures established at least since 2005 was that all contracted spaceholders should share in supplying flow augmentation rental under the *2004 Water Rights (Nez Perce) Agreement* and assure that participants have priority over non-participating spaceholders and non-spaceholders in renting storage through the rental pool.

The next Committee of Nine Meeting has been rescheduled to occur on May 16<sup>th</sup> following the May 13<sup>th</sup> rental pool participation deadline. The time and place for the May 16<sup>th</sup> meeting has yet to be determined.

Recent storms have improved the water supply outlook but the supply is still expected to be below average this year. The snowpack in the higher elevations has yet to begin melting, natural flow is at low levels, and priorities are anticipated to drop quickly when several canals begin diverting water over the next few weeks. Once warmer weather arrives and peak runoff begins in late-May or early-June, some reservoir priorities may be restored at that time.

The projected priorities and current water right accounting posted on the [www.waterdistrict1.com](http://www.waterdistrict1.com) webpage will begin to be updated more frequently over the next few weeks as more diversions begin diverting water and priorities begin to drop.

# Exhibit B

## Travis Thompson

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**From:** John Simpson  
**Sent:** Friday, April 15, 2022 1:32 PM  
**To:** Travis Thompson; Kent Fletcher  
**Subject:** FW: Participation

**From:** Olenichak, Tony <Tony.Olenichak@idwr.idaho.gov>  
**Sent:** Friday, April 15, 2022 1:30 PM  
**To:** John Simpson <jks@idahowaters.com>  
**Cc:** Jerry Rigby (jrigby@rex-law.com) <jrigby@rex-law.com>  
**Subject:** RE: Participation

John,

In the past, when essentially everyone but the Tribe and BOR were participants, my perspective didn't matter. Now that a significant number of spaceholders have become non-participants, I think I need the Co9 to clarify the intent of their procedures. My understanding up until now has been simple:

"Non-participating" spaceholders can't supply leased/rental storage from the non-participant's storage allocation to other water user diversions.....nor can a non-participant spaceholder divert or "receive" leased/rental storage delivered to their headgate, regardless of where (or to what purpose) the leased/rental storage originated or lands it is to be used upon. It doesn't matter if the storage was from the small pool, large pool, assignment pool, or private lease, nor does it matter where the place-of-use resides nor does it matter the purpose of the rental storage usage. Only the point-of-diversion matters because it is the only thing that can be regulated and measured by the Watermaster.

Some may say that a non-participant canal can divert rental pool storage if the rental storage is used by someone other than a canal shareholder or used on grounds outside of the canal's decreed place-of-use. However, the Watermaster cannot regulate how much of, or where, the rental storage is used within the non-participant canal's distribution system. The Watermaster is limited to only regulating the amount of rental storage delivered through the canal's headgate.

If Rental Pool storage is assigned to a "participating" spaceholder canal. The Watermaster delivers that rental or leased storage to the participating canal's headgate. It then becomes the canal's responsibility to distribute that rental through or within their canal system. Otherwise, the participating canal shouldn't have signed the Rental Pool Application or carrying agreement agreeing to deliver the storage through, or within, their canal's system.

According to Procedure 5.2.106, the Tribes shall be "treated" as non-participants in the WD1 Rental Pool. The Tribes have neither considered themselves participants nor non-participants in the WD1 Rental Pool, but in some respects, they sometimes receive the benefits of both. If the Tribe leases their storage through the Tribal Rental Pool to be delivered to a canal that is a non-participant in the WD1 Rental Pool, I think the WD1 Watermaster is obligated to deliver the Tribal storage rented through the Tribal Rental Pool to the canal, regardless of the canal's participation status with the WD1 Rental Pool.

Procedure 5.2.101 says the BOR is non-participant but may rent flow augmentation storage. Other than the Tribe and BOR, I think all other spaceholders clearly fall into the category of either being a participant or a non-participant to determine whether or not WD1 Rental Pool storage can be supplied by, or delivered to, a WD1 canal.

Tony

**From:** John Simpson <jks@idahowaters.com>  
**Sent:** Friday, April 15, 2022 10:43 AM  
**To:** Olenichak, Tony <Tony.Olenichak@idwr.idaho.gov>  
**Cc:** Jerry Rigby (jrigby@rex-law.com) <jrigby@rex-law.com>  
**Subject:** Participation

Tony,

I believe it is important to fully understand your perspective on the non-participant prohibition on leased water under procedures 6.1, 10.3 or any other Rental Pool procedure addressing the rights or limitations associated with participation in the Common Pool. I fully understand that the Committee of Nine may or may not adopt your perspective but you do have a level of influence on motions being made.

1. May a non-participating spaceholder receive water rented through the large pool (50,000 ac-ft)? The word "receive" as used in these questions, is interpreted as the ability to divert and put to beneficial use on decreed lands of the spaceholder.
2. May a non-participating spaceholder receive water rented through the small pool (5,000 ac-ft)?
3. May a non-participating spaceholder receive water assigned and delivered to the spaceholder's headgate. Assigned water would originate from a private lease (Procedure 6.0) or through the assignment pool (Procedure 10).
4. May a non-participating spaceholder convey assigned or leased water to a wateruser within the spaceholder's decreed boundary, if the spaceholder is not a party to the lease or assignment?
5. May a non-participating spaceholder convey assigned or leased water to a wateruser outside of the spaceholder's decreed boundary where the wateruser pays for such request?
6. Does the rental of water, by a non-spaceholder or a non-participating spaceholder from the Shoshone Bannock Tribes have the same restrictions/interpretations applicable to private leased water and common pool water received or conveyed by non-participants?

Thanks for your input.

John K. Simpson  
Barker Rosholt & Simpson LLP  
1010 W. Jefferson, Suite 102  
P.O. Box 2139  
Boise, Idaho 83701-2139  
Phone: 208.336.0700  
Fax: 208.344.6034  
[www.idahowaters.com](http://www.idahowaters.com)

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

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

Docket No. CM-DC-2010-001

Docket No. CM-MP-2016-001

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

**BACKGROUND**

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

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

Second, the SWC seeks a status conference related to the stipulated mitigation plan submitted by the SWC and the Idaho Ground Water Appropriators, Inc. (“IGWA”) and previously approved by the Director. *Id.* The plan committed signatory ground water districts to “a total ground water diversion reduction of 240,000 acre-feet annually.” *Id.* (citation omitted). IGWA’s recent performance report shows that the ground water districts only reduced their diversions by 122,784 acre-feet in 2021. *Id.* The SWC states, “IGWA and its junior priority ground water right members are not operating in accordance with the approved plan and are failing to mitigate the material injury to [SWC] members.” *Id.* at 3. The SWC asks the Director for a status conference “to address what actions he intends to take in 2022 in response to this non-compliance and enforcement of the order approving the mitigation plan.” *Id.*

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

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

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

## RESPONSE

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

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

The first step is to have the steering committee review the available technical information. *2nd Addendum* ¶ 2.c.i. Then, if the steering committee finds a breach of one of the long-term practices of the plan (like the diversion reduction component), the steering committee is required to notify the breaching party in writing. *Id.* ¶ 2.c.iii. If the breaching party fails to cure the breach, the steering committee then reports the breach to the Director. *Id.* If the SWC and IGWA do not agree that a breach has occurred or cannot agree upon actions that must be taken by the breaching party to cure the breach, the steering committee will report this to the Director and ask the Director to determine if a breach has occurred. *Id.* ¶ 2.c.iv.

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

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

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

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

### **NOTICE OF STATUS CONFERENCE**

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

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

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

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



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

Dated this 5<sup>th</sup> day of May 2022.

  
\_\_\_\_\_  
GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

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

John K. Simpson Travis L. Thompson BARKER ROSHOLT & SIMPSON, LLP P. O. Box 63 Twin Falls, ID 83303-0063 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlr@idahowaters.com">tlr@idahowaters.com</a> <a href="mailto:nls@idahowaters.com">nls@idahowaters.com</a> <a href="mailto:jf@idahowaters.com">jf@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 <a href="mailto:wkf@pmt.org">wkf@pmt.org</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
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RESPONSE TO REQUEST FOR STATUS CONFERENCE; NOTICE OF STATUS  
CONFERENCE—Page 6

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

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

\_\_\_\_\_  
IN THE MATTER OF IGWA'S )  
SETTLEMENT AGREEMENT )  
MITIGATION PLAN )  
\_\_\_\_\_)

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

**SURFACE WATER COALITION'S  
NOTICE OF STEERING  
COMMITTEE IMPASSE / REQUEST  
FOR STATUS CONFERENCE**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively hereafter referred to as the “Surface Water Coalition”, “Coalition”, or “SWC”), by and through their counsel of record, and hereby provide the following notice and request related to the above-captioned matters.

**I. Ground Water Districts’ Compliance with Approved Mitigation Plan**

The Director approved the stipulated mitigation plan submitted by SWC and IGWA on May 2, 2016. *See Final Order Approving Stipulated Mitigation Plan*. Pursuant to the plan the signatory<sup>1</sup> ground water districts and their members agreed to “a total ground water diversion reduction of 240,000 acre-feet annually.” *See Order* at 2. On Friday April 1, 2022, counsel for IGWA submitted the districts’ 2021 performance report. As detailed in that report, the signatory ground water districts only performed 56,953 acre-feet in diversion reductions and 65,831 acre-feet in recharge for a total of 122,784 acre-feet. IDWR recently submitted its verification report on June 30, 2022. *See Brian Ragan June 30, 2022 Memo*. IDWR’s numbers differed from IGWA’s in that IDWR assumed (0) diversion for various wells within Carey Valley and North Snake Ground Water Districts. *See id. at 3, Table 2 Notes*. Further, IDWR’s reduction calculations were significantly different than IGWA’s resulting in IDWR using a diversion reduction value of 66,586 acre-feet compared to IGWA’s number of 56,952 acre-feet. The Coalition requests further review of this issue given the large disparity. IDWR also used a smaller recharge value which was 1,514 acre-feet less than IGWA’s. *See Memo at 5, Table 4*.

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<sup>1</sup> The nine signatory ground water districts are Aberdeen-American Falls, Bingham, Bonneville-Jefferson, Carey Valley, Fremont Madison Irrigation District, Jefferson-Clark, Madison, Magic Valley, and North Snake. A&B Irrigation District and Southwest Irrigation District are not part of the districts’ obligation under the settlement agreement or mitigation plan. IGWA has erroneously included A&B and SWID as part of its 240,000 af calculations every year, but until this year the nine districts have exceeded the 240,000 af reduction requirement. The Coalition expressly requests the Director to address this issue as well.

Regardless, even assuming IDWR's number is correct (which the Coalition disputes and requests further review and audit), the nine signatory ground water districts' 2021 actions were at least 109,097 acre-feet short of what is required by the stipulated mitigation plan and the Director's order approving the same. Consequently, IGWA and its junior priority ground water right members are not operating in accordance with the approved plan and are failing to mitigate the material injury to the Coalition members. *See* CM Rule 40.05. The over-pumping in 2021 has caused additional depletions to reach gains which have resulted in reduced water supplies to the Coalition's storage and natural flow water rights, both through the winter of 2021-22 and throughout the 2022 irrigation season.

The Surface Water Coalition requests the Director to address what actions he intends to take in response to this non-compliance and enforcement of the order approving the mitigation plan.

## **II. Steering Committee Impasse**

In the *Response to Request for Status Conference*, the Director noted the following:

The first step is to have the steering committee review the available technical information. . . . If the SWC and IGWA do not agree that a breach has occurred or cannot agree upon actions that must be taken by the breaching party to cure the breach, the steering committee will report this to the Director and ask the Director to determine if a breach has occurred.

*Response at 2.*

The Steering Committee held meetings on May 18<sup>th</sup>, June 27<sup>th</sup>, and most recently on July 13<sup>th</sup>. The above-referenced technical information was reviewed and the SWC stated its position that a breach occurred due to the signatory ground water districts' non-performance of the long-term diversion reduction actions in 2021. IGWA disagreed.

Accordingly, SWC hereby provides the Director with the requested notice that the Steering Committee reached an impasse and did not agree that a breach occurred in 2021.

### **REQUEST FOR STATUS CONFERENCE**

The Coalition respectfully requests the Director set a status conference to address the above following issues regarding IGWA's approved mitigation plan:

- 1) IGWA's annual diversion reduction requirement (annual or average?)
- 2) What that requirement is? (240,000 af or something less?)
- 3) Whether IGWA complied in 2021 based upon its technical information and IDWR's review of the same (as identified in April 1 and June 30 reports)
- 4) Disparity in those reports (what was the actual number for both diversion reduction and recharge that occurred in 2021)
- 5) Director's planned action in response to IGWA's non-compliance with mitigation plan.

The Coalition is fully committed to the Settlement Agreement, the stipulated mitigation plan, and their effective and successful implementation. To Coalition would request a status conference be set as soon as possible to address the above pending issues.

DATED this 21<sup>st</sup> day of July, 2022.

**BARKER ROSHOLT & SIMPSON LLP**



John K. Simpson  
Travis L. Thompson

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

**FLETCHER LAW OFFICE**



for  
W. Kent Fletcher

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

## CERTIFICATE OF SERVICE

I hereby certify that on this 21<sup>st</sup> day of July, 2022, I served a true and correct copy of the foregoing *Surface Water Coalition's Notice of Steering Committee Impasse / Request for Status Conference* on the following by the method indicated:

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Travis L. Thompson

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

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

Docket No. CM-DC-2010-001

Docket No. CM-MP-2016-001

**NOTICE OF STATUS CONFERENCE**

**BACKGROUND**

On July 21, 2022, the Surface Water Coalition (“SWC”) filed with the Idaho Department of Water Resources (“Department”) the *Surface Water Coalition’s Notice of Steering Committee Impasse/Request for Status Conference* (“Request”) in the above-captioned matters.<sup>1</sup> In the Request, the SWC alleges that the ground water districts are not complying with the stipulated mitigation plan approved by the Director on May 2, 2016.<sup>2</sup> *Request* at 2. The SWC states that the allegations of noncompliance have been reviewed by the steering committee, as required by the approved mitigation plan, and that the SWC and the Idaho Ground Water Appropriators, Inc. (“IGWA”) have reached an impasse on whether there has been a breach. *Id.* at 3-4. The SWC requests the Director set a status conference to discuss the allegations of noncompliance. *Id.* at 4. The SWC also requests a status conference to discuss discrepancies between the numbers in IGWA’s 2021 performance report and IDWR’s verification report. *Id.*

The Director will grant the SWC’s request for a status conference. The status conference will be set for August 5, 2022, at the time and location described below.

**NOTICE OF STATUS CONFERENCE**

The Director hereby notifies the parties that a status conference in this matter will be held on **August 5, 2022, at 10:00 a.m. (MST)**, at the Department’s State Office, located at 322 E.

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

<sup>2</sup> After May 2, 2016, the parties agreed to modify their stipulated mitigation plan. On May 9, 2017, the Director issued a *Final Order Approving Amendment to Stipulated Mitigation Plan* (“Amended Plan”). The Amended Plan includes a process that calls for the parties to first raise compliance disputes with the joint steering committee. *Second Addendum to Settlement Agreement* at 3 (December 14, 2016).

Front Street, 6th Floor, Boise, Idaho. All parties to the matter must be represented at the status conference in person or by video conference.

To join the conference via computer or smartphone, please click the following Webex link, follow the prompts, and wait to be admitted by the meeting host:

<https://idahogov.webex.com/idahogov/j.php?MTID=m78f1a435dac9d9b4b55cfcfd62d74668>

To join the conference via telephone, please dial 1(415) 655-0001 (US Toll) and enter the following meeting access code when prompted: **2465 943 7520**

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

The conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations to attend, participate in, or understand the conference, please advise the Department no later than five (5) days before the conference. Inquiries for special accommodations should be directed to Sarah Tschohl, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4800.

Dated this 26<sup>th</sup> day of July 2022.



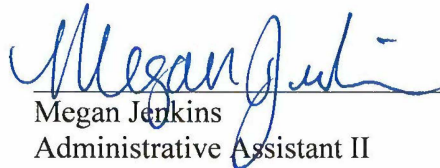
GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26<sup>th</sup> day of July 2022, the above and foregoing, was served by the method indicated below, and addressed to the following:

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**STATE OF IDAHO**  
**DEPARTMENT OF WATER RESOURCES**

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

IN THE MATTER OF IGWA’S SETTLEMENT  
AGREEMENT MITIGATION PLAN

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

**IGWA’s Response to Surface Water  
Coalition’s Notice of Steering  
Committee Impasse**

Idaho Ground Water Appropriators, Inc. (“IGWA”)<sup>1</sup> submits this response to the Surface Water Coalition’s Notice of Impasse / Request for Status Conference (“SWC Notice”) filed July 21, 2022, in this matter.

The SWC Notice requests a status conference to address several issues related to IGWA’s compliance with section 3.a.i. of the IGWA-SWC Settlement Agreement. The SWC Notice was filed pursuant to section 2.c.iv of the Second Addendum to Settlement Agreement which allows the Director to “evaluate all available information, determine if a breach occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.”

On July 26, 2022, the Director issued a Notice of Status Conference granting the SWC’s request and scheduling a status conference on August 5, 2022. The Notice of Status Conference does not ask IGWA file a response to the SWC Notice. Nevertheless, to better inform the Director of the issues before him, IGWA provides this response. IGWA reserves the right to

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<sup>1</sup> IGWA is an umbrella organization that represents the interests of the nine ground water districts who are parties to the IGWA-SWC Settlement Agreement: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Henry’s Fork Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

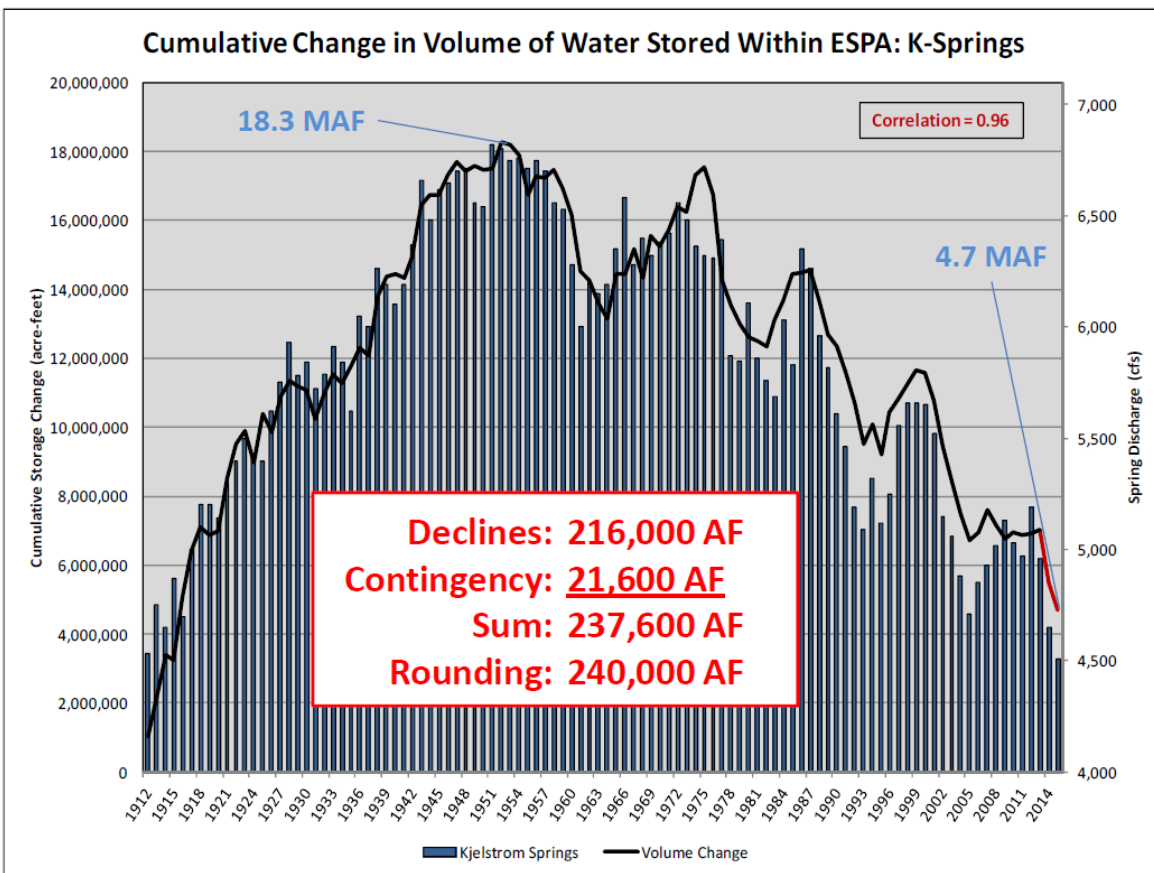
supplement this response based on information presented at the August 5 status conference.

The SWC Notice lists five questions related to IGWA's compliance with section 3.a.i of the Settlement Agreement. (SWC Notice, p. 4.) Answers to those questions depend on two primary issues: (i) whether the districts represented by IGWA bear responsibility for the full 240,000 acre-feet of groundwater conservation or only their proportionate share, and (ii) whether each district's diversion reduction is measured on an annual or an average basis.

As explained below, IGWA is in compliance with section 3.a.i because (a) the plain language of the Agreement provides that each participating district is responsible for its "proportionate share" of the 240,000 acre-feet, (b) the Agreement states that compliance will be measured on a five-year rolling average, and (c) each district's conservation activities have exceeded its proportionate share of 240,000 acre-feet over the last five years.

**A. Each ground water district is responsible for its "proportionate share" of the 240,000 acre-feet of groundwater conservation.**

The IGWA-SWC Settlement Agreement was entered into after a prolonged period of litigation between the SWC and IGWA. The parties determined that, instead of periodic curtailments under the Methodology Order, a more effective way to provide a secure water supply for the SWC is through a long-term program to reverse the trend of declining ESPA water levels which supply water to the Blackfoot to Minidoka reach of the Snake River. The following chart served as the centerpiece of the settlement negotiations:



In the decades preceding the settlement, the ESPA experienced an average annual decline of 216,000 acre-feet. To arrest this decline and place the ESPA on a path to recovery, the parties agreed that a 240,000 acre-foot change in the water budget was warranted. The State of Idaho stepped up to assist with the recovery by committing to perform at least 250,000 acre-feet of managed aquifer recharge on average.

One point of concern for IGWA was that it did not want to bear responsibility to mitigate for groundwater diversions by non-IGWA members. IGWA expected A&B Irrigation District, Southwest Irrigation District, cities, and others to mitigate for their own water use. Accordingly, section 3.a.i contemplates an aquifer-wide reduction in groundwater use. It reads: “Total ground water diversion shall be reduced by 240,000 ac-ft annually.” It does not read: “IGWA will reduce ground water diversions by 240,000 ac-ft.” This distinction is significant. Other provisions in the Agreement impose obligations on IGWA and its members specifically, including section 2.a (“IGWA on behalf of its member districts will acquire a minimum of 110,000 ac-ft for assignment”), section 3.b.i (“IGWA will provide 50,000 ac-ft of storage water through private leases”), section 3.b.ii (“IGWA shall use its best efforts to continue existing conversions in Water Districts 130 and 140”), and section 3.f (“IGWA’s contributions to the State sponsored recharge program will be targeted for infrastructure and operations above American Falls”). By contrast, section 3.a.i is general in nature. It does not require IGWA to reduce diversions by 240,000 acre-feet because the decline in aquifer storage was the product of all groundwater diversions from the ESPA, not just IGWA’s diversions, and the parties expected that all groundwater users would be required to provide mitigation, not just IGWA.

Section 3.a.ii of the Agreement confirms that the districts represented by IGWA are responsible only for their “proportionate share” of the aquifer recovery goal: “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.” (Emphasis added.) Because IGWA districts do not account for all pumping from the ESPA, they are responsible for mitigating for only their proportionate share. The parties contemplated that A&B Irrigation District, Southwest Irrigation District, cities, and other non-IGWA members would be required to provide additional mitigation, above and beyond the mitigation provided by IGWA, to aid in recovering the ESPA.

And that’s what happened. The SWC entered into separate settlement agreements with A&B Irrigation District, Southwest Irrigation District, and the Coalition of Cities. The A&B agreement states that “[t]he obligations of Ground Water Districts set forth in paragraph 2-4 of the Settlement Agreement do not apply to A&B and its ground water rights.” This does not mean that IGWA is responsible to mitigate for A&B’s proportionate share of the 240,000 acre-feet; it means that A&B would provide its own mitigation via conversions under the terms of its settlement agreement. The Coalition of Cities agreement similarly states that “aquifer enhancement activities performed by the Signatory Cities under this Agreement shall be in addition to aquifer enhancement activities performed by IGWA under the IGWA-SWC Settlement Agreement or by the IWRB under Idaho Senate Concurrent Resolution no. 136 (2016).” While many of the cities are members of IGWA districts or are located within the boundaries of IGWA districts, the mitigation provided by the Coalition of Cities would be in addition to, and would not be credited toward, IGWA’s mitigation under the IGWA-SWC Settlement Agreement.

Consistent with the foregoing, IGWA has from the outset allocated to its members a proportionate share of the 240,000 acre-feet. To calculate IGWA’s proportionate share, IGWA



deducted groundwater diversions within A&B Irrigation District, Southwest Irrigation District, and Falls Irrigation District, as set forth in IGWA's first performance report in 2016:

<b>2016 Performance Summary Table</b>		
<b>(all values in acre-feet)</b>		
	<b>Diversion Baseline</b>	<b>Target Conservation</b>
Aberdeen - American Falls GWD	271,989	33,595
Bingham GWD	282,476	34,890
Bonneville - Jefferson GWD	147,337	18,198
Carey Valley GWD	5,671	700
Jefferson - Clark GWD	438,634	54,178
Fremont-Madison ID/Madison GWD <sup>1</sup>	43,491	5,372
Magic Valley GWD	261,877	32,346
A&B ID <sup>3</sup>	174,735	21,582
North Snake GWD <sup>2</sup>	205,501	25,382
Southwest ID <sup>3</sup>	104,417	12,897
Falls ID <sup>3</sup>	6,968	861
<b>Total:</b>	<b>1,943,096</b>	<b>240,000</b>

At the time, IGWA had not queried diversion data for cities and other non-IGWA members who make up a small percentage of diversions from the ESPA. In hindsight, such other use should also have been allocated a proportionate share of the 240,000 acre-feet.

In 2017 the SWC asked IGWA to remove A&B, Southwest, and Falls from the 240,000 acre-feet allocation because they were not signatory to the Settlement Agreement. IGWA agreed to remove Falls because its diversions are relatively small, partly outside the ESPA boundary, and under very old priority dates. IGWA refused to remove A&B or Southwest because their pumping contributes significantly to SWC reach gains, and section 3.a.ii protects IGWA from having to mitigate for non-IGWA members.

IGWA's performance reports have continuously allocated to IGWA districts a proportionate share of the 240,000 acre-feet. To now require IGWA to bear responsibility for the full 240,000 acre-feet would undermine the basis of the bargain and contradict the plain language of the Settlement Agreement and the parties' course of dealings.

**B. The Settlement Agreement provides that compliance with section 3.a.i will be measured on a five-year rolling average.**

While section 3.a.i of the Agreement clearly requires each district to reduce its diversions by a proportionate share of 240,000 acre-feet, it does not explain how those reductions will be measured. It would be simple if the amount of groundwater pumped from the ESPA were static, but it is not—more water is naturally pumped during hot and dry years than in cool and wet years. Reducing groundwater diversions by 240,000 acre-feet (approximately 12% of total groundwater use) would still result in IGWA pumping more water in dry years and less water in wet years—it would simply be 12% less than would have otherwise been pumped.

In an ideal world we would know how much groundwater would be diverted in a given year without conservation measures in place, and then compare that with actual diversions to

determine whether each district conserved its proportionate share of 240,000 acre-feet. Of course, that’s impossible because farmers cannot farm the same land in the same year both with and without conservation measures in place.

The only way to determine whether IGWA is conserving water is to compare diversions before the Settlement Agreement with diversions after the Settlement Agreement. And since groundwater diversions naturally fluctuate from year-to-year, diversions must be compared over a multi-year period if the comparison is to be reliable. Fortunately, section 3.e.iv of the Agreement does explain how this will be done. It states: “When the ground water level goal is achieved for a *five-year rolling average*, ground water diversion reductions may be reduced or removed, so long as the ground water level goal is sustained.”<sup>2</sup> (Emphasis added.)

Since compliance is measured on a five-year average, IGWA used a five-year average for the period 2010-2014 to define the pre-Settlement Agreement baseline from which groundwater conservation will be measured. The five-year average used to define the baseline has been reported to the SWC and to IDWR from the outset of the Settlement Agreement.

**C. Each ground water district’s conservations efforts exceeded its proportionate share of 240,000 acre-feet over the five-year period 2017-2021.**

IGWA’s collective share of 240,000 acre-feet is 205,397 acre-feet. For the five-year period 2017-2021, IGWA’s average conservation was 347,220 acre-feet per year—an excess of 141,823 acre-feet. Individually, each ground water district exceeded its proportionate share of the 240,000 acre-feet by at least 27 percent as shown in the table below. While 2021 was especially challenging due to lack of rain, exceptionally dry weather, a constrained surface water supply, and other factors, each IGWA district remains in compliance with section 3.a.i of the Settlement Agreement.

IGWA Conservation 2017-2021								
	Target Conservation	2017	2018	2019	2020	2021	Average	% of Target
American Falls-Aberdeen	33,715	95,851	66,779	78,288	50,335	14,569	61,164	181%
Bingham	35,015	84,437	48,161	66,316	38,728	-15,036	44,521	127%
Bonneville-Jefferson	18,264	68,346	32,365	33,133	11,033	3,155	29,606	162%
Carey	703	4,535	4,284	4,787	2,308	1,335	3,450	491%
Jefferson-Clark	54,373	126,756	86,656	59,755	67,457	42,737	76,672	141%
Henry’s Fork / Madison	5,391	33,661	57,021	60,537	67,892	15,189	46,860	869%
Magic Valley	32,462	36,872	45,295	67,501	34,726	35,341	43,947	135%
North Snake <sup>3</sup>	25,474	44,925	42,436	56,420	35,720	25,494	40,999	161%
A&B <sup>4</sup>								
Southwest ID <sup>4</sup>								
Total:	205,397	495,383	382,997	426,737	308,199	122,784	347,220	

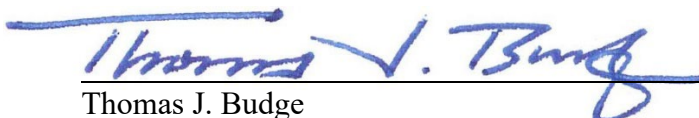
<sup>2</sup> A five-year average is also used to measure compliance under the Cities Settlement Agreement and to measure compliance with ground water management plans in the Oakley Valley.

## CONCLUSION

For the foregoing reasons, IGWA respectfully requests that the Director confirm that each participating ground water district is responsible for its “proportionate share” of the 240,000 acre-feet, that compliance is measured on a five-year rolling average, and that IGWA is in compliance with the Settlement Agreement for the period 2017-2021.

DATED this 3<sup>rd</sup> day of August, 2022.

RACINE OLSON, PLLP




Thomas J. Budge

*Attorneys for Idaho Ground Water  
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## CERTIFICATE OF SERVICE

I hereby certify that on this 3<sup>rd</sup> day of August, 2022, I served the foregoing document on the persons below via email:

  
Thomas J. Budge

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

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

\_\_\_\_\_)  
IN THE MATTER OF IGWA'S )  
SETTLEMENT AGREEMENT )  
MITIGATION PLAN )  
\_\_\_\_\_)

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

**SURFACE WATER COALITION'S  
REPLY TO IGWA'S RESPONSE**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively hereafter referred to as the “Surface Water Coalition”, “Coalition”, or “SWC”), by and through their counsel of record, and hereby file this reply in response to *IGWA’s Response to Surface Water Coalition’s Notice of Steering Committee Impasse* (August 3, 2022) (hereinafter “*Response*”).

## **REPLY**

IGWA does not dispute its 2021 performance under the Settlement Agreement (i.e. 122,784 acre-feet). *Response* at 5. IGWA does however dispute whether this underperformance results in a breach of the Agreement and compliance with its approved Mitigation Plan. Consequently, the parties are at an impasse and the Director is left to determine whether this performance was short of what was required by the Agreement and the approved Mitigation Plan. IGWA argues that its underperformance is acceptable based upon an erroneous interpretation of the Settlement Agreement. Rather than point to actual language in the agreement, IGWA bases its claims on unstated intent and internal calculations and theory. As explained below, IGWA’s efforts to justify its performance based upon a misreading of the Agreement should be denied.

### **I. Ground Water Districts’ 240,000 AF Annual Consumptive Use Volume Reduction.**

IGWA attempts to persuade the Director that its signatory ground water districts did not breach the Settlement Agreement in 2021 on the theory that: 1) other non-parties have a share of the 240,000 acre-feet annual reduction; and 2) the reduction is evaluated based upon a five-year rolling average. *Response* at 2-5. Both of these arguments have no support in the actual Agreement and should be rejected on their face.

First, the Settlement Agreement was executed by the seven Coalition members and the eight ground water districts and Fremont-Madison Irrigation District. *See* Settlement Agreement signature pages. IGWA’s attempt to inject non-parties into this issue is contrary to basic contract interpretation and should be rejected. *See Greater Boise Auditorium Dist. v. Frazier*, 159 Idaho 266, 274 (2015) (non-parties are generally not bound by contracts they did not enter into). In short, non-parties are not responsible for the districts’ annual obligation under the Agreement.

Next, the Settlement Agreement includes the following “Long Term Practices” that commenced in 2016:

- a. *Consumptive Use Volume Reduction*
  - i. Total ground water diversion shall be reduced by 240,000 ac-ft annually.
  - ii. Each Ground Water District 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.

Settlement Agreement at 2, ¶ 3.a.

An unambiguous contract will be given its plain meaning. *See Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 723 (2012). The above language is plain and unambiguous and should be enforced by the Director. *See Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 264 (2011). The Agreement simply requires the signatory districts to reduce their total ground water diversion by 240,000 acre-feet per year.<sup>1</sup> There is no basis to construe the Agreement or examine IGWA’s intent and its version of history leading up to the Agreement’s execution. *See Seward v. Musick Auction, LLC*, 164 Idaho 149, 158 (2018) (“A

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<sup>1</sup> How IGWA allocated its member signatory districts’ proportionate share of the 240,000 acre-feet is not relevant for purposes of this issue before the Director. *See Response* at 3-4. The fact IGWA erroneously included other non-parties as part of that calculation is its unilateral internal mistake based upon a misreading of the Agreement.



party's subjective, undisclosed intent is immaterial to the interpretation of a contract"). What IGWA believed and intended concerning other non-party ground water users is irrelevant to the Agreement that it signed and has a duty to perform.

Moreover, there is nothing in the Agreement that indicates IGWA's "Long Term Practices" are the obligations of non-parties. Since the term "Each Ground Water District and Irrigation District" refers to the nine signatory districts, it is obvious IGWA did not allocate any share of that reduction to its other listed non-signatory members (i.e. "Anheuser-Busch, United Water, Glanbia Cheese . . ."). See Agreement at 1, n. 2. Further, as admitted by IGWA, the separate settlement agreement with the A&B Irrigation District as to its ground water rights supports the fact that the long-term practices apply solely to the ground water districts, not other non-parties. See *A&B Settlement Agreement* at 1, ¶ 2 ("The obligations of the Ground Water Districts set forth in Paragraphs 2 – 4 of the *Settlement Agreement* do not apply to A&B and its ground water rights"). IGWA's attempt to use this separate agreement to mean that other non-parties would share in the 240,000 acre-feet reduction is non-sensical. The agreement plainly states otherwise.

The plain language of the Settlement Agreement requires the signatory districts to reduce their total groundwater diversions by 240,000 acre-feet annually. Any attempt to interpret the Agreement as stating anything else is flat wrong and should be rejected.

## **II. IGWA's Diversion Reduction Compliance is an Annual Requirement, Not Based on a Five-Year Rolling Average.**

IGWA cannot escape the plain language of Paragraph 3.a.i which requires "Total ground water diversion shall be reduced by 240,000 ac-ft annually." The term "annually" is an unambiguous term of art and is defined as follows:

In annual order or sucession; yearly, every year, year by year. At end of each and every year during a period of time. Imposed once a year, computed by the year. Yearly, or once a year, but does not in itself signify what time of year.

*Black's Law Dictionary*, p. 58 (6<sup>th</sup> Ed. 1991) (emphasis added).

Annually does not mean a five-year rolling average. IGWA ignores the plain language and argues that it is compliance with the 240,000 acre-feet annual diversion reduction requirement on the theory that “since groundwater diversions naturally fluctuate from year-to-year, diversions must be compared over a multi-year period if the comparison is to be reliable.” *Response* at 5. IGWA then claims since reductions may be reduced or removed if the ground water level goal is achieved for a five-year rolling average, then that means the annual reduction can be similarly judged. *Id.* Again, IGWA’s efforts to construe the Agreement to say something that it doesn’t are misplaced and should be rejected. There is simply no reason to conclude that the signatory ground water districts have the ability to “average” their diversion reduction requirement over a five-year period. The Director should deny IGWA’s argument accordingly.

### CONCLUSION

The Director should evaluate IGWA’s performance for 2021 and determine whether it complied with the Agreement and Mitigation Plan. Whereas the data and plain language of the Agreement shows a clear breach of that obligation, the Director should reject IGWA’s arguments to the contrary.

DATED this 4<sup>th</sup> day of August, 2022.

#### **BARKER ROSHOLT & SIMPSON LLP**



Travis L. Thompson  
*Attorneys for A&B Irrigation District,  
Burley Irrigation District, Milner Irrigation  
District, NSCC and TFCC*

#### **FLETCHER LAW OFFICE**

 for

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

## CERTIFICATE OF SERVICE

I hereby certify that on this 4<sup>th</sup> day of August, 2022, I served a true and correct copy of the foregoing *Surface Water Coalition's Reply to IGWA's Response* on the following by the method indicated:

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Travis L. Thompson

Aug 12, 2022

DEPARTMENT OF  
WATER RESOURCES

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## STATE OF IDAHO

### DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF IGWA'S SETTLEMENT  
 AGREEMENT MITIGATION PLAN

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

### **IGWA's Supplemental Response to Surface Water Coalition's Notice of Steering Committee Impasse**

Idaho Ground Water Appropriators, Inc. ("IGWA")<sup>1</sup> submits this supplemental response to the Surface Water Coalition's Notice of Impasse / Request for Status Conference ("SWC Notice") filed July 21, 2022, in this matter.

The SWC Notice asks the Director of the Idaho Department of Water Resources ("IDWR" or "Department") to address certain issues related to IGWA's compliance with the IGWA-SWC Settlement Agreement. In response, the Director issued a Notice of Status Conference on July 26, 2022, and held a status conference on August 5, 2022. The Notice of Status Conference did not request briefing, affidavits, or oral argument. On August 3, 2022, IGWA filed a written response to the SWC Notice to better inform the Director of the issues before him. IGWA's response reserved the right to provide supplemental information following

<sup>1</sup> IGWA is an umbrella organization that represents the interests of the nine ground water districts who are parties to the IGWA-SWC Settlement Agreement: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Henry's Fork Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

the conference.

IGWA submits this supplemental response primarily to show that the rules of procedure of the Department preclude the Director from making a decision on the issues raised in the SWC Notice until the SWC files a proper motion and the parties file briefs and supporting affidavits.

Should the Director elect to decide the issues without a motion, briefs, and affidavits, this supplemental response provides additional information to demonstrate that compliance with section 3.a of the Agreement should be measured on a five-year rolling average based on the plain language of the Agreement. If the Director finds that the plain language does not warrant a five-year average, then the Agreement is ambiguous and parol evidence must be introduced to determine the intent of the parties as to how compliance is measured. This must be done before the Director can take action on the SWC Notice.

Lastly, IGWA submits supplemental information to address an issue that was not listed in the SWC Notice but was raised by the Director at the August 5 status conference; namely, whether a breaching party must be given an opportunity to cure the breach. If the Director determines that a breach occurred, the Agreement explicitly requires that the breaching party be given 90 days to cure the breach.

**A. IDWR rules of procedure require the SWC to file a motion, and that parties be permitted to submit briefs and supporting affidavits, before the Director decides the issues listed in the SWC Notice.**

The SWC Notice asked that the Director set a “status conference” to address five issues listed in the SWC Notice. Accordingly, the Director scheduled a “status conference.” The designation of the August 5 meeting as a status conference is significant because status conferences are not typically used to make decisions on the merits of a case; they are used to address procedural matters and stipulations of the parties in accordance with rules 510 and 511 of the Department’s rules of procedure. Decisions on contested matters are typically made after the filing of briefs, affidavits, and a hearing in accordance with rules 550-562.

Since the August 5 meeting was designated a status conference, IGWA did not anticipate that the Director would take formal argument and issue a decision on the issues listed in the SWC Notice. However, the Director solicited oral argument at the status conference and stated that he intended to issue a written decision in 2-3 weeks.

For the Director to decide the issues listed in the SWC Notice, the SWC Notice must be treated as a “motion” under the rules of procedure. Rule 220 defines “motion” as “a request to the agency to take an action in a contested case.” (IDAPA 37.01.01.220.) The SWC Notice does not qualify as a motion because it does not contain the information required by rule 300.02, which requires the moving party to fully state “the facts upon which it is based” and “the relief sought,” among other things. (IDAPA 37.01.01.220.) The SWC did not submit affidavits setting forth facts in support of the SWC Notice, nor does the SWC Notice state the relief sought; it simply asks the Director to “address” the issues listed. Since the SWC Notice does not qualify as a motion under rule 220, the director cannot take action on the issues listed in the SWC Notice.

Even if the SWC Notice qualified as a motion, the Director cannot issue a decision without following the procedures required by rule 220.02, including the filing of briefs and supporting affidavits by the SWC, the filing of briefs and supporting affidavits by responding parties, the filing of a reply brief by the SWC, and oral argument if requested. In this case, no supporting brief or affidavit was filed by the SWC, the status conference was held prior to the deadline set forth in the rules for filing responsive briefs and affidavits, and no party was advised that the

Director intended to take action on the SWC Notice.

Therefore, IGWA respectfully requests that the Director decline to take action on the issues listed in the SWC Notice for failure to comply with applicable rules of procedure.

If the Director elects to take action without requiring a motion, briefs, and affidavits, the Director should consider the information provided below.

**B. Compliance with section 3.a of the Settlement Agreement must be measured on a five-year rolling average based on the plain language of the Agreement.**

The SWC Notice asks whether IGWA's conservation obligation under section 3.a of the Settlement Agreement is measured annually or on an average. (SWC Notice, p. 4.) Section 3.a.i reads: "Total ground water diversion shall be reduced by 240,000 ac-ft annually." It does not state how the reduction (commonly referred to as "conservation") is to be measured.

There is no dispute that section 3.a.i of the Agreement contemplates 240,000 acre-feet of groundwater conservation "annually." The question is how to measure annual conservation. IGWA and the SWC have presented two different methods by which compliance with section 3.a could be measured. IGWA contends that compliance should be determined on a five-year rolling average. The SWC contends that compliance should be measured by taking average groundwater diversions from 2010-2014, reducing the average by 240,000 acre-feet, and treating the reduced average as a fixed diversion cap.

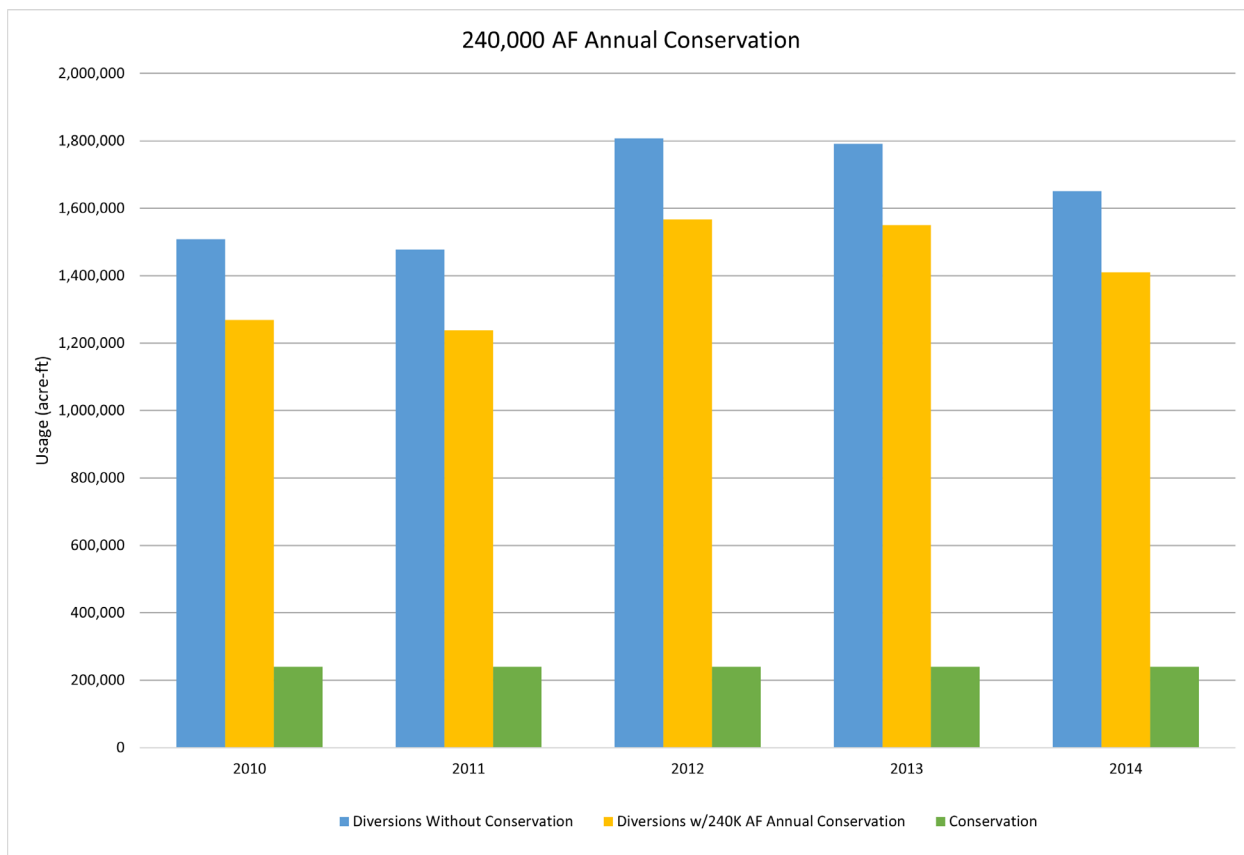
When interpreting a contract, it must be read "as a whole, not by an isolated phrase." *McFarland v. Liberty Ins. Corp.*, 164 Idaho 611, 618 (2019) (quoting *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 663 (2005)). "Although reading a term or provision in isolation can create an ambiguity, reading the [contract] as a whole can remove the ambiguity by rendering one of the possible interpretations unreasonable." *Id.*

As explained below, use of a five-year average as proposed by IGWA is grounded in the plain language of the Agreement. The SWC's fixed cap proposal is not, and it leads to a result that contradicts the plain language of the Agreement.

Looking backward, we know how much groundwater would have been pumped if 240,000 acre-feet were conserved annually in the years leading up to the Agreement, because we know how much groundwater was diverted during those years without conservation. The following chart shows actual diversions from 2010-2014 versus diversions that would have occurred with 240,000 acre-feet of conservation annually:<sup>2</sup>

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<sup>2</sup> Diversion volumes exclude usage from 192 wells in Madison Ground Water District and Henry's Fork Ground Water District that were not under measurement orders during the 2010-2014 time period. To account for null values within the WMIS database, an averaging factor was applied. Adjustments were made to some diversions to correct errors, as identified in IGWA's annual performance reports submitted to the SWC and IDWR.

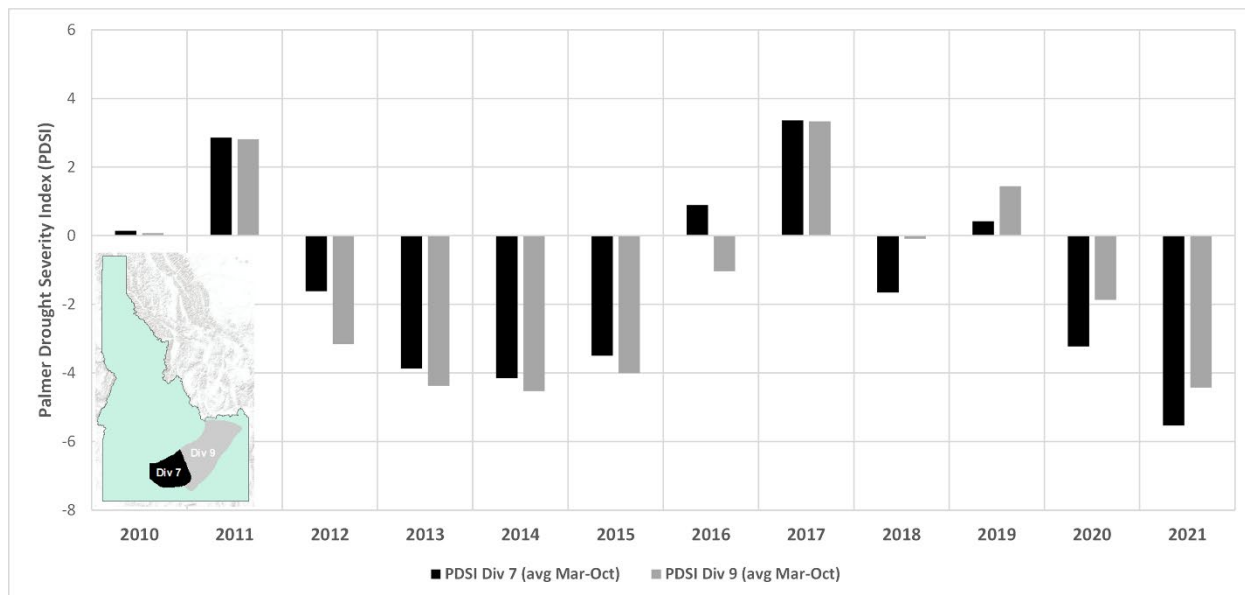


The above chart shows that groundwater diversions fluctuate considerably based on climatic conditions. When the Agreement was signed in 2015, the parties could not foretell how much snow, rain, wind, and heat would occur in future years, and they knew that groundwater diversions would continue to fluctuate post-Agreement. Had groundwater users opted to achieve groundwater conservation solely by drying up farmland, groundwater diversions post-Agreement would continue to follow a pattern similar to what is shown by the yellow bars in the chart.

As expected, climatic conditions have varied considerably since the Settlement Agreement was signed in 2015, as shown by the Palmer Drought Severity Index for the Eastern Snake River Plain:<sup>3</sup>

<sup>3</sup> The Palmer Drought Severity Index (PDSI; Palmer, 1965) is a common measure of agricultural water supply conditions and is prominently used for drought monitoring. The PDSI incorporates current and precedent hydrologic components including precipitation, temperature, potential evaporative demand, and water-holding capacity of soils to determine the cumulative departure in the surface water balance. Negative values of the PDSI reflect drier-than-normal conditions and positive values reflect wetter-than-normal conditions. A value of -2.0 or lower is considered moderate drought, -3.0 and lower is considered severe drought, and values lower than -4.0 are considered extreme drought. The National Oceanic and Atmospheric Administration (NOAA) divides the lower 48 states into 344 divisions for the calculation of the PDSI. Climate Divisions 7 and 9 cover the Eastern Snake River Plain.



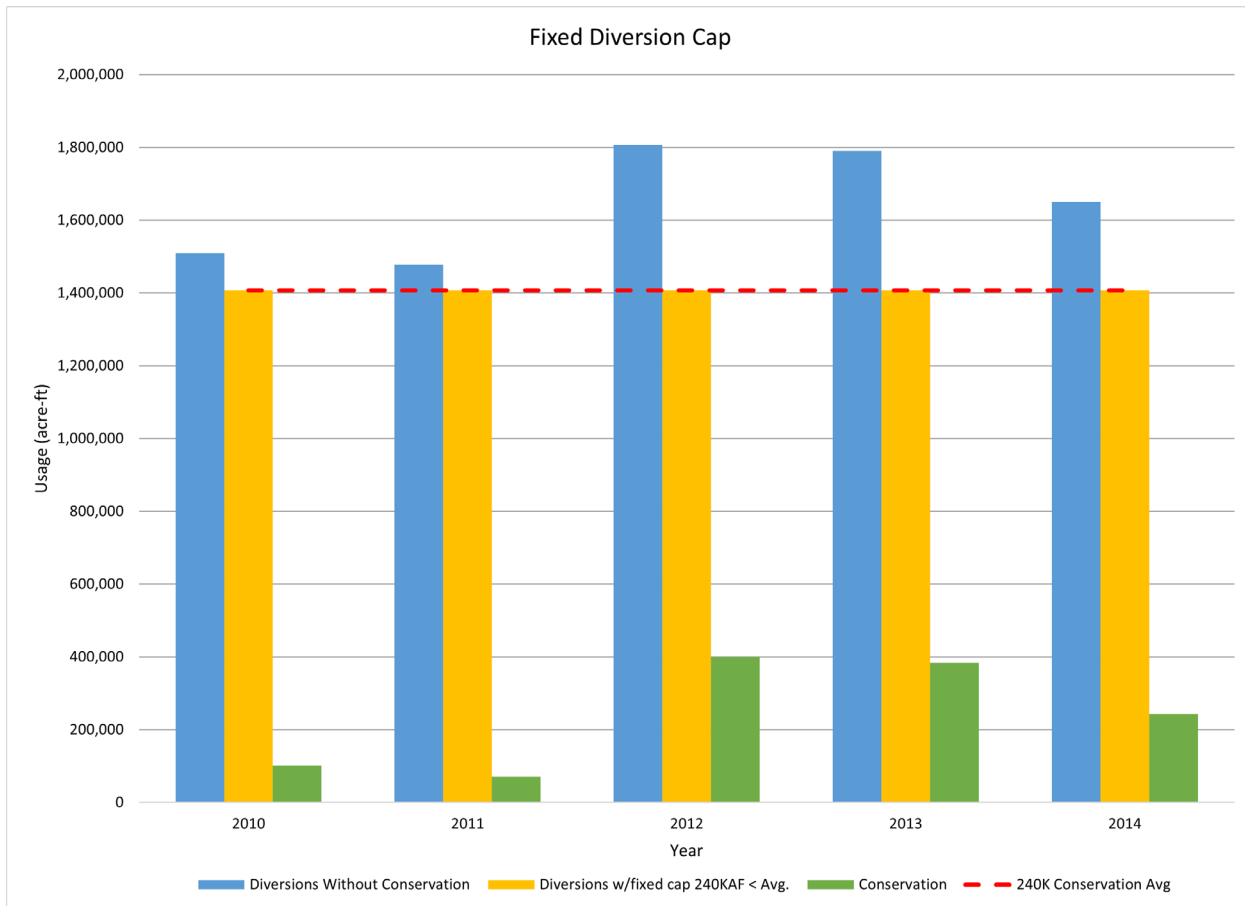


When the Settlement Agreement was signed in 2015, neither IGWA nor the SWC could foresee what climatic conditions would occur in future years. And it is impossible to measure groundwater conservation prospectively by comparing diversions both with and without taking conservation actions, because farmers cannot farm the same land in the same year both with and without conservation actions. An alternative method of measuring compliance is necessary.

The SWC has proposed that compliance be measured by using average diversions from 2010-2014 time period to establish a fixed diversion cap that is 240,000 acre-feet less than the average. While such a method is possible, it is incompatible with the plain language of the Agreement in two important respects.

First, the Agreement does not state in any way, shape, or form that average diversions from 2010-2014 would be utilized to impose a fixed diversion cap. Had that been the intent of the parties, section 3.a of the Agreement should say something like: “Total ground water diversions shall be reduced by 240,000 acre-feet annually from average diversions during the time period 2010-2014.” Instead, it states simply: “Total ground water diversions shall be reduced by 240,000 acre-feet annually.”

Second, imposing a fixed diversion cap contradicts the expectation that 240,000 acre-feet of conservation occur “annually.” The fixed cap method proposed by the SWC would require IGWA to conserve far more than 240,000 acre-feet in some years and far less than 240,000 acre-feet in other years. To illustrate, had the SWC’s method been imposed from 2010-2014, only 71,033 acre-feet of conservation would have been required to comply with the Agreement in year 2011, whereas 400,125 acre-feet of conservation would have been required in year 2012 to comply with the Agreement, as shown in the table below. This is incompatible with the plain language requiring 240,000 acre-feet of conservation “annually.”



In practice, the fixed cap method would be much more drastic if applied prospectively because it would force groundwater irrigators to make planting decisions every year based on the hottest and driest summer possible. When farmers make planting decisions in the spring, they have no idea how much rain will fall, how much wind will blow, and what air temperatures will be in May, June, July, or August. If they are required to assume the worst-case scenario every year, they will be forced to conserve far more than 240,000 acre-feet most years in order to squeak by with 240,000 acre-feet of conservation on the driest and hottest of years. This is not what they agreed to. They agreed to conserve their proportionate share of 240,000 acre-feet “annually.”

IGWA’s proposed method for measuring compliance more accurately reflects annual conservation and is grounded in the plain language of the Agreement. IGWA proposes that conservation be measured by comparing pre-Agreement diversions with post-Agreement diversions. Since groundwater diversions naturally fluctuate from year-to-year based on climatic conditions, the comparison must occur over a multi-year period to be reliable.

IGWA utilized average diversions during the five-year period immediately preceding the Agreement (2010-2014) to define the baseline against which post-Agreement conservation will be measured because the Agreement calls for compliance to be measured on a five-year average. The purpose of conserving 240,000 acre-feet under section 3.a is to “reverse the trend of declining ground water levels and return ground water levels to a level equal to the average of the aquifer levels from 1991-2001” as set forth in section 3.e.i. The Agreement provides that compliance with the groundwater level goal will be measured on “a five-year rolling average.” Because the groundwater level goal and groundwater conservation are interlinked, compliance

with the conservation obligation must be congruently measured on a five-year average. This is the only method of compliance that is grounded in the plain language of the Agreement.

Therefore, if the Director elects to decide whether IGWA is in compliance with section 3.a of the Agreement without requiring a motion from the SWC or briefs or affidavits from the parties, IGWA respectfully requests that he determine that compliance be measured on a five-year rolling average in accordance with the plain language of the Agreement. Based on a five-year average, each ground water district is currently in compliance as shown in the table below:

MITIGATION BALANCE (2021)	
5-Year Average	
American Falls-Aberdeen	27,449
Bingham	9,506
Bonneville-Jefferson	11,342
Carey	2,747
Jefferson-Clark	22,299
Henry's Fork / Madison	41,469
Magic Valley	11,485
North Snake	15,525

**C. If the Director determines that the plain language does not provide for a five-year rolling average, then the Agreement is ambiguous and parole evidence must be introduced to determine the intent of the parties.**

As stated above, the compliance method proposed by the SWC is nowhere to be found in the plain language of the Agreement. If the Director determines that a five-year rolling average is also not grounded in the plain language of the Agreement, then the Agreement is ambiguous as to how compliance is determined.

A contract is ambiguous if, after reading the agreement as a whole, there are “two different reasonable interpretations of the term.” *Swanson v. Beco Const. Co.*, 145 Idaho 59, 62 (2007). Ambiguity may be patent or latent. *Id.* “Idaho courts look solely to the face of a written agreement to determine whether it is patently ambiguous.” *Id.* (quoting *Ward v. Puregro Co.*, 128 Idaho 366, 369 (1996)). “A latent ambiguity is not evident on the face of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist.” *Id.* (quoting *In re Estate of Kirk*, 127 Idaho 817, 824 (1995)).

The parties have presented two different methods by which compliance with section 3.a may be determined. If the Director finds that the Agreement prescribes neither method, then IGWA and the SWC must be given an opportunity to introduce parole evidence to demonstrate the parties’ intent at the time the Agreement was entered into. *Simons v. Simons*, 134 Idaho 824, 828 (2000). IGWA will present evidence to show that, in addition to being consistent with the plain language of the Agreement, (a) individual IGWA members understood from the beginning that compliance would be based on an average, (b) the SWC acknowledged explicitly that compliance would be based on an average, (c) IGWA has provided far more than 240,000 acre-feet of conservation most years (compared to the baseline) with the expectation that the excess would carry forward via averaging, (d) a five-year average is used to measure compliance with diversion restrictions in critical ground water areas in the Oakley Valley, and (e) a five-year

average is used to measure compliance under the Cities' Settlement Agreement. The SWC acknowledged explicitly that compliance would be based on an average in the Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order filed March 9, 2016, which includes a proposed order stating that compliance with the 240,000 acre-feet obligation will be "based on a 3-year rolling average." The Director did not incorporate this into his order approving the mitigation plan, and IGWA ultimately implemented a five-year average based on the plain language of the Agreement and IGWA's determination that a five-year average more reliably reflects historic pumping levels than a three-year average. Had IGWA utilized a three-year average, the baseline would have been significantly higher; thus, the five-year average has benefitted the SWC by defining a lower baseline from which conservation is measured. Most importantly, the proposed order demonstrates that the parties contemplated from the beginning that compliance with section 3.a would be based on an average and not on the fixed cap method proposed by the SWC.

If parol evidence clarifies the intent of the parties, then the Director must construe the Agreement in accordance with that intent. *Id.* If parol evidence demonstrates that the parties did not reach agreement on a material term, then the Agreement is voidable: "where a contract is too vague, indefinite, and uncertain as to its essential terms, and not merely ambiguous, there has been no 'meeting of the minds' which is necessary for contract formation and courts will 'leave the parties as they found them.'" *Silicon Int'l Ore, LLC v. Monsanto Co.*, 155 Idaho 538, 551 (2013) (quoting *Griffith v. Clear Lakes Trout Co.*, 143 Idaho 733, 737 (2007)); *Brunobuilt, Inc. v. Strata, Inc.*, 166 Idaho 208, 217-18 (2020) (citation omitted). Parol evidence may also demonstrate that the Agreement is unenforceable because it is "a mere agreement to agree." *Id.* (quoting *Spokane Structures, Inc. v. Equitable Inv., LLC*, 148 Idaho 616, 621 (2010)).

Therefore, if the Director elects to take action without a motion, briefs, and affidavits, and if the Director determines that a five-year average is not called for by the plain language of the Agreement, he must solicit parol evidence to determine the intent of the parties before determining whether a breach has occurred.

**D. If the Director determines that a breach occurs, the breaching party must be given 90 days to cure the breach.**

At the August 5 status conference, the Director questioned whether he has authority to undertake curtailment if he finds that a breach occurred. Under section 2.c.iii of the Second Addendum to Settlement Agreement, if a breach occurs "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." In this instance, the Steering Committee reached an impasse as to whether a breach occurred, and no 90-day notice has been given. If the Director determines that a breach occurred, the matter must be remanded to the Steering Committee to determine what actions must be taken to cure the breach and then give the breaching party 90 days written notice to cure the breach. If the Director does not remand the matter to the Steering Committee, the Director must give 90 days written notice to the breaching party specifying actions that must be taken to cure the breach. One way or another, the Settlement Agreement entitles the breaching parties to 90 days notice and an opportunity to cure. The Director is not in a position to undertake curtailment until that happens.


It bears mentioning that an attempt to implement immediate curtailment would be catastrophic because the Department would be attempting to curtail groundwater irrigators who are almost all in compliance with the mitigation programs implemented by their respective

ground water district. The reason why IGWA pumped considerably more water in 2021 than in prior years is not because individual patrons refused to comply with their district's mitigation program; it is because every district's program includes averaging, and most patrons had accrued excess conservation in prior years that they were able to draw against in 2021.

The Settlement Agreement is unique because it requires groundwater conservation to occur long-term, both wet years and dry years, by all groundwater users (to differing degrees depending on priority), with each district implementing its own mitigation program tailored to the needs of its particular geographic area and membership. Simply reporting non-compliance to the Department curtailment would result in the wrong users being curtailed in many instances. This is why the Settlement Agreement requires a notice of breach and an opportunity to cure.

DATED this 12<sup>th</sup> day of August, 2022.

RACINE OLSON, PLLP



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Thomas J. Budge

*Attorneys for Idaho Ground Water  
Appropriators, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of August, 2022, I served the foregoing document on the persons below via email:

  
Thomas J. Budge

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

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

IN THE MATTER OF IGWA’S SETTLEMENT  
AGREEMENT MITIGATION PLAN

Docket No. CM-MP-2016-001

**NOTICE OF INTENT TO TAKE  
OFFICIAL NOTICE OF IGWA’S  
2021 SETTLEMENT  
AGREEMENT PERFORMANCE  
REPORT AND SUPPORTING  
SPREADSHEET**

On August 5, 2022, the Director of the Idaho Department of Water Resources (“Department”) held a status conference in response to a request by the Surface Water Coalition (“SWC”). During the conference, counsel for the SWC and the Idaho Ground Water Appropriators, Inc. (“IGWA”) presented argument as to whether IGWA is in breach of a settlement agreement between the SWC and IGWA that serves as an approved mitigation plan in the SWC’s delivery call. The SWC’s allegations of breach are based on IGWA’s 2021 Settlement Agreement Performance Report and supporting information contained in an electronic spreadsheet attached to the report. Although the SWC, IGWA, Director, and Department have copies of the report and spreadsheet, those documents are not in the agency record for this proceeding currently.

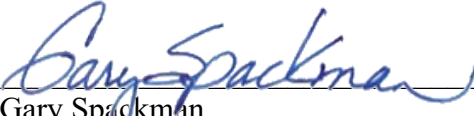
Rule 602 allows the Director to take official notice “of any facts that could be judicially noticed in the courts of Idaho and of generally recognized technical or scientific facts within the agency’s specialized knowledge . . . .” IDAPA 37.01.01.602. Further, the Director “shall notify the parties of specific facts or material noticed and the source of the material noticed.” *Id.* The notice must be provided “before the issuance of any order based in whole or in part on facts or material officially noticed.” *Id.*

The Director hereby notifies the parties that he intends to take official notice of the facts and data in IGWA’s 2021 Settlement Agreement Performance Report dated April 1, 2021, and the supporting spreadsheet attached to that report.

Concurrent with this notice, copies of those documents shall be posted to the Department’s docket for this proceeding. Pursuant to Rule 602, any party may file a written objection “to contest and rebut the facts or material to be officially noticed” on or before August 25, 2022. IDAPA 37.01.01.602.



Dated this 18th day of August 2022.

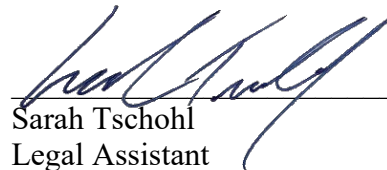
  
\_\_\_\_\_  
Gary Spackman  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of August 2022, the above and foregoing was served by the method indicated below and addressed to the following:

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STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF IGWA'S SETTLE-  
MENT AGREEMENT MITIGATION PLAN

Docket No. CM-MP-2016-001

**IGWA's Objection to Notice of Intent  
to Take Official Notice of IGWA's  
2021 Settlement Agreement Performance  
Report and Supporting Spreadsheet;  
and Request for Hearing**

Idaho Ground Water Appropriators, Inc. ("IGWA")<sup>1</sup> hereby objects to the *Notice of Intent to Take Official Notice of IGWA's 2021 Settlement Agreement Performance Report and Supporting Spreadsheet* ("Notice") issued August 18, 2022, in the above-captioned matter. As explained below, the Director cannot lawfully take official notice of IGWA's 2021 performance report<sup>2</sup> without granting a hearing and allowing IGWA to present evidence concerning the report and any action the Director may take in reliance thereon. For the Director to selectively take official notice of certain facts, while precluding the parties from presenting their own evidence to counter or rebut such facts, would violate the constitutional right to due process, the Idaho Administrative Procedures Act, and the rules of procedure of the Department, as explained below.

<sup>1</sup> IGWA is an umbrella organization that represents the common interests of the nine ground water districts who are parties to the IGWA-SWC Settlement Agreement: North Snake Ground Water District, Carey Valley Ground Water District, Magic Valley Ground Water District, American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Henry's Fork Ground Water District, and Madison Ground Water District.

<sup>2</sup> References to "IGWA's 2021 performance report" include the supporting spreadsheet.

Therefore, IGWA requests that the Director state the purpose for which he intends to take official notice of IGWA's 2021 performance report and hold an evidentiary hearing before taking any action in reliance thereon.

## **Introduction**

The Notice states that it is issued in response to a request by the Surface Water Coalition ("SWC") to address an alleged breach of the IGWA-SWC Settlement Agreement. As explained in *IGWA's Supplemental Response to Surface Water Coalition's Notice of Steering Committee Impasse* ("IGWA's Supplemental Response") filed August 12, 2018, in this matter, the Director cannot lawfully take action on the SWC request unless and until the SWC files a motion that complies with the rules of procedure of the Department, and the parties are given an opportunity to submit evidence and file briefs in accordance with the rules. (IGWA's Response, p. 2-3.) IGWA's Supplemental Response also explains that if the Director intends to look outside the four corners of the Agreement to interpret its meaning, Idaho law requires the Director to consider parol evidence to determine the intent of the parties at the time the Agreement was entered. *Id.* at 7-8.

The Notice does not request a motion from the SWC, nor set a hearing, nor otherwise invite evidence from the parties. From this, IGWA infers that the Director intends to take action on the issues listed in the *SWC's Notice of Steering Committee Impasse / Request for Hearing* without first holding a hearing to develop an evidentiary record. Should the Director take action to interpret the Agreement and determine whether a breach occurred, without allowing IGWA to present evidence concerning the issues, it would be an egregious violation of due process, in utter disregard of the Idaho Administrative Procedures Act and Department rules of procedure of the. Such reckless disregard of the law would necessitate an immediate appeal and request for stay, and would entitle IGWA to bring a cause of action against the Director under 42 U.S. Code section 1983 for deprivation of the civil rights of IGWA and its member districts, and a claim for attorney fees and costs under Idaho Code § 12-117 for acting without a reasonable basis in law or fact.

## **Argument**

### **A. Due Process entitles IGWA to a hearing and opportunity to present evidence.**

A fundamental right afforded by the United States Constitution is that "No state ... shall deprive any person of life, liberty, or property without due process of law." U.S. Const., Amend. 14 §1; Idaho Const. art. I, § 13. Under Idaho law, "individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state." *Nettleton v. Higginson*, 98 Idaho 87, 90 (1977). Due process applies to water right administration by the Department. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815-16 (2011).

Due process entitles property owners to "an opportunity for a hearing before he is deprived of any significant property interest." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). The United States Supreme Court has explained why a hearing is required:

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession

of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon application of and for the benefit of a private party.

*Id.* at 80-81. The hearing requirement “is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.” *Id.* at 90, fn 22.

Importantly, the opportunity for a hearing must be granted “*before* he is deprived of any significant property interest, except for extraordinary situations when some valid governmental interest is at stake that justifies postponing the hearing until after the event.” *Id.* at 81 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971) (emphasis in original)). The bar is high for depriving a property interest before holding a hearing. It is allowed only in “extraordinary” situations, after taking into account

the importance of the private interest at stake, the risk of an erroneous deprivation of rights given the processes at hand, the probable value, if any, of additional or substitute procedural safeguards and the government’s interest and including the function involved and the fiscal and administrative burdens that the additional and substitute procedural requirements would entail.

*LU Ranching Co. v. U.S. (In re Snake River Basin Adjudication Case No. 6)*, 138 Idaho 606, 608 (2003) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (internal quotations omitted)). Even if extraordinary situations warrant an immediate deprivation of property, a hearing still “must be granted at a meaningful time and in a meaningful manner.” *Id.* at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

In *Nettleton v Higginson*, the owner of a surface water right (Nettleton) argued that he is entitled to a hearing before his water right is curtailed. 98 Idaho 87 (1977). The court rejected that argument on the basis that Nettleton had not been deprived of a “significant property interest” since his water right was merely a claimed “constitutional use” right which had not been proven or decreed. *Id.* The court stated in dicta that administration of surface water rights by a watermaster under Idaho Code § 42-607 may constitute “extraordinary situations when postponement of notice and a hearing is justified,” but confined that reasoning to “the present case.” *Id.* at 92.

The Idaho Supreme Court has acknowledged important differences between the administration of surface water rights and ground water rights. In *American Falls Reservoir Dist. No. 2 vs. Idaho Dept. of Water Resources (“AFRD2”)*, the Court reversed the district court’s conclusion that “when a junior diverts or withdraws water in times of water shortage, it is presumed there is injury to a senior,” reasoning that the conclusion was based on precedent in *Moe v. Harger*, 10 Idaho 302 (1904), which was “a case dealing with competing surface water rights and this case involves interconnected ground and surface water rights.” 143 Idaho 862, 877 (2007). “The issues presented,” the Court explained, “are simply not the same.” *Id.*

These differences compelled the Idaho legislature to adopt an entirely new section of code (the Ground Water Act) to address the special needs of groundwater administration. Unlike surface water administration under Idaho Code section 42-607, which involves rote regulation by a watermaster, administration under the Ground Water Act originally required that delivery calls be made in writing, under oath, stating “the facts upon which the claimant founds his belief that the use of his right is being adversely affected.” Idaho Code § 42-237b (repealed). If the Director found that the call meets the minimum statutory requirements, he “shall issue a notice setting the matter for

hearing before a local ground water board.” *Id.* Only after a hearing is held would a curtailment decision be made. Idaho Code § 42-237c (repealed). This process was followed in a delivery call by surface users against groundwater users in *Stevenson v. Steele*, 93 Idaho 4 (1969). The call was made at the beginning of the irrigation season, and the hearing was not completed until October. The decision was then appealed to the district court, followed by an appeal to the Idaho Supreme Court. The Supreme Court decision gives no indication that curtailment could have been warranted before the hearing was held.

The Court had much earlier emphasized the importance of fully examining all evidence before ordering curtailment of groundwater use. In *Jones v. Vanausdeln*, the Court refused to curtail groundwater pumping for lack of clear evidence that the senior was injured, explaining that “very convincing proof of the interference of one well with the flow of another should be adduced before a court of equity would be justified in restraining its proprietors from operating it on that ground.” 28 Idaho 743, 749 (1916).

More recently, the Court reaffirmed that when it comes to curtailing groundwater rights, “It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.” *AFRD2* 143 Idaho at 875 (emphasis added).

More recently still, in *Clear Springs Foods* delivery call case the Court held that “the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for a hearing.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815 (2011). The Court explained that a hearing must be held prior to ordering curtailment because “groundwater pumping did not cause a sudden loss of water discharge from the springs,” and “[c]urtailment would not quickly restore the spring flows.” *Id.*

In this case, there is no “extraordinary circumstance” that requires the director to interpret the IGWA-SWC Settlement Agreement without first holding a hearing and taking evidence from the parties. This situation does not involve priority administration by a watermaster under Idaho Code section 42-607; it involves a dispute over interpretation of a contract. Even when a breach occurs under the Agreement, the parties have agreed that immediate curtailment is unnecessary; rather, the Agreement establishes a steering committee which is vested with responsibility to identify actions to cure the breach, after which the breaching party must be given 90 days’ notice to implement the curative actions. Even after the Steering Committee reached an impasse, the SWC did not file a motion requesting curtailment; it asked only for a status conference, illustrating that the circumstances do require that the Director interpret the Agreement or take action to enforce the Agreement before holding a hearing.

The present circumstance illustrates why IGWA and the SWC formed a steering committee to identify curative actions, rather than simply turn a breaching party over to the Department for curtailment. First and foremost, the parties to the Agreement are ground water districts, yet curtailment would be imposed upon individual farmers within those districts, almost all of whom are in compliance with their district’s mitigation program. If the Director orders blanket curtailment of all members of a particular district, the result would curtailment of water users who individually are in compliance with their responsibilities under the Agreement, resulting in a government taking of private property without due process or just compensation. This is a major reason why a steering committee was formed to determine appropriate actions that must be taken to cure a breach.

In addition, curtailment by the Department would be ineffective during years when there is no curtailment date under the Methodology Order, and curtailment would not be pragmatic at other times, including the present circumstance. If the Director were to order curtailment now, with only

a few weeks left in the irrigation season, the consequences would be drastic (killed crops, breached contracts, loan defaults, etc.). This would not only hurt IGWA members, it would also hurt members of the SWC whose dairies and other businesses rely on commodities grown by IGWA members. By contrast, curtailment would accrue only a small amount of additional water to SWC storage accounts for use next year, which could be negated by above-average winter snowfall.

There is no reason why a hearing cannot be held before the Director undertakes to interpret or enforce the Agreement. Even if evidence presented at a hearing demonstrated that curtailment was justified sooner, impacts from continued pumping for the remainder of the 2022 irrigation season could be remedied by requiring ground water districts to deliver rented storage to the SWC or suffer additional diversion restrictions during the 2023 irrigation season.

**B. The Idaho Administrative Procedures Act also entitles IGWA to a hearing and opportunity to present evidence.**

To ensure that Idaho agencies provide due process, the Idaho Administrative Procedures Act (“APA”) states that any agency proceeding “which may result in the issuance of an order is a contested case” (Idaho Code § 67-5240), that a contested case may be disposed of informally only “by negotiation, stipulation, agreed settlement, or consent order” (Idaho Code § 67-5240); that formal disposition of a contested case requires a hearing “to assure that there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary” (Idaho Code § 67-5242(3)(a)); and that all parties shall have “the opportunity to respond and present evidence and argument on all issues involved” (Idaho Code § 67-5242(3)(b)).

The APA allows state agencies to take action without a hearing, but only “in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate government action.” Idaho Code § 67-5247(1). Even then, the agency must “proceed as quickly as feasible to complete any proceedings that could be required.” Idaho Code § 67-5247(4).

In this case, immediate curtailment is not necessary to avoid immediate danger to public health, safety, or welfare, as explained above. Therefore, the APA requires that a hearing be held, and that IGWA and the SWC be permitted to present evidence, before the Director can undertake to interpret or enforce the Agreement.

**C. Department rules of procedure also entitle IGWA to a hearing and opportunity to present evidence.**

In keeping with due process and the APA, the rules of procedure of the Department require the Department to “base its decision in a contested case on the official record in the case,” and to “maintain an official record including the items described in section 67-5249, Idaho Code” (Rule 650.01), to hold a hearing (Rules 550-553) where testimony is received under oath (Rule 558), and to take evidence “to assist the parties’ development of a record, not excluded to frustrate that development” (Rule 600).

Rule 602 allows the Director to take official notice of certain documents, but this must occur within the context of a contested case hearing. The rules neither contemplate nor allow the Director to selectively take judicial notice of hand-picked facts while depriving the parties of the opportunity to present evidence. Rule 602 specifically requires that “[p]arties must be given an opportunity to contest and rebut the facts or material officially noticed.”



Moreover, Rule 602 does not authorize the Director to take official notice of just any fact, but “of generally recognized technical or scientific data or facts within the agency’s specialized knowledge and records of the agency.” Rule 602. IGWA’s 2021 performance report was created by IGWA and is within the specialized knowledge of IGWA and its consultants. It was not created by Department staff and is not within the specialized knowledge of the Department. While IGWA or the SWC may be able to present it as evidence at a hearing, it does not fall within the category of facts for which the Department may take official notice.

**D. If the Director disregards IGWA’s constitutional due process rights, it will give rise to a cause of action under 42 U.S.C. § 1983.**

Federal law provides that any government actor who deprives the constitutional rights of any citizen of the United States “shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” 42 U.S.C.A. § 1983. If the Director takes action to interpret or enforce the Agreement without first holding a hearing, such action would entitle IGWA to bring a cause of action against the Director under 42 U.S.C. § 1983 for injunctive or declaratory relief for violation of groundwater users’ procedural due process rights and attorney’s fees and costs.

**E. If the Director disregards IGWA’s legal right to present evidence at a hearing before taking action, or disregards Idaho law governing contract interpretation, such action will likely entitle IGWA to recover attorney fees under Idaho Code § 42-117.**

Idaho Code § 42-117 entitles the prevailing party in any proceeding involving a state agency as an adverse party to recover attorney’s fees and costs if the non-prevailing party “acted without a reasonable basis in fact or law.” The Director’s legal duty to hold a hearing and take evidence before acting to interpret or enforce the Agreement is unequivocal. It is not a matter of discretion. If the Director ignores that duty, without a reasonable basis in fact or law, IGWA will be entitled to recover attorney fees and costs under Idaho Code § 42-117.

**Request for Hearing.**

For the reasons set forth above, IGWA hereby requests that the Director refrain from interpreting or enforcing the Agreement without first holding a hearing and allowing IGWA and the SWC to present evidence concerning the matter.

DATED August 23, 2022.

RACINE OLSON, PLLP

By:   
Thomas J. Budge  
Attorneys for IGWA

## CERTIFICATE OF SERVICE

I hereby certify that on this 23<sup>rd</sup> day of August, 2022, I served the foregoing document on the persons below via email or as otherwise indicated:

  
Thomas J. Budge

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## SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into effective September 7, 2022, between participating members of Idaho Ground Water Appropriators, Inc.<sup>1</sup> (“IGWA”) and participating members of the Surface Water Coalition<sup>2</sup> (“SWC”). Such participating members may be referred to herein individually as a “party” and collectively as the “parties.”

### Recitals

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

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

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

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

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

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

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

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

### **Agreement**

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

**1. 2021 Remedy.** As a compromise to resolve the parties' dispute over IGWA's compliance with the Settlement Agreement and Mitigation Plan in 2021, and not as an admission of liability, IGWA will collectively provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year. Such amounts will be in addition to the long-term obligations set forth in section 3 of the Settlement Agreement and approved Mitigation Plan. IGWA agrees to take all reasonable steps to lease the quantities of storage water set forth above from non-SWC spaceholders. If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA will make up the difference by either (a) leasing storage water from the SWC as described in section 2, or (b) undertaking diversion reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River. For example, if by April 1, 2023, IGWA has secured contracts for only 25,000 acre-feet of storage water, IGWA will either (a) lease 5,000 acre-feet of storage from the SWC, or (b) undertake 5,000 acre-feet of diversion reductions. The remedy described in this section shall satisfy IGWA's obligation under the Settlement Agreement for 2021 only.

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

**3. Agreement to be filed with the Director.** The parties agree to jointly submit this Agreement to the Director as a stipulated plan to remedy the alleged shortfall regarding IGWA's 2021 groundwater conservation obligation as set forth in the SWC Notice. The Director shall incorporate the terms of section 1 above as the remedy selected for the alleged shortfall in lieu of curtailment, and shall issue a final order regarding the interpretive issues raised by the SWC Notice. The parties reserve the right to seek judicial review of the decision by the Director

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

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

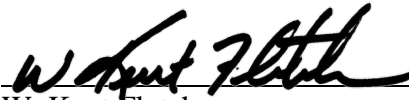
**5. Reservation of Rights.** This Agreement shall not be construed as an admission or waiver of any party's rights or arguments with respect to the Settlement Agreement and Mitigation Plan, except with respect to IGWA's compliance with its 2021 groundwater conservation obligation. The parties reserve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

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

**BARKER ROSHOLT & SIMPSON LLP**

/s/ John Simpson                      9/7/22  
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John Simpson  
*Attorneys for A&B Irrigation District,  
Burley Irrigation District, Milner Irrigation  
District, NSCC and TFCC*

**FLETCHER LAW OFFICE**  
September 7, 2022

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

**RACINE OLSON, PLLP**

A handwritten signature in blue ink, reading "Thomas J. Budge", is positioned above a horizontal line.

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

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

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

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

Docket No. CM-MP-2016-001

**FINAL ORDER REGARDING  
COMPLIANCE WITH APPROVED  
MITIGATION PLAN**

This Final Order resolves a dispute over the requirements of an approved mitigation plan in the above-captioned matter. In addition, this Final Order determines that there was a breach of the approved mitigation plan in 2021, and recognizes certain terms in a recent settlement between the parties as an appropriate remedy for that breach. It is only because of this negotiated remedy that curtailment is not necessary to address the 2021 breach.

**BACKGROUND**

On March 9, 2016, the Surface Water Coalition ("SWC")<sup>1</sup> and certain members of the Idaho Ground Water Appropriators, Inc. ("IGWA")<sup>2</sup> submitted to the Director of the Idaho Department of Water Resources ("Department") the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* ("Request for Order").

Attached to the Request for Order as Exhibits B and C respectively were the *Settlement Agreement Entered into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc.* ("SWC-IGWA Agreement"), and the *Addendum to Settlement Agreement* ("First Addendum"). Attached

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

<sup>2</sup> For purposes of this Final Order, references to IGWA include only the following eight ground water districts and one irrigation district, which are the signatories to the Mitigation Plan: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Fremont Madison Irrigation District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.



to the Request for Order as Exhibit D was the October 7, 2015 *Agreement* (“A&B-IGWA Agreement”) between A&B Irrigation District (“A&B”) and the same IGWA members that entered into the SWC-IGWA Agreement. The SWC and IGWA submitted the SWC-IGWA Agreement, the First Addendum, and the A&B-IGWA Agreement (collectively, “2015 Agreements”) as a stipulated mitigation plan in response to the SWC delivery call (Docket No. CM-DC-2010-001). *Request for Order* at 3.

Through the SWC-IGWA Agreement, the SWC and IGWA members agreed, among other things, that “[t]otal ground water diversion shall be reduced by 240,000 ac-ft annually.” *SWC-IGWA Agreement* § 3.a.i.

The SWC and IGWA stipulated “that the mitigation provided by participating IGWA members under the [2015] Agreements is, provided the [2015] Agreements are implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member.” *Request for Order* ¶ 8. The SWC and IGWA agreed “[n]o ground water user participating in this [SWC-IGWA] Agreement will be subject to a delivery call by the SWC members as long as the provisions of the [SWC-IGWA] Agreement are being implemented.” *SWC-IGWA Agreement* § 5.

On May 2, 2016, the Director issued the *Final Order Approving Stipulated Mitigation Plan* (“First Final Order”). The First Final Order approved the 2015 Agreements as a mitigation plan subject to conditions, including: “a. All ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan.”; and “b. The ground water level goal and benchmarks referenced in the Mitigation Plan are applicable only to the parties to the Mitigation Plan.” *First Final Order* at 4.

On February 7, 2017, the SWC and IGWA submitted to the Department the *Surface Water Coalition’s and IGWA’s Stipulated Amended Mitigation Plan and Request for Order* (“Second Request for Order”). Attached to the Second Request for Order as Exhibit A was the *Second Addendum to Settlement Agreement* (“Second Addendum”) entered into on December 14, 2016, between the SWC and IGWA.

The Second Addendum amended the SWC-IGWA Agreement by providing “further details concerning implementation of the agreement addressing Sections 3.a (Consumptive Use Volume Reduction); 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a. (Adaptive Water Management).” *Second Request for Order* ¶ 4. The SWC and IGWA requested the Director issue an order approving the Second Addendum as an amendment to the mitigation plan. *Id.* ¶ 6.

On May 9, 2017, the Director issued the *Final Order Approving Amendment to Stipulated Mitigation Plan* (“Second Final Order”), approving the Second Addendum as an amendment to the parties’ mitigation plan subject to the following conditions:

- a. While the Department will exert its best efforts to support the activities of IGWA and the SWC, approval of the Second Addendum does not obligate the Department to undertake any particular action.

- b. Approval of the Second Addendum does not limit the Director's enforcement discretion or otherwise commit the Director to a particular enforcement approach.

*Second Final Order* at 5.

Today, the mitigation plan stipulated by the SWC and IGWA and approved by the Director consists of four agreements: (1) the SWC-IGWA Agreement, (2) the First Addendum, (3) the A&B-IGWA Agreement, and (4) the Second Addendum. These four documents are collectively referred to in this order as the "Mitigation Plan."

Section 2.c.iv of the Second Addendum states:

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

On July 21, 2022, the SWC filed with the Department the *Surface Water Coalition's Notice of Steering Committee Impasse/Request for Status Conference* ("Notice"). In the Notice, the SWC alleged that in 2021 IGWA's members did not comply with the Mitigation Plan's requirement that IGWA reduce total ground water diversion by 240,000 acre-feet annually. *Notice* at 2–3. The SWC stated that the allegations of noncompliance have been reviewed by the steering committee, as required by the Mitigation Plan, and that the SWC and IGWA disagree on whether there has been a breach and the Steering Committee was at an impasse. *Id.* at 3–4. The SWC requested the Director schedule a status conference to discuss the allegations of noncompliance. *Id.* at 4. The SWC also requested a status conference to discuss discrepancies between the numbers in IGWA's 2021 Settlement Agreement Performance Report and the Department's verification report. *Id.* On July 26, 2022, the Director issued a *Notice of Status Conference* granting the SWC's request for a status conference and scheduled the status conference for August 5, 2022.

On August 3, 2022, IGWA filed *IGWA's Response to Surface Water Coalition's Notice of Impasse* ("Response"). The Response argues there was no breach in 2021 because each IGWA member met its proportionate share of the 240,000 acre-foot reduction obligation—as measured on a five-year rolling average and assuming that A&B and Southwest Irrigation District ("Southwest") are responsible for portions of the 240,000 acre-foot total.

On August 4, 2022, the SWC filed the *Surface Water Coalition's Reply to IGWA's Response* ("Reply"). The Reply contends that IGWA's arguments "have no support in the actual [SWC-IGWA] Agreement and should be rejected on their face." *Reply* at 2. Specifically, the Reply argues that non-parties, such as A&B and Southwest, are not responsible for any portion of the 240,000 acre-foot reduction obligation, and that the 240,000 acre-foot reduction obligation is an annual requirement, not based on a five-year rolling average. *Id.* at 3–5.

On August 5, 2022, the Director held the status conference. Among other topics covered, counsel for the SWC and IGWA presented arguments as to whether IGWA breached the Mitigation Plan in 2021. During the status conference, the Director referenced Section 2.c.iv of the Second Addendum, which states that if the Director determines a breach, there is an expectation that the Director will “issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.” The Director initiated a discussion with counsel for the parties regarding possible curative remedies should the Director find a breach. The only concrete proposal, suggested by an attorney for the SWC, was an increase in diversion reduction in 2022 equal to the 2021 deficiency.

On August 12, 2022, IGWA filed *IGWA’s Supplemental Response to Surface Water Coalition’s Notice of Steering Committee Impasse* (“Supplemental Response”). In addition to expanding IGWA’s five-year-rolling-average argument, the Supplemental Response raises two new procedural arguments. First, IGWA argues the Director should not act on the SWC’s Notice until the SWC files a motion under the Department’s rules of procedure. *Supplemental Response* at 2–3. Second, IGWA argues that, if the Director finds a breach of the Mitigation Plan, he must provide the breaching party 90 days’ notice and an opportunity to cure. *Id.* 8–9.

On August 18, 2022, the Director issued a *Notice of Intent to Take Official Notice of IGWA’s 2021 Settlement Agreement Performance Report and Supporting Spreadsheet*. Pursuant to Rule 602 of the Department’s rules of procedure (IDAPA 37.01.01.602), this notice explained that the Director intended to take official notice of IGWA’s 2021 Settlement Agreement Performance Report and supporting spreadsheet (collectively, “2021 Performance Report”) and gave the parties one week to object in writing. IGWA filed *IGWA’s Objection to Notice of Intent to Take Official Notice of IGWA’s 2021 Settlement Agreement Performance Report and Supporting Spreadsheet; and Request for Hearing* (“Objection”) on August 23, 2022.

Also on August 18, 2022, the Director issued the *Order Revising July 2022 Forecast Supply (Methodology Steps 7–8)* (“2022 Step 7–8 Order”) in the SWC delivery call matter (Docket No. CM-DC-2010-001). The Director curtailed ground water users not covered by an approved mitigation plan whose ground water rights bear a priority date junior to March 25, 1981. *2022 Step 7–8 Order* at 12.

On September 7, 2022, the Department received a Settlement Agreement (“Remedy Agreement”), signed by IGWA and the SWC, that seeks to ensure “the Director does not curtail certain IGWA members during the 2022 irrigation season.” *Remedy Agreement* ¶ E. To accomplish this, the Remedy Agreement sets forth a stipulated remedy for the breach alleged in the SWC’s Notice:

**2021 Remedy.** As a compromise to resolve the parties’ dispute over IGWA’s compliance with the Settlement Agreement and Mitigation Plan in 2021, and not as an admission of liability, IGWA will collectively provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year. Such amounts will be in addition to the long-term obligations set forth in section 3 of the Settlement Agreement and approved Mitigation Plan. IGWA agrees to take all

reasonable steps to lease the quantities of storage water set forth above from non-SWC spaceholders. If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA will make up the difference by either (a) leasing storage water from the SWC as described in section 2, or (b) undertaking diversion reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River. For example, if by April 1, 2023, IGWA has secured contracts for only 25,000 acre-feet of storage water, IGWA will either (a) lease 5,000 acre-feet of storage from the SWC, or (b) undertake 5,000 acre-feet of diversion reductions. The remedy described in this section shall satisfy IGWA's obligation under the Settlement Agreement for 2021 only.

*Remedy Agreement* § 1. The SWC and IGWA agreed to submit the Remedy Agreement to the Director "as a stipulated plan to remedy the alleged shortfall regarding IGWA's 2021 groundwater conservation obligation as set forth in the SWC Notice." *Id.* § 3. The Remedy Agreement contemplates that the Director will incorporate the terms of the 2021 remedy provision "as the remedy selected for the alleged shortfall in lieu of curtailment, and shall issue a final order regarding the interpretive issues raised by the SWC Notice." *Id.*

### **APPLICABLE LAW**

Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, states:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

Idaho Code § 42-1805(8) authorizes the Director to "promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department."

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

Pursuant to Chapter 52, Title 67, Idaho Code, and Sections 42-603 and 42-1805(8), Idaho Code, the Department promulgated the Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"), effective October 7, 1994. IDAPA 37.03.11.000-001.

The CM Rules “prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply.” IDAPA 37.03.11.001.

Under CM Rule 40.01, once the Director finds that material injury is occurring, he “shall” either:

- a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment; or
- b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

IDAPA 37.03.11.040.01.

CM Rule 42.02 states:

The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.

IDAPA 37.03.11.042.02.

Under Idaho law, a settlement agreement “stands on the same footing as any other contract and is governed by the same rules and principles as are applicable to contracts generally.” *Budget Truck Sales, LLC v. Tilley*, 163 Idaho 841, 846, 419 P.3d 1139, 1144 (2018) (internal quotation omitted). The interpretation of a contract starts with the language of the contract itself. “The meaning of an unambiguous contract should be determined from the plain meaning of the words. Only when the language is ambiguous, is the intention of the parties determined from surrounding facts and circumstances.” *Clear Lakes Trout Co. v. Clear Springs Foods, Inc.*, 141 Idaho 117, 120, 106 P.3d 443, 446 (2005) (citations omitted).

## **FINDINGS OF FACT**

The Mitigation Plan is comprised of four agreements between IGWA and certain members of the SWC. IGWA and all of the SWC members except A&B are signatories to the SWC-IGWA Agreement, the First Addendum, and the Second Addendum. Only IGWA and A&B are parties to the A&B-IGWA Agreement.

A&B and members of the Southwest Irrigation District (“Southwest”) both pump ground water. Southwest did not sign the SWC-IGWA Settlement Agreement or any of the subsequent addendums. A&B participates in the Mitigation Plan only as a member of the SWC. *See A&B-IGWA Agreement* ¶ 2.

A&B and Southwest each agreed to separate settlements with the SWC, and the Department has approved the settlements as mitigation plans under the CM Rules. The separate settlements between the SWC, A&B, and Southwest are not at issue here.

Under the Mitigation Plan, a Steering Committee comprised of representatives of the SWC, IGWA, and the State meets at least once annually. *See SWC-IGWA Agreement* § 3.m. One of the responsibilities of the Steering Committee is to review progress on implementation and achieving benchmarks and the ground water goal set out in the Mitigation Plan. *Id.* The Steering Committee also reviews technical information from the Department and technical reports by SWC or IGWA consultants. *Second Addendum* § 2.c.i. The Steering Committee began meeting annually in 2016 and has met at least annually every year since. At these Steering Committee meetings, IGWA has prepared and presented a report summarizing compliance with annual reduction obligations. *See Second Addendum* § 2.a.i.

In its annual reports to the Steering Committee, IGWA has assigned to A&B and to Southwest a proportionate percentage and quantity of the 240,000 acre-foot reduction obligation agreed upon in the SWC-IGWA Agreement. *Response* at 3–4. Assigning portions of the 240,000 acre-foot total to A&B and Southwest effectively reduces the obligations of the IGWA signatories to the Mitigation Plan by 14.4%—more than 34,000 acre-feet. *See Response* at 4.

On April 1, 2021, IGWA’s counsel sent copies of IGWA’s 2021 Performance Report to representatives of the SWC and the Department. While the report was sent to the Department, it did not automatically become part of the agency record for this proceeding. On August 18, 2022, the Department provided notice to the parties that the Director intended to take official notice of IGWA’s 2021 Performance Report.<sup>3</sup> A spreadsheet included in the 2021 Performance Report summarizes IGWA’s, A&B’s, and Southwest’s mitigation efforts during 2021. IGWA’s summary spreadsheet is reproduced as Table 1 on the following page.

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<sup>3</sup> IGWA’s Objection to taking official notice of the 2021 Performance Report is addressed below in subsections 5.a and 5.b of the Analysis and Conclusions of Law.

TABLE 1

2021 Performance Summary Table							
	Target Conservation	Baseline	2021 Usage	Diversion Reduction	Accomplished Recharge	Total Conservation	2021 Mitigation Balance
American Falls-Aberdeen	33,715	286,448	291,929	-5,481	20,050	14,569	-19,146
Bingham	35,015	277,011	302,020	-25,009	9,973	-15,036	-50,052
Bonneville-Jefferson	18,264	156,287	158,212	-1,925	5,080	3,155	-15,109
Carey	703	5,671	4,336	1,335	0	1,335	632
Jefferson-Clark	54,373	441,987	405,131	36,856	5,881	42,737	-11,636
Henry's Fork <sup>1</sup>	5,391	73,539	65,323	8,216	3,000	15,189	9,798
Madison <sup>2</sup>		81,423	77,449	3,973			
Magic Valley	32,462	256,270	231,474	24,795	10,546	35,341	2,879
North Snake <sup>3</sup>	25,474	208,970	194,778	14,192	11,301	25,494	20
A&B <sup>4</sup>	21,660	-	-	-	-	21,660	0
Southwest ID <sup>4</sup>	12,943	-	-	-	-	12,943	0
Total:	<b>240,000</b>	1,787,604	1,730,652	56,953	65,831	157,387	-82,613
Notes:							
(1) Includes mitigation for Freemont- Madison Irrigation District, Madison Ground Water District and WD100. Mitigating by alternative means.							
(2) Madison baseline is preliminary estimate, see note on district breakdown.							
(3) North Snake GWD baseline includes annual average of 21,305 acre-feet of conversions.							
(4) A&B ID and Southwest ID Total Conservation is unknown and assumed to meet target.							

The parties to the Mitigation Plan have adopted a process under which the Steering Committee may resolve an alleged breach or noncompliance with the Mitigation Plan. *See Second Addendum* § 2.c.iii. Alternatively, if the SWC and IGWA do not agree that a breach has occurred, the Director may determine if a breach occurred and issue an order specifying actions the breaching party must take to cure the breach or be subject to curtailment. *Id.* § 2.c.iv.

On April 29, 2022, the SWC requested a status conference in this proceeding to discuss, among other matters, IGWA's compliance with the Mitigation Plan. SWC's Req. for Status Conf. at 2–3. The SWC alleged "IGWA and its junior priority ground water right members are not operating in accordance with the approved plan and are failing to mitigate the material injury to the [SWC] members." *Id.* at 3. Specifically, the SWC alleged, based on IGWA's 2021 Performance Report, that IGWA had not met its obligation under the Mitigation Plan to reduce total ground water diversion by 240,000 acre-feet in 2021. *Id.* at 2–3. On May 5, 2022, the Director issued a response, declining to immediately address the allegations until the Steering Committee had a chance to meet and review the technical information. Resp. to Req. for Status Conf.; Notice of Status Conf. at 2.

The Steering Committee met and reviewed technical information, including IGWA's 2021 Performance Report, on May 18, June 27, and July 13, 2022.

As noted in the background section above, on July 21, 2022, the SWC filed its Notice that the Steering Committee met and was at an impasse on whether IGWA had breached the Mitigation Plan in 2021. IGWA also concedes “the Steering Committee reached an impasse as to whether a breach occurred . . . .” *Supplemental Response* at 8. The parties to the Mitigation Plan, therefore, do not dispute that the Steering Committee’s principal members—the SWC and IGWA—do not agree that a breach of the Mitigation Plan occurred in 2021. Accordingly, the Director finds no further notice from the Steering Committee is required before he may consider whether a breach of the Mitigation Plan occurred in 2021 and, if so, the remedy.

The SWC and IGWA’s Remedy Agreement establishes a mutually agreed upon “compromise to resolve the parties’ dispute over IGWA’s compliance with the Settlement Agreement and Mitigation Plan in 2021.” Among other things, IGWA agreed to collectively supply the SWC “an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year.” *Remedy Agreement* § 1. Additionally:

If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA will make up the difference by either (a) leasing storage water from the SWC as described in section 2, or (b) undertaking diversion reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River.

*Id.* The parties further agreed this remedy “shall satisfy IGWA’s obligation under the [2015] Settlement Agreement for 2021 only.” *Id.*

## ANALYSIS AND CONCLUSIONS OF LAW

Because the SWC and IGWA disagree on whether a breach has occurred, the Director should evaluate the available information, determine if a breach of the Mitigation Plan has occurred, and determine an appropriate remedy for any such breach. *See Second Addendum* § 2.c.iv; *see also Remedy Agreement* § 3 (“The Director shall incorporate the terms of section 1 above as the remedy selected for the alleged shortfall in lieu of curtailment, and shall issue a final order regarding the interpretive issues raised by the SWC Notice.”). This is necessary to assess whether each IGWA member district’s “use of water under the[ir] junior-priority right[s] is covered by an approved and *effectively operating* mitigation plan.” IDAPA 37.03.11.042.02 (emphasis added); *see also SWC-IGWA Agreement* § 5 (“No ground water user participating in this Settlement Agreement will be subject to a delivery call by the SWC members as long as the provisions of the Settlement Agreement are being implemented.”).

### **1. The Mitigation Plan obligates IGWA to reduce total ground water diversions by 240,000 acre-feet every year.**

The Mitigation Plan obligates IGWA to reduce total ground water diversions, or conduct equivalent private recharge, by 240,000 acre-feet annually. Subsection 3.a of the SWC-IGWA Agreement states:

FINAL ORDER REGARDING COMPLIANCE WITH APPROVED MITIGATION PLAN—  
Page 9



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

The SWC argues that “240,000 ac-ft annually” in section 3.a.i means that the Mitigation Plan requires IGWA’s “signatory districts to reduce their total ground water diversion by 240,000 acre-feet per year.” *Reply* at 3. IGWA concedes that section 3.a.i “contemplates 240,000 acre-feet of groundwater conservation ‘annually.’” *Supplemental Response* at 3. However, IGWA argues its diversion reduction obligation is measured on a five-year rolling average. *Response* at 4–5; *Supplemental Response* at 3–7. If the mitigation obligation was measured as IGWA argues, then a year in which IGWA reduces ground water diversion by less than 240,000 acre-feet, such as 2021, would not necessarily constitute a breach of the obligation under section 3.a.i. *Id.*

IGWA’s argument is contrary to the plain language of the Mitigation Plan. The phrase “shall be reduced by 240,000 ac-ft annually” is unambiguous and must be enforced according to its plain terms. *See Clear Lakes*, 141 Idaho at 120, 106 P.3d at 446. The adverb “annually” derives from the adjective “annual,” which means “of or measured by a year” or “happening or appearing once a year; yearly.” *Annual*, Webster’s New World Dictionary (3d coll. ed. 1994). As a legal term of art, “annually” has the same essential meaning:

In annual order or succession; yearly, every year, year by year. At the end of each and every year during a period of time. Imposed once a year, computed by the year. Yearly or once a year, but does not in itself signify what time in a year.

*Black’s Law Dictionary* 58 (6th ed. 1991). The Mitigation Plan’s plain language, therefore, requires IGWA to reduce its ground water diversions by 240,000 acre-feet every year.

This understanding is reinforced by other Mitigation Plan provisions that use the word “annually.” For example, section 2.a.i of the Second Addendum requires IGWA to submit certain data to the Steering Committee “[p]rior to April 1 annually.” IGWA has done so every year. Likewise, section 2.c.v of the Second Addendum obligates the Steering Committee, which includes IGWA representatives, to “submit a report to the Parties and the Department prior to May 1 annually” on certain enumerated subjects. The Department receives these reports every year. Nothing in the Mitigation Plan suggests that the parties intended a different meaning for “annually” in section 3.a.i of the SWC-IGWA Agreement.

IGWA argues section 3.e.iv of the SWC-IGWA Agreement requires its obligation under section 3.a.i to be measured on a five-year rolling average. Section 3.e.iv states: “When the ground water level goal is achieved for a five year rolling average, ground water diversion reductions may be reduced or removed, so long as the ground water level goal is sustained.” (emphasis added). Under section 3.e.i of the SWC-IGWA Agreement, the ground water level

goal is to “return ground water levels to a level equal to the average of the aquifer levels from 1991-2001” as measured in certain mutually agreed upon wells using mutually agreed upon techniques. Considering the measurements contemplated by section 3.e.i, section 3.e.iv simply means that a five-year rolling average of *those measurements* will be used to determine if the ground water level goal is achieved. Section 3.e.iv does not say or imply that the ground water diversion reductions required under section 3.a.i are to be measured on a five-year rolling average. As explained above, the plain language of section 3.a.i imposes an annual—i.e., every year—obligation and thus does not allow for averaging over multiple years.

IGWA also argues that a five-year rolling average is required because it has averaged its annual diversions for the five years of 2010–2014 to determine historical annual diversion quantities as a baseline for the 240,000 acre-feet diversion reduction. But this averaging process is not described in the Settlement Agreement. IGWA calculated and reported annual reduction based on its own adopted baseline process. It cannot replace the clear requirement of an annual 240,000 acre-feet reduction with its own averaging process. Under the plain and unambiguous terms of the Mitigation Plan, IGWA has an obligation to reduce total ground water diversion by 240,000 acre-feet every year.

IGWA contends that the SWC, by arguing the reduction obligation applies every year, is seeking to establish a “fixed diversion cap.” *Supplemental Response* at 3–6. They claim the “fixed cap method proposed by the SWC would require IGWA to conserve far more than 240,000 acre-feet in some years and far less than 240,000 acre-feet in other years.” *Id.* at 5. This claim is a strawman. Nothing in the SWC’s filings in this matter states or implies they are seeking anything more (or less) than compliance with the annual 240,000 acre-foot diversion reduction obligation unambiguously set forth in the Mitigation Plan. Likewise, nothing in this order should be read to suggest that IGWA’s obligation under section 3.a.i of the SWC-IGWA Agreement is anything other than reducing total ground water diversion “by 240,000 acre-feet annually.”

**2. The 240,000 acre-foot diversion reduction obligation is the sole responsibility of IGWA members participating in the Mitigation Plan.**

As shown in Table 1 above, IGWA included conservation activities by A&B and Southwest in its calculation of “Total Conservation” for 2021. IGWA’s inclusion of A&B and Southwest in sharing the 240,000-acre foot reduction obligation is based on IGWA’s interpretation of the Section 3.ii of the SWC-IGWA Agreement, which reads: “Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity.” IGWA assumes that A&B and Southwest share in the reduction obligation because A&B and Southwest are both “Irrigation District[s] with members pumping from the ESPA.” *Response* at 3 (quoting *SWC-IGWA Agreement* § 3.a.ii).

Based on that assumption, IGWA’s performance reports have included volumetric diversion reduction obligations for A&B and Southwest. “IGWA has from the outset allocated to its members a proportionate share of the 240,000 acre-feet” after it “deducted groundwater diversions within A&B Irrigation District, Southwest Irrigation District,” and, for one year,

another irrigation district. *Response* at 3–4. This deduction, in effect, shifts a portion of the 240,000 acre-foot reduction obligation to A&B and Southwest, lowering IGWA’s aggregate share of the obligation by 14.4%—more than 34,000 acre-feet.

The basis for IGWA’s deduction is unclear. There are no reported data for diversion reductions for A&B and Southwest in any of IGWA’s reports. A&B and Southwest are subject to their own mitigation plans approved by the Department. Southwest is not a party to the Mitigation Plan at issue here. Additionally, in the A&B-IGWA Agreement, IGWA recognized that A&B was only a party to the Mitigation Plan as a surface water user, not as a ground water user. *A&B-IGWA Agreement* ¶ 2.

The SWC argues IGWA’s deduction is “an attempt to inject non-parties into this issue” and “is contrary to basic contract interpretation.” *Reply* at 3. The Director agrees.

The Mitigation Plan is comprised of a series of settlement agreements, which are construed in the same manner as contracts. *Budget Truck*, 163 Idaho at 846, 419 P.3d at 1144. “Non-parties are generally not bound by contracts they did not enter into.” *Greater Boise Auditorium Dist. v. Frazier*, 159 Idaho 266, 273 n.6, 360 P.3d 275, 282 n.6 (2015). Indeed, the SWC-IGWA Agreement specifically states it does not cover non-participants: “Any ground water user not participating in this Settlement Agreement or otherwise have [sic] another approved mitigation plan will be subject to administration.” *SWC-IGWA Agreement* § 6. Moreover, the Director’s First Final Order approved the 2015 Agreements as a mitigation plan subject to the following condition: “All ongoing activities required pursuant to the Mitigation Plan *are the responsibility of the parties to the Mitigation Plan.*” *First Final Order* at 4 (emphasis added). Moreover, the A&B-IGWA Agreement specifically provides that “[t]he obligations of the [IGWA] Ground Water Districts set forth in Paragraphs 2 – 4 of the [SWC-IGWA] Agreement do not apply to A&B and its ground water rights.” *A&B-IGWA Agreement* ¶ 2. The 240,000 acre-foot reduction obligation is among the obligations referenced in that provision. *SWC-IGWA Agreement* § 3.a.i.

Against this backdrop, it is untenable for IGWA to argue non-parties are included in the phrase “[e]ach Ground Water and Irrigation District” in section 3.a.ii of the SWC-IGWA Agreement. IGWA’s argument not only lacks support in the unambiguous language of the Mitigation Plan, it also violates an express condition in the Director’s approval of the 2015 Agreements. *First Final Order* at 4. Accordingly, when the agreement language assigns an obligation to “[e]ach” of the ground water districts and irrigation districts, it means each IGWA member district that signed the agreement is obligated for their proportionate share of the 240,000 acre-feet reduction. *SWC-IGWA Agreement* § 3.a.ii.

Therefore, the 240,000 acre-foot diversion reduction obligation is IGWA’s sole responsibility. A&B and Southwest are not responsible for any portion of the 240,000 acre-foot diversion reduction obligation. It follows that IGWA members participating in the Mitigation Plan “shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity.” *Id.*

### 3. Certain IGWA members breached the Mitigation Plan in 2021.

Based on the foregoing, each IGWA member participating in the Mitigation Plan is obligated to reduce total ground water diversion (or provide equivalent private recharge) by each member's proportionate share of 240,000 acre-feet every year. *SWC-IGWA Agreement* § 3.a.

Table 2 below shows IGWA's 2021 summary spreadsheet (Table 1) with yellow-highlighted columns added. The "Re-proportioning" column redistributes the 14.4% of "[IGWA] Target Conservation" that IGWA had assigned to A&B and Southwest. The yellow-highlighted "Target Conservation" column uses the re-proportioned shares of the total to compute proportionate obligations consistent with the plain language of the Mitigation Plan. The yellow-highlighted target conservation values are then compared to IGWA's 2021 reduction activities. Negative values in the yellow-highlighted "2021 Mitigation Balance" column identify IGWA members that did not fulfill their proportionate share of the 240,000 acre-foot reduction obligation in 2021.

**TABLE 2**

2021 Performance Summary Table											
	IGWA Proportioning	[IGWA] Target Conservation	Re- proportioning	Target Conservation	Baseline	2021 Usage	Diversion Reduction	Accomplished Recharge	Total Conservation	[IGWA] 2021 Mitigation Balance	2021 Mitigation Balance
American Falls-Aberdeen	14.0%	33,715	16.4%	39,395	286,448	291,929	-5,481	20,050	14,569	-19,146	-24,826
Bingham	14.6%	35,015	17.0%	40,914	277,011	302,020	-25,009	9,973	-15,036	-50,052	-55,951
Bonneville-Jefferson	7.6%	18,264	8.9%	21,341	156,287	158,212	-1,925	5,080	3,155	-15,109	-18,185
Carey	0.3%	703	0.3%	821	5,671	4,336	1,335	0	1,335	632	513
Jefferson-Clark	22.7%	54,373	26.5%	63,533	441,987	405,131	36,856	5,881	42,737	-11,636	-20,796
Henry's Fork <sup>1</sup>	2.2%	5,391	2.6%	6,299	73,539	65,323	8,216	3,000	15,189	9,798	8,890
Madison <sup>2</sup>					81,423	77,449	3,973				0
Magic Valley	13.5%	32,462	15.8%	37,931	256,270	231,474	24,795	10,546	35,341	2,879	-2,590
North Snake <sup>3</sup>	10.6%	25,474	12.4%	29,765	208,970	194,778	14,192	11,301	25,494	20	-4,272
A&B <sup>4</sup>	9.0%	21,660	--	--	-	-	-	-	21,660	0	--
Southwest ID <sup>4</sup>	5.4%	12,943	--	--	-	-	-	-	12,943	0	--
Total:	100%	240,000	100%	240,000	1,787,604	1,730,652	56,953	65,831	157,387	-82,613	
Notes:											
(1) Includes mitigation for Fremont- Madison Irrigation District, Madison Ground Water District and WD100. Mitigating by alternative means.											
(2) Madison baseline is preliminary estimate, see note on district breakdown.											
(3) North Snake GWD baseline includes annual average of 21,305 acre-feet of conversions.											
(4) A&B ID and Southwest ID Total Conservation is unknown and assumed to meet target.											

Madison Ground Water District, Fremont Madison Irrigation District, and Carey Ground Water District satisfied their proportionate 2021 mitigation obligations in 2021. Based on the analysis in Table 2, Table 3 on the following page identifies the IGWA ground water districts that did not fulfill their proportionate share of the total annual ground water reduction and the volume of each district's deficiency.

TABLE 3

Ground Water District	Deficiency (acre-feet)
American Falls-Aberdeen	24,826
Bingham	55,951
Bonneville-Jefferson	18,185
Jefferson-Clark	20,796
Magic Valley	2,590
North Snake	4,272
<b>Total</b>	<b>126,620</b>

**4. The IGWA members in Table 3 are not covered by an effectively operating mitigation plan and IGWA must implement the 2021 remedy in the Remedy Agreement.**

In a delivery call under the CM Rules, out-of-priority diversion of water by junior priority ground water users is allowable only “pursuant to a mitigation plan that has been approved by the Director.” IDAPA 37.03.11.040.01.b. Junior-priority ground water users “covered by an approved *and effectively operating* mitigation plan” are protected from curtailment under CM Rule 42. IDAPA 37.03.11.042.02 (emphasis added). In other words, only those junior ground water users who are in compliance with an approved mitigation plan are protected from curtailment.

The Director has approved several mitigation plans when the joint administration of ground water and surface water has been imminent. Some of these approved mitigation plans have been contested by holders of senior priority water rights. In this case, however, because of the stipulated Mitigation Plan, the Director allowed significant latitude to the agreeing parties in accepting the provisions of the Mitigation Plan. Nonetheless, the courts have defined the Director’s responsibilities if the holders of junior priority water rights do not comply with the mitigation requirements.

In the *Rangen* case, Judge Eric Wildman addressed the Director’s responsibility when a mitigation plan fails. Mem. Decision & Order, *Rangen, Inc. v. Idaho Dep’t of Water Res.*, No. CV-2014-4970 (Twin Falls Cnty. Dist. Ct. Idaho June 1, 2015) [hereinafter “*Rangen June 1, 2015 Decision*”]. A mitigation plan that allows out-of-priority diversions must supply water to the holders of senior priority water rights during the time-of-need. The Court stated: “When the Director approves a mitigation plan, there should be certainty that the senior user’s material injury will be mitigated throughout the duration of the plan’s implementation. This is the price of allowing junior users to continue their offending out-of-priority water use.” *Rangen June 1, 2015 Decision* at 8. Judge Wildman previously held in an earlier case that the compensation for underperformance of the requirements of the mitigation plan cannot be delayed. See Mem. Decision & Order at 10, *Rangen, Inc. v. Idaho Dep’t of Water Res.*, No. CV-2014-2446 (Twin Falls Cnty. Dist. Ct. Idaho Dec. 3, 2014). Furthermore, without mitigation at the time-of-need, the holders of junior ground water rights could materially injure senior water rights by diverting out-of-priority with impunity.

Here, the Mitigation Plan obligates IGWA to undertake total diversion reductions or equivalent recharge of 240,000 acre-feet every year. Each IGWA member is annually responsible for their proportionate share of that total. But the Mitigation Plan is unique in that it contemplates delays in analyzing IGWA's mitigation efforts. These delays are inherent in the Steering Committee process the parties agreed to in the Second Addendum.

For example, section 2.a.i of the Second Addendum requires IGWA to submit, "[p]rior to April 1 annually," ground water diversion and recharge data (i.e., the types of data in the 2021 Performance Report) to the Steering Committee for the previous irrigation season. Further, the parties agreed to a process by which the Steering Committee evaluates IGWA's data from the previous irrigation season to assess whether a breach occurred in the previous season. *Second Addendum* § 2.c.i–.iv. Because IGWA is not obligated to submit its data to the Steering Committee until April 1 every year, the Steering Committee process necessarily begins well after the actions or inactions constituting a breach. Moreover, the process does not involve the Director until the Steering Committee finds a breach or, as here, reaches an impasse. *Id.* While the Director believes this process was developed and has been implemented by all parties in good faith, it nevertheless means that any breach will be addressed many months after it occurs.

A mitigation plan that depends on a prediction of compliance must include a contingency plan to mitigate if the predictive mitigation plan is not satisfied:

If junior users wish to avoid curtailment by proposing a mitigation plan, the risk of that plan's failure has to rest with junior users. Junior users know, or should know, that they are only permitted to continue their offending out-of-priority water use so long as they are meeting their mitigation obligations under a mitigation plan approved by the Director. IDAPA 37.03.11.040.01.a,b. If they cannot, then the Director must address the resulting material injury by turning to the approved contingencies. If there is no alternative source of mitigation water designated as the contingency, then the Director must turn to the contingency of curtailment. Curtailment is an adequate contingency if timely effectuated. In this same vein, if curtailment is to be used to satisfy the contingency requirement, junior users are on notice of this risk and should be conducting their operation so as to not lose sight of the possibility of curtailment.

*Rangen June 1, 2015 Decision* at 9.

In this case, certain holders of junior-priority water rights failed to satisfy their mitigation obligation in 2021. Out-of-priority diversions by the IGWA members in Table 3 above were not "pursuant to a mitigation plan that has been approved by the Director." IDAPA 37.03.11.040.01.b. The approved Mitigation Plan was not "effectively operating" with respect to those IGWA members in 2021. IDAPA 37.03.11.042.02. Consequently, the holders of senior water rights have been and are being materially injured by the failure of the juniors to fully mitigate during the 2021 irrigation season.

The CM Rules contemplate that out-of-priority diversions by junior-priority ground water users will be curtailed absent compliance with an approved mitigation plan. IDAPA 37.03.11.040.01. But curtailment may be avoided if an adequate, alternative source of mitigation water is designated as a contingency. *Rangen June 1, 2015 Decision* at 9. Therefore, the Director must determine if there is an adequate contingency for IGWA members' 2021 noncompliance with the Mitigation Plan.

The Mitigation Plan itself does not include a contingency in the event IGWA did not meet the 240,000 acre-foot reduction obligation, but it does contemplate the Director will "issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment." *Second Addendum* § 2.c.iv. The Director concludes the SWC and IGWA's Remedy Agreement provides a cure for the breach and constitutes an adequate contingency for IGWA members' noncompliance in 2021. Specifically, in section 1 of the Remedy Agreement, IGWA agrees to "collectively provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year." Moreover, the Remedy Agreement details IGWA's options in the event it cannot lease the necessary water from non-SWC spaceholders:

If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA will make up the difference by either (a) leasing storage water from the SWC as described in section 2, or (b) undertaking consumptive use reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River.

*Remedy Agreement* § 1. The SWC and IGWA agree their stipulated 2021 remedy should be the "remedy selected for the alleged [2021] shortfall in lieu of curtailment." *Id.* § 3. The Director agrees. The parties' remedy constitutes an appropriate contingency for IGWA members' noncompliance of the Mitigation Plan in 2021. Therefore, in lieu of curtailment, the Director will order that IGWA must implement the 2021 remedy in section 1 of the Remedy Agreement.

## **5. IGWA's procedural and evidentiary objections lack merit.**

IGWA has raised procedural and evidentiary objections in connection with this matter. For the reasons stated below, these objections lack merit.

### ***a. IGWA's request for a pre-decision hearing is denied.***

In its Objection, IGWA requests the Director "refrain from interpreting or enforcing the [SWC-IGWA] Agreement without first holding a hearing and allowing IGWA and the SWC to present evidence concerning the matter." *Objection* at 6. IGWA argues such a hearing is required by due process clauses in the United States Constitution and the Idaho Constitution, the Idaho Administrative Procedure Act, and the Department's rules of procedures. *Id.* 2–6. The Director disagrees that a pre-decision hearing is required in the circumstances of this case.

i. *The Remedy Agreement moots IGWA's due process argument.*

In general, due process requires notice and an opportunity to be heard when governmental action results in a deprivation of property. Water rights are property rights, so this general rule applies when water rights are curtailed. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 814, 252 P.3d 71, 95 (2011). However, due process “does not necessarily require a hearing before property is taken.” *Id.* This is because “due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (cleaned up). The Idaho Supreme Court has set out three requirements for the Director to consider before curtailing water rights before a hearing:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

*Clear Springs*, 150 Idaho at 814, 252 P.3d at 95 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972)).<sup>4</sup> “Whether or not curtailment of water use can be ordered without prior notice or an opportunity for a hearing depends upon whether the three requirements are met under the circumstances of a particular delivery call or curtailment.” *Id.* at 815, 252 P.3d at 96. All three requirements may be satisfied here, but the Director need not decide the issue because the Remedy Agreement makes curtailment unnecessary.

The due process issue raised in IGWA's Objection—which was filed weeks before the parties entered into the Remedy Agreement—presumes the Director would be ordering curtailment. The SWC and IGWA entered into the Remedy Agreement for the express purpose of avoiding curtailment during the 2022 irrigation season. *Remedy Agreement* ¶ E. As discussed above, the Remedy Agreement is an appropriate contingency and cure for IGWA members' noncompliance with the Mitigation Plan in 2021, and thus renders curtailment unnecessary. Indeed, IGWA agreed to “not seek review of the remedy” established in section 1 of the Remedy Agreement and incorporated into this order. *Id.* § 3. It follows that this order does not deprive IGWA of any property right. Because IGWA's argument depends on the Director curtailing IGWA's water rights, the due process issues presented in the Objection are moot in light of the

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<sup>4</sup> Despite recognizing the applicability of *Clear Springs* in this case, IGWA argues a different three-part test for determining whether a legal procedure satisfies due process. *Objection* at 3 (quoting *LU Ranching Co. v. U.S.*, 138 Idaho 606, 608, 67 P.3d 85, 87 (2003)). That test, which derives from the U.S. Supreme Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), is generalized, and the Idaho Supreme Court applied it in a case challenging the constitutionality of the procedures for claiming and adjudicating rights in the Snake River Basin Adjudication. *LU Ranching*, 138 Idaho 606, 67 P.3d 85. When faced with the specific due process question presented by IGWA (the propriety of curtailment before a hearing), the Idaho Supreme Court has applied the three requirements from *Fuentes*—both before and after it decided *LU Ranching* in 2003. *Clear Springs*, 150 Idaho at 814, 252 P.3d at 95; *Nettleton v. Higginson*, 98 Idaho 87, 92, 558 P.2d 1048, 1053 (1977).



Remedy Agreement. *See Farrell v. Whiteman*, 146 Idaho 604, 610, 200 P.3d 1153, 1159 (2009) (“An issue is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome.”)

ii. *Idaho Administrative Law does not require a hearing before the Director acts.*

IGWA argues that a pre-decision hearing is required under the Idaho Administrative Procedure Act and the Department’s rules of procedure. Regarding the Administrative Procedure Act, IGWA argues a hearing must be held in accordance with Idaho Code § 67-5242(3), except when immediate action without a hearing is authorized under Idaho Code § 67-5247. *Objection* at 5. This argument overlooks the statute governing hearings before the Director, which provides in pertinent part:

Unless the right to a hearing before the director . . . is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.

I.C. § 42-1701A(3). Section 42-1701A(3) is specific to “hearing[s] before the director” and entitles aggrieved persons to a hearing *after* the Director makes “any decision, determination, order or other action, including action upon any application for a[n] . . . approval . . . or similar form of permission required by law to be issued by the director.” *Id.*

The determination of IGWA’s compliance with its approved Mitigation Plan in this order is an action on a form of permission required by law to be issued by the director, and therefore § 42-1701A(3) governs. *See Valiant Idaho, LLC v. JV L.L.C.*, 164 Idaho 280, 289, 429 P.3d 168, 177 (2018) (“A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general. Thus, the more general statute should not be interpreted as encompassing an area already covered by one which is more specific.”). Section 42-1701A(3) allows for a post-decision hearing, and no statute otherwise provides for a hearing to determine compliance with a previously approved mitigation plan.

In addition, the Department’s rules of procedure do not require a pre-decision hearing. The various rules IGWA cites do not dictate *when* a hearing must be held. *Objection* at 5 (citing IDAPA 37.01.01.550–.553, .558, .600, .650.01). Those rules either provide procedures and evidentiary standards *for* a hearing, or require decisions to be based on the official record maintained by the Department. The Director is taking official notice of the 2021 Performance Report for the purpose of deciding this matter on the official record. With that record, the Director may, consistent with Idaho Code § 42-1701A, determine the meaning of the unambiguous Mitigation Plan and determine whether IGWA’s 2021 Performance Report demonstrates compliance with the Mitigation Plan without first holding an evidentiary hearing. However, to the extent it is a “person aggrieved,” IGWA would be entitled to a hearing on this final order pursuant to Idaho Code § 42-1701A(3) if it requests one.

**b. It is appropriate for the Director to take official notice of IGWA’s 2021 Performance Report.**

IGWA’s Objection also argues the Director cannot take official notice of IGWA’s 2021 Performance Report under the standards in Rule 602 of the Department’s rules of procedure. *Objection* at 5–6 (quoting IDAPA 37.01.01.602). IGWA claims that Rule 602 allows the Director to take official notice but only “within in the context of a contested case hearing.” *Objection* at 5. But Rule 602 is not so limited. “The presiding officer may take official notice of any facts that could be judicially noticed in the courts of Idaho, of generally recognized technical or scientific data or facts within the agency’s specialized knowledge and records of the agency.” IDAPA 37.01.01.602. However, “[p]arties must be given an opportunity to contest and rebut the facts or material officially noticed.” *Id.* Accordingly, the presiding officer must first “notify the parties of specific facts or material noticed and the source of the material noticed,” and such “notice should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed.” *Id.*

The rule does not, as IGWA claims, preclude official notice outside the context of a hearing. Rather, the presiding officer may take official notice after notifying the parties, and the notice to the parties must occur, at the latest, before issuance of any order based on the officially noticed facts or material. That is what occurred here. The Director notified all parties that he intended to take official notice of the 2021 Performance Report on August 18, 2022, and IGWA filed its objection pursuant to that notice on August 24. The Director properly notified the parties before the issuance of this final order, and IGWA had the requisite opportunity to contest and rebut the facts and material officially noticed.

Instead of contesting or rebutting the 2021 Performance Report, IGWA simply argues the report does not qualify as “generally recognized technical or scientific data or facts within the agency’s specialized knowledge and records of the agency” under Rule 602. *Objection* at 6 (quoting IDAPA 37.01.01.602). The Director disagrees for two reasons. First, IGWA created the 2021 Performance Report for the specific purpose of documenting its compliance with an approved mitigation plan in a long-running and ongoing delivery call proceeding under the CM Rules. *See Second Addendum* § 2.a.i; *see also* IDAPA 37.03.11.040.01.b (allowing for “out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director”). The 2021 Performance Report contains ground water diversion and recharge data, which certainly are within the Director’s and Department’s specialized knowledge. *See, e.g.,* I.C. § 42-1701(2). Second, and independently, the 2021 Performance Report constitutes “records of the agency” because IGWA submitted it to the Department on April 1, 2022, so that the Department could perform the verification required under section 2.b.iii of the Second Addendum. IDAPA 37.01.01.602. IGWA has not argued the 2021 Performance Report is inaccurate or unreliable, nor has it offered anything to rebut the report’s clear showing that certain IGWA members failed to comply with the Mitigation Plan in 2021. It is therefore appropriate for the Director to take official notice of the 2021 Performance Report.

**c. A motion is not necessary for the Director to determine compliance with a previously approved Mitigation Plan.**

IGWA argues the Director cannot address the issues raised in the SWC's July 21 Notice of the Steering Committee impasse because the Notice does not qualify as a motion under Rule 220 of the Department's rules of procedure. *Supplemental Response* at 2 (citing IDAPA 37.01.01.220). Specifically, IGWA contends that the SWC's Notice is not supported by an affidavit setting forth the facts on which it is based and does not state the relief sought. *Id.*

The Director "liberally construe[s]" the Department's rules of procedure "to ensure just, speedy, and economical determinations of all issues presented to the agency." IDAPA 37.01.01.051. Accordingly, "[t]he agency may permit deviation from these rules when it finds that compliance with them is impracticable, unnecessary or not in the public interest." *Id.*

In this case, formal motion practice is unnecessary and not in the public interest. The SWC has filed two briefs and IGWA has filed three, defining their positions on the breach question and various other matters. *See generally Notice; Response; Reply; Supplemental Response; Objection.* The information necessary to evaluate IGWA's compliance with the Mitigation Plan in 2021 consists of the Mitigation Plan and IGWA's 2021 Performance Report. All this information is in the record. In fact, the parties have known of IGWA's deficient performance at least since IGWA reported it to the Steering Committee on April 1, 2022. This occurred because the Mitigation Plan expressly requires IGWA to submit its performance reports and supporting data to the Steering Committee "annually," and the Department, in turn, "annually" reviews that information. *Second Addendum* §§ 2.a.i, 2.c.v. In this context, a motion supported by an affidavit containing information the SWC, IGWA, and the Department have had since April 1, 2022 is unnecessary, and the delay associated with such a procedure is not in the public interest.

Motion practice also is not necessary, nor in the public interest, for ascertaining the relief the SWC seeks. The SWC has been candid and consistent in its view that IGWA did not comply with the Mitigation Plan. *E.g., SWC's Request for Status Conference* at 3 (Apr. 29, 2022) ("IGWA and its junior priority ground water right members are not operating in accordance with the approved plan and are failing to mitigate the material to the Coalition members."); *Reply* at 5 ("the data and plain language of the Agreement shows a clear breach . . ."). Furthermore, the SWC and IGWA have, through the Remedy Agreement, stipulated to the relief necessary to remedy the SWC's concerns.

Clearly, the SWC seeks a determination that IGWA did not comply with the Mitigation Plan in 2021. And both the SWC and IGWA have agreed on a remedy for that noncompliance. *Remedy Agreement* § 1. Requiring these matters to be set forth, again, in a motion would serve no purpose but delay. Here, delay is not in the public interest because of the time that has already elapsed since IGWA's deficient mitigation during 2021.

**d. The 90-day cure period is inapplicable when the Steering Committee does not agree that a breach has occurred.**

Delay is also inherent in IGWA's claim that it must be granted an additional 90 days to cure the breach. *See Supplemental Response* at 8–9. But the Mitigation Plan does not require the Director to provide a cure period when he determines a breach has occurred.

As IGWA notes, section 2.c.iii of the Second Addendum states that “*the Steering Committee* shall give ninety (90) days written notice of the breach to the breaching party specifying the actions that must be taken to cure such breach.” (emphasis added). That provision is inapplicable where, as here, there is an impasse on whether a breach occurred. Rather, when the SWC and IGWA do not agree a breach has occurred, the Mitigation Plan contemplates that the Director “evaluate all available information, determine if a breach has occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.” *Second Addendum* § 2.c.iv. Moreover, the Director approved the Second Addendum on the express condition that the “[a]pproval . . . does not limit the Director’s enforcement discretion or otherwise commit the Director to a particular enforcement approach.” *Second Final Order* at 5. The plain text of both the Second Addendum and the Director’s Second Final Order undermine IGWA’s claim that it is entitled to a 90-day cure period now that the matter is before the Director.

More significantly, the Remedy Agreement shows that the SWC and IGWA do not need additional time to identify a cure. The parties not only agree the 2021 remedy “shall satisfy IGWA’s obligation under the [2015] Settlement Agreement,” they also agreed to “not seek review of the remedy agreed to and incorporated into the Director’s Order.” *Remedy Agreement* §§ 1, 3. Through the Remedy Agreement, the parties have stipulated to a cure for the breach. An additional 90-day cure period is neither required nor necessary in these circumstances.

## **ORDER**

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

(1) The Director takes official notice of IGWA’s 2021 Performance Report.

(2) To remedy noncompliance with the Mitigation Plan in 2021 only, IGWA must collectively supply to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year. Such amounts will be in addition to the long-term obligations set forth in section 3 of the 2015 Settlement Agreement and approved Mitigation Plan. IGWA must take all reasonable steps to lease the quantities of storage water set forth above from non-SWC spaceholders. If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA must make up the difference by either (a) leasing storage water from the SWC as described in section 2 of the Remedy Agreement, or (b) undertaking diversion reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River.

(3) Except as necessary to implement paragraph (2) above, nothing in this order alters or amends the Mitigation Plan or any condition of approval in the Director's First Final Order or Second Final Order in this matter.

DATED this 8th day of September 2022.

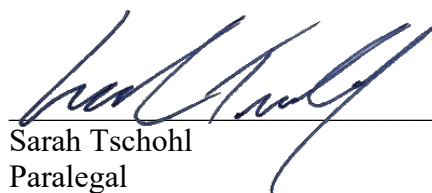
  
GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of September 2022, the above and foregoing was served by the method indicated below and addressed to the following:

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Sarah Tschohl  
Paralegal

## **EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER**

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

### **REQUEST FOR HEARING**

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

### **APPEAL OF FINAL ORDER TO DISTRICT COURT**

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.



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## STATE OF IDAHO

### DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF IGWA'S SETTLEMENT  
 AGREEMENT MITIGATION PLAN

Docket No. CM-MP-2016-001

### **Petition for Reconsideration and Request for Hearing**

Idaho Ground Water Appropriators, Inc. ("IGWA") submits this petition for reconsideration pursuant to Idaho Code § 67-5246(4) and rule 740.02.b of the Department's rules of procedure in response to the *Final Order Regarding Compliance with Approved Mitigation Plan* ("Final Order") issued September 8, 2022. This petition requests that the Director withdraw those parts of the Final Order that adjudicate IGWA's contractual obligations under the IGWA-SWC Settlement Agreement<sup>1</sup> (the "Settlement Agreement").

If the Director declines to amend the Final Order as requested in IGWA's petition for reconsideration, then IGWA requests a hearing pursuant to Idaho Code § 67-5242 and/or § 42-1701A(3) and rule 740.02.c of the Department's rules of procedure to address the merits of the Director's adjudication of IGWA's contractual obligations under the Settlement Agreement.

<sup>1</sup> The "IGWA-SWC Settlement Agreement" consists of the *Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of Idaho Ground Water Appropriators, Inc.*, the *Addendum to Settlement Agreement*, and the *Second Addendum*.

## PETITION FOR RECONSIDERATION

The Director should withdraw those parts of the Final Order that adjudicate IGWA's contractual obligations under the Settlement Agreement because (1) the adjudication of contractual disputes between third parties exceeds the Director's statutory authority, (2) IGWA's 2021 compliance with the Settlement Agreement is a moot issue, and (3) the Director's adjudication of the Settlement Agreement was made upon unlawful procedure.

### **1. The Director does not have statutory authority to adjudicate IGWA's contractual obligations under the Settlement Agreement.**

Idaho state agencies have no inherent authority; they have only those powers granted by the legislature. *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 102 Idaho 744, 750 (1981); *Idaho Retired Firefighters Assoc. v. Pub. Emp. Ret. Bd.*, 165 Idaho 193, 196 (2019). They are, in other words, "tribunals of limited jurisdiction." *In re Idaho Workers Comp. Bd.*, 167 Idaho 13, 20 (2020) (citing *Washington Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho 875, 879 (1979)). When implementing express statutory powers, "administrative agencies have the implied or incidental powers that are reasonably necessary in order to carry out the powers expressly granted." *Vickers v. Lowe*, 150 Idaho 439, 442 (2011) (citing 2 Am.Jur.2d *Administrative Law* § 57 (2004)). If an agency acts outside of its express and implied powers, such actions are void. *Wernecke v. St. Maries Joint Sch. Dist. No. 401*, 147 Idaho 277, 286 n.10 (2009) (citing 73 C.J.S. *Public Administrative Law & Procedure* § 112).

Adjudication of contract disputes is not among the powers granted to the Director. Such power is vested in the judiciary. The Director's statutory authority is confined to the distribution of water among water users and matters related thereto. While the Director's water distribution duties may be affected by third party contracts, and while the Director may need to interpret such contracts for the purpose of performing such duties, that is the extent of his interpretive authority. The Director does not have legal authority to definitively adjudicate disputes between third parties over contract interpretation. That authority remains with the judiciary.

The Second Addendum provides a process for resolving disputes over IGWA's compliance with the Settlement Agreement, but it does empower the Director to adjudicate disputes over contract interpretation. Section 3.m of the Second Addendum provides that disputes over compliance will be resolved by the Steering Committee, but if the Steering Committee cannot resolve the dispute then it will be submitted to the Director. Section 3.m pertains specifically to disputes over compliance. It does not empower the Director to adjudicate disputes over contract interpretation. Nor could it since that authority has not been given to the Director by the legislature. In fact, the Second Addendum recognizes that judicial action is necessary to resolve some disputes, as stated in section 4: "The parties further reserve all remedies, including the right to judicial action, to enforce the terms of the Settlement Agreement and this Second Addendum."

The *Surface Water Coalition's Notice of Steering Committee Impasse / Request for Status Conference* ("SWC Notice") placed before the Director two questions of contract interpretation, two questions regarding IGWA's 2021 compliance with the Settlement Agreement, and a final question asking what actions the Director would take in response to the alleged non-compliance. (SWC Notice, p. 4.) Had the parties not resolved their dispute over IGWA's 2021 compliance, the Director would have had to interpret the Settlement Agreement for the limited purpose of performing his water distribution duties. However, the parties did resolve their dispute. Once the 2022 Settlement Agreement ("2022 Agreement") was signed, there was no longer a need for the Director

to evaluate IGWA's 2021 performance in order to perform his water distribution duties. And since there was no need to evaluate IGWA's 2021 performance, there was no need to interpret its contractual obligations under the Settlement Agreement. Therefore, that part of the Final Order that adjudicates IGWA's contractual obligations under the Settlement Agreement constitutes an advisory opinion in excess of the Director's statutory authority.

The 2022 Agreement includes a statement that the Director "shall issue a final order regarding the interpretive issues raised by the SWC Notice." The Final Order should have dismissed the interpretive issues since the 2022 Agreement resolved IGWA's 2021 compliance. The Director does not have statutory authority to issue decisions granting prospective relief in the absence of a petition for declaratory ruling filed in accordance with the Idaho Administrative Procedures Act ("APA") and the rules of procedure of the Department, which has not occurred in this case.

Since the Director's advisory opinion adjudicating the contract dispute between IGWA and the SWC exceeds his statutory authority, those parts of the Final Order should be withdrawn.

## **2. The Director's ruling that IGWA's 2021 performance breached the Settlement Agreement violates due process because the issue is moot.**

A fundamental right afforded by the U.S. Constitution is that "No state ... shall deprive any person of life, liberty, or property without due process of law." U.S. Const., Amend. 14 §1; Idaho Const. art. I, § 13. Among other things, due process precludes courts and state agencies from adjudicating matters where no justiciable controversy exists. "Justiciability is generally divided into subcategories—advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political question and administrative questions." *Westover v. Idaho Ctys. Risk Mgmt. Program*, 164 Idaho 385, 389 (2018), *Wylie v. State*, 151 Idaho 26, 31 (2011), *Miles v. Idaho Power Co.*, 116 Idaho 635, 639 (1989). The Director's ruling that IGWA's 2021 performance breached the Settlement Agreement violates due process because the issue is moot.

"An issue is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome." *Farrell v. Whiteman*, 146 Idaho 604, 610 (2009). In other words, a case becomes moot "when the issues presented are no longer live." *Franz v. Osborn*, 167 Idaho 176, 180 (2020) (quoting *Ferrell*, 146 Idaho at 610). Justiciability requires an actual controversy that is "definite and concrete." *Bliss v. Minidoka Irr. Dist.*, 167 Idaho 141, 158 (2020) (citing *Bettwieser v. New York Irr. Dist.*, 154 Idaho 317, 326 (2013)). It does not exist when "only a hypothetical question remains, and it is impossible for the court to grant that party any other or additional relief." *Sallaz v. Rice*, 161 Idaho 223, 230 (2016) (citing *Dorman v. Young*, 80 Idaho 435-37 (1958)). The doctrine "precludes courts from deciding cases which are purely hypothetical or advisory." *State v. Rhoades*, 119 Idaho 594, 597 (1991).

IGWA's 2021 compliance with the Settlement Agreement is moot because the matter was resolved by the 2022 Agreement. There is no longer a live controversy. The Director is not in a position to grant any other or additional relief concerning IGWA's 2021 compliance. In fact, the Final Order acknowledges this. The Director refused to consider IGWA's due process argument because he deemed it to be "moot in light of the Remedy Agreement," explaining that he was no longer in a position to order curtailment due to IGWA's 2021 performance (i.e. the Director was unable to grant any other or additional relief). (Final Order, p. 17-18).

Since IGWA's 2021 compliance with the Settlement Agreement is a moot issue, those parts of the Final Order that adjudicate IGWA's 2021 compliance, including the contractual interpretations upon which they are based, should be withdrawn.

**3. The Director's ruling that IGWA breached the Settlement Agreement should be withdrawn because it was made upon unlawful procedure.**

Even if the Director has authority to adjudicate contractual disputes between IGWA and the SWC, his ruling that IGWA breached the Settlement Agreement must be withdrawn because it was made in violation of due process and the Idaho Administrative Procedures Act ("APA").

**3.1 The Director violated due process by adjudicating IGWA's property rights without first holding a hearing.**

"Due process of law under the federal and state constitutions requires that one be heard before his rights are adjudged." *Duggan v. Potlatch Forests, Inc.*, 92 Idaho 262, 264 (1968) (quoting *Lovell v. Lovell*, 80 Idaho 251 (1958)). "This principle of equity embedded in our constitutions is applicable in proceedings before administrative bodies." *Id.* (citing *Washington Water Power Co. v. Idaho Public Util. Comm.*, 84 Idaho 341, 372 P.2d 409 (1962)). Due process requires a hearing "before he is deprived of any significant property interest, except for extraordinary situations when some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Fuentes v. Shevin*, 407 U.S. 67, 81 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378–79 (1971) (emphasis in original)).

Before the Final Order was issued, IGWA argued that due process requires the Director to hold a hearing before interpreting or enforcing the Settlement Agreement. (IGWA's Obj. to Notice of Intent to Take Off. Notice, p. 2–5). The Director declined, concluding that due process only affords a hearing prior to a curtailment, and that the Final Order "does not deprive IGWA of any property right." (Final Order, p. 17.) This conclusion is mistaken. The Settlement Agreement and its accompanying IDWR-approved mitigation plan directly control how much water IGWA's members are permitted to divert under their water rights. Therefore, the Director's adjudication of IGWA's obligations under the Settlement Agreement and mitigation plan directly affects its members' property rights. This is obvious from the fact that Director's decision reduces the amount of water IGWA can divert by more than 34,000 acre-feet. (Final Order, p. 9–11.) The Final Order unequivocally deprives IGWA of property rights, effective immediately.

There is no "extraordinary circumstance" that requires a rushed interpretation of the Settlement Agreement without first holding a hearing. The dispute giving rise to the SWC Notice began last April. The SWC did not file the SWC Notice until July 21, 2022, and it was not accompanied by a motion requesting expedited action. Most importantly, the 2022 Agreement removed any need for immediate action by the Department.

Since there was no need for an immediate decision, due process requires that the Director hold a hearing before adjudicating IGWA's property rights under the Settlement Agreement. Since that was not done, those parts of the Final Order that purport to adjudicate IGWA's contractual obligations should be withdrawn.

**3.2 The Director violated the APA by making a decision in contested case without holding a hearing or declaring an emergency.**

To ensure that Idaho agencies afford due process, the APA prescribes procedures that must be followed in any contested case. Under the APA, any proceeding "which may result in the issuance of an order is a contested case." Idaho Code § 67-5240. A contested case may be disposed of either formally or informally. Informal disposition may occur "by negotiation, stipulation, agreed

settlement, or consent order.” Idaho Code § 67-5240. Formal disposition, on the other hand, must comply with specific procedures, including a hearing, to assure that “there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary,” and that all parties have “the opportunity to respond and present evidence and argument on all issues involved.” Idaho Code §§ 67-5242(3)(a)-(b).

The APA allows state agencies to take action without a hearing only “in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate government action.” Idaho Code § 67-5247(1). Even then, the agency must “proceed as quickly as feasible to complete any proceedings that could be required.” Idaho Code § 67-5247(4).

Before the Final Order was issued, IGWA argued that the APA requires the Director to hold a hearing before interpreting or enforcing the Settlement Agreement. (IGWA’s Obj. to Notice of Intent to Take Off. Notice, p. 5). The Director declined, concluding that Idaho Code § 42-1701A(3) allows him to make decisions first and hold hearings later. (Final Order, p. 17-18.) Section 42-1701A(3) reads, in relevant part:

Unless the right to a hearing before the director ... is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.

The Final Order asserts that § 42-1701A(3) trumps the APA because it applies specifically to hearings before the Director. (Final Order, p. 18). However, this argument disregards the plain language of § 42-1701A(3) which limits its application to circumstances where “the right to a hearing before the director is [not] otherwise provided by statute.”

The Director takes actions in a wide range of contexts that frequently do not qualify as contested cases under the APA. In those contexts, § 42-1701A(3) entitles aggrieved parties to an after-the-fact hearing to contest the action. By contrast, when the Director takes action “which may result in the issuance of an order,” such action qualifies as a “contested case” under the APA. Idaho Code § 67-5240. Under the APA, a hearing is provided by statute: Idaho Code § 67-5242. Therefore, § 42-1701A(3) does not apply in contested cases governed by the APA.

Both the SWC Notice and the Final Order were filed in existing contested cases that have been conducted under the APA from the beginning. The original Department order issued in 2005 in response to the SWC delivery call states: “A contested case is initiated pursuant to Idaho Code § 67-5240 to consider the relief requested.” (Order, Feb. 15, 2005, p. 33.) The Department orders approving the Settlement Agreement and the Amendment to Settlement Agreement similarly include the following statement: “The accompanying order is a “Final Order” issued by the department pursuant to section 67-5246, Idaho Code.” The SWC Notice was filed under a caption that cites the IDWR document numbers for both the SWC delivery call and the Settlement Agreement contested cases (Docket Nos. CM-DC-2010-011 and CM-MP-2016-001), and the Final Order was filed in the contested case governing the Settlement Agreement (Docket No. CM-MP-2016-001).

After many years of the SWC delivery and the Settlement Agreement being governed by the APA, the Director’s decision to circumvent the APA and avoid hearing all evidence before passing

judgment on IGWA's contractual obligations under the Settlement Agreement is very troubling. In any case, the decision was issued in violation of the APA.

Since the Director's adjudication of IGWA's contractual obligations under the Settlement Agreement was made without a hearing and without an emergency declaration, in violation of the APA, those parts of the Final Order should be withdrawn.

## REQUEST FOR HEARING

If the Director grants IGWA's petition for reconsideration by withdrawing those parts of the Final Order that adjudicate IGWA's obligations under the Settlement Agreement, then the Director need not grant IGWA's request for hearing. However, if the Director declines to withdraw those parts from the Final Order, then IGWA requests a hearing to address the merits of the Director's decision.

The merits of developing a full evidentiary record and considering all arguments before making critical decisions need not be recited here. Suffice it to say that the APA as well as the Department's rules of procedure contemplate that such a process will be the norm, not the exception. Department rules of procedure require the Director to hold a hearing (Rules 550-553) where testimony is received under oath (Rule 558), "base its decision in a contested case on the official record in the case" (Rule 650.01), "maintain an official record including the items described in section 67-5249, Idaho Code" (Rule 650.01), and instruct that evidence be accepted "to assist the parties' development of a record, not excluded to frustrate that development" (Rule 600). Rule 602 allows the Director to take official notice of certain documents, but this must occur within the context of a contested case hearing and "[p]arties must be given an opportunity to contest and rebut the facts or material officially noticed."

No hearing has been held in accordance with the APA and Department rules of procedure. The Director's "discussion with counsel for the parties regarding possible curative remedies should the Director find a breach" at a status conference (Final Order, p. 4) does not even approach the hearing process required by constitution, the APA, and Department rules of procedure. The Final Order asserts that the Director may "liberally construe" the Department rules of procedure when "impracticable, unnecessary or not in the public interest," but any deviation must still provide a "just, speedy and economical determination of all issues presented to the agency" (Rule 51), and must still comply with due process or the APA. *A&B Irr. Dist. v. Idaho Dep't of Water Res.*, 154 Idaho 652, 654 (2012) ("[A]ny interpretation by IDWR of the provisions of the section 67-5246 is not entitled to deference."). A discussion at a status conference, with no motion or petition having been filed, and no opportunity to conduct discovery, present evidence, or examine witness, falls far short what is legally required.

The Settlement Agreement expressly provides that when the Steering Committee does not agree as to whether a breach occurred, the Director must "evaluate all available information" to determine if a breach has occurred. (Second Addendum, § 2.c.iv (emphasis added)). IGWA requested an evidentiary hearing before the Director construed IGWA's obligations under the Settlement Agreement because additional information was necessary for the decision to be fully informed. (IGWA's Obj. to Not. of Intent to Take Off. Not., p. 6).

IGWA requests hearing for reconsideration of the following determinations in the Final Order: (a) that the Settlement Agreement is unambiguous as to IGWA's share of the 240,000-acre-foot groundwater reduction; (b) that Settlement Agreement is unambiguous as to the means by which compliance with IGWA's conservation obligation is measured; (c) that the Settlement


Agreement unambiguously precludes averaging for the purpose of measuring compliance with IGWA's conservation obligation; (d) that the Director is permitted to look outside the four corners of the Settlement Agreement to interpret unambiguous terms; (e) that the Director is permitted to selectively consider parole evidence when interpreting ambiguous terms; (f) that certain IGWA members breached the Settlement Agreement and accompanying Mitigation Plan in 2021; (d) that certain IGWA members are not covered by an effectively operating Mitigation Plan; and (e) that the 90-day cure period is inapplicable when the Steering Committee does not reach agreement as to whether a breach has occurred. IGWA reserves the right to raise additional issues based on evidence presented at the hearing.

### CONCLUSION

For the reasons set forth above, IGWA requests that the Director withdraw those parts of the Final Order that adjudicate IGWA's contractual obligations under the Settlement Agreement, and issue an amended order that simply approves the 2022 Agreement. If the Director withdraws those parts of the Final Order, he need not grant IGWA's request for hearing. However, if the Director declines to grant IGWA's petition for reconsideration as requested, IGWA respectfully requests a hearing to address the merits of the Director's decision.

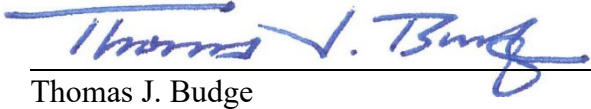
DATED September 22, 2022.

RACINE OLSON, PLLP

By:   
Thomas J. Budge  
*Attorneys for IGWA*

## CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2022, I served the foregoing document on the persons below via email as indicated:

  
Thomas J. Budge

Gary Spackman, Director Garrick Baxter, Deputy Attorney General IDAHO DEPT. OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098	<a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a> <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a>
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William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318	<a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a>

**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

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

Docket No. CM-MP-2016-001

**ORDER GRANTING REQUEST FOR  
HEARING; NOTICE OF  
PREHEARING CONFERENCE**

**BACKGROUND**

On September 8, 2022, the Idaho Department of Water Resources ("Department") issued a *Final Order Regarding Compliance with Approved Mitigation Plan* ("Final Order"). The Final Order concluded that, in 2021, the Idaho Ground Water Appropriators, Inc. ("IGWA") did not comply with the approved mitigation plan between the Surface Water Collation ("SWC") and IGWA. Additionally, the Final Order approved the settlement agreement the parties filed with the Department on September 7, 2022, as an appropriate remedy for IGWA's 2021 breach.

On September 22, 2022, IGWA timely filed with the Department a *Petition for Reconsideration and Request for Hearing* ("Petition"). The Petition requests the Director amend the Final Order to "withdraw those parts . . . that adjudicate IGWA's contractual obligations under the Settlement Agreement . . ." Petition at 7. In the alternative, the Petition "requests a hearing to address the merits of the Director's decision." *Id.*

**APPLICABLE LAW**

Idaho Code § 42-1701A(3) provides in relevant part:

Unless the right to a hearing before the director . . . is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action . . . who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.

## ANALYSIS AND CONCLUSIONS OF LAW

IGWA has not previously been afforded an opportunity for hearing on the Final Order. Therefore, the Director concludes he should grant IGWA's request for hearing in accordance with Idaho Code § 42-1701A(3). Because the Director is granting the request for hearing, IGWA's request for reconsideration is moot and will not be addressed in this order. The issues raised in the request for reconsideration can be raised at hearing or within briefing.

## NOTICE OF PREHEARING CONFERENCE

The Director hereby notifies the parties that a prehearing conference in this matter will be held on **November 10, 2022, at 10 a.m. (MST)**, at the Department's State Office, located at 322 E. Front Street, 6th Floor, Conference Room 602C-D, Boise, Idaho. All parties to the matter must be represented at the prehearing conference in person or by video conference. The parties shall come prepared to identify the issues to be addressed at hearing or decided on briefing, and to establish a schedule.

To join the conference via computer or smartphone, please click the following Webex link, follow the prompts, and wait to be admitted by the meeting host:

<https://idahogov.webex.com/idahogov/j.php?MTID=m76fe9d00b5c92782fa4b287a30145f64>.

To join the conference via telephone, please dial 1(415) 655-0001 (US Toll) and enter the following meeting access code when prompted: 2467 819 2382.

The prehearing conference will be held in accordance with the provisions of Chapter 17, Title 42, and Chapter 52, Title 67, Idaho Code, and the Department's Rules of Procedure, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at <https://adminrules.idaho.gov/rules/current/37/370101.pdf>.

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

## ORDER

IT IS HEREBY ORDERED that IGWA's request for hearing is GRANTED.

Dated this 13<sup>th</sup> day of October 2022.

  
GARY SPACKMAN  
Director


ORDER GRANTING REQUEST FOR HEARING; NOTICE OF PREHEARING  
CONFERENCE—Page 2

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13<sup>th</sup> day of October 2022, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson Travis L. Thompson BARKER RSHOLT & SIMPSON, LLP P. O. Box 63 Twin Falls, ID 83303-0063 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a> <a href="mailto:nls@idahowaters.com">nls@idahowaters.com</a> <a href="mailto:jf@idahowaters.com">jf@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
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Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Sarah A Klahn Somach Simmons & Dunn 1155 Canyon Blvd, Ste. 110 Boulder, CO 80302 <a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email

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

  
Megan Jenkins  
Administrative Assistant II

**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

**NOTICE OF RESCHEDULED  
PREHEARING CONFERENCE**

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

The Director hereby notifies the parties that the prehearing conference set in this matter for November 10, 2022, at 10 a.m. (MST) has been rescheduled for **November 10, 2022, at 9 a.m. (MST)**. The conference will take place at the Department's State Office, located at 322 E. Front Street, 6th Floor, Conference Room 602C-D, Boise, Idaho. All parties to the matter must be represented at the prehearing conference in person or by video conference. The parties shall come prepared to identify the issues to be addressed at hearing or decided on briefing, and to establish a schedule.

To join the conference via computer or smartphone, please click the following Webex link, follow the prompts, and wait to be admitted by the meeting host:  
<https://idahogov.webex.com/idahogov/j.php?MTID=m76fe9d00b5c92782fa4b287a30145f64>.

To join the conference via telephone, please dial 1(415) 655-0001 (US Toll) and enter the following meeting access code when prompted: 2467 819 2382.

The prehearing conference will be held in accordance with the provisions of Chapter 17, Title 42, and Chapter 52, Title 67, Idaho Code, and the Department's Rules of Procedure, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at <https://adminrules.idaho.gov/rules/current/37/370101.pdf>.

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

Dated this 8<sup>th</sup> day of November 2022.

  
GARY SPACKMAN  
Director

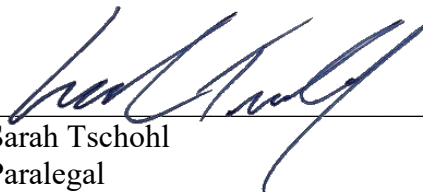
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of November 2022, the above and foregoing, was served by the method indicated below, and addressed to the following:

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

  
\_\_\_\_\_  
Sarah Tschohl  
Paralegal

## Tschohl, Sarah

---

**From:** Tschohl, Sarah  
**Sent:** Monday, November 14, 2022 4:17 PM  
**To:** jks@idahowaters.com; Travis Thompson; nls@idahowaters.com; jf@idahowaters.com; wkf@pmt.org; randy@racineolson.com; TJ Budge; kathleenmarion.carr@sol.doi.gov; david.gehlert@usdoj.gov; mhoward@usbr.gov; Sarah A Klahn; Diane Thompson; Diehl, Rich; Chris Bromley; Candice McHugh; Rob Williams (rewilliams@wmlattys.com); Robert L Harris; rfife@idahofallsidaho.gov; Olenichak, Tony; Skinner, Corey; 'William Parsons'  
**Cc:** Baxter, Garrick; Spackman, Gary; Jenkins, Megan; Cecchini-Beaver, Mark; Weaver, Mathew  
**Subject:** Disclosure by the Director | No. CM-MP-2016-001  
**Attachments:** 2015 Settlement Agreement.pdf; 20221103 Email to the Director.pdf

Hello,

During the November 10, 2022 Prehearing Conference, Director Spackman referenced an email and document he received from a ground water user and stated that he would disclose them to the parties. Please see the attached copies of the email received by the Director and the document attached to that email.

Thank you,



**Sarah Tschohl | Paralegal**

Water Resources Section | Natural Resources Division  
Office of the Attorney General | State of Idaho  
O: 208-287-4815 | W: [ag.idaho.gov](http://ag.idaho.gov)

NOTICE: This message, including any attachments, is intended only for the individual(s) or entity(ies) named above and may contain information that is confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you are not the intended recipient, please reply to the sender that you have received this transmission in error, and then please delete this email.

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**SETTLEMENT AGREEMENT ENTERED INTO JUNE 30, 2015 BETWEEN PARTICIPATING  
MEMBERS OF THE SURFACE WATER COALITION<sup>1</sup> AND PARTICIPATING MEMBERS OF THE  
IDAHO GROUND WATER APPROPRIATORS, INC.<sup>2</sup>**

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

**1. Objectives.**

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

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

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

## **2. Near Term Practices.**

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

## **3. Long Term Practices, Commencing 2016.**

- a. *Consumptive Use Volume Reduction.*
  - i. Total ground water diversion shall be reduced by 240,000 ac-ft annually.
  - ii. Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity. Private recharge activities cannot rely on the Water District 01 common Rental Pool or credits acquired from third parties, unless otherwise agreed to by the parties.
- b. *Annual storage water delivery.*
  - i. IGWA will provide 50,000 ac-ft of storage water through private lease(s) of water from the Upper Snake Reservoir system, delivered to SWC 21 days after the date of allocation, for use to the extent needed to meet irrigation

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

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

c. *Irrigation season reduction.*

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

d. *Mandatory Measurement Requirement.*

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

e. *Ground Water Level Goal and Benchmarks.*

- i. Stabilize and ultimately reverse the trend of declining ground water levels and return ground water levels to a level equal to the average of the aquifer levels from 1991-2001. Utilize groundwater levels in mutually agreed upon wells with mutually agreed to calculation techniques to measure ground water levels. A preliminary list of 19 wells has been agreed to by the parties, recognizing that the list may be modified based on additional technical information.
- ii. The following benchmarks shall be established:
  - o Stabilization of ground water levels at identified wells by April 2020, to 2015 ground water levels;
  - o Increase in ground water levels by April 2023 to a point half way between 2015 ground water levels and the ground water level goal; and
  - o Increase of ground water levels at identified wells by April 2026 to the ground water level goal.
- iii. Develop a reliable method to measure reach gain trends in the Blackfoot to Milner reach within 10 years.
- iv. When the ground water level goal is achieved for a five year rolling average, ground water diversion reductions may be reduced or removed, so long as the ground water level goal is sustained.
- v. If any of the benchmarks, or the ground water level goal, is not achieved, adaptive measures will be identified and implemented per section 4 below.

f. *Recharge.*

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

State has  
a list of  
approved devices



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

g. *NRCS Programs.*

Parties will support NRCS funded permanent water conservation programs.

h. *Conversions.*

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

i. *Trust Water Rights.*

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

j. *Transfer Processes.*

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

k. *Moratorium Designations.*

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

l. *IDWR Processes.*

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

m. *Steering Committee.*

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

4. **Adaptive Water Management Measures.**

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

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

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

**5. Safe Harbor.**

No ground water user participating in this Settlement Agreement will be subject to a delivery call by the SWC members as long as the provisions of the Settlement Agreement are being implemented.

**6. Non-participants.**

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

**7. Term.**

This is a perpetual agreement.

**8. Binding Effect.**

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

**9. Entire Agreement.**

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

**10. Effect of Headings.**

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

**11. Effective Date.**

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

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

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

RACINE OLSON NYE BUDGE AND BAILEY, CHARTERED

Randall C. Budge 7/1/2015  
Randall C. Budge Date

Attorney for Idaho Ground Water Appropriators, Inc.



IDAHO GROUND WATER APPROPRIATORS, INC.

 7/1/2015  
Tim Deeg Date

President

**QUESTIONS AND ANSWERS**

**TO: IGWA Members**  
**FROM: Randy Budge, T.J. Budge**  
**DATE: July 2, 2015**  
**RE: SWC – IGWA SETTLEMENT AGREEMENT dated June 30, 2015**

1. How was the 240,000 acre-feet of reduction in groundwater diversions arrived at?

Answer: The total volume of water stored in the ESPA has declined by an average of approximately 220,000 acre-feet annually over the last 60 years. The 240,000 acre-feet is a negotiated reduction.

2. What is the purpose of the 240,000 acre-feet reduction in groundwater diversion plus the 250,000 acre-feet of state-Sponsored recharge?

Answer: Stabilize the declining aquifer, then trend groundwater levels upward until the established goal is reached (discussed below).

3. Why is it necessary to raise groundwater levels?

Answer: Several reasons: (1) to increase the water supplies of senior surface water right holders and avoid future delivery calls; (2) improve reach gains to the Snake River; (3) sustain the Murphy gage minimum flows; and (4) decrease pumping lifts and re-drilling costs.

4. How will the 240,000 acre-foot reduction in groundwater withdrawals be allocated between the districts?

Answer: Each of the twelve (12) ground water and irrigation districts that divert water from the ESPA will be allocated their proportionate share of the total annual ground water reduction based on the number of cfs and/or irrigated acres within each district.

5. If one or more districts choose not to participate in the settlement, will the participating districts have to further reduce diversions in order to reach the cumulative 240,000 acre-foot reduction in groundwater use?

Answer: No, each district will only be responsible for its share of the 240,000 acre-feet. However, if the ground water level goal or benchmarks identified in the settlement agreement are not met further diversion reductions may be necessary to meet the goal.

6. What is the approximate percentage reduction in groundwater diversions needed to achieve an overall 240,000 acre-foot reduction?

Answer: Approximately 10.9% to each district, subject to refinement as the exact amount of groundwater diverted in each district is determined.

7. How will the diversion reduction be applied across the ESPA?

Answer: Each district will be required to reduce diversion by 10.9%. The following table shows the current crop irrigation requirements (CIR) for each district, compared to the CIR with a 10.9 % reduction. These figures may change as the amount of groundwater diverted by each district is refined.

District	Current	10.9% Reduction
A&B Irrig. Dist.	2.6	2.32
Aberdeen-American Falls GWD	2.1	1.87
Bingham GWD	2.3	2.05
Bonneville-Jefferson GWD	1.9	1.69
Carey Valley GWD	2.2	1.96
Fremont-Madison Irrig. Dist.	1.7	1.51
Jefferson-Clark GWD	1.9	1.69
Madison GWD	1.7	1.51
Magic Valley GWD	2.6	2.32
North Snake GWD	2.4	2.14
Raft River GWD	1.8	1.60
Southwest Irrig. Dist.	2.4	2.14

8. Is each district required to dry up 10.9% of its irrigated acreage?

Answer: No. Each district will decide how to accomplish its 10.9% reduction. Options may include diversion caps, fallowing land, end-gun removals, conversions to surface water, changing crop rotation patterns to less consumptive crops, and enrolling land in CREP.

9. What is the ground water level goal?

Answer: An average of the 1991 to 2001 ground water levels at 19 identified wells.

10. What is the benchmark for stabilizing ground water levels?

Answer: By April 2020 stabilize ground water levels at identified wells to 2015 ground water levels.

11. What are the benchmarks for increasing groundwater levels?

Answer: By 2023 increase ground water levels at identified wells to a point half way between 2015 ground water levels and the ground water level goal; and, by April 2026 increase ground water levels at identified wells to the ground water level goal.

12. Will the 240,000 acre-foot reduction of groundwater diversion plus 250,000 acre-feet of state-sponsored recharge be sufficient to stabilize and then return ground water levels to an average of the 1991 to 2001 levels?

Answer: Model runs indicate it will, though precipitation plays a significant role in how long it will take.

13. How long will it take to restore the aquifer to meet the goals?

Answer: Under average precipitation, the aquifer is projected to stabilize in about 5 years and reach the recovery goal in about 10 years. Persistent drought will cause it to take longer, whereas a wet cycle will expedite the recovery.

14. If ground water level goal is achieved, can the reduction in groundwater diversions be reduced or eliminated?

Answer: Yes. Success is measured when a rolling average of 5 years of groundwater levels at identified wells equals or exceeds the established goal. When these levels are achieved and sustained, groundwater diversion reductions may be reduced or eliminated so long as the groundwater level goal is maintained.

15. What happens if the groundwater level goal is not achieved?

Answer: Adaptive measures will be identified and implemented. A steering committee comprised of the parties and the State will identify appropriate adaptive measures.

16. What is the "safe harbor" provided to participating groundwater users in a participating district?

Answer: No participating groundwater user within a district that is party to the settlement will be subject to a delivery call by the SWC.

17. How long is the agreement for?

Answer: It is perpetual.

18. Will groundwater users who have already implemented efficiencies such as participating in end gun removals, CREP and conversions for example, still be required to reduce more?

Answer: Not necessarily. It will depend on the methods implemented by each district to achieve their diversion reduction. Highly efficient water users may already be near or under a diversion cap.

19. Who makes the decision whether to participate in the settlement?

Answer: The board of directors of each district will decide whether their district participates. The districts plan to hold member meetings to provide guidance.

20. When must each district decide whether to participate in the settlement?

Answer: By August 1, 2015.

21. Will a district that does not participate in the settlement by August 1, 2015, be able to change its mind and participate at a later date?

Answer: Unknown at this time. All parties to the agreement would have to decide whether to allow others to participate later and upon what terms.

22. What happens to a participating district that opts out of the settlement or fails to perform?

Answer: The settlement agreement does not provide for an option to opt out. If a district fails to perform, the members water rights will be subject to administration by IDWR. District members will then be required to comply with mitigation and curtailment orders imposed by the Director under the SWC delivery call. Members of districts who do not perform may be subject to curtailment during times when SWC water rights are short.



23. If a district board decides to participate in the settlement, can individual groundwater users opt out?

Answer: No, unless the district board allows them to withdraw from the district.

24. If a district board allows a member to withdraw from the district, will the remaining district members have to make up the senior's share?

Answer: Yes.

25. If a district chooses not to participate in the settlement, may a member choose to participate by reducing their groundwater diversion by 10.9%?

Answer: The settlement agreement does not address this, but the member may be able to petition to join another participating district for mitigation purposes to participate in the SWC settlement and gain safe harbor from curtailment.

26. What happens if a water user fails to keep its diversions under a diversion cap?

Answer: The district would need to enforce the cap or be in breach of the agreement. If the agreement is breached the safe harbor protections would end and all of the district's member's water rights would be subject to administration and curtailment.

27. Can a district obligate senior groundwater rights to participate in the settlement?

Answer: Districts have authority under Idaho Code 42-5224 to enter into the settlement agreement on behalf of their members. A district member could challenge the Board's action. The outcome of such challenge is unknown.

It is important that groundwater users understand that the settlement agreement presents a unique opportunity to solve the declining aquifer problem. The alternative is leaving the problem to the devices of IDWR and judges. The demand reduction plus recharge plan is a holistic approach that aims to keep everyone in business and operating every year, rather than being subject to curtailment during periods of drought.

If the settlement agreement fails, groundwater users will be required to live with curtailment orders issued by the IDWR and judges, which require drying up land. The settlement agreement is the only way for groundwater users to avoid curtailment by reducing diversions instead of drying up land.

Since all groundwater rights could be at risk of curtailment under the SWC delivery call, most groundwater users have multiple water rights with different priority dates, and the settlement provides an opportunity to keep land in production by reduced diversions, IGWA believes it is the most cost-effective and fair approach to solving the problem.

28. How will the priority of water rights between groundwater users be recognized by those districts who participate in the settlement?

Answer: Districts could decide to allocate the reduction unequally so that older rights have a smaller diversion cap and later rights have a larger diversion cap. However, this would likely be more difficult and expensive to administer than other alternatives because of stacked rights. It would also be difficult for individual farmers to implement.

29. How will enforcement of the diversion reductions be accomplished against participating groundwater districts?

Answer: Groundwater diversions have been measured and reported to IDWR for many years. This database will be used to determine whether farmers stay within their diversion cap. In addition, satellite sensors will be used by IDWR to measure ET losses from irrigated fields to confirm a reduction in consumptive use.

30. Who will do the enforcement of the groundwater diversion reductions against the districts and their members?

Answer: Each district is ultimately responsible to ensure its members comply with the diversion cap for the district. IDWR may help districts facilitate enforcement.

31. Can the diversion reductions be accomplished by averaging diversions or a period of years to accommodate crop rotation practices?

Answer: Perhaps, but this technical detail will need to be worked out.

32. Does the Director's new 2015 Methodology Order increase mitigation obligations to the SWC?

Answer: Yes. Changes made to the 2015 Methodology Order, along with declining aquifer levels, cause much larger mitigation obligations than existed previously and also increase the frequency of years in which mitigation obligations will exist.

33. Will groundwater diverters outside of the Rule 50 aquifer boundary, such as in the Big Loss, Big Wood and Portneuf basins, be required to participate in the settlement?

Answer: Not at this time because they are legally outside of the ESPA. This is expected to change in the future so that all ground water users that impact aquifer levels are required to participate in the solutions necessary to protect the aquifer.

34. How will the starting groundwater level be determined and how will stabilization and increase in groundwater levels be determined?

Answer: Technical experts representing the parties have identified 19 wells to establish the current ground water level and to monitor changes in the groundwater level and determine if the benchmarks and goal are being achieved.

35. What happens if the State does not meet its commitment to recharge an average of 250,000 acre-feet annually?

Answer: The State's recharge obligation is separate from the groundwater users under the settlement. The districts obligations to perform continue regardless of whether the State achieves its recharge objective.

36. Can a district still participate in the settlement and have safe harbor if another district does not?

Answer: Yes. Participating districts will enjoy safe harbor while members of non-participating districts will risk curtailment.

37. Will commercial, industrial, municipal, or stock water rights in participating districts also be required to reduce their diversions?

Answer: Yes. However, the means by which they accomplish reductions in their diversions have yet to be determined.

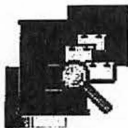


38. Summarize how approving and performing the settlement will solve problems and help eliminate curtailment risks to ground water users?

Answer: The settlement agreement will help solve ongoing risks of curtailment in three key areas: (1) by permanently solving all mitigation obligations to the SWC and providing safe harbor from curtailment; (2) by increasing spring discharges in the Hagerman Valley which will reduce or eliminate over time for mitigation obligations there; and (3) by increasing base river flows in the summer to help avoid need for curtailment to sustain the Murphy gage minimum flows.

Stabilizing then restoring the aquifer will cause chronic pain for a number of years until the groundwater level goal is met. In return, ground water users will receive certainty by removing the risk of curtailment for the future and preserving the right to reduce or eliminate diversion reductions once the ground water level goal is achieved.

It will not be business as usual, but a way to stay in business!



# Idaho Statutes

## TITLE 42

### IRRIGATION AND DRAINAGE -- WATER RIGHTS AND RECLAMATION

#### CHAPTER 52

#### GROUND WATER DISTRICTS

42-5251. PETITION FOR EXCLUSION OF LANDS -- GROUND WATER IRRIGATED LANDS -- LANDS OF NONIRRIGATOR -- LANDS MAY REMAIN IN THE DISTRICT FOR MITIGATION PURPOSES. (1) Any district member who is an irrigator may file with the district board a petition requesting that the member's irrigated lands be excluded from the district. The petition may request that the lands either be excluded for all purposes or be excluded for all purposes except mitigation. The petition shall be signed by each petitioner, and shall state that continued inclusion of the irrigated lands in the district is inappropriate or unwarranted:

(a) Because the diversions of ground water under the ground water irrigator's water right have no depletive effect on any water source, either individually or cumulatively when considered in conjunction with other similar diversions;

(b) Because the only ground water use associated with the lands sought to be excluded by the petition is a domestic or stock water use as defined by sections 42-111 and 42-1401A, Idaho Code;

(c) Because the exclusion of the lands will not impair the district's ability to repay debt or carry out mitigation plans;

(d) Because the exclusion is in the best interests of the district and its members; or

(e) For other compelling reasons.

The board shall consider the petition and, based on findings concerning such factors, the board shall grant or deny the petition within ninety (90) days of the date it is filed, unless the board, in its sole discretion, grants a hearing on the petition within such time period, in which case the board shall issue a final decision within sixty (60) days after the conclusion of the hearing.

(2) Any district member who is a nonirrigator, may file with the district board a petition requesting that the member's lands be excluded from the district. The petition may request that the lands either be excluded for all purposes or be excluded for all purposes except mitigation. The petition shall be signed by each petitioner, but need not be acknowledged. The board shall consider the petition and grant or deny the petition within ninety (90) days of the date it is filed, unless the board, in its sole discretion, grants a hearing on the petition within such time period, in which case the board shall issue a final decision within sixty (60) days after the conclusion of the hearing.

(3) All costs incurred by the district in carrying out an exclusion proceeding shall be assessed as provided in section 42-5253, Idaho Code. A person purchasing land under a written contract shall be deemed to be the owner of that land for purposes of this section.

# Idaho Statutes

## TITLE 42 IRRIGATION AND DRAINAGE -- WATER RIGHTS AND RECLAMATION

### CHAPTER 52 GROUND WATER DISTRICTS

42-5252. CONTENTS OF PETITION -- REPRESENTATIONS, CERTIFICATION AND LIABILITY -- WAIVER OF BENEFITS UPON EXCLUSION. (1) A petition for exclusion shall set forth or include the following:

(a) A description of the land and/or facilities of petitioner for which exclusion is requested, together with such evidence of ownership of the land and/or facilities as is satisfactory to the district board;

(b) A representation that no mortgagee or other person holds a lien of record in the county where the land for which exclusion is requested is located, for which the lienholder's consent to the exclusion is required or that, if such consent is required, the consent has been granted by the lienholder;

(c) If the member seeks exclusion for all purposes, an explicit written waiver and relinquishment, on a form provided by the board or otherwise, of all right to rely upon or be covered by any program, plan, activity or benefits of any kind provided by or through the district;

(d) If the member seeks to be excluded from the district for all purposes except mitigation, an explicit written waiver and relinquishment stating that the member recognizes and agrees that:

(i) The member no longer will be entitled to vote or participate in the governance of the district, to nominate directors, or to serve as a director of the district except as specified in this chapter;

(ii) The member will remain subject to all assessments pertaining to the district's mitigation program(s) or plans;

(iii) The member will be entitled to receive no benefits of any kind from the district except those pertaining to mitigation purposes.

(e) Regardless of whether the exclusion will be for all purposes or for all except mitigation purposes, an explicit written statement, on a form provided by the board or otherwise, that the member recognizes and agrees that he will remain liable to the district, and subject to assessment, for any financial indebtedness the member may have to the district for indebtedness incurred before exclusion occurs.

(2) The district board shall return to the petitioner any petition not accompanied by the information required in subsection (1) of this section, and no further action shall be required of the board with respect to such petition. The petitioner shall be liable for any expenses or damages to lienholders or to other landowners or to the district resulting directly or indirectly from wrongful exclusion of lands by

ison of untrue or incorrect statements in the petition.

(3) The petition for exclusion shall be signed by the member and be acknowledged in front of a notary public in the same manner as for deeds land.

story:

[42-5252, added 1995, ch. 290, sec. 1, p. 1004.]



# Idaho Statutes

## TITLE 42

### IRRIGATION AND DRAINAGE -- WATER RIGHTS AND RECLAMATION

#### CHAPTER 52

#### GROUND WATER DISTRICTS

42-5253. ORDER OF EXCLUSION. (1) In the event the district's board of directors grants a petition for exclusion, the board shall, by resolution, make an order forthwith excluding the lands described in the petition either for all purposes or for only those purposes not related to mitigation. No hearing is required prior to granting a petition for exclusion.

(2) At a minimum, the order of exclusion shall specify that:

(a) Lands excluded for all purposes shall not be a part of or be entitled to receive any benefits from the district;

(b) Lands excluded only for purposes not related to mitigation, shall continue to be part of the district for mitigation purposes only and shall be assessed for these purposes as provided under this chapter;

(c) Any excluded lands are subject to the requirements of section 42-5257, Idaho Code.

(d) When the petition is filed on or before December 1 in any calendar year, any assessment, other than those specified in section 42-5257, Idaho Code, against the land for any calendar year subsequent to the year in which the petition was filed shall not be valid and no lien for any such attempted assessment shall attach under section 42-5240, Idaho Code.


#### History:

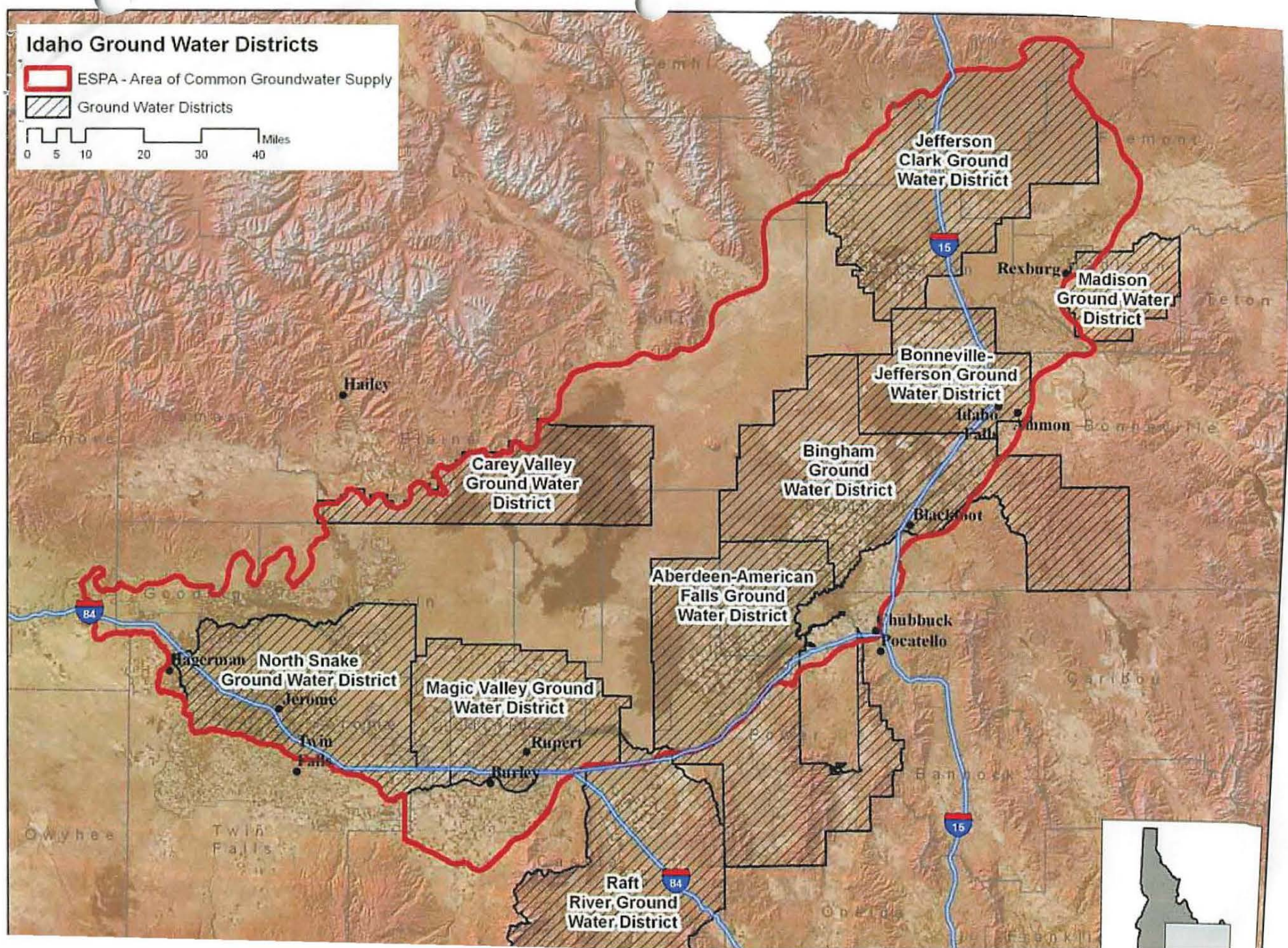
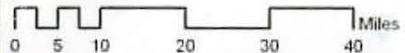
[42-5253, added 1995, ch. 290, sec. 1, p. 1005; am. 2005, ch. 367, sec. 16, p. 1165.]



# Idaho Ground Water Districts

 ESPA - Area of Common Groundwater Supply

 Ground Water Districts





## 240kAF REDUCTION ALLOCATED BY DISTRICT

District	Current			% Share of 240kAF	Reduction			Benefit (ac-ft)
	CIR (ac-ft/acre)*	Acres*	Total AF		% Reduction	CIR Cap (ac-ft/acre)	Total AF	
A&B ID***	2.6	66,686	173,384	7.9%	10.9%	2.32	154,451	18,932
Aberdeen-American Falls GWD*	2.1	146,988	308,675	14.0%	10.9%	1.87	274,970	33,705
Bingham GWD*	2.3	134,083	308,391	14.0%	10.9%	2.05	274,717	33,674
Bonneville-Jefferson GWD*	1.9	91,086	173,063	7.9%	10.9%	1.69	154,166	18,897
Carey Valley GWD*	2.2	2,513	5,529	0.3%	10.9%	1.96	4,925	604
Fremont-Madison ID**	1.7	8,000	13,600	0.6%	10.9%	1.51	12,115	1,485
Jefferson-Clark GWD*	1.9	171,488	325,827	14.8%	10.9%	1.69	290,249	35,578
Madison GWD*	1.7	739	1,256	0.1%	10.9%	1.51	1,119	137
Magic Valley GWD*	2.6	189,990	493,974	22.5%	10.9%	2.32	440,035	53,939
North Snake GWD*	2.4	84,601	203,042	9.2%	10.9%	2.14	180,871	22,171
Raft River GWD*	1.8	11	20	0.0%	10.9%	1.60	18	2
Southwest ID**	2.4	79,655	191,172	8.7%	10.9%	2.14	170,297	20,875
<b>TOTALS</b>		<b>975,840</b>	<b>2,197,933</b>	<b>100%</b>			<b>1,957,933</b>	<b>240,000</b>

\*From IDWR 5/28/2015 ("SWC Delivery Call Settlement & Term Sheet")

\*\*Acres reported to IGWA by District; FMID assigned same CIR as MGWD; SWID assigned same CIR as NSGWD

\*\*\*Acres from A&B delivery call; assigned same CIR as MGVWD

*380,000 including Madison*

**DISTRICT MEETING SCHEDULE  
SWC - IGWA SETTLEMENT AGREEMENT**

<b>District</b>	<b>Meeting Date</b>	<b>Meeting Place</b>
North Snake GWD	None	
Magic Valley GWD	None	
Carey GWD	July 27, 2015 @ 10:00 a.m.	Carey City Hall
Southwest Irrigation District	July 22, 2015 @ 1:00 p.m.	Burley City Hall
Aberdeen-American Falls GWD	July 16, 2015 @ 7:00 p.m.	Aberdeen High School
Bingham GWD	July 29, 2015 @ 8:00 p.m.	Snake River Junior High
Madison GWD	July 23, 2015 @ 7:00 p.m.	American Motel in Rexburg
Jefferson-Clark GWD	July 28, 2015 @ 1:00 p.m.	Terreton High School
Bonneville-Jefferson GWD	July 29, 2015 @ 9:00 a.m.	Hampton Inn in I.F.
Fremont-Madison Irrigation District	None	

etidaho.com

Iron line

Approved measuring devices

Rule 50 removed

Utah Call Doctrine

Bingham  
Ray Matsura  
Robert Murdoch  
Craig Evans



# 240kAF REDUCTION ALLOCATED BY DISTRICT

7/20/2015

District	Current			% Share of 240kAF	Reduction			Benefit (ac-ft)
	CIR (ac-ft/acre)*	Acres*	Total AF		% Reduction	CIR Cap (ac-ft/acre)	Total AF	
A&B ID	2.6	66,686	173,384	7.7%	10.7%	2.32	154,796	18,588
Aberdeen-American Falls GWD	2.1	144,539	303,532	13.6%	10.7%	1.87	270,991	32,541
Bingham GWD	2.3	203,975	469,143	21.0%	10.7%	2.05	418,847	50,296
Bonneville-Jefferson GWD	1.9	62,000	117,800	5.3%	10.7%	1.70	105,171	12,629
Carey Valley GWD	2.2	3,634	7,995	0.4%	10.7%	1.96	7,138	857
Fremont-Madison ID	1.7	8,000	13,600	0.6%	10.7%	1.52	12,142	1,458
Jefferson-Clark GWD	1.9	175,509	333,467	14.9%	10.7%	1.70	297,717	35,750
Madison GWD	1.7	50,852	86,448	3.9%	10.7%	1.52	77,180	9,268
Magic Valley GWD	2.6	127,818	332,327	14.8%	10.7%	2.32	296,699	35,628
North Snake GWD	2.4	87,399	209,758	9.4%	10.7%	2.14	187,270	22,488
Raft River GWD	1.8	11	20	0.0%	10.7%	1.61	18	2
Southwest ID	2.4	79,655	191,172	8.5%	10.7%	2.14	170,677	20,495
<b>TOTALS</b>		<b>1,010,078</b>	<b>2,238,645</b>	<b>100%</b>			<b>1,998,645</b>	<b>240,000</b>

*Bingham IDWR  
actual 134,000 acres*

**From:** [sjwmick@gmail.com](mailto:sjwmick@gmail.com)  
**To:** [Spackman, Gary](#)  
**Subject:** Settlement Agreement  
**Date:** Thursday, November 3, 2022 8:51:05 AM  
**Attachments:** [2015 Settlement Agreement.pdf](#)

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**CAUTION:** This email originated outside the State of Idaho network. Verify links and attachments BEFORE you click or open, even if you recognize and/or trust the sender. Contact your agency service desk with any concerns.

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Gary,

Here is the settlement sheet.

Stephanie

Thomas J. Budge (ISB# 7465)  
Elisheva M. Patterson (ISB# 11746)  
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*Attorneys for IGWA*

**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT MITIGATION  
PLAN

Docket No. CM-MP-2016-001

**Notice of Substitution of Counsel**

Notice is hereby given that Randall C. Budge withdraws as counsel of record for Idaho Ground Water Appropriators, Inc. ("IGWA"), and that Elisheva M. Patterson of Racine Olson, PLLP, appears as attorneys of record in this matter for IGWA along with Thomas J. Budge.

DATED this 15<sup>th</sup> day of November, 2022.

RACINE OLSON, PLLP

By:   
Thomas J. Budge  
*Attorneys for IGWA*

## CERTIFICATE OF SERVICE

I hereby certify that on this 15<sup>th</sup> day of November, 2022, I served the foregoing document on the persons below via email or as otherwise indicated:

  
Thomas J. Budge

Idaho Department of Water Resources Gary Spackman, Director Garrick L. Baxter, Deputy Attorney General IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720-0098	<a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a> <a href="mailto:gary.Spackman@idwr.idaho.gov">gary.Spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:mark.cecchini-beaver@idwr.idaho.gov">mark.cecchini-beaver@idwr.idaho.gov</a>
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**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

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

Docket No. CM-DC-2010-001

**FINAL ORDER  
ESTABLISHING 2022  
REASONABLE CARRYOVER  
(METHODOLOGY STEP 9)**

**FINDINGS OF FACT**

1. On April 19, 2016, the Director ("Director") of the Idaho Department of Water Resources ("Department") issued the *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order"). The Methodology Order established 9 steps for determining material injury to members of the Surface Water Coalition ("SWC"). This order applies step 9, the final step of the Methodology Order for the 2022 water year.

2. The Methodology Order describes step 9 as follows:

Step 9: Following the end of the irrigation season (on or before November 30), the Department will determine the total actual volumetric demand and total actual [crop water need] for the entire irrigation season. This information will be used for the analysis of reasonable carryover shortfall, selection of future [base line year], and for the refinement and continuing improvement of the method for future use.

On or before November 30, the Department will issue estimates of actual carryover and reasonable carryover shortfall volumes for all members of SWC. These estimates will be based on, but not limited to, the consideration of the best available water diversion and storage data from Water District 01, return flow monitoring, comparative years, and [reasonable in-season demand]. These estimates will establish the obligation of junior ground water users in providing water to the SWC for reasonable carryover shortfall. Fourteen (14) days following the issuance by the Department of reasonable carryover shortfall obligations, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to supply a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC. If junior ground water users cannot provide this information, the Director will issue an order curtailing junior ground water rights.

*Methodology Order* at 38–39.

FINAL ORDER ESTABLISHING 2022 REASONABLE CARRYOVER (*METHODOLOGY STEP 9*)– Page 1

3. There are currently seven approved mitigation plans in place responding to the SWC delivery call to mitigate for material injury to in-season demand and reasonable carryover:

- 1) Docket No. CM-MP-2009-007 for the benefit of the Idaho Ground Water Appropriators, Inc. (“IGWA”) (delivery of stored water);
- 2) Docket No. CM-MP-2009-006 for the benefit of IGWA (conversions, dry ups, and recharge);
- 3) Docket No. CM-MP-2016-001 for the benefit of IGWA (the IGWA and SWC stipulated mitigation plan);
- 4) Docket No. CM-MP-2010-001 for the benefit of the Southwest Irrigation and Goose Creek Irrigation District (collectively, “SWID”);
- 5) Docket No. CM-MP-2019-001 for the benefit of certain cities commonly referred to as the “Coalition of Cities”;
- 6) Docket No. CM-MP-2015-003 for the benefit of the A&B Irrigation District (“A&B”); and
- 7) Docket No. CM-MP-2007-001 for the benefit of J.R. Simplot Company, Basic American Foods, and ConAgra Foods Packaged Foods Company, Inc., d/b/a Lamb-Weston (collectively, the “Water Mitigation Coalition”) (delivery of stored water).

4. The following table summarizes the 2022 irrigation season diversions and crop water need, and reasonable in-season demand (“RISD”) volumes for each SWC entity. RISD is calculated for each SWC entity using demand, crop water need, and project efficiency. *Methodology Order* at 16. All values are reported in acre-feet (“AF”). These values are used to determine entity-specific season ending reasonable in-season demand (“RISD”) values.

Entity	Demand <sup>1</sup>	Crop Water Need
<b>A&amp;B</b>	63,848	35,762
<b>AFRD2</b>	408,710	160,162
<b>BID</b>	241,033	103,327
<b>Milner</b>	56,452	31,908
<b>Minidoka</b>	311,795	188,016
<b>NSCC</b>	953,998	375,458
<b>TFCC</b>	957,044	472,011

5. The following table summarizes the final calculated 2022 in-season demand shortfall values in AF, if any, for each member of the SWC. The values in this table are different from those in the *Final Order Regarding April 2022 Forecast Supply (Methodology Steps 1–3)* (April 20, 2022) (“April Forecast Supply Order”) and *Order Revising April 2022 Forecast Supply and Amending Curtailment Order (Methodology Steps 5 & 6)* (July 20, 2022) (“July Order”). The Director predicted a 162,600 AF material injury to the SWC in the April Forecast Supply Order. *April Forecast Supply Order* at 4. The Director predicted a 52,600 AF material injury to the SWC in the July Order. *July Order* at 8. The differences are due to changes in total supply and

<sup>1</sup> The “Demand” for each SWC entity is equal to each entity’s 2022 April – October diversions.



RISD that reflect diversion and ET data not available at the time the April Forecast Supply Order and July Order were issued. The second column of the summary table contains the total natural flow diversions from April 1 to October 31 for each SWC member.<sup>2</sup> The third column summarizes the natural flow adjustments, which include natural flow delivered for recharge<sup>3</sup> and natural flow delivered to SWID.<sup>4</sup> The fourth column contains the preliminary storage allocations reported from WD01.<sup>5</sup> The fifth column summarizes storage adjustments due to application of the Minidoka Credit.<sup>6</sup> The sixth column contains the total supply available to each SWC member and is calculated by summing columns two through five. The seventh column contains the calculated RISD. The demand shortfall in the last column is calculated by subtracting the RISD from the total supply. The demand shortfall is zero when the total supply is greater than the RISD. Completed application of the methodology order results in a final net in-season demand shortfall volume of 84,200 AF to AFRD2 and 192,400 AF to TFCC for the 2022 irrigation season.<sup>7</sup>

Entity	Natural Flow Diverted through 10/31	Natural Flow Adjustment	Preliminary Storage Allocation	In-Season Storage Adjustment	Total Supply	RISD	Demand Shortfall
<b>A&amp;B</b>	0	-	106,072	-	106,072	60,832	-
<b>AFRD2</b>	40,893	(2,464)	338,245	1,000	377,673	461,831	84,200
<b>BID</b>	86,261	(3,714)	202,293	5,130	289,970	243,232	-
<b>Milner</b>	9,717	(3,011)	63,046	-	69,752	62,186	-
<b>Minidoka</b>	111,676	-	251,632	8,370	371,678	354,496	-
<b>NSCC</b>	354,800	(10,368)	762,791	(7,750)	1,099,473	1,059,783	-
<b>TFCC</b>	755,866	(5,346)	220,395	(6,750)	964,165	1,156,558	192,400

<sup>2</sup> The natural flow diverted was calculated from the preliminary daily water right accounting records located here: <https://www.waterdistrict1.com/media/yszp4lj1/snkwra.pdf>.

<sup>3</sup> Natural flow recharge values represent accomplished recharge through the Idaho Water Resource Board's recharge water rights as of October 31, 2022.

<sup>4</sup> See column titled "Natural Flow Adjustment" in Attachment A to this order for further information regarding these adjustments.

<sup>5</sup> The preliminary storage allocations can be found on Water District 01's website located here: <https://www.waterdistrict1.com/media/5vaf2jtc/2022.pdf>

<sup>6</sup> See column titled "In-Season Storage Adjustment" in Attachment A to this order. The Minidoka Credit is a long-standing exchange of stored water among AFRD2, BID, MID, NSCC, and TFCC that has been incorporated into an agreement of those entities and accepted by the SRBA district court.

<sup>7</sup> *The Order Revising 2022 Forecast Supply (Methodology Steps 7–8)* (August 18, 2022) ("Step 7–8 Order") revised the total shortfall prediction to 132,100 AF and established the times of need. *Step 7–8 Order* at 10–11. The Step 7–8 Order demand shortfall was mitigated by junior ground water users through implementation of approved mitigation plans cited in Finding of Fact 3, or by curtailment of water use authorized by junior-priority water rights during the 2022 irrigation season not protected by an approved mitigation plan. No additional mitigation is required to address in-season demand shortfall for the 2022 irrigation season.



6. The following table summarizes the end of season reasonable carryover shortfall calculation for 2022. All values are reported in AF. The second column of the summary table contains the carryover volumes reported from the October 31, 2022 Water District 01 water rights accounting report.<sup>8</sup> The third column summarizes the water supplied to each SWC member for mitigation. Adjusting the October 31, 2022 carryover volumes by deducting storage water delivered to SWC members for mitigation ensures that junior ground water users not participating in approved mitigation plans do not benefit from implementation of those mitigation plans. The fourth column summarizes adjustments for storage water leased by a SWC member to the rental pool via a private lease. The adjustments for storage water leased by a SWC member ensure that the leases, which are voluntary reductions in storage supplies, do not increase the reasonable carryover shortfall obligation of junior ground water users. The fifth column contains the actual carryover volumes as defined by the Methodology Order (*Methodology Order* at 28) and is calculated by summing columns two, three, and four. The sixth column contains the reasonable carryover volumes established in the Methodology Order. *Methodology Order* at 28. The reasonable carryover shortfall in the last column is the difference between reasonable carryover and the actual carryover volume for each member of the SWC at the end of the irrigation season. Completed application of the Methodology determines a final net shortfall to AFRD2's reasonable carryover of 38,255 AF and a final net shortfall to TFCC's reasonable carryover of 11,054 AF. No other members of the SWC have a reasonable carryover shortfall.

Entity <sup>9</sup>	Oct. 31, 2022, Carryover	Adjustments for Mitigation	Adjustments for Storage Water Leased	Actual Carryover	Reasonable Carryover	Reasonable Carryover Shortfall
<b>A&amp;B</b>	54,982	(9,703)	-	45,279	18,500	0
<b>AFRD2</b>	10	(26,765)	-	(26,755)	11,500	38,255
<b>BID</b>	51,583	(4,388)	-	47,196	0	0
<b>Milner</b>	28,424	(2,598)	-	25,826	4,800	0
<b>Minidoka</b>	66,727	(14,157)	30,000	82,569	0	0
<b>NSCC</b>	171,637	(14,216)	-	157,142	65,500	0
<b>TFCC</b>	31,125	(16,979)	-	14,146	25,200	11,054

7. The above determinations are based on water diversion and storage data from Water District 01. Although these preliminary numbers are subject to revision by Water District 01 during final accounting for 2022, revisions will not become available until after issuance of this order. For this reason, these estimates establish the final obligation of junior ground water users

<sup>8</sup> The preliminary water right accounting report for the 2022 irrigation season was published to the Water District 01 webpage on November 18, 2022: <https://www.waterdistrict1.com/media/yszp4lj1/snkwra.pdf>

The carryover volumes used in this order can be found in the report's summary Diversion table under the "AF RMNG" columns for October 31, 2022. The "AF RMNG" for Minidoka and BID were summed and then prorated 56.4% to Minidoka and 43.6% to BID. Because final accounting for 2022 is not yet complete for Water District 01, the proportions were estimated using an average of the previous five years. The October 31, 2022 "AF RMNG" for AFRD2 was corrected to address an accounting error that indicated additional storage use after irrigation shut off.

<sup>9</sup> Details of adjustments to quantities in the above tables are set forth in Attachment A to this order.

in supplying water to the SWC for reasonable carryover shortfall. The above determination of reasonable carryover shortfall is carried forward from the Methodology Order and accounts for the best available water diversion and storage data, comparative water years, and RISD. *Methodology Order* at 38–39.

### CONCLUSIONS OF LAW

1. The Methodology Order states that, on or before November 30, the Director will estimate the SWC’s reasonable carryover shortfall, if any, for 2022. *Methodology Order* at 38–39 (Step 9). If a reasonable carryover shortfall is established, junior-priority ground water users shall have fourteen days to demonstrate, to the satisfaction of the Director, “their ability to provide a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC.” *Id.* at 39.

2. The evidentiary standard to apply in conjunctive administration of hydraulically connected water rights is clear and convincing. *A&B Irr. Dist. v. Idaho Dep’t of Water Res.*, 153 Idaho 500, 524, 284 P.3d 225, 249 (2012).

3. “Clear and convincing evidence refers to a degree of proof greater than a mere preponderance.” *Idaho State Bar v. Topp*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996) (internal quotations removed). “Clear and convincing evidence is generally understood to be ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008) citing *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006); *see also Idaho Dep’t of Health & Welfare v. Doe*, 150 Idaho 36, 41, 244 P.3d 180, 185 (2010).

4. Consistent with Finding of Fact 6, the Director concludes by clear and convincing evidence there is a 38,255 AF volume of material injury to AFRD2’s reasonable carryover and a 11,054 AF volume of material injury to TFCC’s reasonable carryover. No other members of the SWC have a reasonable carryover shortfall.

5. Because not all junior ground water users are participants in an approved mitigation plan, the Director must determine a priority date for curtailment that will result in an accumulation of water at steady state, to the reaches of the Snake River from which the SWC members divert, in amount equal to the established reasonable carryover shortfall. Using the Eastern Snake Plain Aquifer Model (“ESPAM”) Version 2.2, the Director determines the curtailment date to produce a steady state volume of at least 49,309 AF in the near Blackfoot to Minidoka reach is junior to May 31, 1989.

6. According to the Methodology Order, fourteen days following issuance of this order, which establishes the reasonable carryover shortfall obligation, junior ground water users must “establish, to the satisfaction of the Director, their ability to supply a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC.”

*Methodology Order* at 39. Otherwise, “the Director will issue an order curtailing junior ground water rights.” *Id.*

### ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that, junior ground water users holding consumptive ground water rights within the Eastern Snake Plain Aquifer area of common ground water supply bearing priority dates junior to May 31, 1989, must mitigate for their proportionate share of the reasonable carryover shortfall of 49,309 AF in accordance with an approved mitigation plan.<sup>10</sup> If, within fourteen days following issuance of this order, junior ground water users fail to establish, to the satisfaction of the Director, their ability to mitigate for their proportionate share of the reasonable carryover shortfall of 49,309 AF in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water use.

IT IS FURTHER ORDERED that this final order concludes the application of the *Methodology Order* to the climatic, hydrologic, and agronomic facts of the 2022 irrigation season.

Dated this 30th day of November 2022.

  
GARY SPACKMAN  
Director

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<sup>10</sup> As stated, in Finding of Fact 3 above, seven mitigation plans are currently approved for the SWC delivery call to mitigate for material injury to reasonable carryover. Participants in the mitigation plans approved for IGWA, SWID, the Cities, and Water Mitigation Coalition do not need to establish their ability to mitigate for their proportionate share of the reasonable carryover shortfall. However, due to the nature of A&B’s mitigation plan, A&B must establish to the satisfaction of the Director its ability to mitigate for its proportionate share of the reasonable carryover shortfall, which is 2,542 AF.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November 2022, I served a true and correct copy of the foregoing, *Final Order Establishing 2022 Reasonable Carryover (Methodology Step 9)*, by the method indicated below, upon the following:

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

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

  
Megan Jenkins  
Administrative Assistant II

**Attachment A (2022 SWC Adjustments)**

Entity	Volume (AF)	Description	Natural Flow Adjustment	In-Season Storage Adjustment	Adjustments of Mitigation	Adjustments for Storage Water Lease
<b>A&amp;B</b>	6,400.0	IGWA Assignments - SWC			Yes	
	2,215.0	IGWA Assignments - SWC			Yes	
	3,038.0	Magic Valley GWD				
	1,088.0	Minidoka (Water Mitigation Coalition)			Yes	
		<b>Total A&amp;B</b>	<b>0</b>	<b>0</b>	<b>9,703</b>	<b>0</b>
<b>AFRD2</b>	4,855.1	City of Pocatello (multiple cities)			Yes	
	1,435.1	City of Pocatello			Yes	
	1,755.0	Enterprise (Galena GWD)				
	1,100.0	Idaho Canal (Big Wood GWD)				
	4,900.0	IGWA Assignments - SWC			Yes	
	1,696.0	IGWA Assignments - SWC			Yes	
	13,046.0	IGWA Assignments - SWC			Yes	
	(1,076.0)	Magic Valley GWD				
	3,500.0	Minidoka (North Snake GWD)				
	833.0	Minidoka (Water Mitigation Coalition)			Yes	
	1,000.0	Minidoka Credit		Yes		
	(2,464.0)	IWRB Recharge	Yes			
		<b>Total AFRD</b>	<b>(2,464)</b>	<b>1,000</b>	<b>26,765</b>	<b>0</b>
<b>BID</b>	3,750.0	IGWA Assignments - SWC			Yes	
	2,200.0	Minidoka (Southwest Irrigation District)				
	637.5	Minidoka (Water Mitigation Coalition)			Yes	
	5,130.0	Minidoka Credit		Yes		
	(3,714.0)	SWID Natural Flow	Yes			
		<b>Total BID</b>	<b>(3,714)</b>	<b>5,130</b>	<b>4,388</b>	<b>0</b>
<b>Milner</b>	200.0	Scott Breeding				
	978.5	Artesian				
	1,500.0	Falls Irrigation District (Southwest Irrigation District)				
	1,000.0	IGWA Assignments - SWC			Yes	
	346.0	IGWA Assignments - SWC			Yes	
	1,082.0	IGWA Assignments - SWID			Yes	
	3,038.0	Magic Valley GWD				
	170.0	Minidoka (Water Mitigation Coalition)			Yes	
	2,800.0	Minidoka (Southwest Irrigation District)				
	1,046.4	PWUI				
	140.0	Southwest Irrigation District Pumps				
	(3,011.0)	SWID Natural Flow	Yes			
		<b>Total Milner</b>	<b>(3,011)</b>	<b>0</b>	<b>2,598</b>	<b>0</b>
<b>MID</b>	(1,088.0)	A & B (Water Mitigation Coalition)				Yes
	(3,500.0)	AFRD #2 (North Snake GWD)				Yes
	(833.0)	AFRD #2 (Water Mitigation Coalition)				Yes
	(637.5)	Burley Irrigation District (Water Mitigation Coalition)				Yes
	(2,200.0)	Burley Irrigation District (Southwest Irrigation District)				Yes
	13,128.5	IGWA Assignments - SWC			Yes	
	(170.0)	Milner (Water Mitigation Coalition)				Yes
	(2,800.0)	Milner (Southwest Irrigation District)				Yes
	(2,065.5)	Northside Canal Co (Water Mitigation Coalition)				Yes
	(11,500.0)	Northside Canal Co (North Snake GWD)				Yes
	(1,500.0)	Northside Canal Co (Water Mitigation Coalition)				Yes
	1,028.5	IGWA Assignments - SWID			Yes	
	(1,028.5)	IGWA Assignments - SWID				Yes
	(2,677.0)	TFCC (Water Mitigation Coalition)				Yes
	8,370.0	Minidoka Credit		Yes		
		<b>Total MID</b>	<b>0</b>	<b>8,370</b>	<b>14,157</b>	<b>(30,000)</b>
<b>NSCC</b>	12,150.0	IGWA Assignments - SWC			Yes	
	100.0	Arthur Henry Farms				
	11,500.0	Minidoka (North Snake GWD)				
	1,500.0	Minidoka (Water Mitigation Coalition)				
	2,065.5	Minidoka (Water Mitigation Coalition)			Yes	
	(7,750.0)	Minidoka Credit		Yes		
	(10,367.8)	IWRB Recharge	Yes			
		<b>Total NSCC</b>	<b>(10,368)</b>	<b>(7,750)</b>	<b>14,216</b>	<b>0</b>
<b>TFCC</b>	1,391.7	Artesian				
	8,671.5	IGWA Assignments - SWC			Yes	
	4,500.0	IGWA Assignments - SWID			Yes	
	1,130.0	IGWA Assignments - SWID			Yes	
	2,677.5	Minidoka (Water Mitigation Coalition)			Yes	
	281.9	PWUI				
	(6,750.0)	Minidoka Credit		Yes		
	(5,346.0)	IWRB Recharge	Yes			
		<b>Total TFCC</b>	<b>(5,346)</b>	<b>(6,750)</b>	<b>16,979</b>	<b>0</b>

# **EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER**

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

## **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

## **REQUEST FOR HEARING**

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

## **APPEAL OF FINAL ORDER TO DISTRICT COURT**

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.



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Elisheva M. Patterson (ISB# 11746)  
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*Attorneys for IGWA*

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT MITIGATION  
PLAN


Docket No. CM-MP-2016-001

NOTICE OF SERVICE OF IGWA'S  
FIRST SET OF DISCOVERY  
REQUESTS TO THE SWC

PLEASE TAKE NOTICE that Idaho Ground Water Appropriators, Inc. ("IGWA") served ***IGWA's First Set of Discovery Requests to the SWC*** on December 5, 2022, on counsel for 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 as indicated in the Certificate of Service.

DATED this 5<sup>th</sup> day of December, 2022.

RACINE OLSON, PLLP

By:   
Thomas J. Budge  
*Attorneys for IGWA*

## CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>th</sup> day of December, 2022, I served the foregoing document on the persons below via email as indicated:

  
Thomas J. Budge

Gary Spackman, Director Garrick Baxter, Deputy Attorney General IDAHO DEPT. OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098	<a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a> <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:mark.cecchini-beaver@idwr.idaho.gov">mark.cecchini-beaver@idwr.idaho.gov</a>
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David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. DEPARTMENT OF JUSTICE 999 18th St., South Terrace, Suite 370 Denver, CO 80202	<a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>
Matt Howard US BUREAU OF RECLAMATION 1150 N Curtis Road Boise, ID 83706-1234	<a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a>

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William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318	<a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a>

**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

IN THE MATTER OF IGWA’S SETTLEMENT  
AGREEMENT MITIGATION PLAN

Docket No. CM-MP-2016-001

**ORDER AUTHORIZING  
DISCOVERY; NOTICE OF HEARING**

On September 8, 2022, the Director of Idaho Department of Water Resources (“Department”) issued a *Final Order Regarding Compliance with Approved Mitigation Plan* (“Final Order”). The Final Order concluded that, in 2021, the Idaho Ground Water Appropriators, Inc. (“IGWA”) did not comply with the approved mitigation plan between the Surface Water Collation (“SWC”) and IGWA. Additionally, the Final Order approved the settlement agreement the parties filed with the Department on September 7, 2022, as an appropriate remedy for IGWA’s 2021 breach.

On September 22, 2022, IGWA timely filed with the Department a *Petition for Reconsideration and Request for Hearing* (“Petition”). The Petition requested the Director amend the Final Order to “withdraw those parts . . . that adjudicate IGWA’s contractual obligations under the Settlement Agreement . . . .” *Petition* at 7. In the alternative, the Petition requests a hearing on “the merits of the Director’s decision.” *Id.*

In an Order dated October 13, 2022, the Director granted IGWA’s request for a hearing under Idaho Code § 42-1701A(3) and found IGWA’s petition for reconsideration moot pending the hearing.

The same order set a prehearing conference, which the Director held on November 10, 2022. During the prehearing conference, the Director and the parties discussed the hearing schedule, but there was little agreement on a path forward. For example, the SWC advocated for a hearing in January 2023 and IGWA advocated for a stay of further administrative proceedings. After hearing from the parties, the Director expressed his intention to move forward with the hearing that IGWA requested and was granted. Accordingly, the Department and the parties worked to identify hearing dates before the 2023 irrigation season. The Director finds that the hearing dates identified below are appropriate considering the parties’ statements during the prehearing conference and available dates identified by the parties’ counsel.

During the prehearing conference, the Director and parties also discussed the need for discovery ahead of the hearing. IGWA and the City of Pocatello stated that discovery would be necessary and appropriate. The Director stated that discovery could begin immediately, and the order below simply memorializes the Director's authorization.

### ORDER

**IT IS HEREBY ORDERED** that the parties are authorized to immediately conduct and engage in discovery pursuant to IDAPA 37.01.01.521.

**IT IS FURTHER ORDERED** that, pursuant to IDAPA 37.01.01.053, documents filed in this proceeding may be served on the parties and the Department via email. Service on the Department shall be made by email to [file@idwr.idaho.gov](mailto:file@idwr.idaho.gov). Service on the parties shall be made by email to the email addresses listed in the Certificate of Service below.

### NOTICE OF HEARING

**NOTICE IS HEREBY GIVEN** that the Department will hold a hearing on IGWA's compliance with its approved mitigation plan during the 2021 irrigation season. The hearing will be held on **February 8–10, 2023, beginning each day at 9:00 AM (MST), in Conference Rooms 602C and 602D at the Department's State Office**, located at 322 E. Front Street, 6<sup>th</sup> Floor, Boise, Idaho.

All parties who wish to participate in the hearing must be present in person. Remote participation will be allowed for those who wish to observe the hearing. To request remote participation information, contact Sarah Tschohl at the phone number or email listed below.

The hearing will be held in accordance with the provisions of Chapters 2 and 17, Title 42 and Chapter 52, Title 67, Idaho Code, as well as the Department's Rules of Procedure, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at: <https://adminrules.idaho.gov/rules/current/37/index.html>.

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

Dated this 7<sup>th</sup> day of December 2022.

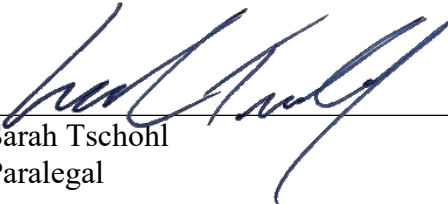
  
GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of December 2022, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson Travis L. Thompson BARKER ROSHOLT & SIMPSON, LLP P. O. Box 63 Twin Falls, ID 83303-0063 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a> <a href="mailto:nls@idahowaters.com">nls@idahowaters.com</a> <a href="mailto:jf@idahowaters.com">jf@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
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Kathleen Marion Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 <a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18 <sup>th</sup> St., South Terrace, Suite 370 Denver, CO 80202 <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
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Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 <a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a>	<input checked="" type="checkbox"/> Email
<b>COURTESY COPY TO:</b> William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a>	<input checked="" type="checkbox"/> Email

  
\_\_\_\_\_  
Sarah Tschohl  
Paralegal



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*Attorneys for Coalition of Cities*

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*Attorneys for City of Pocatello*

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

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT  
MITIGATION PLAN

Docket No. CM-MP-2016-001

**NOTICE OF SERVICE OF FIRST SET  
OF DISCOVERY TO THE IDAHO  
GROUND WATER APPROPRIATORS,  
INC.**

PLEASE TAKE NOTICE that the Coalition of Cities and the City of Pocatello served ***First***  
***Set of Discovery Requests to the Idaho Ground Water Appropriators, Inc.*** on December 12, 2022,  
on counsel for the Idaho Ground Water Appropriators.

DATED this 12th day of December, 2022.



CANDICE M. MCHUGH



for

SARAH KLAHN



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December, 2022, I caused to be served a true and correct copy of the foregoing by transmitting a copy thereof in the manner listed below:

Gary Spackman, Director Garrick Baxter, Deputy Attorney General IDAHO DEPT. OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098	<a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a> <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a>
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Randall D. Fife City Attorney CITY OF IDAHO FALLS P.O. Box 50220 Idaho Falls, ID 83405	<a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a>
William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318	<a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a>

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CANDICE M. MCHUGH

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

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

Docket No. CM-DC-2010-001

**FINAL ORDER CURTAILING  
GROUND WATER RIGHTS  
JUNIOR TO MAY 31, 1989**

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

**FINDINGS OF FACT**

1. On April 19, 2016, the Director issued the *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). The Methodology Order established nine steps for determining material injury to members of the Surface Water Coalition (“SWC”).<sup>1</sup>

2. On November 30, 2022, the Director issued the *Final Order Establishing 2022 Reasonable Carryover (Methodology Step 9)* (“Step 9 Order”). Therein, the Director concluded there is a 38,255 acre-foot (“AF”) volume of material injury to AFRD2’s reasonable carryover and a 11,054 AF volume of material injury to TFCC’s reasonable carryover. *Step 9 Order* at 5. The Director concluded no other members of the SWC have a reasonable carryover shortfall. *Id.*

3. The Director ordered that within fourteen days of November 30, 2022, “junior ground water users holding consumptive water rights within the Eastern Snake Plain Aquifer area of common ground water supply bearing priority dates junior to May 31, 1989, must mitigate for their proportionate share of the reasonable carryover shortfall of 49,309 AF in accordance with an approved mitigation plan.” *Id.* at 6. The Director ordered that if such junior ground water users cannot mitigate for their proportionate share of the reasonable carryover shortfall “in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water use.” *Id.*

4. There are currently seven approved mitigation plans in place responding to the SWC delivery call to mitigate for material injury to in-season demand and reasonable carryover:

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<sup>1</sup> The SWC is comprised of A&B Irrigation District (“A&B”), American Falls Reservoir District #2 (“AFRD2”), Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (“TFCC”).

- 1) Docket No. CM-MP-2007-001 for the benefit of J.R. Simplot Company, Basic American Foods, and ConAgra Foods Packaged Foods Company, Inc., d/b/a Lamb-Weston (collectively, the “Water Mitigation Coalition”) (delivery of stored water);
- 2) Docket No. CM-MP-2009-006 for the benefit of the Idaho Ground Water Appropriators, Inc. (“IGWA”) (conversions, dry ups, and recharge);
- 3) Docket No. CM-MP-2009-007 for the benefit of IGWA (delivery of stored water);
- 4) Docket No. CM-MP-2010-001 for the benefit of the Southwest Irrigation and Goose Creek Irrigation Districts (collectively, “SWID”);
- 5) Docket No. CM-MP-2015-003 for the benefit of the A&B Irrigation District (“A&B”);
- 6) Docket No. CM-MP-2016-001 for the benefit of IGWA (the IGWA and SWC stipulated mitigation plan); and
- 7) Docket No. CM-MP-2019-001 for the benefit of certain cities commonly referred to as the “Coalition of Cities”, the City of Idaho Falls, and the City of Pocatello (collectively, the “Coalition of Cities”).

5. Participants in the mitigation plans approved for IGWA, SWID, the Coalition of Cities, and the Water Mitigation Coalition do not need to establish their ability to mitigate for their proportionate share of the reasonable carryover shortfall. However, due to the nature of A&B’s mitigation plan, A&B must establish, to the satisfaction of the Director, its ability to mitigate for its proportionate share of the reasonable carryover shortfall, which is 2,542 AF. *Id.* at 6 n.10.<sup>2</sup>

## CONCLUSIONS OF LAW

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

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

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<sup>2</sup> On December 13, 2022, A&B submitted a letter responding to the Step 9 Order, in which it states an “intent to continue to curtail the enlargement water rights (2,063 acres) for the 2023 irrigation season.” To ensure that A&B’s enlargement water rights are curtailed for the 2023 season, the Director will place the enlargement water rights on the curtailment list in Attachment A to this order.

2. As explained above, within fourteen days of November 30, 2022, “junior ground water users holding consumptive water rights within the Eastern Snake Plain Aquifer area of common ground water supply bearing priority dates junior to May 31, 1989, must mitigate for their proportionate share of the reasonable carryover shortfall of 49,309 AF in accordance with an approved mitigation plan.” *Step 9 Order* at 6. If a junior ground water user does not establish they can mitigate for their proportionate share of the reasonable carryover shortfall in accordance with an approved mitigation plan, the ground water user will be subject to this “order curtailing the junior-priority ground water use.” *Id.*

3. Due to the nature of the approved mitigation plans for SWID, IGWA, the Coalition of Cities, and the Water Mitigation Coalition, these entities do not need to establish that they can mitigate for their proportionate share of the reasonable carryover shortfall. Junior ground water users entitled to the protection of SWID, IGWA, Coalition of Cities, and the Water Mitigation Coalition mitigation plans will not be subject to curtailment related to the reasonable carryover shortfall. Due to the nature of A&B’s mitigation plan, A&B must establish to the satisfaction of the Director its ability to mitigate for its proportional share of the reasonable carryover shortfall, which is 2,542 AF. *Id.* at 6 n.10.

4. The Director concludes junior-priority ground water users that have not established mitigation of their proportionate share of the reasonable carryover shortfall in accordance with an approved mitigation plan should be curtailed. Junior-priority ground water users subject to curtailment are listed in Attachment A to this order.

### **ORDER**

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that, at 12:01 a.m. on or before December 15, 2022, ground water users holding water rights bearing priority dates junior to May 31, 1989, within the Eastern Snake Plain Aquifer area of common ground water supply (“ESPA ACGWS”) listed in Attachment A to this order, shall curtail/refrain from diversion and use of ground water pursuant to those water rights unless notified by the Department that the order of curtailment has been modified or rescinded. This order applies to consumptive ground water rights, including but not limited to, agricultural, commercial, industrial, and municipal uses. This order excludes ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(11), pursuant to IDAPA 37.03.11.020.11.

IT IS FURTHER ORDERED that watermasters for the water districts within the ESPA ACGWS who regulate ground water are directed to review the water rights listed in Attachment A to this order and contact the water right holders in their respective districts to effectuate the curtailment required by this order.

Dated this 14<sup>th</sup> day of December 2022.

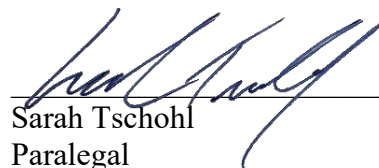
  
GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of December 2022, I served a true and correct copy of the foregoing, *Final Order Curtailing Ground Water Rights Junior to May 31, 1989*, by the method indicated below, upon the following:

John K. Simpson Travis L. Thompson BARKER ROSHOLT & SIMPSON, LLP P. O. Box 63 Twin Falls, ID 83303-0063 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a> <a href="mailto:nls@idahowaters.com">nls@idahowaters.com</a> <a href="mailto:jf@idahowaters.com">jf@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 <a href="mailto:wkf@pmt.org">wkf@pmt.org</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Randall C. Budge Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 <a href="mailto:randy@racineolson.com">randy@racineolson.com</a> <a href="mailto:tj@racineolson.com">tj@racineolson.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Kathleen Marion Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 <a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
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Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 <a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a>	<input checked="" type="checkbox"/> Email
<b>COURTESY COPY TO:</b> William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a>	<input checked="" type="checkbox"/> Email

  
Sarah Tschohl  
Paralegal



Attachment A  
List of Ground Water Rights Subject to Curtailment  
Sorted by Owner

Owner	Water Right No.	Basis	Priority Date	Beneficial Water Use	Diversion Rate	Total Acres	Enlargement
2K FARMS	35-8766	License	6/1/1989	COMMERCIAL, DOMESTIC	0.020		
A & B IRRIGATION DISTRICT/ US BUREAU OF RECLAMATION	36-15127B	Decreed	4/1/1984	IRRIGATION	28.890		Y
A & B IRRIGATION DISTRICT/ US BUREAU OF RECLAMATION	36-15196B	Decreed	4/1/1981	IRRIGATION	0.080		Y
A & B IRRIGATION DISTRICT/ US BUREAU OF RECLAMATION	36-15195B	Decreed	4/1/1978	IRRIGATION	2.240		Y
A & B IRRIGATION DISTRICT/ US BUREAU OF RECLAMATION	36-15194B	Decreed	4/1/1968	IRRIGATION	2.510		Y
A & B IRRIGATION DISTRICT/ US BUREAU OF RECLAMATION	36-15193B	Decreed	4/1/1965	IRRIGATION	0.310		Y
AEI CORP	29-8037	License	11/13/1990	DOMESTIC, INDUSTRIAL	0.060		
AGRICULTURAL SERVICES INC	35-8857	License	9/6/1989	COMMERCIAL	0.040		
ANDERSON, CHAD ALLEN; ANDERSON, JASHELLE HEATHER	45-7650	License	6/21/1989	DOMESTIC, IRRIGATION	0.060	1.0	
ATKINSON, ANDREW; ATKINSON, MARY	29-13736	License	2/21/2006	DOMESTIC	0.080		
B & F DISTRIBUTING CO	25-7555	License	10/12/1989	COMMERCIAL	0.040		
BARTLETT, ERWIN; BARTLETT, JANICE	45-7653	License	6/6/1989	COMMERCIAL	0.040		
BINGHAM, BOYD A; BINGHAM, SHERRY R	36-8425	License	6/23/1989	IRRIGATION	0.880	105.0	
BINGHAM, JERRYD; BINGHAM, VALERIE H	35-12226	Decreed	4/1/1987	IRRIGATION	0.590	285.0	Y
BRIGGS, JOYCE; BRIGGS, VAN W	22-7656	License	11/21/1989	COMMERCIAL	0.040		
BRINKMANN, GEORGE	35-8893	License	3/29/1990	COMMERCIAL	0.010		
BRP INC	25-14504		10/12/2021	DOMESTIC	0.260		
BRP INC	25-7622	License	9/23/1998	DOMESTIC	0.230		
BRUMFIELD, DALE	35-13320	License	8/7/2001	DOMESTIC	0.100		
BURDETTE INC	25-7532	License	9/20/1989	COMMERCIAL	0.040		
BURNS CONCRETE INC	25-13982	License	12/18/2002	COMMERCIAL	3.530		
BURRELL, GEORGE W; BURRELL, LURANA J; RODRIQUEZ, FABIAN	29-13900	License	4/3/2009	DOMESTIC	0.080		
CASSIDY, FRANCIS J; HOFFMAN, RICHARD P; MEYER, DAVID DANIEL; MEYER, JENNY CLUFF; TANNER, TOMMY C	25-7638	License	4/25/1995	DOMESTIC	0.100		
CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS	22-13745	License	7/23/2007	DOMESTIC	0.110		
COUNTRY CLUB ESTATES WATER ASSN INC	36-8607	License	11/18/1991	DOMESTIC, FIRE PROTECTION, STOCKWATER	0.500		
COUNTRY CLUB WATER	25-14448	Decreed	10/31/1986	IRRIGATION	0.010	18.7	Y
COUNTY OF JEFFERSON	25-13985	License	5/13/2003	RECREATIONSTORAGE			
CRM CO	25-7554	License	9/8/1989	COMMERCIAL	0.040		
DANCE, DAVID P; DANCE, KARAN D	35-8822	License	7/3/1989	COMMERCIAL	0.010		
DANIEL, MELVIN R JR	25-7538	License	9/19/1989	COMMERCIAL	0.070		
DAVIS, ERNIE; DAVIS, RHONDA	35-8814	License	9/5/1989	COMMERCIAL	0.040		
DEMOTT, WILLIAM J; GROVER, LAVAR; RIGBY, WILLIAM F	25-7537	License	9/20/1989	COMMERCIAL	0.080		
DERBYHAWK LLC	25-7553	License	9/27/1989	DOMESTIC	0.110		
DREW, STAN	29-8237	License	4/17/2000	DOMESTIC	0.110		
EAMES, LINDAJ	25-7643	License	12/4/1995	DOMESTIC	0.180		
EVANS GRAIN & ELEVATOR CO	35-8848	License	11/6/1989	COMMERCIAL	0.040		
FARFAN-CEJA, CASTULO; JUAREZ, ARTEMIO; JUAREZ, GUADALUPE	36-15565	License	2/5/2001	DOMESTIC	0.080		
FERGUSON, DANNY G; FERGUSON, MARCENE M	25-7599	License	9/25/1991	IRRIGATION	2.280	118.0	
FOSTER FAMILY FARMS INC	35-8773	License	6/7/1989	COMMERCIAL, DOMESTIC	0.040		
FOSTER FAMILY FARMS INC	35-8774	License	6/20/1989	COMMERCIAL	0.040		
GARNER, KAYR; GARNER, LESLIE	35-14288	License	11/13/2012	COOLING, HEATING	0.040		
GILLEN, NORMAN	27-7585	License	4/20/1999	DOMESTIC	0.140		
GOLDEN VALLEY DEVELOPMENTS	22-7805	License	2/16/1999	DOMESTIC	0.390		
GONZALES, FERNANDO B; GONZALES, IRENE H	29-7984	Decreed	4/23/1990	IRRIGATION	0.030	8.0	
HART, BOB; HART, MELANIE	25-7520	License	10/16/1989	COMMERCIAL	0.040		
HENDRICKS, TERRY	22-13913	License	1/20/2009	DOMESTIC	0.170		
HERITAGE DEVELOPMENT	29-8173	License	7/19/1996	DOMESTIC	0.270		
HINCKLEY, LAPREAL	25-14005	License	10/12/2003	IRRIGATION	0.060	3.0	
HOBBS, LAURALEE	25-7540	License	8/18/1989	DOMESTIC	0.100		
HOOPER, LLOYDC	25-7531	License	10/22/1989	COMMERCIAL	0.040		
HOPE, DENNIS K	22-7784	License	5/24/1995	DOMESTIC	0.110		
HOPE, DENNIS K	22-7764	License	11/3/1993	DOMESTIC	0.150		

Attachment A  
List of Ground Water Rights Subject to Curtailment  
Sorted by Owner

Owner	Water Right No.	Basis	Priority Date	Beneficial Water Use	Diversion Rate	Total Acres	Enlargement
HUNSTMANS PROPERTIES	27-7511	License	4/20/1990	COMMERCIAL	0.330		
IDAHO POTATO PACKERS CORP	35-8909	License	8/3/1990	COMMERCIAL	0.010		
IDAHO POWER CO	45-7669	License	1/9/1990	DOMESTIC	0.060		
IDAHO POWER COMPANY	36-17184		4/9/2021	DOMESTIC, FIRE PROTECTION	0.120		
INTERSTATE MFG	36-8454	License	9/14/1989	COMMERCIAL	0.040		
JEFFERSON COUNTY	25-14281	License	9/9/2010	COMMERCIAL	0.650		
JEROME COUNTY ROD & GUN CLUB	36-8620	License	11/14/1991	COMMERCIAL, IRRIGATION	0.020	0.5	
JOURNEYS END HOMEOWNERS ASSN	35-13611	License	1/13/2007	COMMERCIAL, DOMESTIC	0.110		
JOURNEYS END HOMEOWNERS ASSN	35-13612	License	11/24/2003	DOMESTIC	0.400		
KARE YLANE WELL ASSN	35-8943	License	5/3/1991	DOMESTIC	0.090		
KEY BANK NATIONAL ASSOC	25-7517	License	8/24/1989	COMMERCIAL	0.500		
KING, FERRIL; KING, RENE	36-8440	License	9/7/1989	COMMERCIAL	0.020		
KOON, JACK E	22-7751	License	9/18/1992	DOMESTIC	0.060		
LAZY EIGHT ESTATES DIVISION 2 HOMEOWNERS ASSN INC	25-14189	License	10/26/2006	DOMESTIC	0.500		
LOVELL, HOPE; LOVELL, JAMES R	25-7598	License	9/25/1991	IRRIGATION	0.030	1.9	
M&B INVESTMENTS LLC	25-14379	License	8/13/2012	DOMESTIC	0.390		
M&B INVESTMENTS LLC	25-14163	License	12/9/2004	DOMESTIC	0.300		
MASONS	35-8828	License	7/28/1989	COMMERCIAL	0.040		
MCCOWIN, BRENDA	25-7544	License	8/16/1989	DOMESTIC	0.070		
MERRILL, KENT	25-14364	License	2/28/1992	IRRIGATION	0.190	12.2	
MOUNTAIN RIVER SPORTSMANS RV PARK & CAMP	25-14229	License	9/2/2008	COMMERCIAL	0.200		
MUD LAKE WATER USERS INC	31-12447	License	11/2/2018	COMMERCIAL	0.040		
NEIBAUR, RYAN	25-7561	License	3/2/1990	IRRIGATION	4.000	360.5	
NELSEN DAIRY	36-8745	License	11/7/1995	COMMERCIAL, STOCKWATER	0.110		
NEW PHASE INVESTMENTS LLC	25-14186	License	9/18/2006	COMMERCIAL	0.050		
PACIFICORP	25-14431	License	2/19/2016	WATERQUALITYIMPROVEMENT	0.470		
PARKINSON FARMS	34-10393	Decreed	5/1/1976	IRRIGATION	0.260	306.0	Y
PINSON, JANICE	25-14182	License	3/24/2006	COMMERCIAL	0.200		
POULSON, DUANEL	35-8767	License	6/9/1989	COMMERCIAL	0.010		
QUALITY INSULATION & CONSTRUCTION INC	25-7539	License	8/18/1989	COMMERCIAL	0.040		
QUINTON, BERNADENE L; QUINTON, RAY E	25-7536	License	9/18/1989	COMMERCIAL	0.020		
RC WILLEY HOME FURNISHINGS	35-14596		5/25/2018	COMMERCIAL	0.780		
RICHAN, CLYDE L; RICHAN, ELVERA L	36-8486	License	9/19/1989	COMMERCIAL, DOMESTIC	0.030		
RIM ROCK LEASING LLC	36-8512	License	2/27/1990	COMMERCIAL	0.020		
RINDFLEISCH, JAMES A	34-7511		6/12/1989	IRRIGATION	1.850	92.4	
RIVERBEND ESTATES	29-8015	License	6/22/1990	DOMESTIC	0.250		
RURAL ELECTRIC CO	36-8435	License	8/11/1989	COMMERCIAL	0.040		
SCHREINER FARMS IDAHO LLC	35-8951	License	7/29/1991	IRRIGATION	0.880	44.0	
SHURTLIFF, MERLENE; SHURTLIFF, RODNEY	35-8855	License	9/7/1989	DOMESTIC, STOCKWATER	0.080		
SMITH, JOAN; SMITH, SCOTT	34-14313	License	7/8/1992	IRRIGATION	0.010	1.0	
SOUTH PARK ESTATES WATER & SEWER	27-7581	License	10/21/1997	DOMESTIC, FIREPROTECTION	0.690		
STANGER, MARILYN	25-7541	License	7/12/1989	COMMERCIAL	0.020		
STATE OF IDAHO	37-7372	License	6/30/1999	IRRIGATION, STOCKWATER	6.400	287.0	
STORER, BETTY; STORER, GALE	25-7530	License	8/28/1989	COMMERCIAL	0.040		
SUMMERS, RICHARD K; SUMMERS, STELLA F	25-7518	License	8/24/1989	COMMERCIAL, DOMESTIC	0.080		
SUNROC PARK WATER ASSN INC	25-14170	License	6/20/2005	DOMESTIC	0.050		
THOMPSON, HOWARD M	25-7508	License	6/19/1989	DOMESTIC, STOCKWATER	0.110		
TLC DEVELOPMENT LLC	25-14494		6/4/2021	DOMESTIC	0.230		
TYLER, ALDON	25-7542	License	7/14/1989	DOMESTIC	0.060		
US DEPT OF INTERIOR BLM	36-17049		5/22/2015	STOCKWATER, WILDLIFE	0.020		
US DEPT OF INTERIOR BLM	34-14459		8/26/2014	STOCKWATER, WILDLIFE	0.150		
US DEPT OF INTERIOR BLM	21-13032	License	2/24/2006	STOCKWATER, WILDLIFE	0.020		
US DEPT OF INTERIOR BLM	36-8726		4/28/1994	STOCKWATER, WILDLIFE	0.120		

Attachment A  
List of Ground Water Rights Subject to Curtailment  
Sorted by Owner

Owner	Water Right No.	Basis	Priority Date	Beneficial Water Use	Diversion Rate	Total Acres	Enlargement
US DEPT OF INTERIOR BLM	21-7517	License	2/27/1992	STOCKWATER, WILDLIFE	0.070		
VALLEY SCHOOL DISTRICT #262	36-16299	License	9/22/2004	DOMESTIC, FIRE PROTECTION	1.520		
VALLEY VIEW HEIGHTS SUBDIVISION WATER CO	25-13986	License	6/16/2003	DOMESTIC	0.080		
VERBREE LAND HOLDINGS LLC	36-8609	License	10/21/1991	DOMESTIC, IRRIGATION, STOCKWATER	0.020	2.5	
WAGNER JR, EDWARD P; WAGNER, KRISTIE L	35-8856	Decreed	8/11/1989	DOMESTIC, STOCKWATER	0.100		
WALKER, YOUNG HARVEY	34-10473	Decreed	8/10/1977	IRRIGATION	0.360	190.0	Y
WALL, DIANA R; WALL, LARRY G	36-8451	License	9/28/1989	COMMERCIAL	0.020		
WALTERS, BRUCE A; WALTERS, MARCEY L	25-7596	License	6/26/1991	DOMESTIC, IRRIGATION	0.150	10.0	
WARD, OPAL M; WARD, OWEN K	35-8892	License	3/28/1990	DOMESTIC	0.180		
WHEELER, DEE RAY; WHEELER, LINDA	36-8488	License	10/10/1989	COMMERCIAL	0.030		
WILLMORE, JUDY	31-7551	License	8/26/1991	COMMERCIAL	0.040		
WILSON, JOHN CHARLES	29-7916	License	3/20/1990	IRRIGATION	0.090	4.5	
WOODVILLE WATER & SEWER DISTRICT	35-14562		12/11/2017	DOMESTIC	0.370		
WRIDE FARMS	35-8949		8/26/1991	IRRIGATION	3.000	150.0	
ZUNDEL, JACOB; ZUNDEL, SHALIECE	25-14457	License	2/28/1992	IRRIGATION	0.020	1.1	

## **EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER**

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

### **REQUEST FOR HEARING**

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

### **APPEAL OF FINAL ORDER TO DISTRICT COURT**

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

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*Attorneys for City of Pocatello*

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

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT  
MITIGATION PLAN

Docket No. CM-MP-2016-001

**NOTICE OF SERVICE OF FIRST SET  
OF DISCOVERY TO THE MEMEBERS  
OF THE SURFACE WATER  
COALITION**

PLEASE TAKE NOTICE that the Coalition of Cities and the City of Pocatello served

**Pocatello and Coalition of Cities' *First Set of Discovery Requests to the Members of the Surface***

***Water Coalition.*** on December 16, 2022, on counsel for the members of the Surface Water Coalition.

DATED this 16th day of December, 2022.



CANDICE M. MCHUGH



for

SARAH KLAHN

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of December, 2022, I caused to be served a true and correct copy of the foregoing by transmitting a copy thereof in the manner listed below:

Gary Spackman, Director Garrick Baxter, Deputy Attorney General IDAHO DEPT. OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098	<a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a> <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a>
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David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. DEPARTMENT OF JUSTICE 999 18th St., South Terrace, Suite 370 Denver, CO 80202	<a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>
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*Attorneys for American Falls  
Reservoir District #2 and Minidoka  
Irrigation District*

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

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

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

\_\_\_\_\_  
IN THE MATTER OF IGWA'S )  
SETTLEMENT AGREEMENT )  
MITIGATION PLAN )  
\_\_\_\_\_) )

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

**NOTICE OF SERVICE OF  
SURFACE WATER COALITION'S  
FIRST DISCOVERY REQUESTS TO  
ABERDEEN-AMERICAN FALLS  
GROUND WATER DISTRICT,  
BINGHAM GROUND WATER  
DISTRICT, BONNEVILLE-  
JEFFERSON GROUND WATER  
DISTRICT, CAREY VALLEY  
GROUND WATER DISTRICT,  
JEFFERSON-CLARK GROUND  
WATER DISTRICT, MADISON  
GROUND WATER DISTRICT,  
MAGIC VALLEY GROUND WATER  
DISTRICT, NORTH SNAKE GROUND  
WATER DISTRICT, AND FREMONT  
MADISON IRRIGATION DISTRICT**



TO: The Hearing Officer of the Department and all parties and attorneys of record:

PLEASE TAKE NOTICE that Travis L. Thompson, on behalf of A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, AND MINIDOKA IRRIGATION DISTRICT has served the **COALITION'S FIRST DISCOVERY REQUESTS TO ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT; BINGHAM GROUND WATER DISTRICT; BONNEVILLE-JEFFERSON GROUND WATER DISTRICT; CAREY VALLEY GROUND WATER DISTRICT; JEFFERSON-CLARK GROUND WATER DISTRICT; MADISON GROUND WATER DISTRICT; MAGIC VALLEY GROUND WATER DISTRICT; NORTH SNAKE GROUND WATER DISTRICT; AND FREMONT MADISON IRRIGATION DISTRICT** on the following via email:

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DATED this 19<sup>th</sup> day of December, 2022.

**BARKER ROSHOLT & SIMPSON LLP**

/s/ TRAVIS L. THOMPSON  
Travis L. Thompson  
*Attorneys for A&B Irrigation District,  
Burley Irrigation District, Milner Irrigation  
District, NSCC and TFCC*

**FLETCHER LAW OFFICE**

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

**NOTICE OF SERVICE OF SWC'S FIRST DISCOVERY REQUESTS**

**2**

## CERTIFICATE OF SERVICE

I hereby certify that on this 19<sup>th</sup> day of December, 2022, I served a true and correct copy of the foregoing *Surface Water Coalition's First Discovery Requests* on the following by the method indicated:

<p>Director Gary Spackman Garrick Baxter Sarah Tschohl State of Idaho Dept of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a> <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a></p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only  <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a> <a href="mailto:emcgarry@usbr.gov">emcgarry@usbr.gov</a></p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only  <a href="mailto:tony.olenichak@idwr.idaho.gov">tony.olenichak@idwr.idaho.gov</a></p>
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<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only  <a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>	<p>Robert E. Williams Williams, Meservy &amp; Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only  <a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>	<p>Corey Skinner IDWR – Southern Region 650 Addison Ave. W., Ste. 500 Twin Falls, ID 83301 *** service by electronic mail only  <a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>
<p>Robert L. Harris Holden, Kidwell, Hahn &amp; Crapo. PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only  <a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>	<p>Kathleen Carr US Dept Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway, Ste. 400 Boise, ID 83706 *** service by electronic mail only  <a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a></p>	<p>Candice McHugh Chris Bromley McHugh Bromley, PLLC 380 South 4<sup>th</sup> Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only  <a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a> <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>

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/s/ Travis L. Thompson  
Travis L. Thompson

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

**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 )

IN THE MATTER OF IGWA'S )  
 SETTLEMENT AGREEMENT )  
 MITIGATION PLAN )

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

**SURFACE WATER COALITION'S  
 MOTION FOR SUMMARY  
 JUDGMENT**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively hereafter referred to as the “Surface Water Coalition”, “Coalition”, or “SWC”), by and through their counsel of record, and pursuant to Rule 220.03 and I.R.C.P. 56 hereby move for summary judgment in the above-captioned matter. This motion is supported by the documents and prior orders filed in this case and the *Surface Water Coalition’s Memorandum in Support of Motion for Summary Judgment* filed together herewith.

### **MOTION**

Pursuant to well-established law regarding the interpretation of unambiguous agreements, including the stipulated mitigation plan and the Director’s order approving the same in this matter, the Director should dismiss IGWA’s petition requesting a hearing as a matter of law. Since IGWA’s member Ground Water Districts have the clear and unambiguous obligation to reduce 240,000 acre-feet per year pursuant to the terms of the stipulated mitigation plan and the Director’s order, there is no basis for an evidentiary hearing on the Director’s September 8, 2022 compliance order. Therefore the Director should grant summary judgment in this case. The Coalition requests oral argument and an expedited schedule to address this motion as soon as possible so as to preserve the parties’ time and resources.

DATED this 21<sup>st</sup> day of December, 2022.

**BARKER ROSHOLT & SIMPSON LLP**



Travis L. Thompson  
*Attorneys for A&B Irrigation District,  
Burley Irrigation District, Milner Irrigation  
District, NSCC and TFCC*

**FLETCHER LAW OFFICE**



for

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

**SWC MOTION FOR SUMMARY JUDGMENT**

**2**

## CERTIFICATE OF SERVICE

I hereby certify that on this 21<sup>st</sup> day of December, 2022, I served a true and correct copy of the foregoing *Surface Water Coalition's Motion for Summary Judgment* on the following by the method indicated:

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Travis L. Thompson

Dec 21, 2022

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

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

IN THE MATTER OF IGWA'S )  
SETTLEMENT AGREEMENT )  
MITIGATION PLAN )

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

**SURFACE WATER COALITION'S  
MEMORANDUM IN SUPPORT OF  
MOTION FOR SUMMARY  
JUDGMENT**



COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively hereafter referred to as the “Surface Water Coalition”, “Coalition”, or “SWC”), by and through their counsel of record, and hereby file this *Memorandum in Support of Motion for Summary Judgment* pursuant to Rule 220.03 of the Department’s Procedural Rules (IDAPA 37.01.01 et seq.) and Idaho Rule of Civil Procedure 56. For the reasons set forth below the Director should grant the Coalition’s motion and dismiss IGWA’s *Request for Hearing* as a matter of law.

### **UNDISPUTED FACTS**

The facts leading to the Director’s *Final Order Regarding Compliance with Approved Mitigation Plan* (“Compliance Order”) are undisputed.

In the summer of 2015 IGWA<sup>1</sup> and the Coalition entered into a *Settlement Agreement*<sup>2</sup> (“Agreement”) to resolve continued litigation over the Coalition’s delivery call.<sup>3</sup> In consideration of certain mitigation actions, IGWA received “safe harbor” from curtailment. Relevant to this contested case, IGWA agreed to the following “long term practices”:

- a. *Consumptive Use Volume Reduction.*
  - i. Total ground water diversion shall be reduced 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. . . .

Agreement at 2 (italics in original).

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<sup>1</sup> Signatory members of IGWA are 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. These entities are hereafter referred to collectively as “IGWA” or “the Districts.”

<sup>2</sup> A copy of the Agreement can be found at Ex. B to *Stipulated Plan and Request for Order* (March 9, 2016).

<sup>3</sup> The parties later executed a First Addendum in October 2015. See Ex. C to *Stipulated Plan*.

The Agreement also included the following merger clause:

9. **Entire Agreement.**

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

Agreement at 5 (bold in original).

The Agreement was submitted to IDWR as a stipulated mitigation plan pursuant to CM Rule 43. *See Stipulated Mitigation Plan and Request for Order* (March 9, 2016). IDWR published notice of the mitigation plan in various newspapers around the state. The cities of Idaho Falls and Pocatello filed protests that were later withdrawn by stipulation. *See Motion for Order Approving Stipulation to Conditionally Withdraw Protests* (April 22, 2016). The Director issued a final order approving the mitigation plan on May 2, 2016 with certain conditions (“2016 Order”), including the following:

- a. All ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan.

2016 Order at 4.

The parties then executed a *Second Addendum to Settlement Agreement* in late 2016 and early 2017. The parties submitted the addendum as a stipulated amendment to the previously approved mitigation plan. *See Stipulated Amended Mitigation Plan and Request for Order* (Feb. 7, 2017). Again, IDWR published notice of the amended plan pursuant to CM Rule 43 and the Director approved the amendment by final order dated May 9, 2017 (“2017 Order”). That order included the following provision:

- b. Approval of the Second Addendum does not limit the Director's enforcement discretion or otherwise commit the Director to a particular enforcement approach.

2017 Order at 5.

IGWA submitted its 2021 performance report to IDWR and the SWC on April 1, 2022. *See T.J. Budge April 1, 2022 Email and attachments.* As detailed in that report, the Districts only reduced groundwater diversions and recharged a total of 122,784 acre-feet in 2021. Following meetings of the Steering Committee in the summer of 2022, the Coalition provided IDWR with notice of the committee's impasse on the question of the Districts' performance in 2021. *See SWC Notice of Steering Committee Impasse / Request for Status Conference* (July 21, 2022). The Districts filed a response and did not dispute the committee's impasse on the question of the Districts' 2021 performance. *See IGWA's Response to Surface Water Coalition's Notice of Steering Committee Impasse* (August 3, 2022).

The Director held a status conference on August 5, 2022, and then took official notice of the Districts' 2021 performance report and supporting spreadsheets. *See Notice of Intent et al.* (August 18, 2022). The Director issued the *Final Order Regarding Compliance with Approved Mitigation Plan* on September 8, 2022. IGWA filed a *Petition for Reconsideration and Request for Hearing* on September 22, 2022. The Director issued an order granting the request for hearing on October 13, 2022.

### **STANDARD OF REVIEW**

IDWR's Rules of Procedure authorize the filing of motions for summary judgment. Rule 220.03. Such motions are governed by I.R.C.P. 56, except that the rule's time procedure set forth in subsection (b) does not apply. *See id.*

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

Summary judgment is appropriate in this case because the Director is called upon to interpret an unambiguous order and stipulated mitigation plan. There is no disputed issue of fact and pursuant to well-established precedent the Director can dismiss IGWA's petition and contested case challenging the Compliance Order as a matter of law.

## **ARGUMENT**

### **I. The Mitigation Plan and Director's Orders Approving the Plan are Unambiguous and can be Determined as a Matter of Law.**

This case concerns interpretation of the Director's order approving IGWA's stipulated mitigation plan and the Districts' 2021 non-compliance with that order. The parties stipulated to the mitigation plan in 2016, along with an amendment in 2017. *See generally*, 2016 Order and 2017 Order. The Director has the authority to interpret the plan and prior orders and rule on IGWA's present petition as a matter of law. Rather than spending weeks of the parties' and agency's time and resources on developing what would be a moot evidentiary record, the Director can grant the Coalition's motion for summary judgment and dismiss IGWA's petition.

**A. Only the Signatory Parties are Responsible for the Mitigation Obligation.**

The first issue is who bears the mitigation obligation identified in the plan and the approval order. The stipulated plan was filed by IGWA “on behalf of its participating members identified in the Agreements.” *See Stipulated Mitigation Plan* at 3, ¶ 12. The 2015 Agreement was executed by 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.<sup>4</sup> *See Ex. A to Stipulated Mitigation Plan.*

Non-parties to the Settlement Agreement are not part of the stipulated mitigation activities. *See Greater Boise Auditorium Dist. v. Frazier*, 159 Idaho 266, 274 (2015) (non-parties are generally not bound by contracts they did not enter into). Moreover, the Director ordered that “[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan.” 2016 Order at 4 (emphasis added). There is no question as to the parties to IGWA’s mitigation plan. Moreover, there is no confusion as to A&B Irrigation District’s position with respect to its ground water rights since IGWA expressly agreed that “[t]he obligations of the Ground Water Districts set forth in Paragraphs 2 – 4 of the *Agreement* do not apply to A&B and its ground water rights.” *See Ex. C to Stipulated Mitigation Plan; see also Compliance Order* at 12 (“A&B and Southwest are not responsible for any portion of the 240,000 acre-foot diversion reduction obligation”).

Accordingly, the mitigation obligations in the stipulated plan and order approving the same fall upon the signatory members of IGWA alone. The Director can make such a finding as a matter of law based upon the Agreement’s plain and unambiguous language.

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<sup>4</sup> The addendums were executed by the same parties as well.

**B. The Signatory Parties' Reduction Obligation is 240,000 acre-feet per year.**

The interpretation of IGWA's mitigation plan and the Director's order approving the same, starts with the documents' plain language. The Director must first decide, when construing the plan and prior order, whether they are ambiguous, which is a question of law. *See e.g., Idaho Counties Risk Management Underwriters v. Northland Ins. Companies*, 147 Idaho 84, 86 (2009).

The stipulated mitigation plan states: "Total ground water diversion shall be reduced **240,000 ac-ft annually**." *See* Agreement at 2 (emphasis added). The Director noted the following with regards to IGWA's stipulated mitigation plan:

10. As discussed above, the Mitigation Plan requires numerous ongoing activities, including: (a) **annual** ground water reductions and storage water deliveries . . .

2016 Order at 4 (emphasis added).

The terms "annually" and "annual" are unambiguous and have settled legal meaning.

Black's Dictionary defines the terms as follows:

**Annual.** Of or pertaining to year; returning every year; coming or happening yearly. Occurring or recurring once in each year; continuing for the period of a year, accruing within the space of a year; relating to or covering the events or affairs of a year. Once a year, without signifying what time in year.

**Annually.** In annual order or succession; yearly, every year, year by year. At end of each and every year during a period of time. Imposed once a year, computed by the year. Yearly or once a year, but does not in itself signify what time in year.

Black's Law Dictionary at 57-58 (6<sup>th</sup> ed. 1991).

When the language of a contract is unambiguous, its interpretation is a question of law. *See Nelsen v. Nelsen*, 170 Idaho 102, 508 P.3d 301, 333 (2022). An unambiguous contract will be given its plain meaning. *See Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*,

153 Idaho 716, 723 (2012); *Caldwell Land and Cattle, LLC v. Johnson Thermal Systems, Inc.*, 165 Idaho 787 (2019). The above language is plain and unambiguous and should be enforced by the Director. *See Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 264 (2011).

The unambiguous language simply requires the Districts to reduce diversions or conduct recharge in the amount of 240,000 acre-feet each and every year of the Agreement. There is no other reasonable interpretation of this term and the Director's decision on this issue should be confirmed as a matter of law. *See* Compliance Order at 10 ("The phrase 'shall be reduced by 240,000 ac-ft annually' is unambiguous and must be enforced according to its plain terms."). Just because IGWA disagrees with that interpretation does not make IGWA's position "reasonable," or one that can survive summary judgment in this case.

The Districts wrongly contend that their reduction obligation is only 205,000 acre-feet and that their performance can be evaluated on a five-year rolling average. *See IGWA Response* at 3-5. Nothing in the plain terms of the Agreement refers to the Districts' obligation as "205,000 acre-feet" or that it is measured by a "five-year rolling average." As recognized by the Director, the Agreement's only reference to a "five-year rolling average" is in reference to the Districts' reduction obligation and what could happen once the ground water level goal was achieved and sustained. *See* Compliance Order at 10. Therefore, the Districts' interpretation of the Agreement is patently unreasonable and contrary to its plain terms. Stated another way, no reasonable person would read the Agreement in the manner IGWA suggests.

## **II. The Agreement and Stipulated Mitigation Plan are Integrated.**

The Districts' interpretation of the Agreement should be found invalid as a matter of law since the Agreement (and Stipulated Mitigation Plan) are integrated through its merger clause. As noted above, the Agreement includes an "entire agreement" provision at page 5. Such

language has important legal ramifications that foreclose the Districts' arguments under their petition requesting a hearing.

For example, in *AED, Inc. v. KDC Investments, LLC*, 155 Idaho 159 (2013), the Idaho Supreme Court held the following with respect to a contract's merger clause:

"Where a written agreement is integrated, questions of the parties' intent regarding the subject matter of the agreement may only be resolved by reference to the agreement's language." *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 267, 297 P.3d 222, 230 (2012) (citing *Valley Bank v. Christensen*, 119 Idaho 496, 498, 808 P.2d 415, 417 (1991)). If a written contract contains a merger clause, it is an integrated agreement for purposes of the parol evidence rule. . . . Thus, extrinsic evidence may not be used to determine whether a written and integrated contract is based upon consideration other than what is contained in the text of the contract.

155 Idaho at 165.

In *AED*, the plaintiff entered into a sales agreement and transferred its interest in a toll bridge to the defendant in exchange for \$25,000. *See* 155 Idaho at 162. The sales agreement included a merger clause analogous to the one in the SWC/IGWA Agreement. *See* 155 Idaho at 165; Agreement at 5, ¶ 9. The parties also entered into a separate blasting agreement. The defendant later informed the plaintiff that it did not want to hire plaintiff for the blasting work, implicitly on the basis that the plaintiff did not have a state license to perform the work. The plaintiff sued and ultimately the district court granted summary judgment quieting title to the bridge in the defendant's name. On appeal the plaintiff argued that the blasting agreement was an essential part of the consideration of the sales agreement and that if the blasting agreement was illegal as a matter of law, the defendant was not entitled to the order quieting title. *See* 155 Idaho at 165. The Idaho Supreme Court rejected the plaintiff's argument and found: "The Sales Agreement in this case is a written and integrated contract, therefore, the parties' intent must be determined solely from the language of the agreement." *Id.*



Similarly in this case, the parties' intent as to the SWC/IGWA Agreement must be "determined solely from the language of the agreement" since it includes a merger clause. Whereas the Agreement expressly provides for an annual obligation of 240,000 acre-feet per year, there is nothing left to examine at a factual hearing regarding the parties' intent and the Agreement's plain meaning. Consequently, the Director can grant the Coalition's motion and dismiss IGWA's petition as a matter of law.

### CONCLUSION

The plain language of the stipulated mitigation plan and order approving the same is undisputed. The Signatory Ground Water Districts have an annual mitigation obligation of 240,000 acre-feet that is not subject to a five-year rolling average evaluation. The terms are unambiguous and can be settled as a matter of law. Since the Agreement includes a merger clause the Director is left with examining the four corners of the document to identify the parties' intent. As such, there is no basis for any fact-finding in this matter and IGWA's petition requesting a hearing can be dismissed as a matter of law.

DATED this 21<sup>st</sup> day of December, 2022.

#### **BARKER ROSHOLT & SIMPSON LLP**



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## CERTIFICATE OF SERVICE

I hereby certify that on this 21<sup>st</sup> day of December, 2022, I served a true and correct copy of the foregoing *Surface Water Coalition's Memorandum in Support of Motion for Summary Judgment* on the following by the method indicated:

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Jan 04, 2023  
DEPARTMENT OF  
WATER RESOURCES

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## STATE OF IDAHO

### DEPARTMENT OF WATER RESOURCES

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

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

#### **IGWA's Response in Opposition to SWC's Motion for Summary Judgment**

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

Idaho Ground Water Appropriators, Inc. ("IGWA") submits this response brief pursuant to rule 220 of the Department's rules of procedure in opposition to *Surface Water Coalition's Motion for Summary Judgment* ("Motion") filed December 21, 2022. As explained below, the Director should deny the Motion and grant partial summary judgment in favor of IGWA.

### INTRODUCTION

IGWA requested a hearing under Idaho Code 42-1701A(3) to challenge the *Final Order Regarding Compliance with Approved Mitigation Plan* entered in this matter on September 8, 2022 ("Compliance Order"). Specifically, IGWA challenges:

1. The Director's failure to "evaluate all available information" before determining whether a breach occurred, as required by section 2.c.iv of the Second Addendum.

2. The ruling that the IGWA-SWC Settlement Agreement (“Agreement”) is unambiguous as to the method of calculating the signatory districts’ groundwater conservation obligations under section 3.a of the Agreement.
3. The ruling that the Agreement unambiguously precludes averaging for the purpose of measuring compliance with the signatory districts’ groundwater conservation obligations.
4. The ruling that certain IGWA districts breached the Agreement in 2021.

The SWC’s Motion addresses issues 2 and 3. It asks the Director to “dismiss IGWA’s petition requesting a hearing as a matter of law,” arguing that “IGWA’s member Ground Water Districts have the clear and unambiguous obligation to reduce 240,000 acre-feet per year pursuant to the terms of the stipulated mitigation plan and the Director’s order.” (Mot., p. 2.)

As explained below, the Motion should be denied, and partial summary judgment should be entered in favor of IGWA as follows:

- IGWA is statutorily entitled to a hearing under Idaho Code 42-1701A(3).
- IGWA is contractually entitled to a hearing to present “all available information” pursuant to section 2.c.iv of the Second Addendum.
- With respect to the method of calculating the proportionate conservation obligations of the signatory districts, either (a) the plain language of the Agreement provides that their proportionate obligations be calculated relative to total groundwater diversions from the ESPA; (b) the Agreement is patently ambiguous as to the method of calculating their proportionate conservation obligations; or (c) IGWA should be permitted to present evidence of latent ambiguity concerning the matter.
- With respect to averaging, the Agreement is latently ambiguous as to how annual groundwater conservation is to be measured, and the SWC explicitly acknowledged that averaging may be utilized for purposes of compliance.
- The Compliance Order finding that a breach occurred in 2021 is withdrawn.

### **SUMMARY JUDGMENT STANDARD**

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 judgment as a matter of law.” I.R.C.P. 56(c); *Orthman v. Idaho Power Co.*, 130 Idaho 597, 600 (1997). Upon review of a motion for summary judgment, the court is not permitted to weigh the evidence or to resolve controverted factual issues, *Bybee v. Clark*, 118 Idaho 254, 257 (1990); rather, it must draw all reasonable factual inferences and conclusions in favor of the non-moving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 529 (1994). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 110 Idaho 466 (1986).

The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865 (1969). If the moving party fails to challenge an element or fails to present evidence establishing the absence of a genuine issue of material fact on that element, the burden does not shift to the non-moving party, and the non-moving party is not required to respond with supporting evidence. *Orthman*, 130 Idaho at 600. If the record contains conflicting inferences or reasonable minds might reach different conclusions, summary judgment must be denied. *Kline v. Clinton*, 103 Idaho 116 (1982).

“Summary judgment may be rendered for any party, not just the moving party, on any or all the causes of action involved, under the rule of civil procedure.” *Harwood v. Talbert*, 136 Idaho 672, 677 (2001) (citation omitted). “The district court may grant summary judgment to the non-moving party even if the party has not filed its own motion with the court.” *Id.* “A motion for summary judgment allows the court to rule on the issues placed before it as a matter of law; the moving party runs the risk that the court will find against it.” *Id.*

## **ARGUMENT**

### **1. IGWA is statutorily entitled to a hearing under Idaho Code 42-1701A(3).**

Idaho Code 42-1701A(3) creates a statutory right to a hearing for any person “who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter.” It is not discretionary. When a hearing request is made, “[t]he hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section.” *Id.* (emphasis added).

When IGWA petitioned for judicial review of the Compliance Order, the Department moved for dismissal based on the exhaustion doctrine, arguing that a hearing under 42-1701A(3) is a “mandatory administrative remedy.” (Resp’s Mot. to Dismiss, *IGWA v. IDWR*, Case No. CV27-22-945, Fifth Jud. Dist., Nov. 9, 2022, p. 5.) Judge Wildman agreed, finding that until a hearing is held, “the administrative remedy available to IGWA under Idaho Code § 42-1701A(3) has not been exhausted.” (Order Granting Mot. to Dismiss, *IGWA v. IDWR*, Case No. CV27-22-945, Fifth Jud. Dist., Dec. 8, 2022, p. 7.)

It would be a violation of Idaho Code 42-1701A(3) for the Director to dismiss the hearing in this matter by rubber-stamping his prior decision which was made in the absence of a full evidentiary record. Therefore, the SWC’s Motion should be summarily denied.

### **2. IGWA is entitled to a hearing to present “all available information” pursuant to section 2.c.iv of the Second Addendum.**

A hearing is also necessary because the Director is obligated under section 2.c.iv of the Second Addendum to consider “all available information” when determining whether a breach occurs. There are many genuine issues of material fact related to IGWA’s compliance with the Agreement, including but not limited to those set forth in the *First Declaration of Jaxon Higgs* filed herewith. IGWA has a contractual right to present these and other facts. Therefore, the Motion should be denied.

**3. The Director should grant partial summary judgment in favor of IGWA concerning the method by which each district's groundwater conservation obligation under section 3.a.ii of the Agreement is determined.**

Section 3.a.i of the Agreement states: "Total ground water diversions shall be reduced by 240,000 ac-ft annually." However, it does not assign this obligation to IGWA or its member districts specifically, which is significant. Other provisions in the Agreement assign obligations on IGWA and its members specifically, including section 2.a ("IGWA on behalf of its member districts will acquire a minimum of 110,000 ac-ft for assignment"), section 3.b.i ("IGWA will provide 50,000 ac-ft of storage water through private leases"), section 3.b.ii ("IGWA shall use its best efforts to continue existing conversions in Water Districts 130 and 140"), and section 3.f ("IGWA's contributions to the State sponsored recharge program will be targeted for infrastructure and operations above American Falls"). There is a reason why section 3.a.i, by contrast, does not.

Section 3.a.i does not obligate IGWA specifically to conserve 240,000 acre-feet because section 3.a.ii requires each participating district to conserve only its "proportionate share" of 240,000 acre-feet, stating: "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."

The Agreement does not state how each district's proportionate share of 240,000 acre-feet is to be calculated. IGWA has from the beginning calculated its members' proportionate shares by comparing their groundwater diversions to the total diversions among eleven ground water districts and irrigation districts whose patrons pump water from the ESPA. (Higgs Decl., ¶ 17.) This method takes into account diversions from A&B Irrigation District and Southwest Irrigation District who did not sign the Agreement. Accounting for the diversions by A&B and Southwest results in the signatory districts being responsible to collectively conserve approximately 205,000 acre-feet. (Compliance Order, p. 7.)

The Compliance Order contains a conclusion of law that "the basis IGWA's deduction [of A&B's and Southwest's diversion volumes] is unclear," but nevertheless determines that it is impermissible, ruling instead that the signatory districts alone must conserve 240,000 acre-feet. (Compliance Order, p. 12.) This conclusion is not based on the plain language of the Agreement, however. As noted above, the Agreement does not prescribe how each district's proportionate share is to be calculated. Rather, it is based on a condition contained in the Director's order approving the Agreement as a mitigation plan which reads: "All ongoing activities are the responsibility of the parties to the Mitigation Plan," along with a statement in the A&B Settlement Agreement which reads: "The obligations of the Ground Water Districts set forth in Paragraphs 2-4 of the Agreement do not apply to A&B and its ground water rights." (Compliance Order, p. 12.) In other words, the Compliance Order ruled that since A&B and Southwest did not sign the Agreement, their diversions from the ESPA cannot be considered in determining the proportionate obligations of the districts that did sign the Agreement.

The SWC asks the Director to rubber-stamp this conclusion of law based on the same rationale. (SWC Memo, p. 6.) The SWC's argument, however, suffers from the same error as the Compliance Order. Both fail to distinguish between the method of calculating the proportionate

conservation obligation of the signatory districts versus the responsibility to conserve groundwater under the terms of the Agreement.

IGWA readily agrees that only the signatory districts are obligated to conserve groundwater under the Agreement. A&B and Southwest conserve groundwater under separate mitigation plans approved by the Director in IDWR Docket Nos. CM-MP-2015-003 and CM-MP-2010-001, respectively. They are required to implement and report groundwater conservation under the terms of the Agreement.

The fact that A&B and Southwest are not bound by the Agreement, however, does not answer the question of how to calculate the conservation obligations of the districts that did sign the Agreement. The latter is a separate issue that must be separately analyzed based on rules of contract interpretation.

As explained below, careful application of the rules of contract interpretation should result in the granting of partial summary judgment in favor of IGWA that either (a) the plain language of the Agreement provides that the signatory districts' proportionate conservation obligations be calculated relative to total groundwater diversions from the ESPA; (b) section 3.a.ii is patently ambiguous because it is susceptible to multiple reasonable interpretations; or (c) IGWA should be permitted to present evidence concerning latent ambiguity of section 3.a.ii.

### **3.1 The plain language of the Agreement provides that the signatory districts' proportionate conservation obligations be calculated relative to total diversions from the ESPA.**

As noted above, section 3.a.i refers to a 240,000 acre-feet reduction in "total" groundwater use. Had the parties intended IGWA's members to be solely responsible to conserve 240,000 acre-feet, section 3.a would have simply said something like: "IGWA's members shall collectively reduce their diversions by 240,000 acre-feet annually," or "Total ground water diversion *by IGWA's member districts* shall be reduced by 240,000 acre-feet annually." Instead, section 3.a.i refers to the "total" ground water diversions. By its plain meaning, "total" diversions refers to all pumping from the ESPA, not just pumping by IGWA members.

In keeping with the language of section 3.a.i, section 3.a.ii provides that each of the signatory districts' responsibility to conserve groundwater would be proportionate to "the total annual groundwater reduction." Again, it does not state that 240,000 acre-feet will be allocated solely among IGWA members; it states that each district's proportionate shares shall be relative to total diversions from the ESPA.

This is reinforced by the fact that the 240,000 acre-feet figure in section 3.a.i was not revised downward when Southwest Irrigation District elected to not sign the Agreement. Southwest is a member of IGWA whose patrons pump groundwater from the ESPA, and the parties anticipated that Southwest would participate in the Agreement, which is why it includes a signature page for Southwest. (Agreement, p. 22.) Southwest did not to sign the Agreement, however, electing instead to conserve groundwater under the terms of a separate settlement agreement with the SWC. Southwest contributes toward stabilization and recovery of the ESPA, it just does so under different terms.



If section 3.a was intended to require the signatory districts alone to conserve 240,000 acre-feet, the withdrawal of Southwest would have necessitated an amendment of section 3.a to remove Southwest's proportionate share of 240,000 acre-feet. This was not necessary because the plain language of section 3.a requires each district's proportionate share to be calculated relative to total diversions from the ESPA; therefore, Southwest's withdrawal had no effect on the obligations of the districts that did sign the Agreement.

Based on the plain language of section 3.a, IGWA respectfully requests that the Director enter partial summary judgment that the signatory districts' proportionate conservation obligations be calculated relative to total diversions from the ESPA.

### **3.2 Alternatively, section 3.a is patently ambiguous because it is susceptible to multiple reasonable interpretations.**

If the Director does not grant partial summary judgment based on the plain language of sections 3.a as set forth above, the Director should find that the plain language is patently ambiguous. A contract is ambiguous if there are "two different reasonable interpretations of the term." *Swanson v. Beco Const. Co.*, 145 Idaho 59, 62 (2007). "Idaho courts look solely to the face of a written agreement to determine whether it is patently ambiguous." *Id.* (quoting *Ward v. Puregro Co.*, 128 Idaho 366, 369 (1996)). "In determining patent ambiguity, the contract as a whole is considered." *Buku Properties, LLC v. Clark*, 153 Idaho 828, 832 (2012).

As explained above, the terms of the Agreement can reasonably be read to calculate the signatory districts' proportionate share relative to total diversions from the ESPA. If the Director determines that the Agreement can also reasonably be read to calculate the signatory districts' proportionate share relative only to the diversions of other signatory districts, the existence of two different reasonable interpretations results in a patent ambiguity.

When a contract is ambiguous, "a court moves past the initial ambiguity question, and the interpretation of the [document] becomes a question of fact determined by parole [sic] evidence of the facts and circumstances surrounding the [] transaction." *Sommer v. Misty Valley, LLC*, 170 Idaho 413 (2021). Parol evidence is considered to determine the intent of the parties which may be derived not only from the language of the contract but also "the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings." *Stanger v. Walker Land & Cattle, LLC*, 169 Idaho 566, 573 (2021); see also *Bischoff v. Quong-Watkins Properties*, 113 Idaho 826, 829 (Ct. App. 1987) ("A court may look to custom and trade practice in interpreting an agreement as well as using such to supply an essential term which is reasonable in the circumstances to the agreement.").

If the Director finds the Agreement to be patently ambiguous, the SWC's Motion must be denied and the hearing held to consider parol evidence.

### **3.3 Alternatively, section 3.a.ii is latently ambiguous.**

Ambiguity may be patent or latent. *Swanson*, 145 Idaho at 62. "A latent ambiguity is not evident on the face of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist." *Id.* (quoting *In re Estate of Kirk*, 127 Idaho 817, 824 (1995)). In

evaluating latent ambiguity there are two points of analysis: “first, we examine the language of the instrument, including other writings incorporated into the instrument; and second, we examine the reasonable alternative meanings suggested by the parties as to language within the instrument.” *Sommer*, 170 Idaho 413 (quoting 11 Williston on Contracts § 30:5 (4th ed.)). The fact finder “may consider extrinsic evidence of the structure of the instrument; the parties’ relative positions and bargaining power; the parties’ bargaining history; the party drafting the instrument; and *any conduct of the parties which reflects their understanding* of the contract’s meaning to determine whether language within the instrument is reasonably susceptible of more than one meaning.” *Id.* (emphasis added; internal quotation omitted).

If the Director finds that section 3.a.ii is not patently ambiguous, IGWA contends that it is latently ambiguous because the Agreement does not explain how each district’s proportionate share is to be calculated, the parties’ conduct demonstrates their intent that this was left to IGWA to determine after the Agreement was signed, and IGWA reasonably accounted for diversions from A&B and Southwest in determining each of the signatory districts’ proportionate groundwater conservation obligations. (Higgs Decl., ¶¶ 17-20.)

IGWA is entitled to a hearing to present extrinsic evidence to further support the meaning of section 3.a as it applies to the facts in existence at the time of the Agreement. Therefore, the SWC’s Motion must be denied.

### **3.4 The SWC’s integration argument is a red herring and should be ignored.**

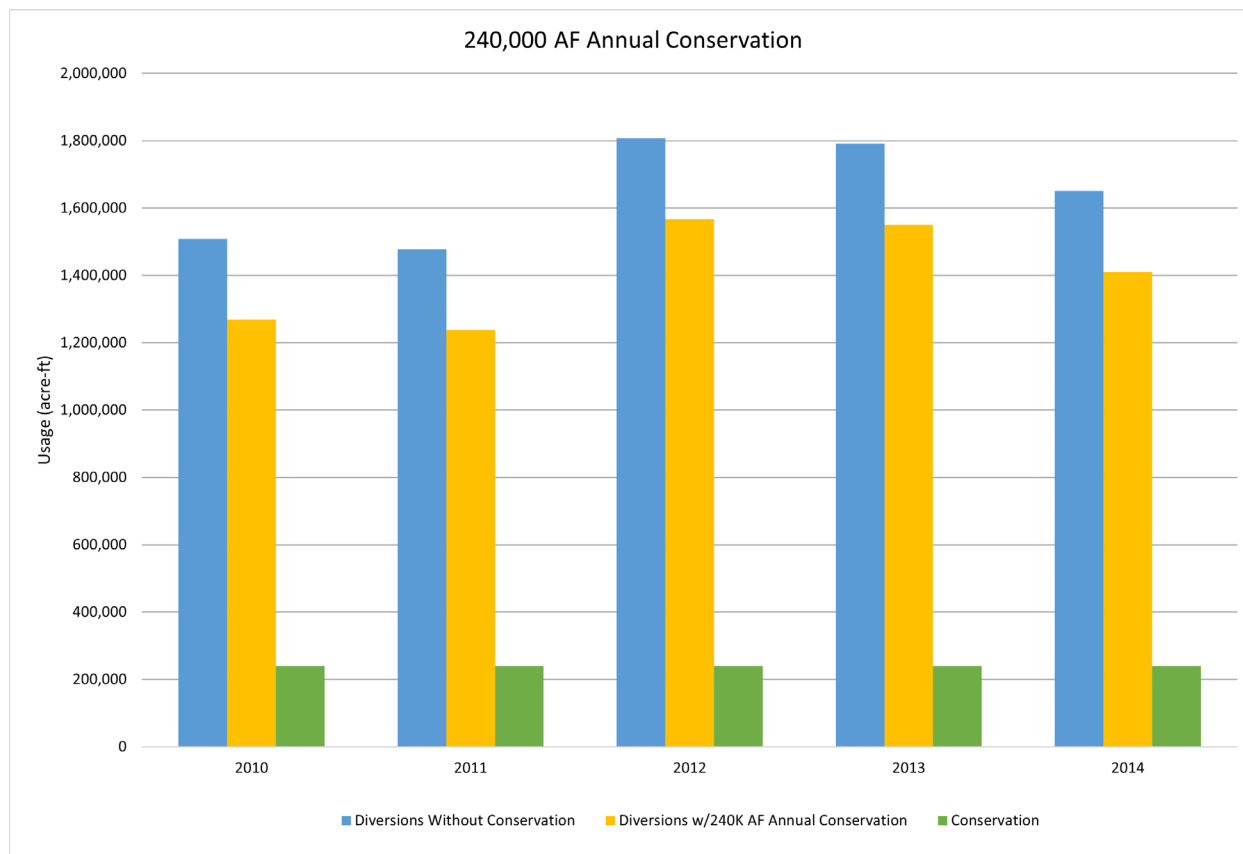
The SWC argues that since the Agreement contains a merger clause, “the parties’ intent as to the SWC/IGWA Agreement must be determined solely from the language of the agreement.” (SWC Memo, p. 9-10.) This argument misstates Idaho law. A merger clause means that there are no terms of agreement that are not incorporated into the written contract. It does not mean that every term that is incorporated into the contract is unambiguous, and it does not excuse the Director’s responsibility to consider parol evidence when the written terms of a contract prove to be ambiguous. The case law is clear that if the terms within the written contract are ambiguous, the Director may consider parol evidence to determine the intent of the parties.

### **4. The Director should deny the SWC’s Motion with respect to averaging because the Agreement is latently ambiguous as to how groundwater conservation is measured, and because the SWC acknowledged that averaging may be utilized.**

While the Agreement clearly requires the signatory districts to conserve a certain amount of groundwater annually, it does not prescribe how groundwater conservation will be measured. The Compliance Order ruled that districts cannot average their diversions across multiple years for the purpose of measuring compliance, reasoning that the plain meaning of “annual” requires that “of or measured by a year” or “happening or appearing once a year, yearly.” (Compliance Order, p. 10.) The SWC asks the Director to rubber-stamp this ruling, citing the same rationale—that the word “annual” is unambiguous. (SWC Memo, p. 7.)

IGWA concurs that the Agreement requires annual conservation. However, the Agreement does not specify how annual conservation will be measured, and a latent ambiguity arises when one attempts to apply this requirement to the facts in existence.

Measuring annual conservation would be simple if groundwater diversions were static from year-to-year, but they are not—more water is pumped during hot and dry years than in cool and wet years. Thus, reducing diversions by a certain volume annually result in gross diversions being higher in dry years than in wet years, yet in every year less than they would have been in the absence of the Agreement. To illustrate, the following chart compares actual diversions from 2010-2014 (based on the selected data set) versus diversions that would have occurred with 240,000 acre-feet of conservation in each of those years:

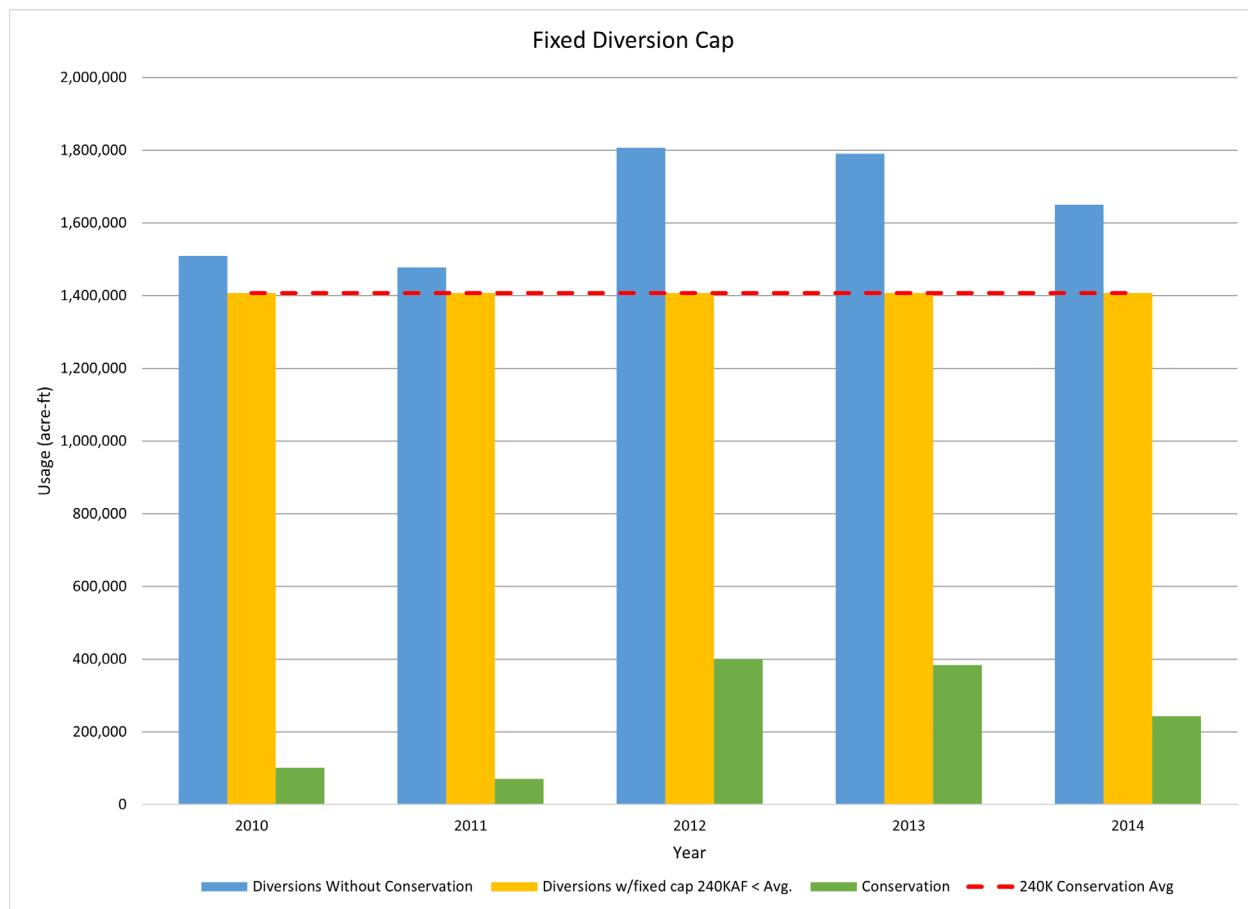


As the above chart shows, conserving 240,000 acre-feet annually would have resulted in actual diversions fluctuating between 1.2 million acre-feet and 1.6 million acre-feet (based on the selected data set).

If groundwater users were to conserve precisely 240,000 acre-feet annually post-Agreement, annual diversions would fluctuate similar to what is shown above. In an ideal world, the participating districts would know how much water their patrons would divert in a given year without conservation measures in place, and then compare that with actual diversions to determine whether each district conserved its proportionate share of 240,000 acre-feet. Of course, that's impossible because farmers cannot farm the same land in the same year both with and without conservation measures in place. Therefore, some other method must be used to measure annual groundwater conservation under the Agreement.

The Agreement does not prescribe how to measure annual conservation. This was left to IGWA to figure out, and there were multiple ways of doing it. (Higgs Decl., ¶¶ 13-14.) Since groundwater diversions naturally fluctuate from year-to-year, IGWA elected to measure compliance by compare average diversions over a multi-year period prior to the Agreement against average diversions over a multi-year period after the Agreement. IGWA selected average diversions from 2010-2014 as the baseline. The Agreement does not prescribe a 5-year average as the baseline; IGWA selected it on its own. *Id.*

If averaging is not available for purposes of measuring compliance with diversion limits, the 2010-2014 average effectively creates a fixed cap which actually contradicts the language of the Agreement by forcing the signatory districts conserve more than their shares of 240,000 acre-feet in some years and less in others, as illustrated by the following chart:



The green bars in the above chart demonstrate that prohibiting the use of averaging would allow the signatory districts to conserve much less than their proportionate shares of 240,000 acre-feet in some years while requiring them to conserve much more in other years.

The point is that measuring “annual” conservation becomes ambiguous when applied to the facts in existence. IGWA is entitled to present evidence concerning this latent ambiguity, and

the parties' intent that IGWA determine how to measure compliance. Therefore, the Motion should be denied on this issue.

Importantly, after the Agreement was entered into the SWC acknowledged that IGWA may utilize averaging for purposes of measuring compliance with the annual conservation obligation. On March 9, 2016, IGWA and the SWC jointly filed with the Department *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order*, which included a proposed order approving the Agreement as a mitigation plan under Rule 43 of the Conjunctive Management Rules. The proposed order includes the a condition that groundwater diversion reductions will be "based on a 3-year rolling average going forward." (Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order, Ex. A, ¶ 2.a.)

##### **5. The Director must withdraw the Compliance Order ruling that a breach occurred in 2021.**

The Compliance Order's conclusion that certain of the signatory districts breached the Agreement in 2021 is predicated on the Director's findings that (a) the proportionate shares of the signatory districts must be calculated relative to the collective diversions of the signatory districts as opposed to total diversions from the ESPA, and (b) averaging is not allowed for purposes of measuring compliance. If the Director denies the Motion with respect to either finding, then he must also withdraw his ruling that a breach occurred in 2021.

Even if the Director were to grant the Motion, he must withdraw his ruling that a breach occurred in 2021, for two reasons.

First, the Director's finding that a breach occurred is predicated on the premise that the Agreement requires that compliance be measured from a fixed baseline based on average diversions from 2010-2014. If averaging is not allowed for purposes of compliance, IGWA may no longer use the 2010-2014 average as a baseline. IGWA may instead take into account precipitation and temperature by comparing the current year with a prior analog year of similar precipitation and temperature. In any case, until an alternative measure of compliance is determined, the Director cannot conclude that a breach occurred.

Second, IGWA has not yet had an opportunity to present affirmative defenses to the SWC's breach claim. For example, there is no breach if IGWA substantially performed its long-term obligations under the Agreement. *Hull v. Giesler*, 156 Idaho 765, 774 (2014) ("There is no material breach of contract where a party substantially performs."). "Substantial performance is performance which, despite a deviation from contract requirements, provides the important and essential benefits of the contract to the promisee." *Id.* Excess conservation by IGWA prior to 2021 provided benefits to the SWC that the Director did not take into account in finding that a breach occurred. Also, the SWC cannot pursue a breach claim if its own conduct has been "inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." *Sword v. Sweet*, 140 Idaho 242, 251 (2004). As mentioned above, the SWC acknowledged in 2016 that averaging may be used for purposes of compliance, and it is inequitable for them to now assert that averaging is not permitted. Other affirmative defenses can also be raised.

Therefore, regardless of the Director's ruling as to method of calculating each district's proportionate conservation obligation, and regardless of his ruling as to averaging, the Director should on summary judgment withdraw his finding that a breach occurred in 2021.


## CONCLUSION

For the reasons set forth above, IGWA requests that the Director deny the SWC's Motion by ruling as follows:

- IGWA is statutorily entitled to a hearing under Idaho Code 42-1701A(3).
- IGWA is contractually entitled to a hearing to present "all available information" pursuant to section 2.c.iv of the Second Addendum.
- With respect to the method of calculating the proportionate conservation obligations of the signatory districts, either (a) the plain language of the Agreement provides that their proportionate obligations be calculated relative to total groundwater diversions from the ESPA; (b) the Agreement is patently ambiguous as to the method of calculating their proportionate conservation obligations; or (c) IGWA should be permitted to present evidence of latent ambiguity concerning the matter.
- With respect to averaging, the Agreement is latently ambiguous as to how annual groundwater conservation is to be measured, and the SWC explicitly acknowledged that averaging may be utilized for purposes of compliance.
- The Compliance Order finding that a breach occurred in 2021 is withdrawn.

DATED January 4, 2023.

RACINE OLSON, PLLP

By:   
Thomas J. Budge  
*Attorneys for IGWA*

## CERTIFICATE OF SERVICE

I hereby certify that on this 4<sup>th</sup> day of January, 2023, the foregoing document was served on the persons below via email as indicated:

  
Thomas J. Budge

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*Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)*

RECEIVED  
Jan 04, 2023  
DEPARTMENT OF  
WATER RESOURCES

**STATE OF IDAHO**  
**DEPARTMENT OF WATER RESOURCES**

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

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

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

**First Declaration of  
Jaxon Higgs**

Jaxon Higgs, being duly sworn, deposes and declares:

1. I am over the age of 18 and competent to testify. If called upon to testify, I could testify to the following, all of which are within my own personal knowledge or based upon my professional judgment.

2. I am a licensed professional Geologist in the State of Idaho. I have a bachelor's degree in Geology from Brigham Young University Idaho and a master's degree in Hydrology from the University of Idaho.

3. I am the principal owner and operator of Water Well Consultants ("WWC"), an Idaho corporation with its principal address at 355 W. 500 S., Burley, Idaho 83318. WWC provides a

variety of hydrogeologic services in southern Idaho related to aquifer management and water conservation.

4. I am a consultant for Idaho Ground Water Appropriators, Inc. (“IGWA”). In that capacity I attend IGWA board meetings and provide technical assistance on a variety of matters, including the settlement agreement entered into between IGWA and the Surface Water Coalition (“SWC”) in 2015 (the “Settlement Agreement”). Among other things, I prepare the spreadsheet showing groundwater diversion and recharge data that IGWA submits to the SWC and IDWR under section 2.a of the Second Addendum to the Settlement Agreement.

5. I am also a consultant for five of IGWA’s member ground water districts: North Snake Ground Water District, Magic Valley Ground Water District, Southwest Irrigation District, American Falls-Aberdeen Ground Water District, and Bonneville-Jefferson Ground Water District. I provided input on the development of, and am familiar with, each of these districts’ programs for conserving groundwater under the Settlement Agreement (Southwest Irrigation District conserves water under a separate settlement agreement with the SWC).

6. Section 3.a of the Settlement Agreement calls for 240,000 acre-feet of groundwater conservation, and states: “Each Ground Water District 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.”

7. The Settlement Agreement does not name the ground water districts and irrigation districts with members that pump groundwater from the ESPA. At the time the Settlement Agreement was entered, the following 13 districts had members that pump groundwater from the ESPA: North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, Southwest Irrigation District, A&B Irrigation District, Raft River Ground Water District, Falls Irrigation District, American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Fremont-Madison Irrigation District.

8. Of the above-named districts, ten were members of IGWA: North Snake Ground North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, Southwest Irrigation District, American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark

Ground Water District, Madison Ground Water District, and Fremont-Madison Irrigation District. Of these, all signed the Settlement Agreement except for Southwest Irrigation District, which has a separate settlement agreement with the SWC.

9. The majority of Madison Ground Water District is located outside the ESPA as defined by rule 50 of the Rules for Conjunctive Management of Surface and Ground Water Resources.

10. The members of Fremont-Madison Irrigation District and other surrounding water users that pump groundwater from the ESPA have since formed Henry's Fork Ground Water District which has assumed the obligations of Fremont-Madison Irrigation District under the Settlement Agreement.

11. In addition to Southwest Irrigation District, A&B Irrigation District, Raft River Ground Water District, Falls Irrigation District did not sign the Settlement Agreement. There were also a large number of groundwater users who pump water from the ESPA but do not belong to any of the districts cited above.

12. The Settlement Agreement does not explain how to allocate the 240,000 acre-feet among the ground water districts and irrigation districts. This was left up to IGWA to figure out. Various meetings were held with IDWR staff to discuss the available data and options for establishing a baseline and allocating the obligation. This is when the IGWA board asked me to attend their meetings and discuss options. There were several possible ways to allocate the obligation. It could have been allocated based on water right acres, acres historically irrigated, water right cfs, cfs historically diverted, water right acre-feet, acre-feet historically diverted, evapotranspiration data, or a combination thereof. After considering various options, the IGWA board decided to use the volume of water historically diverted within each district for the purpose of determining each district's groundwater conservation obligation under the Settlement Agreement. This was the simplest method and it allowed districts to begin crafting individual plans to meet their obligation without delay.

13. Because the Settlement Agreement required a reduction in pumping, IGWA had to figure out a baseline for the purpose of identifying historic diversions. The Settlement Agreement does not prescribe how this would be done, and there are several ways of doing it. Some of those options include using a single year of diversions as the baseline, using average diversions over a period of multiple years, and comparing analog years of similar precipitation and temperature. Attached hereto as Exhibit A is an example table comparing different baseline

diversion volumes that would result from a single year of diversions, a three-year average, and a five-year average.

14. I recommended, and IGWA selected, a five-year average from 2010-2014 to use as the baseline for the purpose of determining each district's groundwater conservation obligation under the Settlement Agreement. As shown on Exhibit A, this resulted in a lower baseline than would have occurred under a three-year average or a single year of peak diversions based on the data available at the time. I recommended a five-year average from 2010-2014 because it was the most recent, and most complete, data available, and it included both wet and dry years. Those five years covered a long enough stretch of time to fairly represent average groundwater use within each district. Averaging over five years also helped address the data gaps in individual wells often referred to as "null" values in the IDWR Water Measurement Information System database (years when water was diverted from a particular well but no usage was reported in the IDWR database for varying reasons).

15. Determining historic diversions was not as easy as one might suspect. Prior to the Settlement Agreement, groundwater diversion data had not been used for any important purpose other than individual compliance with water right elements. Because it was not widely used, complete and accurate diversion data was not a priority in some areas. With the help of the IGWA districts and IDWR staff, I compiled the most complete set of data possible at the time with the understanding that we would refine this dataset as implementation progressed.

16. IGWA also had to determine whether to allocate water to groundwater irrigation diversions that were not patrons of any district. Attached hereto as Exhibit B is a map that I shared with the IGWA board to show the locations of these diversions as well as the large number of groundwater diversions located outside IGWA's member districts.

17. It took more than a year after the Settlement Agreement was signed to finalize the allocation of 240,000 acre-feet among the districts. Attached hereto as Exhibit C is the slide deck from my initial presentation to the IGWA board in August of 2015 addressing alternatives for allocating the 240,000. Attached hereto as Exhibit D is the slide deck from a presentation I gave to the IGWA board in September of 2015 that explains different alternatives for allocating the 240,000 and includes my recommendation of a five-year average baseline. Attached as Exhibit E is the slide deck from a presentation I gave to the IGWA board in November of 2015 that further explains how a five-year average would work and provides an updated allocation based on

usage. Attached hereto as Exhibit F is the final allocation approved by the IGWA board in November 2016.

18. The gross diversion volumes shown in Exhibits C, D, E and F differ due to ongoing refinement of usage volumes and determination of participating water rights and diversions for each district.

19. Exhibits C, D, E and F take into account groundwater diversions from A&B Irrigation District, Southwest Irrigation District, and Raft River Ground Water District for the purpose of determining each district's proportionate share of 240,000 acre-feet. Diversions within districts that did not sign the Settlement Agreement were taken into account because presentations given by IDWR staff to groundwater irrigators in the meetings I attended in 2015 included statements that the 240,000 acre-feet obligation was based on the average annual aquifer-wide water budget deficit. The water budget deficit was attributable to all pumping from the ESPA, not just diversions by the districts that signed the Settlement Agreement.

20. IDWR staff participated in discussions of how each district's proportionate share of 240,000 acre-feet would be calculated. Attached hereto as Exhibit G is the agenda from a workshop held by IDWR on September 23, 2015, in Burley to discuss issues related to implementation of the Settlement Agreement. It is clear from this agenda that neither the method for calculating the baseline nor the method for determining the signatory districts' proportionate groundwater conservation obligations had been determined, and that various options were under consideration. Agenda item #4 was "Discussion of Establishing Baseline, 240,000 AF Proportionment, & Annual Performance Review," with the following sub-items: "a. Consider methods for determining baseline – Mat Weaver," and "b. Consider methods for proportioning 240,000 AF reduction amongst GWDs – Mat Weaver." The Agenda's Objective #7 states: "Determine the data and methods that will be used to proportionately split the 240,000 acre foot obligation up amongst all the parties (i.e., GWDs, A&B, SWID, and others)." Considering all data presented by IDWR, the IGWA board decided to include diversions from Southwest Irrigation District and A&B Irrigation District in allocating of 240,000 acre-feet because those districts were expected to contribute toward reversing the water budget deficit under their separate mitigation plans with the SWC.

21. Each of the ground water districts that I provide consulting services have developed programs for reducing groundwater diversions within their district in order to achieve their

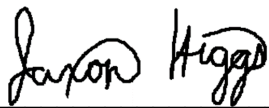
proportionate groundwater conservation obligations. All of these plans assign volumetric diversion limits to each district patron based on the priority date of the patron's water rights. Some districts have also made adjustments based on baseline pumping. For purposes of compliance, each district allows its patrons to pool their water rights, which results in each patron receiving a lump sum volume of water they can divert from their wells collectively. Most of these districts employ some form of averaging for purpose of compliance with its diversion limit. Averaging is important to accommodate crop rotations, particularly for patrons with relatively small farms. It also allows farmers to respond to unforeseen periods of severe heat or drought by making up for the shortfall in prior or subsequent years. A rolling average provides some flexibility but limits the ability for users to get so far out of compliance that they cannot recover.

22. I am familiar with the *Final Order Regarding Compliance With Approved Mitigation Plan* ("Compliance Order") entered in this matter on September 8, 2022. Among other things, the Compliance Order ruled that IGWA is not allowed to utilize averaging for purpose of compliance with the Settlement Agreement. I anticipate that this will compel IGWA to change how it measures compliance with the proportionate allocation of the 240,000 acre-feet and how it allocates that volume to each district. When considering compliance issues, it makes sense to use averaging, especially if comparing against an average. Districts moved forward with their conservation plans with the expectation that averaging would be used for compliance purposes.

23. The Compliance Order finds that certain IGWA members breached the Settlement Agreement in 2021. However, this ruling is based on the five-year average diversion baseline and the allocation method that IGWA developed in good faith with the expectation that averaging would be allowed for purposes of compliance. This method is not written into the Settlement Agreement. If averaging is not allowed, IGWA may reconsider how groundwater conservation obligations are determined and how compliance is measured.

24. I declare under the penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 4<sup>th</sup> day of January 2023.

  
\_\_\_\_\_  
JAXON HIGGS

**Exhibits:**

- A – Table comparing single-year, 3-year average & 5-year average baseline
- B – Map showing wells not represented by IGWA districts
- C – Slide deck August 2015
- D – Slide deck September 2015
- E – Slide deck November 2015
- F – Final allocation
- G – IDWR workshop agenda September 2015

# **EXHIBIT A**

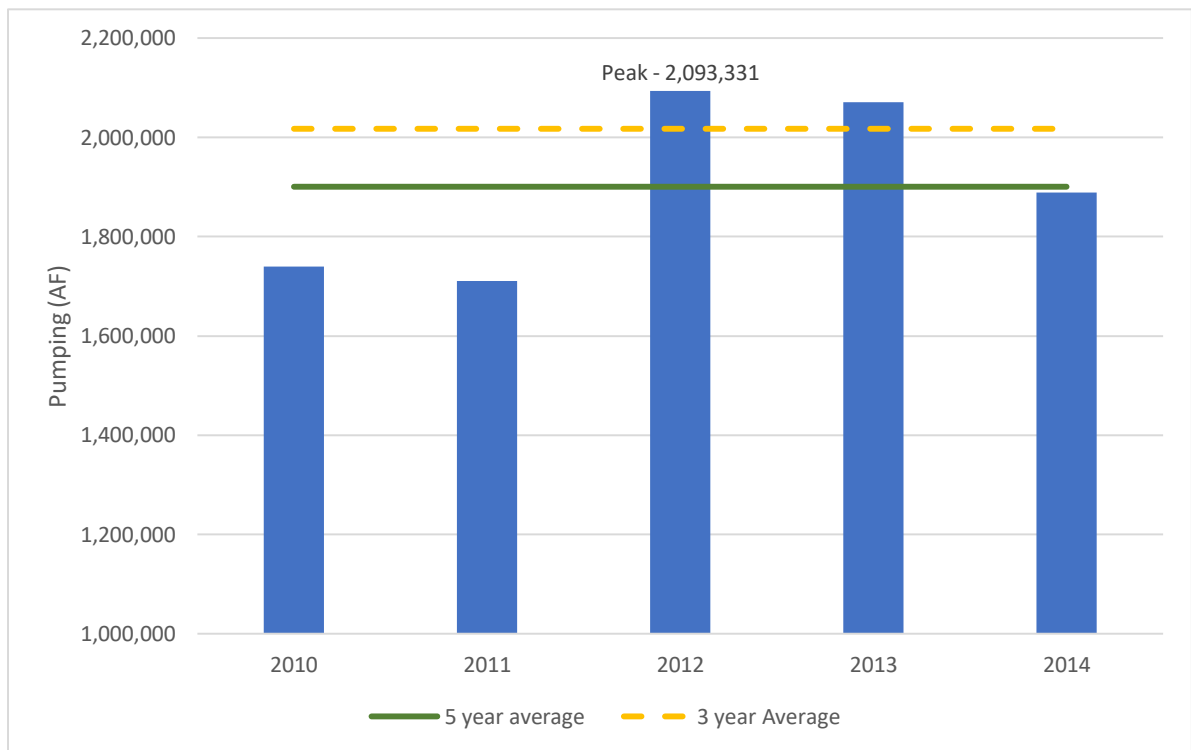
Table comparing single-year, 3-year average & 5-year average baseline



### IGWA Baseline Determination Example:

Year	Total Pumping (AF)	5 year Average	3 Year Average	Peak Diversions
2010	1,739,793			
2011	1,710,914			
2012	2,093,331	1,900,511		2,093,331
2013	2,070,287		2,017,282	
2014	1,888,227			

\*includes entities currently listed on IGWA annual report



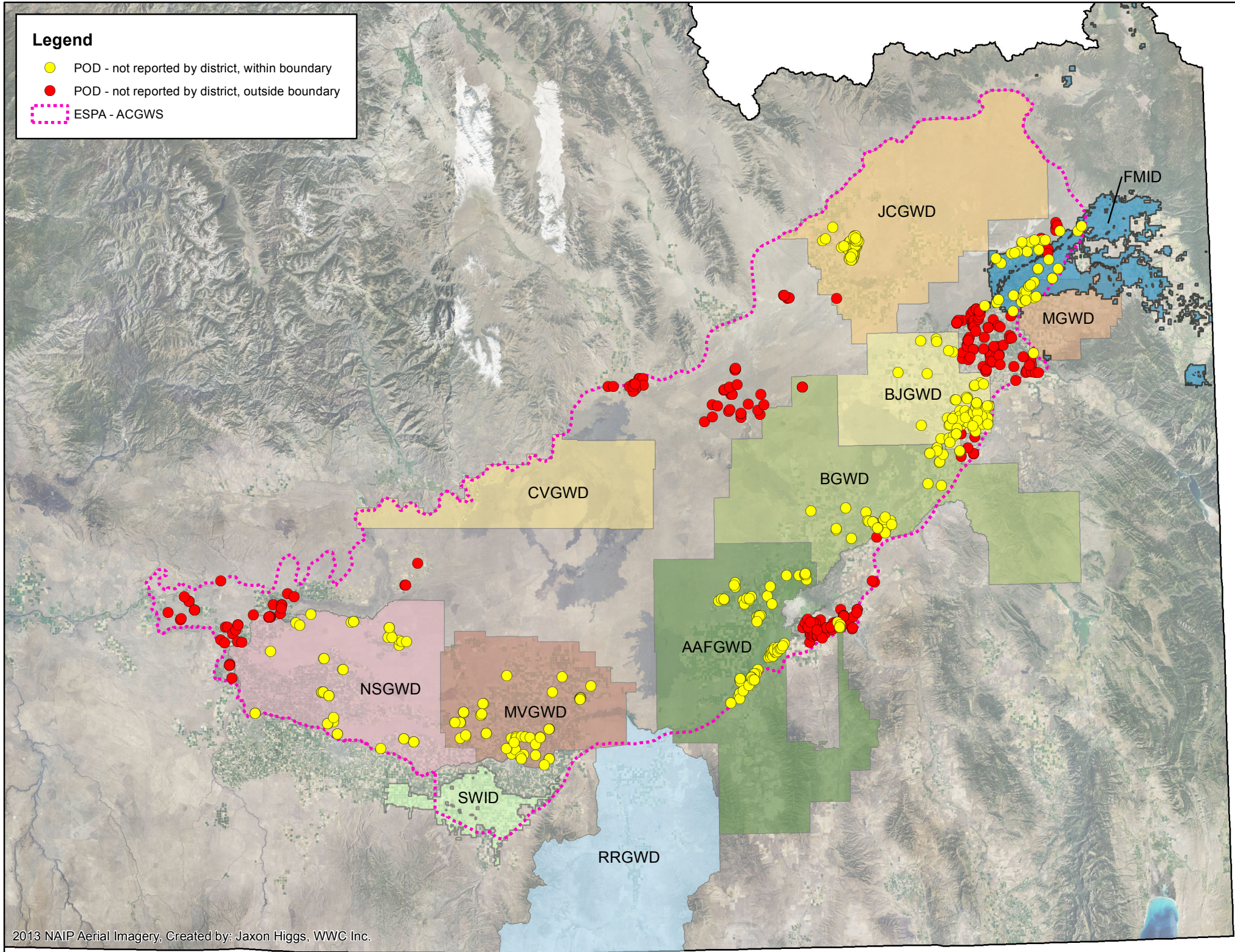
# **EXHIBIT B**

Map showing wells not represented by IGWA districts



## Legend

- POD - not reported by district, within boundary
- POD - not reported by district, outside boundary
- ESP - ACGWS





# **EXHIBIT C**

Slide deck August 2015

# Surface Water Coalition Agreement

District Reduction Apportionment

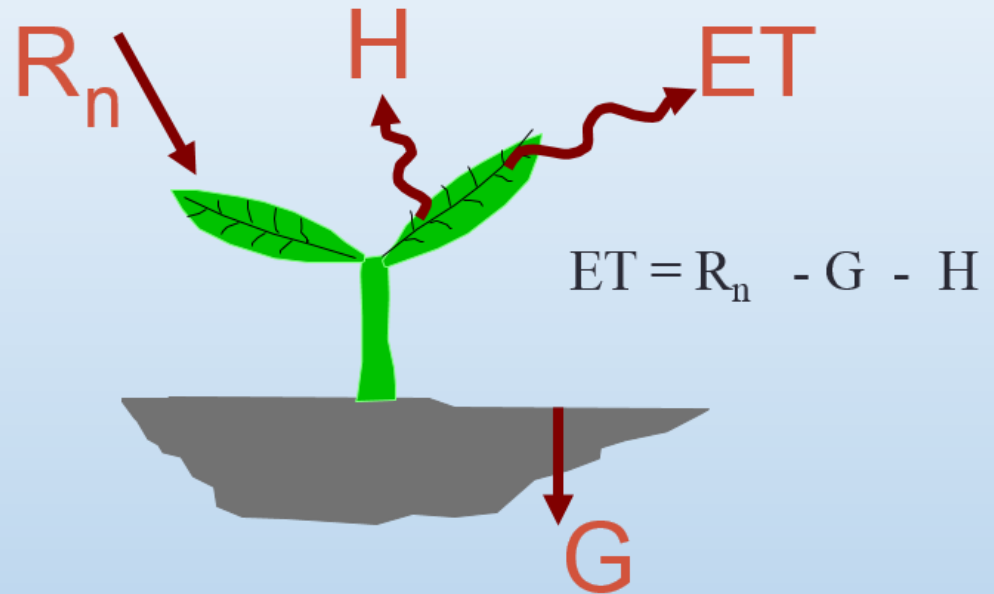
# 240kAF REDUCTION ALLOCATED BY DISTRICT

7/20/2015

District	Current			% Share of 240kAF	Reduction			Benefit (ac-ft)
	CIR (ac-ft/acre)*	Acres*	Total AF		% Reduction	CIR Cap (ac-ft/acre)	Total AF	
A&B ID	2.6	66,686	173,384	7.7%	10.7%	2.32	154,796	18,588
Aberdeen-American Falls GWD	2.1	144,539	303,532	13.6%	10.7%	1.87	270,991	32,541
Bingham GWD	2.3	203,975	469,143	21.0%	10.7%	2.05	418,847	50,296
Bonneville-Jefferson GWD	1.9	62,000	117,800	5.3%	10.7%	1.70	105,171	12,629
Carey Valley GWD	2.2	3,634	7,995	0.4%	10.7%	1.96	7,138	857
Fremont-Madison ID	1.7	8,000	13,600	0.6%	10.7%	1.52	12,142	1,458
Jefferson-Clark GWD	1.9	175,509	333,467	14.9%	10.7%	1.70	297,717	35,750
Madison GWD	1.7	50,852	86,448	3.9%	10.7%	1.52	77,180	9,268
Magic Valley GWD	2.6	127,818	332,327	14.8%	10.7%	2.32	296,699	35,628
North Snake GWD	2.4	87,399	209,758	9.4%	10.7%	2.14	187,270	22,488
Raft River GWD	1.8	11	20	0.0%	10.7%	1.61	18	2
Southwest ID	2.4	79,655	191,172	8.5%	10.7%	2.14	170,677	20,495
<b>TOTALS</b>		<b>1,010,078</b>	<b>2,238,645</b>	<b>100%</b>			<b>1,998,645</b>	<b>240,000</b>

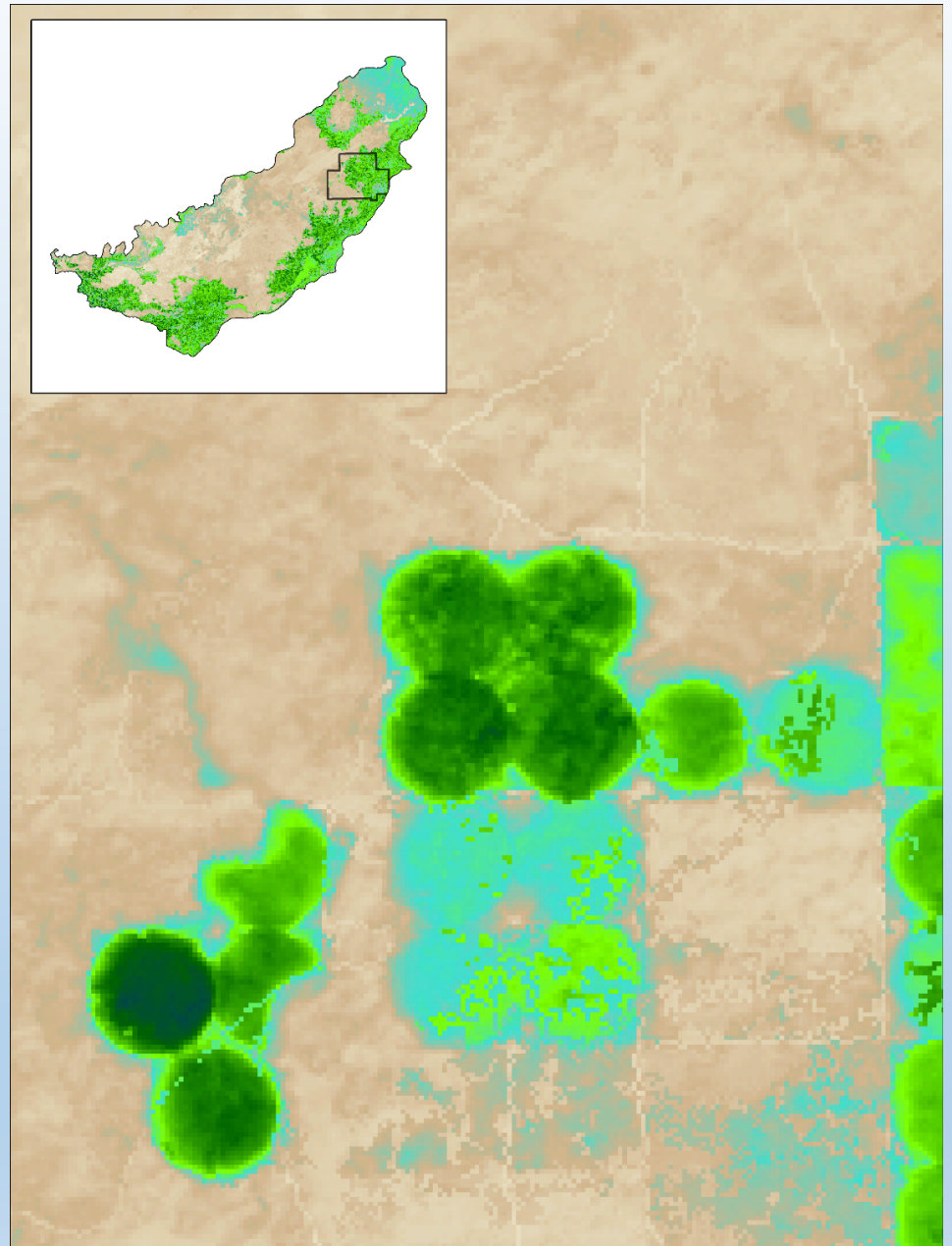
# CIR – Crop Irrigation Requirement

- LANDSAT
  - Near-Infrared
  - Frequent images
  - 30 meter resolution
- Calculate Evapo-Transpiration
  - Energy balance equation
  - Calibrated with ground stations



# CIR – continued

- Determine GW irrigated acres
  - Aerial imagery (infrared)
  - IDWR SW/GW polygon
- Usage
  - $ET = \text{usage rate}$
  - $\text{GW irrigated acres} \times \text{usage rate} = \text{Total usage}$
- District Usage for Agreement
  - Average usage on land within district
  - Acres reported by district
  - AF usage





# Issues with CIR

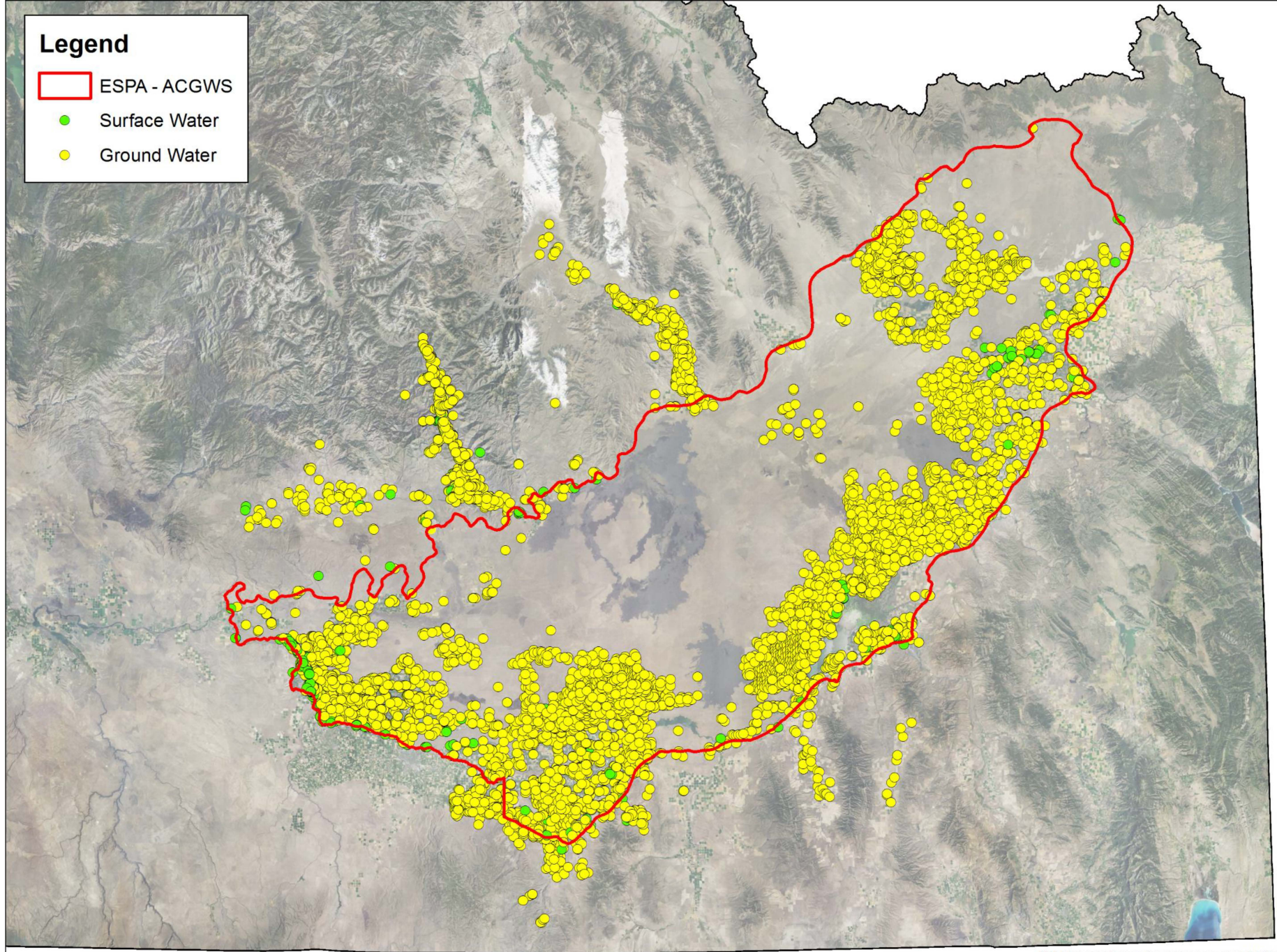
- (-) Snapshots
  - Averaged over year/season
- (-) Measurement error
- (-) Few ground stations for calibration
- (-) SW/GW mixed areas
- (-) Does not account for soft conversions
- (-) Does not account for non-irrigation uses
- (-) Physical reduction not based on CIR
- (+) Includes small users not required to measure
- (+) Quick

# WMIS – Water Measurement Information System

- Database
  - Accessible online to general public
  - Editable by field techs, watermasters, and department staff
  - Contains field notes and measurements
  - Linked to water rights
- Used to calculate usage
  - Water rights  $\geq$  5 acres or 0.24 cfs
- 9,927 points of diversion in ESPA & Tributaries
  - **5,706** ground water PODs in ESPA

## Legend

- ESPA - ACGWS
- Surface Water
- Ground Water





# Example:

- WMIS Organization
  - WMIS #
  - Reporting District
- Well in BJ GWD
  - PCC Option
  - Calculated usage back to 1997
  - Measured 12 times since 1997

Idaho Department of Water Resources

## WMIS

Water Management Information System

**Quick Search:**

Search Method:

Reporting District:

WMIS Number:

Legal Description:

Metal Tag Number:

You are logged in as BHI/GGS

[Point Of Diversion](#) [PCC](#) [Flow Meter](#) [Time Clock](#) [Alternate](#) [Contacts](#) [Data Summary](#) [Other](#) [Logout](#)

### PCC Conditions

You are viewing 200033; A0000359

[Click here to insert a new record.](#)

Year: 2014	Date: 7/18/2014 12:00:00 AM	Total PCC: 938.81	Total Percentage: 100																																																																								
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Report Year	Utility KWH	Total PCC	Acre Feet Volume	Preferred Method
2011	974720.00	06/26/10 1073.18	908.00	PCC

000227

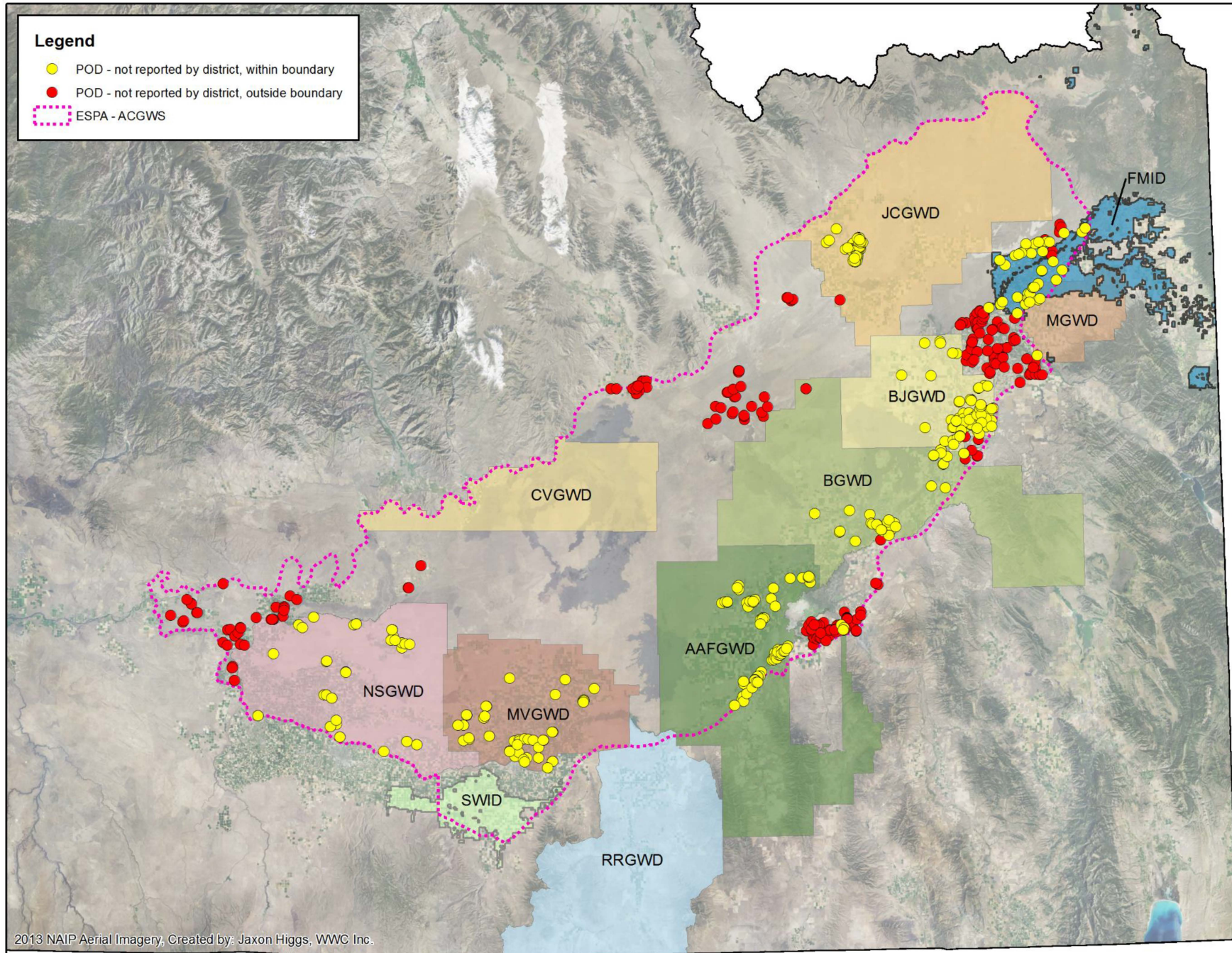
# Issues with Water Measurement

- (-) PCC
  - PCC not valid for some scenarios
  - Data good where PCC is valid
- (-) Missing measurements
  - Mostly small users or wells used infrequently
  - <5 acres not required to measure
- (-) No data in some areas outside ACGWS
- (+) Accounts for supplemental & GW/SW mix
- (+) Accounts for soft conversions
- (+) Accounts for non-irrigation use
- (+) Good records for previous 5+ years
- (+) Reduction will be calculated using measured usage

Preliminary Analysis - Reduction by Usage*												
	Current					Applied					Difference	
	AF/Yr	District % Total	AF Reduction	% Reduction		AF/Yr	District % Total	AF Reduction	% Reduction		AF/Yr	AF Reduction
American Falls	254,777	12.5%	30,111	11.8%		289,023	14.2%	34,158	11.8%		34,246	4047
Bingham	379,429	18.7%	44,843	11.8%		385,001	19.0%	45,502	11.8%		5,572	659
Bonneville	144,925	7.1%	17,128	11.8%		184,557	9.1%	21,812	11.8%		39,632	4684
Carey	2,166	0.1%	256	11.8%		2,166	0.1%	256	11.8%		0	0
Jefferson Clark	311,293	15.3%	36,790	11.8%		373,943	18.4%	44,195	11.8%		62,650	7404
Fremont-Madison**	8,651	0.4%	1,022	11.8%		8,651	0.4%	1,022	11.8%		0	0
Madison	6,530	0.3%	772	11.8%		9,589	0.5%	1,133	11.8%		3,059	362
Magic Valley	253,858	12.5%	30,002	11.8%		257,691	12.7%	30,455	11.8%		3,833	453
A&B	174,399	8.6%	20,611	11.8%		174,399	8.6%	20,611	11.8%		0	0
North Snake	179,846	8.9%	21,255	11.8%		191,460	9.4%	22,628	11.8%		11,614	1373
Raft River	651	0.0%	77	11.8%		651	0.0%	77	11.8%		0	0
Southwest	108,044	5.3%	12,769	11.8%		108,044	5.3%	12,769	11.8%		0	0
In district, not reported by Dist.	160,606	7.9%	18,981	11.8%		-	0.0%	-	0.0%		-160,606	-18981
Out of District	45,529	2.2%	5,381	11.8%		45,529	2.2%	5,381	11.8%		0	0
Total:	<b>2,030,704</b>	100.0%	240,000	11.8%		<b>2,030,704</b>	100.0%	240,000	11.8%		0	0
*ESPA only, includes commercial/stock/multiple use domestic.												
**Assumed all wells within boundary are part of district.												

# Legend

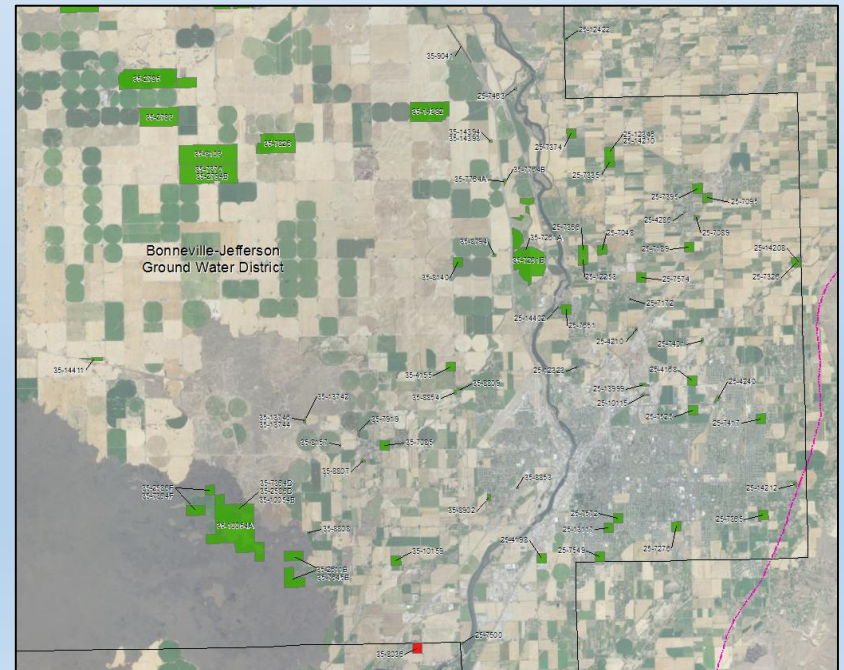
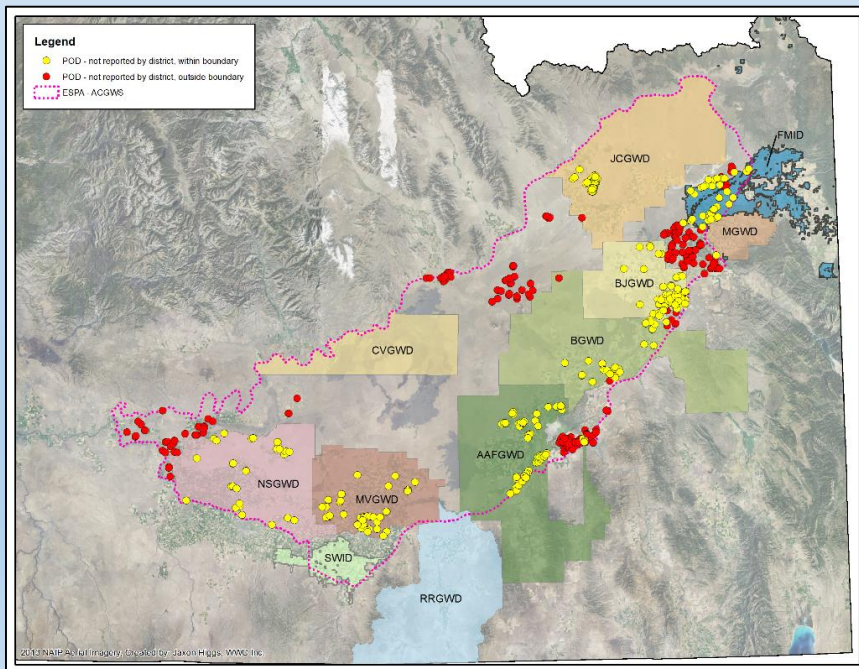
- POD - not reported by district, within boundary
- POD - not reported by district, outside boundary
- ESPAs - ACGWS





# What's next?

- All water rights accounted for
- All wells associated with water rights accounted for
- Meeting w/IDWR technical staff
- Recommendation
  - Usage where available, CIR where not available





# **EXHIBIT D**

Slide deck September 2015

# IGWA - SWC Agreement

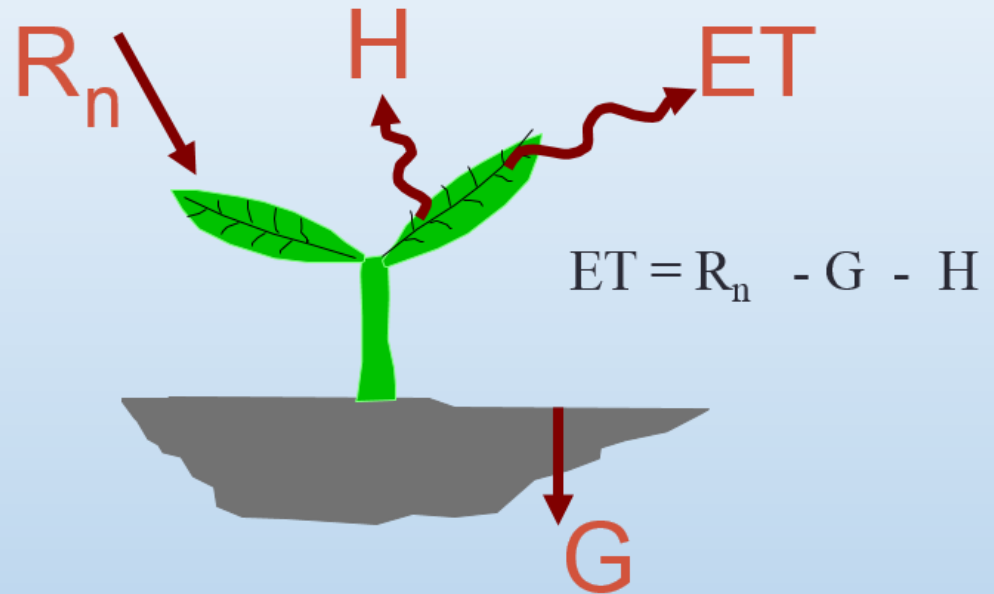
District Reduction Apportionment

# Issues to Address

- Allocation of 240,000 af to districts
  - Baseline years
  - Method
    - Usage, CIR, or combination
  - **Today's discussion**
- District plans for reduction
  - What the individual owes
  - Determined by districts
- Verification of reduction
  - Usage, CIR, combination
  - Today's discussion?

# CIR – Crop Irrigation Requirement

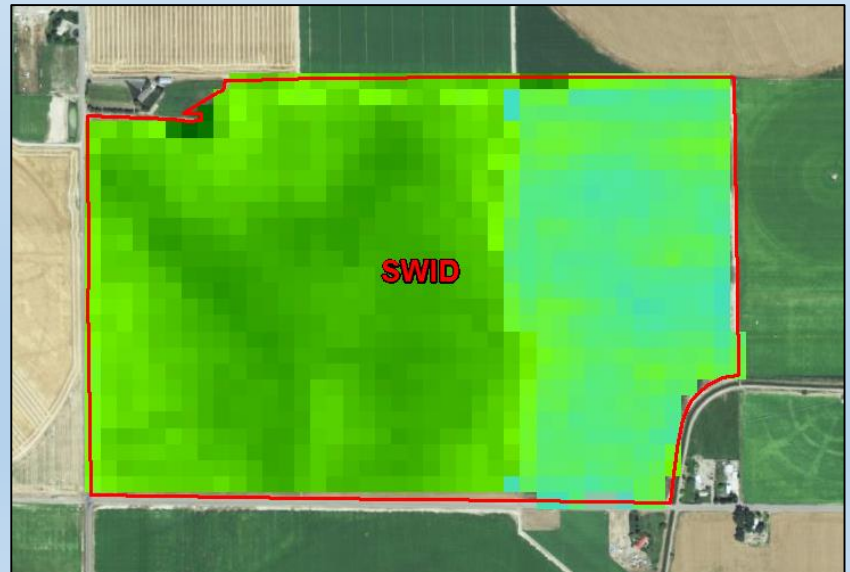
- LANDSAT
  - Near-Infrared
  - Frequent images
  - 30 meter resolution
- Calculate Evapo-Transpiration
  - Energy balance equation
  - Calibrated with ground stations





# CIR – Small Scale Examples

Area	Acres	Type	Volume	ft/acre	ET (ft)	Precip (ft)	ft/acre	ET af	% Difference
SWID	220.6	FM	322	1.46	2.52	0.81	1.71	376	16.9%
BJGWD	470.3	PCC	872	1.85	2.70	0.83	1.87	880	0.9%
MVGWD	658.2	PCC	1,392	2.11	2.30	0.72	1.58	1041	-25.2%



# Issues with CIR

- (-) Not processed every year
  - Unusable images
- (-) Limited ground stations for calibration
- (-) SW/GW mixed areas
- (-) Does not account for soft conversions
- (-) Does not account for non-irrigation uses
- (-) Actual reduction not likely to be based on CIR
  - Flowmeter installation stipulation
- (+) Includes small users not required to measure

# WMIS – Water Measurement Information System

- Database
  - Accessible online to general public
  - Editable by field techs, watermasters, and department staff
  - Contains field notes and measurements
  - Linked to water rights
- Used to calculate usage
  - Water rights  $\geq$  5 acres or 0.24 cfs
  - Based on field measurements
- 9,927 points of diversion in ESPA & Tributaries
  - **5,706** ground water PODs in ESPA

# Issues with Water Measurement

- (-) PCC
  - PCC not valid for some scenarios
- (-) Missing measurements
  - Mostly small users or wells used infrequently
  - <5 acres not required to measure
- (-) No data in some areas outside ACGWS
- (+) Accounts for supplemental & GW/SW mix
- (+) Accounts for soft conversions
- (+) Accounts for non-irrigation use
- (+) Good records for previous 5+ years
- (+) Reduction will be calculated using flowmeters



# Note:

- Best scenario for GW users
  - CIR baseline
  - Measured reduction
  - CIR generally higher than measured
- Best scenario for Aquifer
  - Usage baseline – Usage Reduction
  - CIR baseline – CIR reduction

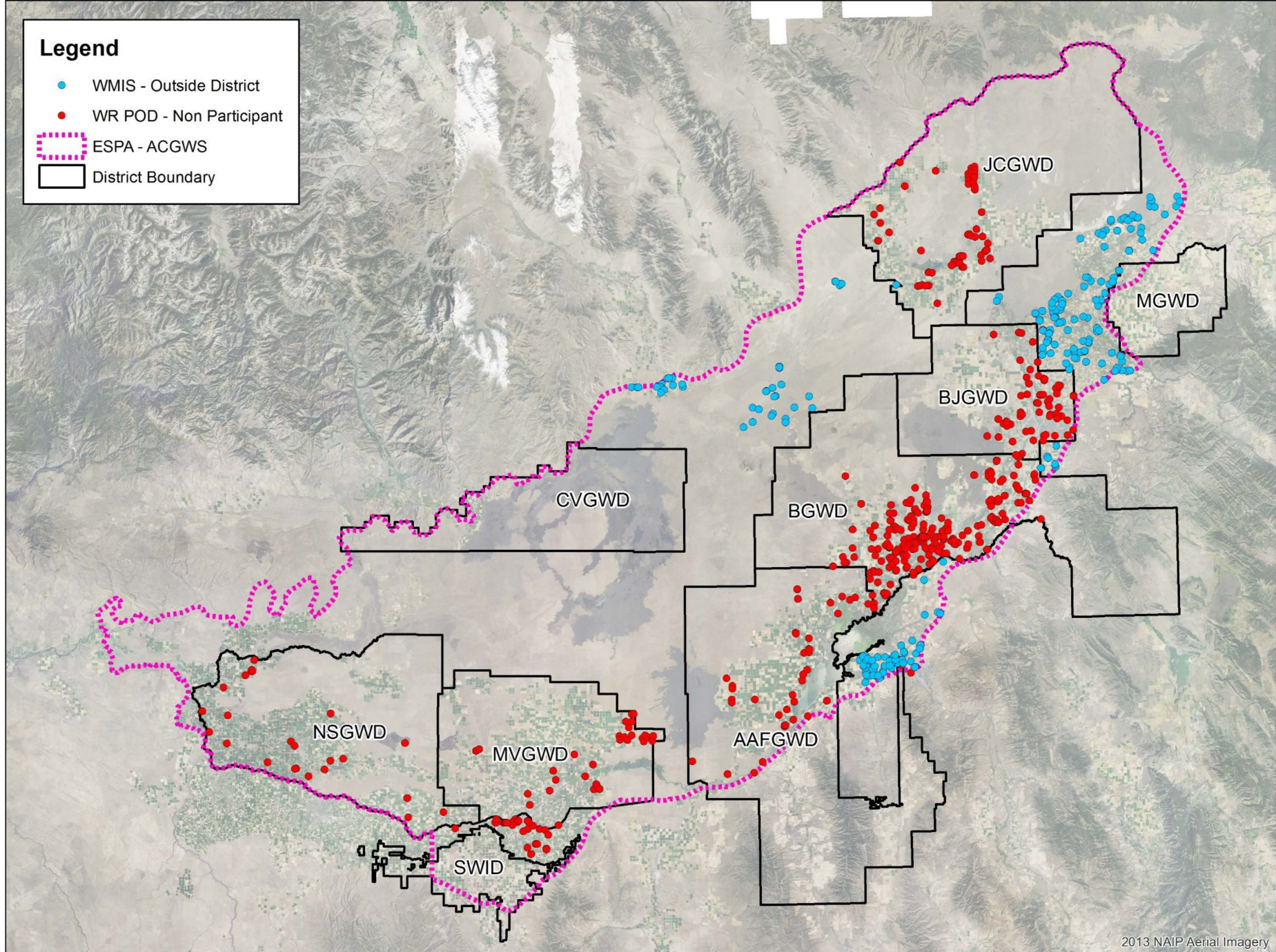
# Recommendation:

- 5 year average baseline from WMIS usage
  - Choose between 2005-2014
- CIR for non reporting users and where WMIS data is not complete/valid
- Use 3-5 year rolling average WMIS data for verification of reduction
  - Flowmeters ASAP
- Possible secondary verification using CIR

Preliminary Analysis - Reduction by Usage*					
	AF/Yr	District % Total	AF Reduction	% Reduction	
American Falls	289,023	14.2%	34,158	11.8%	
Bingham	385,001	19.0%	45,502	11.8%	
Bonneville	184,557	9.1%	21,812	11.8%	
Carey	2,166	0.1%	256	11.8%	
Jefferson Clark	373,943	18.4%	44,195	11.8%	
Fremont-Madison**	8,651	0.4%	1,022	11.8%	
Madison	9,589	0.5%	1,133	11.8%	
Magic Valley	257,691	12.7%	30,455	11.8%	
A&B	174,399	8.6%	20,611	11.8%	
North Snake	191,460	9.4%	22,628	11.8%	
Raft River	651	0.0%	77	11.8%	
Southwest	108,044	5.3%	12,769	11.8%	
Out of District	45,529	2.2%	5,381	11.8%	
Total:	<b>2,030,704</b>	100.0%	<b>240,000</b>	11.8%	
*ESPA only, includes commercial/stock/multiple use domestic.					
**Assumed all wells within boundary are part of district.					

## Legend

- WMIS - Outside District
- WR POD - Non Participant
- ESPAs - ACGWS
- District Boundary



# **EXHIBIT E**

Slide deck November 2015



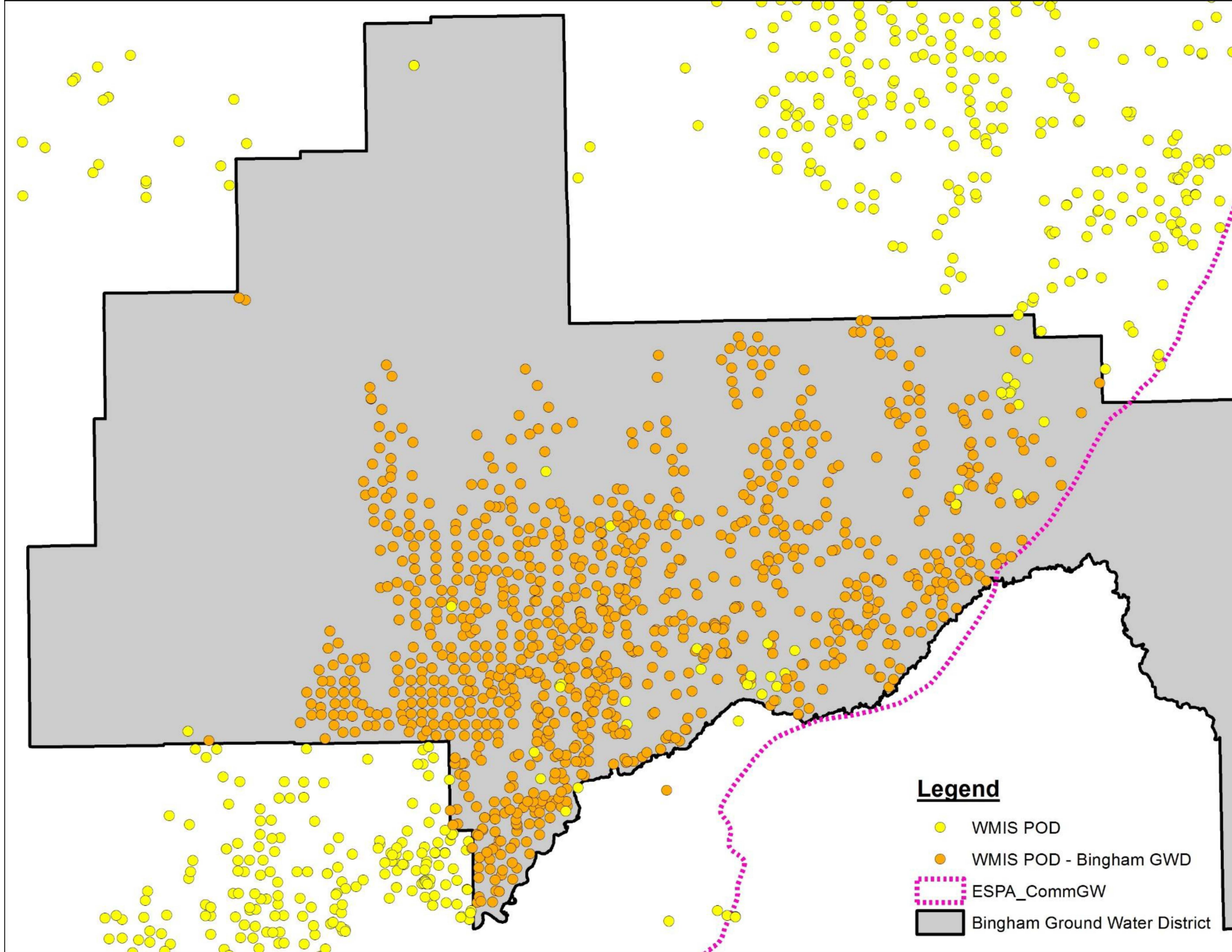


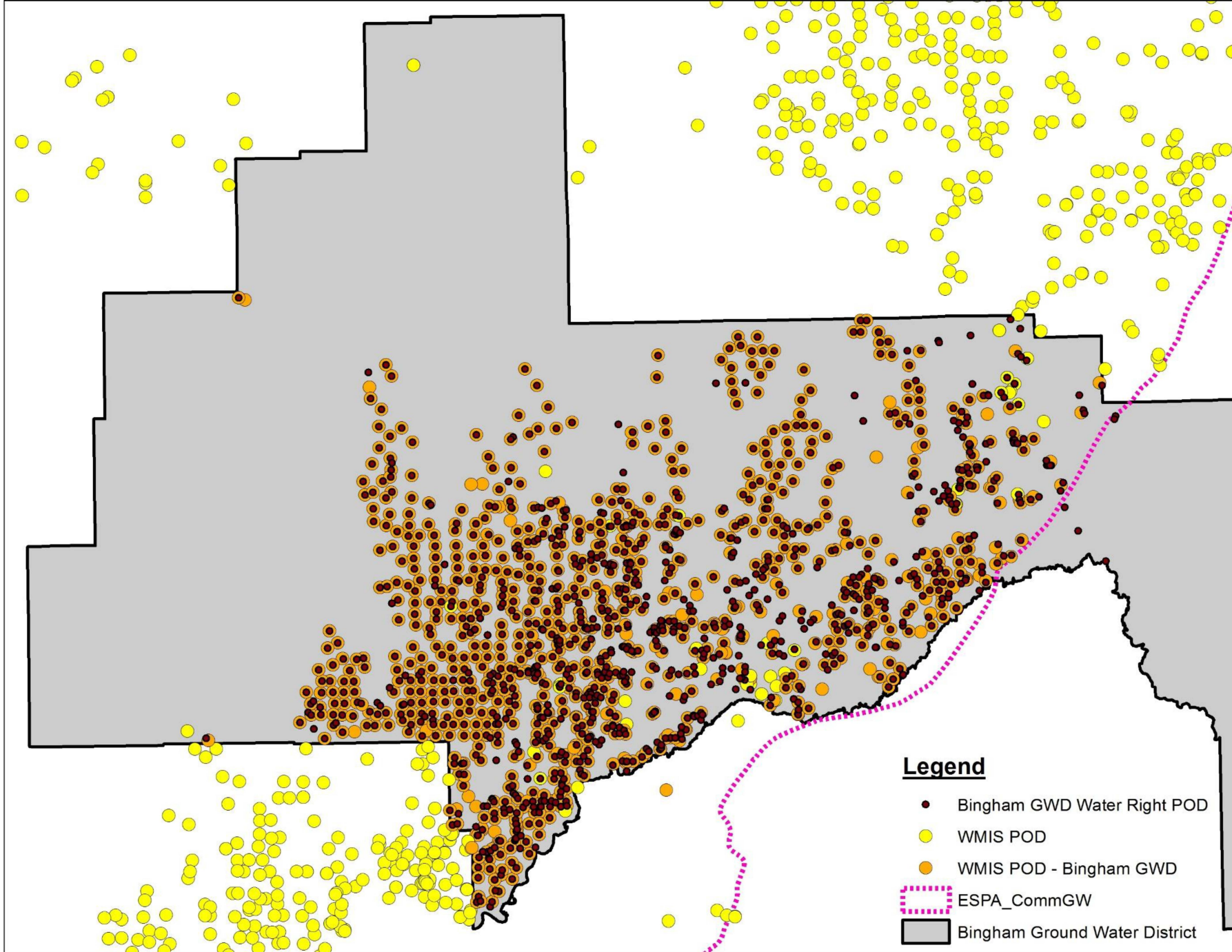
# Revised 240,000 acre-feet Allocation and Baseline

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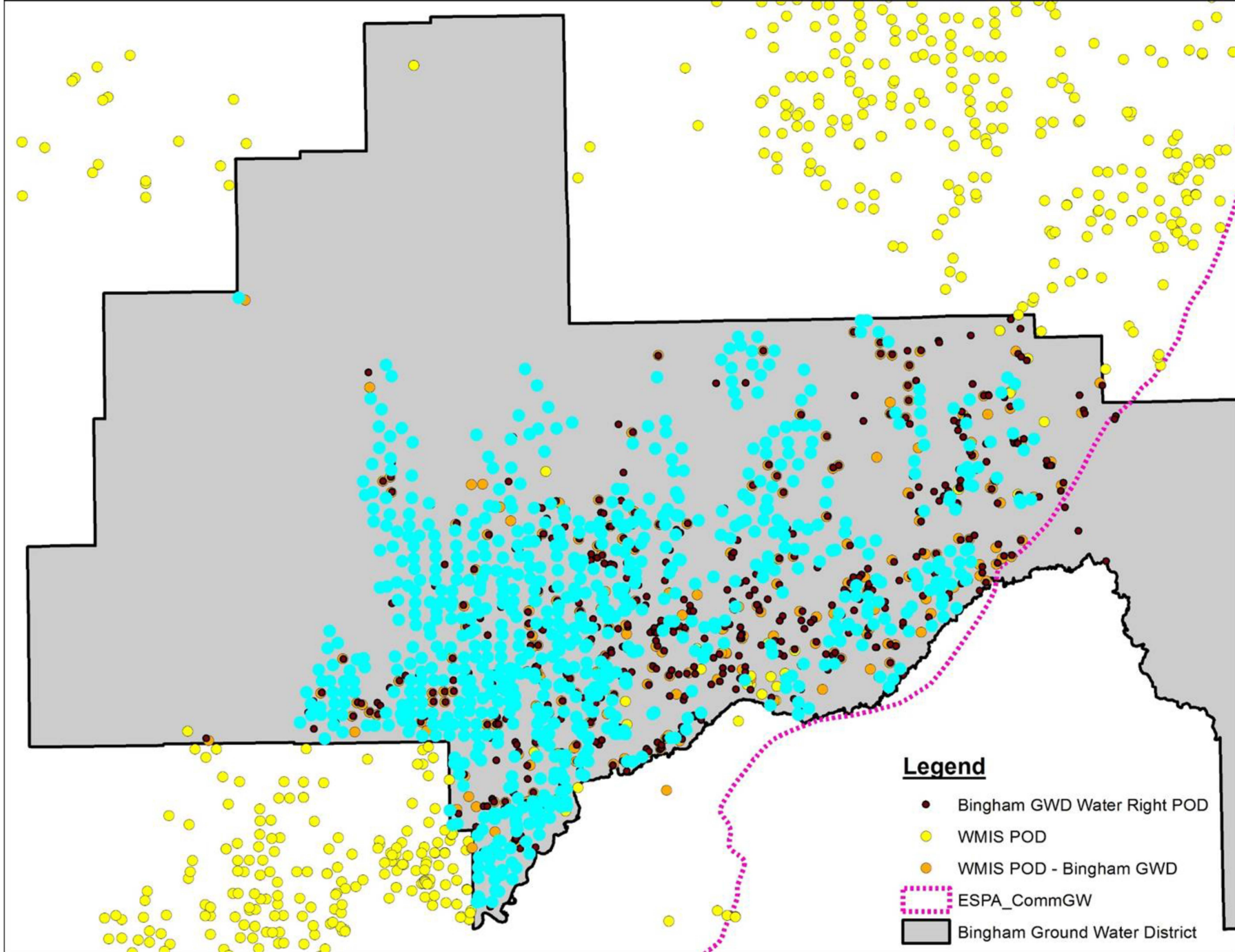
- Process

- Water right lists from GWDs
- Well lists from WMIS
- Correlate spatially
- Reconcile
- Create Average by district

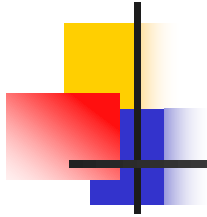








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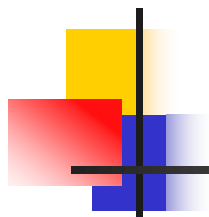
# District Usage List

Ownername	Reporting District	WMIS Number	DiversionName	Meas Option	MetalTag Number	2010 AF	2010 Code	2011 AF	2011 Code	2012 AF	2012 Code	2013 AF	2013 Code	2014 AF	2014 Code	Average
ALAN WOODLAND	MVG	100243	HOME 103 NORTH	Flowmeter (1)	A0004147	578.0	7	495.4	7	617.2	Q	808.2	NM	591.5	NM	618.1
ALAN WOODLAND	MVG	100028	LARGE	Timeclock (7)	A0004017	640.5	5	514.0	5	711.4	5	636.6	5	657.2	5	631.9
ALAN WOODLAND	MVG	100242	HOME 102 SOUTH	Flowmeter (1)	A0004146	416.8	NM	615.0	7	658.4	Q	894.7	NM	662.6	NM	649.5
ALAN WOODLAND	MVG	100703	SUCHAN	Flowmeter (1)	A0003354	614.5	MR	561.8	NM	816.8	2	830.9	2	869.8	2	738.8
ALYCE B & VERN W KING	MVG	100315	Little Well	PCC (2)	A0003444	14.0	2	45.0	2	26.8	1	20.2	1	16.8	8	24.6
AMALGAMATED SUGAR CO	130	400988	WELL 2	Unused (6)	A0000448	0.0	Z									0.0
AMALGAMATED SUGAR CO	130	400987	WELL 4	Timeclock (7)	A0000449	17.7	NM	6.0	MR	22.4	NM	6.1	NM	2.6	NM	11.0
AMALGAMATED SUGAR CO	130	400985	WELL 5	Unused (6)												
AMALGAMATED SUGAR CO	130	400986	WELL 3	Unused (6)												
AND SHERRY K BROUGH	MVG	1000487	unused	Unused (6)												
ANDERLAND LLC	140	401648	KEARL WELL	PCC (2)	A0002774	526.0	3	566.0	5	610.7	5	522.3	5			556.2
ARDEL W & JUDY M WICKEL	140	401605	TURBINE WELL	PCC (2)	A0017504	239.0	1	255.0	5	145.9	2	166.3	2			201.5
ARDEL W & JUDY M WICKEL	140	1001345	NEW WELL 2011	Flowmeter (1)	D0057162							646.8	NM	383.8	NM	515.3
ARDEL W & JUDY M WICKEL	140	401809	IRRIGATION WELL	PCC (2)	A0016691	586.0	2	605.0	5	826.7	4	1001.2	4	1101.9	4	824.1
ARDEL W & JUDY M WICKEL	140	1001807		Flowmeter (1)	D0066829											
ARDEL W & JUDY M WICKEL	140	1001815		Flowmeter (1)	D0066880											
ARNOLD PATTERSON	MVG	100944		Unused (6)	A0003471	0.0	Z	0.0	Z	0.0	Z	0.0	Z	0.0	Z	0.0
ARNOLD PATTERSON	MVG	100493	NEW WELL	PCC (2)	A0017797	293.0		174.0	5	865.2	1	732.2	1	563.8	3	525.6
ARROWHEADPOTATO COMPANY	MVG	100335		Unused (4)	A0003702	0.0	Z	0.0	Z	0.0	Z	0.0	Z	0.0	Z	0.0
B & H FARMS AND B&H FARMING	MVG	100280	Taylor	Flowmeter (1)	A0003522	460.0	FE	484.9	FE	556.1	MR	477.4	8	646.2	8	524.9
B & H FARMS AND B&H FARMING	MVG	100305	Commons.	Flowmeter (1)	A0005428	708.0	5	783.0	3	1094.6	FE	1076.5	8	925.9	8	917.6
B&H FARMING	MVG	100316	NORLAND	Flowmeter (1)	A0004160	368.7	MR	347.4	NM	338.9	EM		EM		EM	351.7
B&H FARMING	MVG	1000535	NORLAND, MOLLER -	Flowmeter (1)	A0004160	601.8	MR	648.7	NM				NM		NM	625.2
B&H FARMING	MVG	100707	Monson	Flowmeter (1)	A0003386	400.0	MR	867.6	NM	911.2	MR	911.4	5	701.5	2	758.3
BAKER FAMILY TRUST	MVG	100276	3D (1550N 125E)	PCC (2)	A0005419	526.0	2	339.0	2	545.3	2	419.8	2	444.9	2	455.0
BB DAIRY LLC	MVG	100241	Wards, POLE 107	PCC (2)	A0005403	569.0	2	297.0	2	571.0	2	704.1	2	697.1	2	567.6
BLINCOE FARMS INC	MVG	100262	STA 195	Unused (4)	A0005380	0.0	Z	0.0	Z	0.0	Z	0.0	Z	0.0	Z	0.0



# Usage Averaging Method

IDWR Method:						
	Usage (AF)					
Well	2010	2011	2012	2013	2014	
A	150	125		175	150	
B	500	475	600	0	550	
C			700	725	700	
D	0	0	0	500	500	
						<b>Average</b>
Total:	650	600	1300	1400	1900	1,170.0
IGWA Method:						
	Usage (AF)					
Well	2010	2011	2012	2013	2014	Average
A	150	125		175	150	150
B	500	475	600	0	550	425
C			700	725	700	708.3
D	0	0	0	500	500	200
Total:						1,483.3



# Usage Averaging Method

WMIS #	Meas Option	MetalTag Number	2010 AF	2011 AF	2012 AF	2013 AF	2014 AF	Average
400042	Flowmeter (1)	A0002817		344.0	131.3	213.7	218.8	226.9
400043	Flowmeter (1)	A0002818		2531.5	822.2	494.6		1282.8
400044	Flowmeter (1)	A0002819						0.0
900152	Flowmeter (1)	A0006858	797.0	561.0	854.6	1176.8	893.4	856.6
900153	Flowmeter (1)	A0006856	238.0	91.4	192.6	35.2	104.6	132.4
900154	Unused (6)	D0050184						0.0
900156	Flowmeter (1)	A0006863	848.0	40.1	1077.7	816.4	915.5	739.5
900197	Flowmeter (1)	A0006857	486.0	297.0	502.8	427.2	430.0	428.6
900198	Flowmeter (1)	A0006853	470.0	292.0	379.4	712.8	523.6	475.5
900202	Flowmeter (1)	A0006745	298.4	279.6	414.1	443.9	291.5	345.5
900203	PCC (2)	A0006743			453.4			453.4
900204	PCC (2)	A0006741	619.0	352.0				485.5
900206	PCC (2)	A0013380	409.0	39.0	448.8	444.0	466.4	361.4
900207	PCC (2)	A0006729	0.0	0.0	0.0	0.0	0.0	0.0
900208	Flowmeter (1)	A0006742	335.4	345.6	543.5	713.5	388.6	465.3
900317	Flowmeter (1)	A0018786	119.0	55.4	207.7	171.0	119.9	134.6
900328	Unused (6)	A0006854	0.0		0.0	0.0	0.0	0.0
900331	Flowmeter (1)	A0006855	11.0	9.7	18.2	18.2	1.0	11.6
1000396	Flowmeter (1)	D0050971			529.3	827.2	507.3	621.3

Total: 4630.8 5238.2 6575.6 6494.5 4860.3

Average: 5,559.9

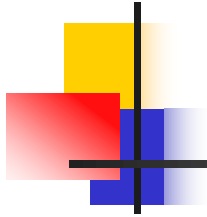
Total: 7020.9

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# Current Allocation Table

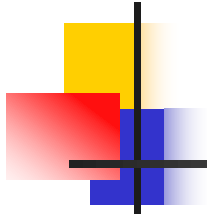
Preliminary Analysis 4- Reduction by Usage				
	AF/Yr	District % Total	AF Reduction	% Reduction
Aberdeen - American Falls	262,102	13.7%	32,865	12.5%
Bingham	270,975	14.2%	33,978	12.5%
Bonneville - Jefferson	143,880	7.5%	18,041	12.5%
Carey Valley	5,439	0.3%	682	12.5%
Jefferson - Clark	349,371	18.3%	43,808	12.5%
Fremont-Madison	27,196	1.4%	3,410	12.5%
WD100*	12,193	0.6%	1,529	12.5%
Madison	4,102	0.2%	514	12.5%
Magic Valley	261,853	13.7%	32,834	12.5%
A&B	174,735	9.1%	21,910	12.5%
North Snake	185,196	9.7%	23,222	12.5%
Southwest	104,417	5.5%	13,093	12.5%
Non-Participant	112,540	5.9%	14,112	12.5%
Total:	1,913,999	100.0%	240,000	12.5%
*Usage will be Mitigated by Fremont-Madison ID or Madison GWD				



# Usage - Notes

---

- 5 year average data sent to each district
- Non-participants can be easily added to a district if needed
- Working Document
  - Minor changes when districts review individual's usage
  - Final 5 year average complete before start of irrigation 2016



# Application to Cities

---

- Usage
  - 67,170 af
    - 45,044 af currently participating w/GWD
    - 22,126 af not participating w/GWD
- Mitigation
  - Recharge
  - Conversions
  - Monetary

# **EXHIBIT F**

Final allocation



Final SWC-IGWA Settlement Allocation 2016

11/3/2016

	AF/Yr	District % Total	AF Reduction	% Reduction
Aberdeen - American Falls GWD	271,989	14.0%	33,595	12.4%
Bingham GWD	282,476	14.5%	34,890	12.4%
Bonneville - Jefferson GWD	147,337	7.6%	18,198	12.4%
Carey Valley GWD	5,671	0.3%	700	12.4%
Jefferson - Clark GWD <sup>1</sup>	438,634	22.6%	54,178	12.4%
Fremont-Madison ID <sup>2</sup>	43,491	2.2%	5,372	12.4%
Magic Valley GWD	261,877	13.5%	32,346	12.4%
A&B ID	174,735	9.0%	21,582	12.4%
North Snake GWD <sup>3</sup>	205,501	10.6%	25,382	12.4%
Southwest ID	104,417	5.4%	12,897	12.4%
Falls ID	6,968	0.4%	861	12.4%
Total:	<b>1,943,096</b>	100.0%	<b>240,000</b>	12.4%
Non-Participants	98,051	4.8%	-	-
Total ESPA:	<b>2,041,147</b>			

1. WD31 has 89,884 af that have no WMIS records, but included in Jefferson-Clark GWD total.

2. Includes Madison Irrigation District and WD100. Instead of diversion reduction FMID providing direct delivery of 1,500 af of storage to IGWA and 3,000 af annual recharge.

3. North Snake GWD 5 year average delivery of water to conversions in WD130 is 21,305 af.

4. Total wells for all districts estimated to be 4,750

# **EXHIBIT G**

IDWR workshop agenda September 2015

**SWC-IGWA Term Sheet Implementation - Technical Work Shop**  
**September 23, 2015 (10:00 AM – 3:00 PM)**  
**Best Western (800 N. Overland Avenue Burley, ID 83318)**

**Agenda**

- 1. Introduction – Mat Weaver & Randy Budge**
  - a. Review of agenda and objectives
  - b. Discuss process and future workshops
  - c. What information do GWDs need
- 2. Review of Department Water Right Data, Consumptive Use Basics, METRIC, NDVI**
  - a. Department Irrigated Land Use Data and Water Right Records – Linda Davis
  - b. Review of Consumptive Use Basics – Matt Anders
  - c. Method for Computing ET – Bill Kramber
- 3. Review of Diversion Data (i.e. WMIS database records)**
  - a. Review of WMIS Data Base and Records – Cindy Yenter
  - b. Review 2015 WMIS QA Effort – Cindy Yenter
  - c. Review PCC Methods and Data – Corbin Knowles
  - d. Analysis and Comparison of Metric vs. PCC Data – Corbin Knowles
- 4. Discussion of Establishing Baseline, 240,000 AF Proportionment, & Annual Performance Review**
  - a. Consider methods for determining baseline – Mat Weaver
  - b. Consider methods for proportioning 240,000 AF reduction amongst GWDs – Mat Weaver
  - c. Consider methods for annual performance review – Mat Weaver
- 5. Discuss Next Steps**
  - a. Prepare list of what outstanding information is still needed – IGWA/GWD
  - b. Schedule next meeting
  - c. Make work assignments
- 6. As Time Allows - Discussion of alternative practices to reduction in consumptive use**
  - a. Discussion of necessary technical evaluation and metrics associated with recharge as an alternative practice
    - i. Answer the question, “Does my recharge activity have an equivalent effect on the aquifer to a reduction in consumptive use?”
  - b. Does 1 AF of recharge or other demand reduction always equal 1 AF of credit?
    - i. Answer to question, “Does my activity have an equivalent effect on the aquifer to a reduction in consumptive use?”

## Objectives

1. Discuss and reconcile the inconsistent usage of “diversion reduction”, “consumptive reduction”, and “demand reduction” language by the term sheet.
2. Develop a clear understanding of the Department’s ground water diversion data set (i.e. WMIS database).
3. Develop a clear understanding of the challenges associated with relying on a power consumption coefficient (PCC) method of measuring diversions.
4. Develop a Clear understanding of the Department’s consumptive use analysis, the analysis input variables, and the completeness and accuracy of the input variables.
5. Identify any missing data necessary for implementation of the term sheet (e.g. field scale data set of ground water irrigated lands).
6. Determine whether “diversion reduction” or “consumptive reduction” will be the standard used by the GWDs in implementing their collective practices to achieve the term sheet’s benchmarks and goal.
7. Determine the data and methods that will be used to proportionately split the 240,000 acre foot obligation up amongst all of the parties (i.e. GWDs, A&B, SWID, and others).
8. Determine the data and methods that will be used to establish the “baseline condition”.
9. Determine the data and methods that will be used to measure the year-to-year performance of the GWDs in achieving the term sheet’s benchmarks and goal.
10. Discuss sideboards for acceptable recharge and other demand reduction practices and how to equate these practices to a diversion/consumptive use reduction.

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 4<sup>th</sup> day of January, 2023, the foregoing document was served on the persons below via email as indicated:

  
Thomas J. Budge

Gary Spackman, Director Garrick Baxter, Deputy Attorney General IDAHO DEPT. OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098	<a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a> <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a>
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**FIRST DECLARATION OF JAXON HIGGS**

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**FIRST DECLARATION OF JAXON HIGGS**

RECEIVED

Jan 04, 2023

DEPARTMENT OF  
WATER RESOURCES

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*Attorneys for Bonneville-Jefferson Ground Water District (BJGWD)*

**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

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

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

Docket No. CM-DC-2010-001

Docket No. CM-MP-2016-001

**BJGWD's Response in Opposition to  
SWC's Motion for Summary Judgment**

The Bonneville-Jefferson Ground Water District (hereafter "BJGWD") hereby joins in the arguments raised by the Idaho Ground Water Appropriators (hereafter "IGWA") *Response in Opposition to SWC's Motion for Summary Judgment* and submits this response brief pursuant to rule 220 of the Department's rules of procedure in opposition to *Surface Water Coalition's Motion for Summary Judgment* ("Motion") filed December 21, 2022. This brief provided for the purpose

of preserving and not waiving certain arguments and legal defenses applicable to these administrative proceedings and future legal proceedings.

## **I. OVERVIEW**

IGWA requested a hearing under Idaho Code 42-1701A(3) to challenge the *Final Order Regarding Compliance with Approved Mitigation Plan* entered in this matter on September 8, 2022 (“Compliance Order”). SWC filed its Motion on December 21, 2022, essentially arguing that there is no need for the Director holding a hearing. On January 4, 2023, IGWA filed its *Response in Opposition to SWC’s Motion for Summary Judgment* (hereafter “IGWA Response”). BJGWD has now joined in its support of the IGWA Response and provides additional legal argument and defenses below:

## **II. STANDARD OF REVIEW**

Summary judgment is appropriate only

if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c).

The burden of proving the absence of material facts is upon the moving party. The adverse party, however, “may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. The moving party is therefore entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party’s case on which that party will bear the burden of proof at trial.

When an action, as here, will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. Resolution of the possible conflict between the inferences is within the responsibilities of the fact finder.



*P.O. Ventures, Inc. v. Loucks Fam. Irrevocable Tr.*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007)

(internal quotations and citations omitted) (emphasis added).

### **III. ARGUMENT**

The Director should deny the Motion and conduct an evidentiary hearing to permit IGWA and BJGWD an opportunity to prove the following legal defenses at a hearing pursuant to Idaho Code 42-1701A(3):

#### **A. Unjust Enrichment**

SWC argues that averaging was not part of the Agreement, which IGWA disputes. However, assuming *arguendo* that averaging is not contemplated by the Agreement, SWC has been unjustly enriched.

A *prima facie* case of unjust enrichment consists of three elements: (1) there was a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof. *Aberdeen–Springfield Canal Co. v. Peiper*, 133 Idaho 82, 88, 982 P.2d 917, 923 (1999).

...

The doctrine of unjust enrichment is not permissible where there is an enforceable express contract between the parties which covers the same subject matter. *Wilhelm v. Johnston*, 136 Idaho 145, 152, 30 P.3d 300, 307 (Ct.App.2001) (citing *DBSI/TRI v. v. Bender*, 130 Idaho 796, 805, 948 P.2d 151, 160 (1997)). Equity does not intervene when an express contract prescribes the right to compensation. *Shacocass, Inc. v. Arrington Constr. Co.*, 116 Idaho 460, 464, 776 P.2d 469, 473 (Ct.App.1989); see *Wolford v. Tankersley*, 107 Idaho 1062, 1064, 695 P.2d 1201, 1203 (1984).

*Vanderford Co. v. Knudson*, 144 Idaho 547, 558, 165 P.3d 261, 272 (2007).

SWC argues that the Agreement does not permit IGWA to average its pumping reductions or ground water recharge on a five-year rolling basis. Accepting this argument as true means the

Agreement does not address nor provide compensation to IGWA when it provides SWC additional pumping reductions or recharge.

The record is undisputed that IGWA provide additional pumping reduction and recharge in three of the five years prior to 2021, such that if averaging were recognized, IGWA would not have been over the 240,000 af annual reduction goal for 2021. See annual reports. The reductions and the additional recharge came at substantial cost to IGWA and its members.

Accordingly, IGWA conferred a benefit upon SWC in the years prior to 2021. SWC received this benefit in the form of additional water. SWC has not compensated IGWA for the benefits it received. Given the costs incurred by IGWA to confer these additional benefits to SWC, it would be inequitable for SWC to retain these benefits without compensating IGWA.

#### **B. Legal Impracticability**

IGWA members strict compliance with an annual reduction of 240,000 is legally impracticable. In quoting Section 269 of the RESTATEMENT (SECOND) OF CONTRACTS the Idaho Supreme Court has held that:

Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.

*See also Twin Harbors Lumber Co. v. Carrico*, 92 Idaho 343, 348, 442 P.2d 753, 758 (1968) (Under the doctrine of impossibility, if the existence of a specific thing is essential for performance, a duty to perform is discharged if the thing "subsequently is not in existence in time for seasonable performance." Emphasis added).

*Sutheimer v. Stoltenberg*, 127 Idaho 81, 85, 896 P.2d 989, 993 (Ct. App. 1995)

Section 7 of the Agreement states that it is "perpetual." The Agreement also multiple goals intended to solve long-term problems on the ESPA. It is not merely focused on any single year's

water supply to the parties. Importantly, the Agreement has an objective to “[m]inimize economic impact on individual water users and the state economy arising from water supply shortages.” See section 1(c).

Idaho historically has periods of drought, which cycle for multiple years. The 2021 crops in the upper valley required additional irrigation to prevent crop failure in light of the unusually hot and dry irrigation season. Had the ground water pumpers not applied sufficient water during the hot and incredibly dry summer months, crop failure would have occurred.

Wide-spread crop failure in the upper basin would have impacted not only individual IGWA water users, but it would also have had state-wide economic impacts. Under the circumstances present during the 2021 growing season, reducing pumping would have resulted in crop failure across the upper valley. Given this, performing the terms of the agreement requiring reduction in groundwater pumping during last season was legally impracticable.

IGWA users also performed all other terms of the Agreement during the 2021 season and years prior. Based upon this, IWGA water users should be excused from performing the terms of the Agreement requiring reduced ground water pumping for the 2021 season.

### **C. Unclean Hands**

The SWC cannot hold IGWA to a breach where it, too, has breached the Agreement. “The doctrine of unclean hands permits a trial court to deny equitable relief to a party.” *N. Idaho Bldg.*

*Contractors Ass’n v. City of Hayden*, 164 Idaho 530, 543, 432 P.3d 976, 989 (2018).

It allows a court to deny equitable relief to a litigant on the ground that his or her conduct has been “inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue.” *Gilbert*, supra; see also *Hoopes v. Hoopes*, 124 Idaho 518, 522, 861 P.2d 88, 92 (Ct. App. 1993); 27 Am. Jur.2d. Equity § 126 (1996).

*Sword v. Sweet*, 140 Idaho 242, 251, 92 P.3d 492, 501 (2004); see also *Andola v. Picott*, 5 Idaho 27, 46 P. 928 (1896) (“...but a condition precedent to any relief either at law or in equity is the

restoration of the consideration. This principle is so elementary that it is surprising that it should have been overlooked by . . . defendants.”).

BJGWD has a reasonable belief that SWC may have violated Idaho law by diverting water out of the basin during the 2021 season.<sup>1</sup> This action is inconsistent with section 1(e) of the Agreement which provides that it is an objective of the Agreement to “[i]ncrease compliance with all elements and conditions of all water rights and increase enforcement when there is not compliance.”

Diverting water outside the basin appears to have been done in violation of Idaho law, and thus, inconsistent with the objectives of section 1(e). By diverting water outside the basin and overusing water, the SWC also was not trying to conserve water, minimize impacts, etc., as the Agreement has as an objective. The SWC also was not acting in good faith by holding IGWA to a higher standard of compliance. Therefore, SWC breached its duty to perform the terms of the Agreement in good faith.

SWC also violated their implied covenant of good faith and fair dealing by disingenuously arguing the Agreement does not contain averaging. As is the case with every agreement, the Settlement Agreement places this duty on SWC. A breach of contract occurs when a party fails to perform any promise that is part of a contract. *Independence Lead Mines Co. v. Hecla Mining Co.*, 143 Idaho 22, 29, 137 P.3d 409, 416 (2006). In every contract, there is an implied duty to perform, in good faith, the obligations required in the contract. *Steiner v. Ziegler Tamura, Co.*, 138 Idaho 238, 242, 61 P.3d 595, 599 (2002) (citations omitted). Such a duty exists even when it involves some events that are beyond the control of the obliging party and are even considered a condition precedent to complete the agreement. *Wade Baker & Sons Farms v. Corp. of Presiding Bishop of*

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<sup>1</sup> This was admitted to at a Steering Committee Meeting earlier this year, and such violations included, but are not limited to Idaho Code §§ 42-203A(5)(g), 42-222(1), 42-240(5), 42-1763, and/or 42-226.

*Church of Jesus Christ of Latter-Day Saints*, 136 Idaho 922, 925, 42 P.3d 715, 718 (Idaho Ct. App. 2002).

SWC's actions in pursuing breach against IGWA violate that duty because they knew and certainly had reason to know that averaging was contemplated as being part of the Agreement, even in documents filed with the Department. *See* IGWA Response for further treatment. Yet, it now expressly denies that averaging was part of the agreement, and seemingly misrepresents their knowledge to the Department. Arguably, SWC is estopped from arguing against averaging. But the record clearly shows that SWC is advancing opposition to a concept it knowingly supported and represented to the Department.

Because SWC is now arguing no averaging is part of the agreement, they are either being untruthful or attempting to exploit IGWA by making disingenuous breach claims. Either way, a question of fact exists as to whether SWC is entitled to alleged breach in violation of its duty of good faith and fair dealing. Having breach the Agreement itself, the SWC cannot come before any adjudicative body with clean hands.

#### **D. No Damages**

SWC cannot establish that it sustained damages from over-pumping in 2021. The elements for a claim for breach of contract are: (a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages.” *Mosell Equities, LLC v. Berryhill & Co.*, 154 Idaho 269, 278, 297 P.3d 232, 241 (2013). “The burden is upon the plaintiff to prove not only that it was injured but that its injury was the result of the defendant's breach; both amount and causation must be proven with reasonable certainty.” *Harris, Inc. v. Foxhollow Const. & Trucking, Inc.*, 151 Idaho 761, 770, 264 P.3d 400, 409 (2011) (Quoting *Griffith v. Clear Lakes Trout Co., Inc.*, 143 Idaho 733, 740, 152 P.3d 604, 611 (2007)).

A breach of contract claims fails if the plaintiff fails to prove causation or damages with reasonable certainty. *Harris*, 151 Idaho at 770, 264 P.3d at 409 (“Accordingly, Harris’ breach of contract claim against Johnson fails for lack of proper proof of damages.”) *See Melaleuca, Inc. v. Foeller*, 155 Idaho 920, 924, 318 P.3d 910, 914 (2014) (“Furthermore, even if the plaintiff establishes that he “has been legally wronged, he may not recover damages unless he has been economically ‘injured.’”) (quoting *Bergkamp v. Martin*, 114 Idaho 650, 653, 759 P.2d 941, 944 (Ct. App. 1988)).

SWC has not shown any evidence that they sustained damages. Even so, any damages sustained in 2021 are offset by the additional water provided to the SWC through increased pumping reductions, recharge, and other forms of mitigation provided in the years proceeding 2021 IGWA. In other words, IGWA and its members mitigated their water over use in the 2021 season by over-reducing their use in the previous years and SWC already received the benefits from IGWA’s increased reductions. SWC benefitted from additional water in the years past and they cannot claim damage during the 2021.

#### **IV. CONCLUSION**

The foregoing demonstrates that SWC has not met its burden to show that there are no disputed facts and that it is entitled to judgment as a matter of law pertaining the IGWA, and its members,’ alleged breach of the Agreement. Even if the Director is inclined to find that a breach occurred, IGWA and BJGWD have affirmative legal defenses that undermine SWC’s claims. As such, SWC’s Motion should be denied, and an evidentiary hearing should be conducted pursuant to Idaho Code 42-1701A(3) permitting IGWA and BJGWD to challenge the *Final Order Regarding Compliance with Approved Mitigation Plan*.

DATED: January 4, 2023

OLSEN TAGGART PLLC

/s/ Skyler C. Johns

SKYLER C. JOHNS

### CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2023, I served the foregoing document on the persons below via email as indicated:

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Jan 04, 2023

DEPARTMENT OF  
WATER RESOURCES

*Attorneys for Bonneville-Jefferson Ground Water District (BJGWD)*

**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

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

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

**PETITION TO INTERVENE**

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

COMES NOW the Bonneville-Jefferson Ground Water District (hereafter "BJGWD"), by and through the undersigned counsel, Olsen Taggart PLLC, and hereby files this *Petition to Intervene* pursuant to IDAPA 37.01.01.350. Intervenor has a direct and substantial interest in the proceeding because their water rights may be affected by the outcome of this formal proceeding. The purpose of this Petition is to preserve and not waive certain legal arguments and defenses not

raised in IGWA's Response brief. This Petition is also supported by *BJGWD's Response is Opposition to SWC's Motion for Summary Judgment* contemporarily filed with this Petition.

DATED: January 4, 2023

OLSEN TAGGART PLLC

/s/ *Skyler C. Johns*  
Skyler C. Johns, Esq.

## CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2023, I served the foregoing document on the persons below via email as indicated:

/s/ Skyler C. Johns

Skyler C. Johns

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IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

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

**SUBSTITUTION OF COUNSEL**

COMES NOW Skyler C. Johns, of Olsen Taggart PLLC, and hereby substitutes as  
counsel on behalf of Intervenor, Bonneville-Jefferson Ground Water District.

DATED: January 4, 2023

OLSEN TAGGART PLLC

/s/ Skyler C. Johns  
Skyler C. Johns, Esq.

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Jan 06, 2023

DEPARTMENT OF  
WATER RESOURCES

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

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

IN THE MATTER OF DISTRIBUTION	)	
OF WATER TO VARIOUS WATER	)	Docket No. CM-MP-2016-001
RIGHTS HELD BY OR FOR THE	)	
BENEFIT OF A&B IRRIGATION	)	<b>NOTICE OF SERVICE OF SURFACE</b>
DISTRICT, AMERICAN FALLS	)	<b>WATER COALITION'S RESPONSES</b>
RESERVOIR DISTRICT #2, BURLEY	)	<b>TO IGWA'S REQUESTS FOR</b>
IRRIGATION DISTRICT, MILNER	)	<b>ADMISSION</b>
IRRIGATION DISTRICT, MINIDOKA	)	
IRRIGATION DISTRICT, NORTH SIDE	)	
CANAL COMPANY, AND TWIN	)	
FALLS CANAL COMPANY	)	
IN THE MATTER OF IGWA'S	)	
SETTLEMENT AGREEMENT	)	
MITIGATION PLAN	)	

TO: The Hearing Officer of the Department and all parties and attorneys of record:

PLEASE TAKE NOTICE that Travis L. Thompson, on behalf of A&B IRRIGATION  
DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH

**NOTICE OF SERVICE OF SURFACE WATER COALITION'S RESPONSES TO IGWA'S  
REQUESTS FOR ADMISSION**



SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS  
RESERVOIR DISTRICT #2, AND MINIDOKA IRRIGATION DISTRICT has served the  
**SURFACE WATER COALITION'S RESPONSES TO IDAHO GROUND WATER  
APPROPRIATORS, INC. REQUESTS FOR ADMISSION** on the following via email:

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DATED this 6<sup>th</sup> day of January, 2023.

**BARKER ROSHOLT & SIMPSON LLP**

/s/ TRAVIS L. THOMPSON  
Travis L. Thompson  
*Attorneys for A&B Irrigation District,  
Burley Irrigation District, Milner Irrigation  
District, NSCC and TFCC*

**FLETCHER LAW OFFICE**

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

## CERTIFICATE OF SERVICE

I hereby certify that on this 6<sup>th</sup> day of January, 2023, I served a true and correct copy of the foregoing *Notice of Service of Surface Water Coalition's Response to IGWA's Requests for Admission* on the following by the method indicated:

<p>Director Gary Spackman Garrick Baxter Sarah Tschohl State of Idaho Dept of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a> <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a></p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a> <a href="mailto:emcgarry@usbr.gov">emcgarry@usbr.gov</a></p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only <a href="mailto:tony.olenichak@idwr.idaho.gov">tony.olenichak@idwr.idaho.gov</a></p>
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/s/ Travis L. Thompson  
Travis L. Thompson

Jan 09, 2023

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WATER RESOURCES

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 North Side Canal Company, and Twin Falls  
 Canal Company*

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

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

IN THE MATTER OF IGWA'S  
 SETTLEMENT AGREEMENT  
 MITIGATION PLAN

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

**SURFACE WATER COALITION'S  
 OPPOSITION TO BONNEVILLE-  
 JEFFERSON GROUND WATER  
 DISTRICT'S MOTION TO  
 INTERVENE / MOTION TO STRIKE  
 RESPONSE**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley  
 Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal  
 Company, and Twin Falls Canal Company (collectively hereafter referred to as the "Surface

Water Coalition,” “Coalition,” or “SWC”), by and through their counsel of record, and pursuant to IDAPA 37.01.01.354 and .220, hereby oppose Bonneville-Jefferson Ground Water District’s (“Bonneville”) *Motion to Intervene*. SWC further moves to strike Bonneville’s *Response in Opposition to SWC’s Motion for Summary Judgment* (“*SJ Response*”). This opposition and motion is supported by the documents and prior orders filed in this case.

### **Introduction**

Throughout this contested case and its related proceedings, dating back to 2010, Bonneville has been a party and participated as a member of the Idaho Ground Water Appropriators, Inc. (“IGWA” or the “Districts”), represented by the law firm of Racine Olson, PLLP. IGWA is an umbrella organization that represents the interests of the nine ground water districts that signed the IGWA-SWC Settlement Agreement and are subject to the Final Order Approving Stipulated Mitigation Plan, as amended, dated May 2, 2016 (“Final Order”): Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Henry’s Fork Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District. *See IGWA’s Response to Surface Water Coalition’s Notice of Steering Committee Impasse* (August 3, 2022) at 1. None of the ground water districts, including Bonneville, appealed the Director’s Final Order.

In the summer of 2022, the Coalition notified IDWR that the Steering Committee was at an impasse on the question of the Districts’ 2021 performance under the Final Order and Stipulated Mitigation Plan. *See SWC Notice of Steering Committee Impasse / Request for Status Conference* (July 21, 2022). The Districts filed a response and did not dispute the committee’s impasse on the question of the Districts’ 2021 performance. *See IGWA’s Response to Surface*

*Water Coalition's Notice of Steering Committee Impasse* (August 3, 2022). The Director held a status conference on August 5, 2022, and then took official notice of the Districts' 2021 performance report and supporting spreadsheets. *See Notice of Intent et al.* (August 18, 2022). The Director issued the *Final Order Regarding Compliance with Approved Mitigation Plan* on September 8, 2022. IGWA filed a *Petition for Reconsideration and Request for Hearing* on September 22, 2022. The Director issued an order granting the request for hearing on October 13, 2022.

On November 10, 2022, the Director held the prehearing conference in this matter. The parties served initial discovery requests in early December. On December 21, 2022, SWC filed its *Motion for Summary Judgment*, arguing that the Mitigation Plan and Final Order are unambiguous and that the Director can resolve this pending case as a matter of law. As such, there is no need for any evidentiary hearing in this matter and IGWA's petition should be dismissed as a matter of law.

In response, on January 4, 2023, IGWA filed its *Response in Opposition to SWC's Motion for Summary Judgment*. Later that same day, and for the first time in this proceeding, Bonneville independently filed its *Motion to Intervene*, *SJ Response*, and *Substitution of Counsel*.<sup>1</sup> By these filings, Bonneville seeks independent intervenor/party status in this contested case. For the reasons discussed herein: (1) Bonneville's *Motion to Intervene* is contrary to the criteria in IDWR's rules and should be denied; (2) Bonneville's *Substitution of Counsel* is incomplete and is therefore without effect; and therefore, (3) Bonneville's *SJ Response* should be stricken from the record.

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<sup>1</sup> Counsel for the SWC received IGWA's response via email at 4:23 p.m. and Bonneville's unauthorized filing via email at 4:40 p.m.

## Argument

### **I. Bonneville's *Motion to Intervene* is inadequate and should be denied.**

Intervenors are permitted to participate in a contested case pursuant to IDWR Rules of Procedure 350 to 354. IDAPA 37.01.01.155. "A person who is not already a party to a contested case and who has a direct and substantial interest in the proceeding may petition" to intervene. IDAPA 37.01.01.350 (emphasis added). The petition to intervene must state the direct and substantial interest of the potential intervenor, must be timely made, must not unduly broaden the issues, and the potential intervenor's interests must not be adequately represented by existing parties. IDAPA 37.01.01.351-.353.

Bonneville's *Motion to Intervene* does not satisfy the requirements of Rules 350 to 354. As a threshold concern, Bonneville is not eligible to be an intervenor because Bonneville is currently a party to this contested case and is represented by IGWA. Bonneville has been a member of IGWA throughout the pendency of this contested case starting back in 2016 for purposes of the Stipulated Mitigation Plan, even longer for the delivery call case. This is recognized by Bonneville, which seeks to substitute new counsel. If Bonneville was not a party to the proceedings, it would have no need to substitute counsel—Bonneville's counsel would need only appear and request intervention.

Additionally, the *Motion to Intervene* fails to allege that Bonneville's interests are not adequately represented by existing parties. Even if they had, that position would be untenable. As IGWA has stated, it represents the interests of its members, including Bonneville and has so in the Coalition delivery call for well over a decade. Moreover, IGWA has specifically represented Bonneville in this mitigation plan case for the past six (6) years, from the initial filing of the Stipulated Mitigation Plan and entry of the Final Order through the recent request

for hearing. Moreover, Bonneville’s January 4, 2023 motion is untimely because the prehearing conference in this matter was held nearly two months ago on November 10, 2022. *See* IDAPA 37.01.01.352 (“Petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, or by the date of the initial prehearing conference, whichever is earlier”) (emphasis added). Allowing Bonneville to intervene at this stage of the case, just weeks before the hearing is scheduled to be held would prejudice the Coalition. Notably, the existing parties have already served discovery requests and engaged in motion practice. Allowing Bonneville to separately intervene at this point would pose additional unwarranted litigation burdens and expenses on the SWC. The Director should prohibit this type of eleventh hour litigation tactic.

Furthermore, Bonneville’s inclusion as an intervenor would unduly broaden the issues in this contested case. Bonneville seeks independent intervenor status “to preserve and not waive certain legal arguments and defenses not raised in IGWA’s Response brief.” *Petition to Intervene* at 1-2. Those legal arguments and defenses are presented in Bonneville’s unauthorized *SJ Response*.<sup>2</sup> Bonneville is attempting to frame this action as a contract action and doesn’t address the fact that a Final Order was entered in this action over six years ago. Bonneville’s asserted arguments include a claim for unjust enrichment, and defenses for legal impracticability, unclean hands, and an absence of damages, all issues that would expand the scope of this proceeding and that are beyond the scope of IGWA’s original request for hearing and response to the SWC’s motion for summary judgment.

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<sup>2</sup> Bonneville does not have independent party status to file any response beyond what was already filed by IGWA. In the event the Director determines that Bonneville will be allowed to participate separate and apart from IGWA, participation of Bonneville must be limited to the issues in the proceeding at the time Bonneville is allowed to proceed independently. If the new issues raised by Bonneville are allowed to be part of the proceeding, SWC reserves the right to file a reply addressing those separate arguments.



The Coalition's summary judgment motion addresses the legal reasons an evidentiary hearing on the Director's *Final Order Regarding Compliance with Approved Mitigation Plan* is unwarranted. SWC argues, in short, that the terms of the Agreement and Stipulated Mitigation Plan between IGWA and the Coalition, and the Director's Final Order approving the same are unambiguous and fully contained within the four corners of the documents. As such, there is no legal basis to consider extraneous information and therefore no need for an evidentiary hearing as a matter of Idaho law. Bonneville's claims and defenses, in addition to being meritless,<sup>3</sup> are issues that unduly broaden the scope of the contested case beyond the specific Mitigation Plan terms and requirements that the parties have heretofore been concerned in this contested case.

In sum, Bonneville is already a party to this contested case represented through IGWA and is therefore ineligible to petition to intervene by IDWR's rules of procedure. Moreover, Bonneville's interests are adequately protected by the existing parties, namely IGWA, and Bonneville does not allege that its interests are not adequately represented. In addition, Bonneville states that its sole purpose in seeking intervention is to expand the issues before the Director as set forth in its brief. Moreover, Bonneville's motion is untimely and at this stage in the proceeding, Bonneville's inclusion as an intervenor would unduly broaden the issues in this matter to the prejudice of the Coalition. For all of these reasons, Bonneville's *Motion to Intervene* should be denied.

**II. Bonneville's *Substitution of Counsel* is incomplete.**

Bonneville's *Substitution of Counsel* states that "Olsen Taggart PLLC, [] hereby substitutes as counsel on behalf of Intervenor, Bonneville-Jefferson Ground Water District." It is signed only by the substituting counsel. While a party's representative may be changed by notice

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to the agency and all parties, “[p]ersons representing a party in a contested case before the agency who wish to withdraw their representation must immediately file with the agency a notice of withdrawal of representation.” IDAPA 37.01.01.204 (emphasis added). Here, Bonneville, via IGWA, is represented by Racine Olson, PLLP. Counsel for IGWA, representing Bonneville as part of IGWA and the other ground water districts, filed a response to the Coalition’s motion on January 4, 2023. There was no indication at that point that Bonneville would attempt to change attorneys and raise additional issues. Indeed, no notice of withdrawal has been filed by Mr. Budge and Ms. Patterson, and there is nothing filed by Bonneville or IGWA stating that Bonneville is no longer a member of IGWA, therefore Olsen Taggart cannot substitute as counsel pursuant to IDWR’s own rules.

### **III. Bonneville’s *SJ Response* should be struck.**

Motions for summary judgment before IDWR are governed by Idaho Rule of Civil Procedure 56 (a-f). IDAPA 37.01.01.220.3. As noted, Bonneville is already a party to this action as a member of IGWA. On January 4, 2023, IGWA filed its response opposing SWC’s motion for summary judgement. IGWA represents Bonneville and its interests. Bonneville had no legal basis to submit a separate additional response through counsel that was not properly substituted. Further, neither IDWR’s procedural rules nor the Idaho Rules of Civil Procedure allow a party to submit multiple independent responses to a party’s motion. As such, Bonneville’s *SJ Response* should be struck as duplicative and/or moot.

Assuming *arguendo* that Bonneville is not a party to this action as a member of IGWA, then Bonneville would remain a non-party to this contested case as they have not been granted intervenor status. Bonneville’s interests are adequately represented in this case, and its *Motion to Intervene* is untimely and unduly broadens the scope of the contested case. As such, Bonneville

should not be granted intervenor status and would not have standing to file any response or objection to SWC's summary judgment motion. Bonneville cannot properly respond until it is granted intervenor status—which it should not be granted for the reasons discussed *supra*.

In either event, Bonneville's *SJ Response* should be struck. If Bonneville is a party through IGWA, Bonneville's response is duplicative and moot. If the district is a non-party seeking intervenor status, Bonneville's response is not authorized until the Director issues an order granting the district separate, and apparently "new" party status. Either way the *SJ Response* is improper and should be stricken at this time. As such, the Coalition moves the Director to strike Bonneville's *SJ Response*.

### **Conclusion**

For the reasons set forth herein, the Coalition: (1) opposes Bonneville's request for intervenor status and requests the Director DENY Bonneville's *Motion to Intervene*; (2) challenges the sufficiency of Bonneville's substitution of counsel and requests the Director disregard Bonneville's *Substitution of Counsel*; and, (3) requests the Director strike Bonneville's *SJ Response*.

DATED this 9th day of January, 2023.

**BARKER ROSHOLT & SIMPSON LLP**



Travis L. Thompson

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

**FLETCHER LAW OFFICE**



W. Kent Fletcher FOR

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

## CERTIFICATE OF SERVICE

I hereby certify that on this 9<sup>th</sup> day of January, 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

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Travis L. Thompson

Jan 10, 2023

DEPARTMENT OF  
WATER RESOURCES

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Irrigation District, Milner Irrigation District,  
North Side Canal Company, and Twin Falls  
Canal Company*

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION	)	
OF WATER TO VARIOUS WATER	)	Docket No. CM-MP-2016-001
RIGHTS HELD BY OR FOR THE	)	
BENEFIT OF A&B IRRIGATION	)	<b>NOTICE OF SERVICE OF SURFACE</b>
DISTRICT, AMERICAN FALLS	)	<b>WATER COALITION'S RESPONSES</b>
RESERVOIR DISTRICT #2, BURLEY	)	<b>TO IGWA'S FIRST SET OF</b>
IRRIGATION DISTRICT, MILNER	)	<b>INTERROGATORIES AND</b>
IRRIGATION DISTRICT, MINIDOKA	)	<b>REQUESTS FOR PRODUCTION OF</b>
IRRIGATION DISTRICT, NORTH SIDE	)	<b>DOCUMENTS</b>
CANAL COMPANY, AND TWIN	)	
FALLS CANAL COMPANY	)	
IN THE MATTER OF IGWA'S	)	
SETTLEMENT AGREEMENT	)	
MITIGATION PLAN	)	

TO: The Hearing Officer of the Department and all parties and attorneys of record:

PLEASE TAKE NOTICE that Travis L. Thompson, on behalf of A&B IRRIGATION  
DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH

**NOTICE OF SERVICE OF SURFACE WATER COALITION'S  
RESPONSES TO IGWA'S FIRST SET OF INTERROGATORIES AND REQUESTS  
FOR PRODUCTION OF DOCUMENTS**

SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS  
RESERVOIR DISTRICT #2, AND MINIDOKA IRRIGATION DISTRICT has served the  
**SURFACE WATER COALITION'S RESPONSES TO IDAHO GROUND WATER  
APPROPRIATORS, INC. FIRST SET OF INTERROGATORIES AND REQUESTS FOR  
PRODUCTION OF DOCUMENTS** on the following via email on January 9, 2023:

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Elisheva M. Patterson  
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DATED this 10<sup>th</sup> day of January, 2023.

**BARKER ROSHOLT & SIMPSON LLP**

/s/ TRAVIS L. THOMPSON  
Travis L. Thompson  
*Attorneys for A&B Irrigation District,  
Burley Irrigation District, Milner Irrigation  
District, NSCC and TFCC*

**FLETCHER LAW OFFICE**

/s/ W. KENT FLETCHER  
W. Kent Fletcher  
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**NOTICE OF SERVICE OF SURFACE WATER COALITION'S  
RESPONSES TO IGWA'S FIRST SET OF INTERROGATORIES AND REQUESTS  
FOR PRODUCTION OF DOCUMENTS**

**Page 2**

## CERTIFICATE OF SERVICE

I hereby certify that on this 10<sup>th</sup> day of January, 2023, I served a true and correct copy of the foregoing *Notice of Service of Surface Water Coalition's Response to IGWA's First Set of Interrogatories and Requests for Production of Documents* on the following by the method indicated:

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/s/ Travis L. Thompson  
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Jan 11, 2023

DEPARTMENT OF  
WATER RESOURCES

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 North Side Canal Company, and Twin Falls  
 Canal Company*

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

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

IN THE MATTER OF IGWA'S  
 SETTLEMENT AGREEMENT  
 MITIGATION PLAN

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

**SURFACE WATER COALITION'S  
 REPLY IN SUPPORT OF SUMMARY  
 JUDGMENT MOTION**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley  
 Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal  
 Company, and Twin Falls Canal Company (collectively hereafter referred to as the "Surface

Water Coalition,” “Coalition,” or “SWC”), by and through their counsel of record, and hereby submit the following reply in support of the motion for summary judgment. This reply addresses points raised in *IGWA’s Response in Opposition to SWC’s Motion for Summary Judgment* (“*IGWA Resp.*”).

## **I. Introduction**

The Coalition’s motion asks for an efficient and dispositive ruling in this case. The Director’s Final Order approving the mitigation plan was issued almost seven years ago. IGWA’s present petition is simply an attempt to improperly alter, amend, or set aside that decision. Further, IGWA wrongly believes this is a “contract” case. To the contrary, this matter concerns a mitigation plan and the Director’s enforcement of his own order approving that plan. Whereas IGWA has enjoyed years of safe harbor in conjunctive administration, it cannot rewrite the terms of its long term obligations now. The plain terms of the Agreement, Stipulated Mitigation Plan, and Final Order dictate the result the Director has reached and should now confirm as a matter of law. *See generally*, Compliance Order.

Issuing a final order that can be decided as a matter of law is not simply “rubber-stamping” the prior decision, it is what is required by Idaho law. While IGWA claims that its obligation is something other than what is stated, and asks for the opportunity to average its obligation, no reasonable person would read those documents in the manner IGWA suggests. Consequently, the parties can avoid further weeks of protracted litigation and costs, and should instead devote valuable time and resources preparing for the 2023 irrigation season, including evaluating the 2023 benchmark. The Director has the authority to grant the Coalition’s motion and hold IGWA to its stated promises. The Coalition’s motion simply asks the Director to confirm what is required by Idaho law in this case.

## **II. IGWA Does Not Dispute the Facts in the Coalition’s Motion.**

Critically, IGWA does not dispute the underlying material facts set forth in the Coalition’s *Memorandum in Support of Motion for Summary Judgment* (“*SWC Memo*”). See *SWC Memo* at 2-4. Pursuant to Rule 56, if IGWA were to assert a fact is “genuinely disputed,” it has a requirement to support that assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

I.R.C.P. 56(c).

Nothing in the *IGWA Response* or the *First Declaration of Jaxon Higgs* (“*Higgs Dec.*”) disputes the seminal facts that: 1) the parties entered into a Settlement Agreement; 2) the parties submitted a Stipulated Mitigation Plan to IDWR; 3) the Director approved that plan by the 2016 Final Order; and, 4) IGWA did not perform its obligations in 2021. Notably, IGWA’s *Response* contains no “facts” section, but instead only offers the conclusory claim that “[t]here are many genuine issues of material fact related to IGWA’s compliance with the Agreement, including but not limited to those set forth in the *First Declaration of Jaxon Higgs* filed herewith.” *IGWA Resp.* at 3. IGWA’s bare assertion that there are “many” issues of fact is insufficient, instead it must show there are such disputes. See *Gordon v. U.S. Bank National Assn.*, 166 Idaho 105, 121, 455 P.3d 374, 390 (2019) (“Mere conclusory allegations will not raise a genuine issue of material fact”).

Mr. Higgs does not contend the terms “annually” or “240,000 af” are ambiguous. Although Mr. Higgs provides paragraphs of discussion as to how IGWA determined to “allocate the 240,000 acre-feet among the ground water districts and irrigation districts” his discussion

does not address the plain terms of the Settlement Agreement, the Stipulated Mitigation Plan, or the Director's Final Order that would create a genuine issue of material fact. Consequently, IGWA's conclusory claim and the *Higgs Declaration* do not create a genuine issue of material fact. Therefore, the Director should grant the Coalition's motion as a matter of law. *See Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984) ("If a motion for summary judgment is supported by a particularized affidavit, the opposing party may not rest upon bare allegations or denials in his pleadings. He must set forth 'specific facts' showing a genuine issue. I.R.C.P. 56(e). If he does not, summary judgment, if appropriate, shall be entered against him. Summary judgment is 'appropriate' if the facts shown by the moving party are undisputed and establish a right to judgment as a matter of law"); *see also, Shacocass v. Arrington Constr. Co.*, 116 Idaho 460, 463, 776 P.2d 469, 472 (Ct. App. 1989) ("a court cannot hypothecate facts which are absent from the record"). Since IGWA has not disputed the salient facts pertinent to the Coalition's motion, its petition requesting a hearing can be dismissed as a matter of law.<sup>1</sup>

Further, nothing in the Second Addendum requires the Director to proceed to a hearing in the face of a proper summary judgment motion here. IGWA wrongly claims that section 2.c.iv of the Agreement "obligates" the Director to consider "all available information" when determining when a breach occurs. *IGWA Resp.* at 3. The paragraph cited by IGWA states that if the Steering Committee does not agree that a breach has occurred "the Steering Committee will report the same to the Director and request that the Director evaluate all available information . . ." *Id.* Nothing obligates the Director to take a particular course of action, such as holding an

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<sup>1</sup> Since the Director, not a jury, will be the fact finder in this case, he "as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences." *See P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007).

unnecessary evidentiary hearing. Indeed, in his order approving the amended mitigation plan, the Director purposely found “[a]pproval of the Second Addendum does not limit the Director’s enforcement discretion or otherwise commit the Director to a particular enforcement approach.” 2017 Order at 5 (emphasis added). IGWA’s argument on this point ignores the plain language of the 2017 Order that is final and binding on IGWA. As such, the Director should reject this argument.

## **II. The Statute Does Not Require an Unnecessary Evidentiary Hearing**

IGWA contends that the Coalition’s motion should be denied because it is “statutorily entitled to a hearing under Idaho Code § 42-1701A(3).” *IGWA Resp.* at 3. IGWA misreads the statute and the Idaho Administrative Procedures Act, (Idaho APA), I.C. §§ 67-5201 *et seq.*

First, section 42-1701A(3) provides for a right to a hearing before the director to contest the action. The statute provides that the hearing shall be held and conducted in accordance with provisions of subsection (1) and (2). *See* I.C. § 42-1701A(3). Subsection (1) states that all hearings shall be conducted “in accordance with the provisions of chapter 52, title 67, Idaho Code, and the rules of procedure promulgated by the director.” I.C. § 42-1701A(3). Under Idaho’s APA, IGWA’s petition requesting a hearing created a “contested case.” I.C. § 67-5240. The Department’s Rules of Procedure allow for summary judgment disposition of contested cases before it. *See* IDAPA 37.01.01.220.03. Just because an “aggrieved party” requests a hearing as provided in section 42-1701A(3), does not mandate the agency to proceed to an evidentiary hearing where one is unnecessary as a matter of law. Stated another way, if the facts are undisputed and a petition requesting a hearing can be decided as a matter of law, there is no basis to proceed with protracted and expensive litigation. That is the very reason for summary judgment motions in the first place. *See Lipe v. Javelin Tire Co., Inc.*, 97 Idaho 805, 806, 554

P.2d 1302, 1303 (1976) (“The purpose of summary judgment is to eliminate groundless claims and paper issues in cases which would end in directed verdict or other rulings of law”).

In this case the parties would be forced to travel hundreds of miles to Boise simply to identify undisputed facts. That is, there is no reason to have parties spend their resources and hold a hearing on unambiguous documents for a case that can be decided as a matter of law.

The fact IGWA erroneously petitioned for judicial review while this administrative case was pending does not change this result. If the law does not require an evidentiary record, i.e. where an agreement and prior mitigation plan are unambiguous, section 42-1701A(3) does not override granting summary judgment under IDWR’s procedural rules.

### **III. IGWA’s Allocation Argument is Misplaced and Does Not Counter the Unambiguous Terms of the Agreement and Stipulated Mitigation Plan.**

Oddly, while IGWA claims on one hand that “[t]here are many genuine issues of material fact,” on the other it asks the Director to grant partial summary judgment on the method of determining the conservation obligation for each district. *Compare IGWA Resp.* at 3 *with* at 4. This request is beyond the scope of the Coalition’s motion which simply asks the Director to rule on the plain terms of the Agreement, Stipulated Mitigation, and Final Order concerning the signatory parties’ annual reduction obligation, which is 240,000 acre-feet. How IGWA divided that unambiguous annual obligation amongst its members is irrelevant for purposes of the Coalition’s motion.

IGWA’s entire argument on this point is based on the erroneous assertion that the Agreement “does not assign this obligation to IGWA or its member districts specifically.” *IGWA Resp.* at 4. IGWA further believes that “total” groundwater use refers to everyone pumping from the ESPA, not just its signatory members. *See id.* at 5.

The plain terms of the Agreement identify “Long Term Practices” that are the responsibility of the signatory districts. The terms “Each Ground Water and Irrigation District with members pumping from the ESPA” refers to the signatory ground water districts and irrigation district (i.e. Fremont-Madison). IGWA believes this “long term practice” applies to all non-parties, but not A&B and Southwest.<sup>2</sup> See *IGWA Resp.* at 4. However, IGWA’s witness identifies other districts that pump groundwater in the ESPA. See *Higgs Dec.* at 2, ¶ 7 (i.e. Raft River, Falls). IGWA’s own theory fails because if the long term obligation (i.e. 240,000 acre-feet) applies to every pump in the ESPA, what in the Agreement supports limiting that to only A&B and Southwest? The answer is easy, nothing. Moreover, IGWA’s argument fails as a matter of law as it expressly agreed with A&B that the obligations in this paragraph do not apply to A&B’s groundwater use. See A&B Agreement at 1 (“The obligations of the Ground Water Districts set forth in Paragraphs 2 – 4 of the *Settlement Agreement* do not apply to A&B and its ground water rights”); see also, Compliance Order at 12. Rather than acknowledge the agreement it signed with A&B, IGWA ignores this document entirely.

There is no dispute that IGWA’s signatory districts only conserved 122,784 acre-feet in 2021. See *SWC Memo* at 4. Which district conserved what is irrelevant for the Director’s ruling on the present summary judgment motion. While “IGWA readily agrees that only the signatory districts are obligated to conserve groundwater under the Agreement,” it completely misses the mark by alleging that determining “how to calculate the conservation obligations” is an issue for the Director to decide in this case. While IGWA mistakenly included non-parties in its own internal calculations, that does not change the fact that the signatory districts did not achieve

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<sup>2</sup> IGWA cannot square its claim that the Agreement’s use of the term “total” refers to all pumping in the ESPA, yet then cherry-pick two users to argue that its obligation should be reduced. Further, IGWA wrongly claims that A&B and Southwest “are required to implement and report groundwater conservation under the terms of the Agreement.” *IGWA Resp.* at 5. Again, nothing binds non-parties to the Agreement. See Compliance Order at 12.



240,000 acre-feet of conservation in 2021. Therefore, even if the Director were to grant partial summary judgment in IGWA's favor, the signatory members did not perform the 205,000 acre-feet they allege is all they are obligated to provide. Regardless, such a ruling is precluded as it is contrary to the plain terms of the Agreement, Stipulated Mitigation Plan, and Final Order.

#### **IV. There is No Ambiguity in the Agreement.**

In opposing the Coalition's motion IGWA continues down the road to claim the Agreement is either "patently" or "latently" ambiguous. *See IGWA Resp.* at 6-7. A contract is ambiguous only if there are two different "reasonable" interpretations of the term. *See Swanson v. Beco Const. Co.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007). Making that initial call is a question of law for the Director to decide. *See Horton v. Horton*, 171 Idaho 60, 64, 518 P.3d 359, 373 (2022). Where a contract is clear and unambiguous, a court or agency "cannot revise the contract in order to change or make a better agreement for the parties." *Id.*

There is no "patent" ambiguity on the face of the Agreement. No reasonable person would conclude that the long-term practices apply to "non-parties," or only to certain "non-parties" as IGWA contends (i.e. A&B and Southwest). Any interpretation that a contract can bind non-parties to that contract is patently absurd and is not a "reasonable" interpretation. Nothing on the face of the Agreement suggests the signatory districts' conservation obligation is something other than "240,000 af." Nothing on the facts of the Agreement suggests that obligation is something other than every year. Accordingly, IGWA's patent ambiguity argument fails as a matter of law.

There is no "latent" ambiguity either. IGWA's sole theory to find a latent ambiguity is "because the Agreement does not explain how each district's proportionate share is to be calculated." *IGWA Resp.* at 7. In *Porcello v. Estate of Porcello*, 167 Idaho 412, 424, 470 P.3d

1221, 1233 (2020), the Idaho Supreme Court found: “it is clear that a latent ambiguity in a contract must ultimately be tied to the language of the instrument itself.” IGWA’s argument is not tied to the language of the Agreement but is based upon its claim as to what the Agreement does not say. *See IGWA Resp.* at 7 (“because the Agreement does not explain how each district’s proportionate share is to be calculated”). Accordingly, IGWA cannot create a “latent” ambiguity where no such ambiguity in the Agreement exists.

IGWA finally argues that its annual conservation obligation can be “averaged” and that this somehow contributes to its “latent” ambiguity theory. *See IGWA Resp.* at 7. IGWA spends considerable time explaining how water is pumped year to year and that its member’s groundwater diversions would have fluctuated between 2010 and 2014. *See id.* at 8-10. However, IGWA ignores the baseline that it set for purposes of implementing the Agreement. *See Higgs Dec.* at 4, ¶ (“IGWA selected, a five-year average from 2010-2014 to use as the baseline for the purpose of determining each district’s groundwater conservation obligation under the Settlement Agreement”). IGWA cannot rewrite history and the baseline it established to measure compliance with the Agreement. Further, the idea of what IGWA “might” have done does not create any ambiguity in the Agreement. Nothing in IGWA’s discussion changes the fact that the Agreement does not provide for “averaging” the long term conservation obligation over a series of years.<sup>3</sup> The terms “annual” and “240,000 af” are unambiguous. As a result the Director’s findings on these issues can be confirmed and IGWA’s petition can be resolved as a matter of law. *See generally*, Compliance Order.

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<sup>3</sup> The proposed order attached to the Stipulated Mitigation Plan was not adopted by the Director and did not amend the Settlement Agreement. *See Settlement Agreement* at 5, ¶ 9 (“Entire Agreement”). The proposed order does not change the plain terms of the Agreement and the Final Order approving the Stipulated Mitigation Plan.

**V. The Agreement is Integrated and IGWA cannot rely on extrinsic evidence to alter the intent of the Agreement.**

The Coalition argues that because the Agreement includes a “merger clause” the “parties intent may only be resolved by reference to the agreement’s language.” *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 267, 297 P.3d 222, 230 (2012) (citing *Valley Bank v. Christensen*, 119 Idaho 496, 498, 808 P.2d 415, 417 (1991)). The Agreement includes the following merger clause:

**9. Entire Agreement.**

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

Settlement Agreement at 5 (bold in original). SWC contends that Idaho law is clear and that when “a written contract contains a merger clause, it is an integrated agreement for purposes of the parol evidence rule,” and that “[t]he parol evidence rule bars the use of extrinsic evidence when a court interprets a written contract.” *AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 165, 307 P.3d 176, 182 (2013). Specifically, the Coalition maintains that the parties’ intent to the Agreement may only be determined from the language of the Agreement.

IGWA contends that the merger clause has no relevance when the terms of a contract are ambiguous and that “[t]he case law is clear that if the terms within the written contract are ambiguous, the Director may consider parol evidence to determine the intent of the parties.” IGWA Response at 7. IGWA however, fails to provide a single legal citation in support of its claim that “case law is clear” and that extrinsic evidence can be used to determine the parties’ intent for the Agreement.

IGWA argues that the Agreement is ambiguous. As discussed *supra* however, the Agreement is not ambiguous and the plain language of the Agreement fully resolves the question of IGWA's signatory districts' obligations. Moreover, IGWA ignores the importance of the merger clause. "The purpose of a merger clause is to establish that the parties have agreed that the contract contains the parties' entire agreement." *Howard v. Perry*, 141 Idaho 139, 142, 106 P.3d 465, 468 (2005).

IGWA now contends that the intent of the Agreement was not for its members to reduce diversions, but that the Agreement only requires total diversions from any source must be 240,000 acre-feet annually. The merger clause precludes this argument. "Where a written agreement is integrated, questions of the parties' intent regarding the subject matter of the agreement may only be resolved by reference to the agreement's language." *Valley Bank v. Christensen*, 119 Idaho 496, 498, 808 P.2d 415, 417 (1991) (emphasis added). Here, the Agreement is integrated. IGWA does not contend otherwise. Idaho law is clear, because the contract is integrated, IGWA cannot rely on extrinsic or parol evidence to "vary, alter, or contradict the terms of the instrument or the legal effect of the terms used." *Cannon v. Perry*, 144 Idaho 728, 731, 170 P.3d 393, 396 (2007).

The Coalition does not take the position that a merger clause precludes any reference to extrinsic evidence in the event a contract term is ambiguous. But, the merger clause does preclude IGWA from presenting parol evidence that the intent of the contract is something other than what is manifest from the Agreement itself.

**VI. IGWA is Not Entitled to Summary Judgment on its Affirmative Defenses and the Compliance Order Need Not be Withdrawn.**

IGWA asks the Director to withdraw the Compliance Order regardless of the disposition of SWC's summary judgment motion, "[if] the Director denies the Motion with respect to either

finding, then he must also withdraw his ruling that a breach occurred in 2021,” and “[e]ven if the Director were to grant the Motion, he must withdraw his ruling that a breach occurred in 2021.” *IGWA Response* at 10.

If the Director denies the Coalition’s summary judgment, IGWA argues, the Director must withdraw the Compliance Order because the Compliance Order “is predicated on the Director’s findings that (a) the proportionate shares of the signatory districts must be calculated relative to the collective diversions of the signatory districts as opposed to total diversions from the ESPA, and (b) averaging is not allowed for purposes of measuring compliance.” *Id.* This position puts the cart before the horse. If SWC’s present motion is denied, the Director will proceed with an evidentiary hearing, at the request of IGWA, to reconsider, review, and potentially withdraw the Compliance Order. Only if IGWA is successful in its *Petition for Reconsideration* would it be appropriate for the Director to withdraw the Compliance Order, not before.

IGWA also argues that it is entitled to have the Compliance Order withdrawn because an alternative measure of compliance has not been determined. *Id.* IGWA states that “the Director’s finding that a breach occurred is predicated on the premise that the Agreement requires that compliance be measured from a fixed baseline based on average diversions from 2010-2014,” and that because “averaging is not allowed for purposes of compliance” IGWA can no longer use the 2010-2014 average as a baseline. *Id.* IGWA misstates the bases of the Director’s finding of noncompliance. The Director did not predicate his finding that a breach occurred on the premise the Agreement requires compliance be measured from a fixed baseline based on average diversions from 2010-2014. In fact, the Director found the opposite. The 2010-2014 “averaging process is not described in the Settlement Agreement . . . Under the plain and unambiguous terms

of the Mitigation Plan, IGWA has an obligation to reduce total ground water diversion by 240,000 acre-feet every year.” Compliance Order at 11. The Director did not tell IGWA it could not use the 2010-2014 baseline average. The Director found that IGWA had an obligation to reduce diversions without averaging those diversions, regardless of the baseline process adopted by IGWA. The Director recognized that a baseline was not described in the Settlement Agreement and that IGWA “calculated and reported annual reduction based on its own adopted baseline process.” *Id.* IGWA is free to employ the 2010-2014 average as a baseline, it simply cannot use an average to determine diversion compliance within any given year.

IGWA argues further that it is entitled to have the Compliance Order withdrawn because “IGWA has not yet had an opportunity to present affirmative defenses to the SWC’s breach claim.” *Id.* IGWA forgets the filings and hearing held prior to the issuance of the Compliance Order. On August 3, 2022, IGWA filed *IGWA’s Response to Surface Water Coalition’s Notice* in which IGWA presented arguments related to SWC’s breach claim. On August 5, 2022, a status conference was held to discuss SWC’s breach claim, IGWA participated. On August 12, 2022, IGWA filed *IGWA’s Supplemental Response to Surface Water Coalition’s Notice of Steering Committee Impasse* and expanded on its five-year-rolling-average argument as well as presenting procedural arguments. After the Director issued a *Notice of Intent to Take Official Notice of IGWA’s 2021 Settlement Agreement Performance Report and Supporting Spreadsheet*, IGWA filed an objection on August 23, 2022. Finally, on September 22, 2022, IGWA submitted its *Petition for Reconsideration and Request for a Hearing*. Given this history, it is disingenuous for IGWA to now claim it has not had an opportunity to present defenses to SWC’s claim.

Nonetheless, IGWA presents two new affirmative defenses to SWC’s breach claim. The Director should ignore these new arguments as they are outside the scope of the Coalition’s

summary judgment motion. IGWA cites *Harwood v. Talbert* for the proposition that the Director can grant summary judgment for the non-moving party, “even if the party has not filed its own motion with the court.” *IGWA Response* at 3 (citing *Harwood v. Talbert*, 136 Idaho 672, 677, 39 P.3d 612, 617 (2001)). But, “[a] motion for summary judgment allows the court to rule on the issues placed before it as a matter of law; the moving party runs the risk that the court will find against it.” *Id.* (emphasis added). To wit, “a district court may not decide an issue not raised in the moving party’s motion for summary judgment.” *Harwood*, 136 Idaho at 678, 39 P.3d at 618 (emphasis added).

Here, IGWA argues that the affirmative defense of substantial performance, unclean hands, or “other affirmative defenses” provide the Director grounds to grant summary judgment and withdraw the Compliance Order. *IGWA Response* at 10. However, the Coalition’s summary judgment matter only asks the Director to dismiss IGWA’s petition on the grounds that the Mitigation Plan and the Director’s Orders approving the plan are unambiguous with respect to who is responsible for mitigation obligations and as to a yearly rather than rolling-average calculation for mitigation. The Coalition does not raise the issue of breach at all, merely asking for summary judgment that the Mitigation Plan terms are unambiguous. As such, IGWA’s request for summary judgment on those affirmative defenses asks the Director to decide issues not raised in the moving party’s motion for summary judgment, and the Director may not decide those issues.

If IGWA believes it has affirmative defenses to the Director’s finding that it breached the Mitigation Plan, it should have included those arguments in its petition. Alternatively, IGWA is entitled to file its own summary judgment motion containing those defenses and the factual bases on which they are made. This possibility will provide the Coalition adequate opportunity to

respond. “The party against whom the judgment will be entered must be given adequate advance notice and an opportunity to demonstrate why summary judgment should not be entered.” *Idaho Endowment Fund Inv. Board v. Crane*, 135 Idaho 667, 671, 23 P.3d 129, 133 (2001).

Even if the Director considers IGWA’s affirmative defenses for summary judgment, “the burden at all times is upon the moving party to prove the absence of a genuine issue of material fact.” *See Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 868 452 P.2d 362, 365 (1969).

“If the moving party fails to present evidence establishing the absence of a genuine issue of material fact on that element, the burden does not shift to the non-moving party, and the non-moving party is not required to respond with supporting evidence.” *Orthman v. Idaho Power Co.*, 130 Idaho 597, 600, 944 P.2d 1360, 1363 (1997) (cleaned up). Here, IGWA does not provide the elements of its defenses, proffering only cursory or conclusory definitions. *See IGWA Response* at 10. Furthermore, IGWA provides only a single sentence in support or analysis of its defenses. *See id.* IGWA has therefore failed to provide the elements of its defenses and failed to present evidence that no genuine issue of material fact exists in relation to its defenses. As such, IGWA’s request for summary judgment based on affirmative defenses should be denied.

Regardless of the final disposition of SWC’s present motion, it is inappropriate for the Director to withdraw the Compliance Order at this time or to grant IGWA summary judgement on its affirmative defenses.

## **VII. Conclusion**

For the reasons set forth herein, the Coalition requests the Director to grant the motion for summary judgment and dismiss IGWA’s petition as a matter of law.

//signature page to follow//



DATED this 11<sup>th</sup> day of January, 2023.

**BARKER ROSHOLT & SIMPSON LLP**

**FLETCHER LAW OFFICE**

/s/ TRAVIS L. THOMPSON  
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## CERTIFICATE OF SERVICE

I hereby certify that on this 11<sup>th</sup> day of January 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

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**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

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

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

Docket No. CM-DC-2010-001

Docket No. CM-MP-2016-001

**BJGWD's REPLY AND OBJECTION  
TO SWC'S OPPOSITION TO  
BONNEVILLE-JEFFERSON  
GROUND WATER DISTRICT'S  
MOTION TO INTERVENE / MOTION  
TO STRIKE**

The Bonneville-Jefferson Ground Water District (hereafter "BJGWD") hereby responds and objects to the Surface Water Coalition's (hereafter "SWC") Opposition to Bonneville-Jefferson Ground Water Districts' Motion to Intervene/Motion to Strike (hereafter "SWC Opposition").

**OVERVIEW**

SWC opposes BJGWD substituting its counsel in this action and BJGWD intervening in the above captioned matter. SWC cannot have it both ways. Either BJGWD is a party to the case

and can substitute its counsel of record or it is not a party to the case and should be permitted to intervene to ensure all legal arguments and defenses are raised at summary judgment and before the Director at the February 8, 2023, hearing.

SWC's arguments focus less on substance and rely on a rigid and unreasonable application of IDAPA Rules. For good reason, the IDAPA grants tremendous discretion to the Director to deviate from Rules when their strict enforcement would be "impracticable, unnecessary or not in the public interest." IDAPA37.01.01.051. Here, there is no question BJGWD is harmed by the outcome of this matter. It has substantially complied with the requirements to substitute its counsel and to intervene. No additional discovery has been sought by BJGWD, nor will any undue delay or prejudice occur by permitting BJGWD to provide, essentially, supplement briefing in support of the Director holding a hearing pursuant to Idaho Code § 42-1701A(3) to challenge the *Final Order Regarding Compliance with Approved Mitigation Plan* entered in this matter on September 8, 2022 ("Compliance Order").

Finally, as a political entity, it is in the public interest to not bar BJGWD from ensuring it protects its legal interests. For the reasons set forth below, the Director should permit BJGWD to substitute its counsel or intervene for the purpose of presenting legal arguments and defenses not raised by IGWA in its summary judgment briefing.

### **STANDARD OF REVIEW**

Decision "on the timeliness of a motion to intervene under an abuse of discretion standard. *State v. United States*, 134 Idaho 106, 109, 996 P.2d 806, 809 (2000) (citing *Cf. NAACP v. New York*, 413 U.S. 345, 365–66, 93 S. Ct. 2591, 2602–03, 37 L.Ed.2d 648, 662–63 (1973) (interpreting identical federal rule governing intervention). Timeliness of intervention is determined from all

the circumstances: the point to which the suit has progressed is not solely dispositive. *Id.* (emphasis added).

## **ARGUMENT**

### **I. BJGWD’s Motion to Intervene is adequate and should be granted.**

SWC first argues that BJGWD is “not eligible to be an intervenor because [BJGWD] is currently a party to this contested case and is represented by IGWA.” SWC Opposition pp. 4. SWC has not presented any authority demonstrating that BJGWD is in fact a party. IGWA is the named party to this litigation. However, even if BJGWD is considered an actual party, it should be permitted to raise arguments as a party to this case. *See infra*.

SWC next argues that BJGWD failed “to allege that Bonneville’s interests are not adequately represented by existing parties” and “[e]ven if they had, that position would be untenable” because IGWA has represented BJGWD “in the Coalition delivery call for well over a decade.” SWC Opposition pp. 4. SWC acknowledges the basis for BJGWD’s request to intervene on page 5 of SWC’s Opposition, which is “to preserve and not waive certain legal arguments and defenses not raised in IGWA’s Response brief.” SWC’s argument also fails to analyze issues arising from the fact that it alleged breach of the Settlement Agreement during the 2021 irrigation season against IGWA, which precipitated the Director’s Compliance Order, which IGWA and BJGWD are contesting.

To the extent a breach was alleged, and the Director has found a breach occurred, BJGWD has a duty to its members to adequately represented all legal arguments and defenses to protect its members from damage claims and further curtailment/reductions of their ground water. These issues did not arise prior to SWC seeking summary judgment in December 2022 to prevent IGWA

from having a Idaho Code § 42-1701A(3) hearing before the Director. As such, BJGWD has a direct and substantial interest in the outcome of the February 8, 2023, hearing.

SWC next argues BJGWD's "January 4, 2023, motion is untimely because the prehearing conference in this matter was held nearly two months ago on November 10, 2022." SWC Opposition pp. 5. SWC cites IDAPA 37.01.01.352: "Petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, or by the date of the initial prehearing conference, whichever is earlier." Importantly, SWC omits Rule 37.01.01.353.02. from its opposition.

The agency may grant late petitions to intervene for good cause shown or may deny or conditionally grant petitions to intervene that are late for failure to state good cause for the late filing, to prevent disruption, to prevent prejudice to existing parties, to prevent undue broadening of the issues, or for other reasons.

Importantly, the "[t]imeliness of intervention is determined from all the circumstances: the point to which the suit has progressed is not solely dispositive." *State*, 134 Idaho 109, 996 P.2d 809.

In this case, the record shows good cause exists for BJGWD's Petition being filed when IGWA filed its opposition to SWC's Motion for Summary Judgment. SWC filed a motion for summary judgment in December 2022 seeking to prevent IGWA from having a hearing pursuant to Idaho Code § 42-1701A(3) to challenge the *Final Order Regarding Compliance with Approved Mitigation Plan* it is entitled to. But, as set forth in its Petition to Intervene, IGWA did not raise all legal arguments and defenses adequate to protect the legal interests of BJGWD's members. BJGWD moved to take a stand once it saw the issues framed. Accordingly, BJGWD petitioned to intervene for the limited purpose of preserving and not waiving certain legal arguments and defenses not raised by IGWA. Therefore, the Director should view all the circumstances requiring

BJGWD to file its Petition motivated by a direct desire to protect the legal interests of its members in light of SWC's Motion for Summary Judgment and IGWA response and opposition thereto.

Finally, SWC argues that "[a]llowing Bonneville to intervene at this stage of the case, just weeks before the hearing is scheduled to be held would prejudice the Coalition" and its "inclusion as an intervenor would unduly broaden the issues in this contested case." SWC Opposition pp. 5. Yet, BJGWD has not requested any further discovery nor sought to continue or otherwise delay the February 8, 2023, hearing. BJGWD's arguments are mainstream questions of contract interpretation and similar matters that are not "exotic" in nature. Therefore, SWC cannot show it will be prejudiced by BJGWD's Petition.

BJGWD also has not broadened the scope of the litigation beyond the issues SWC raised. Importantly, SWC seeks to terminate the February 8, 2023, hearing itself. Therefore, the relief sought in its Motion for Summary Judgment, if granted, would preclude IGWA and BJGWD from ever having a full opportunity to be heard before the Director and present its affirmative defenses to the issue initially submitted to the Director for review – breach of the Settlement Agreement by IGWA in 2021. SWC raised the issue by submitting it to the Director, and neither IGWA nor BJGWD has had an opportunity for an evidentiary hearing on the matter. Therefore, SWC defined the scope of the legal issues by bring the question of breach before the Director and now seeks to constrain the ability of the opposing parties (in particular BJGWD) to put on a full defense. That is fundamentally unfair.

In its Response, BJGWD asserted legal arguments and defenses to be heard before the Director that it views are necessary to respond to the issues SWC alleged, and BJGWD asserts that it has a right to a hearing on these issues before the Director. Simply put, BJGWD support the Director holding an evidentiary hearing because IGWA and its members have a right to present



evidence and legal arguments and affirmative defenses to SWC's underlying allegation of breach of the Settlement Agreement. Accordingly, BJGWD's Petition nor its Response do not add issues not already placed in controversy by SWC, and its Response joins in support of the arguments raised by IGWA and merely raised affirmative defenses to such alleged breach. *See* IGWA Response. Raising affirmative defenses and contradicting legal arguments from a party in a contested case is a common and necessary litigation practice.<sup>1</sup> Therefore, permitting BJGWD to intervene and present legal arguments and defenses will not expand the scope of the issues raised by SWC.

**II. BJGWD should be permitted to change counsel and submit briefing representing its legal interests.**

SWC opposes BJGWD from substituting counsel in this action, even though it argues BJGWD is already a party to the case. BJGWD filed its Petition to Intervene and its Substitution of Counsel with the aim of ensuring that its legal rights are represented at summary judgment and before the Director in the February 8, 2023, hearing.

In opposing BJGWD's Substitution of Counsel, SWC alleges that because Racine Olsen, PLLP has not withdrawn its representation of IGWA, BJGWD cannot substitute Olsen Taggart PLLC as its counsel. In support of this theory, SWC cites the portion of IDAPA 37.01.01.204 which states "[p]ersons representing a party in a contested case before the agency who wish to withdraw their representation must immediately file with the agency a notice of withdrawal of representation . . . ." (emphasis added). All this section of IDAPA 37.01.01.204 is stating is that if

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<sup>1</sup> "Black's Law Dictionary defines an "affirmative defense" as "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." Walker v. Meyer, 170 Idaho 408, 511 P.3d 828, 831 (2021) (citing Affirmative Defense, BLACK'S LAW DICTIONARY (11th ed. 2019)).

counsel for a party wishes to withdrawal from representing that party, then counsel may withdrawal. It has nothing to do with: (1) an intervenor; or (2) a party who seeks to change representation.

First, as set forth above, BJGWD is not a party to this case – IGWA is the party. As such, there is no requirement that intervenor’s counsel withdrawal from the case before an intervenor may substitute new counsel because the intervenor was not represented by counsel to begin with. Instead, all that is required, pursuant to IDAPA 37.01.01.351 and 200, is that the petition to intervene “identify the party’s representative, if any . . .” IDAPA 37.01.01.200. This is precisely what BJGWD accomplished when in the Petition to Intervene it identified Olsen Taggart PLLC as its representative.

However, if the director were to find that BJGWD is a party to the case, it has properly substituted Olsen Taggart PLLC as its counsel. The first part of IDAPA 37.01.01.204 (which SWC fails to quote) provides the process for a party to change its representation. All that is required is that a party provide “notice to the agency and all other parties.” This is precisely what BJGWD accomplished when it filed its Substitution of Counsel giving notice to all the parties that “Olsen Taggart PLLC, [] hereby substitutes as counsel on behalf of Intervenor, Bonneville-Jefferson Ground Water District.” Therefore, even if the Director were to find that BJGWD is already a party to this contested action, BJGWD has properly substituted Olsen Taggart PLLC as their counsel.

### **III. SWC’s Motion to Strike should be denied.**

This Court should not strike BJGWD’s summary judgment response because it is moot. SWC argues that BJGWD cannot submit a response to SWC’s motion for summary judgement because BJGWD’s intervenor status is pending with the Director. However, as set forth above,

BJGWD has either properly intervened in the case and, therefore, is entitled to file a Response brief, or it may file a brief as a party to the case.

Furthermore, SWC provides no authority for the proposition that a person seeking intervenor status cannot file a response to a summary judgment motion while the Director decides whether to grant the person's petition to intervene. Pursuant to IDAPA 37.01.01.051, the Director is to "liberally construe[]" the rules in this chapter to ensure a "just, speedy and economical determination of all issues presented to the agency." Allowing, a response to a summary judgment motion, prior to be granted intervenor status, gives all parties notice of the person's theories and, in fact, speeds up the process for resolving disputes if the person is granted intervenor status. As such, the Director should not strike BJGWD's summary judgment motion because it would violate the purpose of these rules.

SWC also argues—in conclusory form—that BJGWD's interest are already protected by IGWA's representation. However, BJGWD has plainly stated its interests are not being adequately represented by IGWA because IGWA is not presenting all the arguments it views are necessary to protect its members. Again, the purpose of these rules is "to ensure [a] just . . . determination of all issues . . ." IDAPA 37.01.01.051. IGWA's failure to present all the issues to the Director would not ensure a just determination of the issues in this case. Therefore, IGWA is not adequately representing BJGWD's interest and, pursuant to the purpose of these rules, BJGWD should be granted intervenor status.

Lastly, SWC argues that if BJGWD is a party, its response is duplicative. Even if this were the case, pursuant to Idaho Rules of Civil Procedure 56, which governs summary judgment motion, if a party files a summary judgement and "the adverse party wishes to oppose summary judgment, the party must serve an answering brief." I.R.C.P. 56(b)(2). Thus, if a party files a summary

judgment motion against multiple parties, then multiple parties must provide an “answering brief” in order to oppose the motion. This inevitably may result in parties providing duplicative answering briefs, but duplicative answers do not render the arguments moot, it just means defending parties share legal theories but approach them differently. Here, BJGWD has not provided duplicative arguments. In fact, the very reasons it seeks to intervene is because it has separate arguments as to why SWC’s motion for summary judgment should be dismissed. As such, regardless of whether the arguments in BJGWD’s response is duplicative or not, this is not a reason to strike the response.

Therefore, for the above reasons, this Court should not strike BJGWD’s response.

### **CONCLUSION**

For the reasons set forth above, the Director should permit BJGWD to intervene in this matter, so it may present legal arguments that protect its interests at summary judgment and during the February 8, 2023, hearing.

DATED: January 17, 2023

OLSEN TAGGART PLLC

/s/ *Skyler C. Johns*

SKYLER C. JOHNS

## CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2023, I served the foregoing document on the persons below via email as indicated:

/s/ Skyler C. Johns

Skyler C. Johns, Esq.

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Jan 18, 2023

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**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT MITIGATION  
PLAN

Docket No. CM-MP-2016-001

**NOTICE OF SERVICE OF IDAHO  
GROUND WATER APPROPRIATORS,  
INC.'S RESPONSES TO THE  
COALITION OF CITIES' FIRST SET  
OF DISCOVERY REQUESTS**

PLEASE TAKE NOTICE that Idaho Ground Water Appropriators, Inc. ("IGWA") served *Idaho Ground Water Appropriators, Inc.'s Responses to the Coalition of Cities' First Set of Discovery Requests* on January 18, 2023, on counsel for Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone and Wendell ("Coalition of Cities") as indicated in the Certificate of Service.

DATED this 18<sup>th</sup> day of January, 2023.

RACINE OLSON, PLLP

By: 

Elisheva M. Patterson  
*Attorneys for IGWA*

## CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2023, I served the foregoing document on the persons below via email as indicated:



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## STATE OF IDAHO

## DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT MITIGATION  
PLAN

Docket No. CM-MP-2016-001

**NOTICE OF SERVICE OF ABERDEEN-  
AMERICAN FALLS GROUND WATER  
DISTRICT'S RESPONSES TO THE  
SURFACE WATER COALITION'S  
FIRST DISCOVERY REQUESTS**

PLEASE TAKE NOTICE that Aberdeen-American Falls Ground Water District served *Aberdeen-American Falls Ground Water District's Responses to the Surface Water Coalition's First Discovery Requests* on January 18, 2023, on counsel for A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the "Surface Water Coalition", "Coalition", or "SWC"), as indicated in the Certificate of Service.

DATED this 18<sup>th</sup> day of January, 2023.

RACINE OLSON, PLLP

By: 

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STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT MITIGATION  
PLAN

Docket No. CM-MP-2016-001

**NOTICE OF SERVICE OF BINGHAM  
GROUND WATER DISTRICT'S  
RESPONSES TO THE SURFACE  
WATER COALITION'S FIRST  
DISCOVERY REQUESTS**

PLEASE TAKE NOTICE that Bingham Ground Water District served ***Bingham Ground Water District's Responses to the Surface Water Coalition's First Discovery Requests*** on January 18, 2023, on counsel for A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the "Surface Water Coalition", "Coalition", or "SWC"), as indicated in the Certificate of Service.

DATED this 18<sup>th</sup> day of January, 2023.

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## STATE OF IDAHO

## DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION  
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HELD BY AND FOR THE BENEFIT OF A&B  
IRRIGATION DISTRICT, AMERICAN  
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IRRIGATION DISTRICT, NORTH SIDE  
CANAL COMPANY, AND TWIN FALLS  
CANAL COMPANY

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT MITIGATION  
PLAN

Docket No. CM-MP-2016-001

**NOTICE OF SERVICE OF  
BONNEVILLE-JEFFERSON GROUND  
WATER DISTRICT'S RESPONSES TO  
THE SURFACE WATER COALITION'S  
FIRST DISCOVERY REQUESTS**

PLEASE TAKE NOTICE that Bonneville-Jefferson Ground Water District served ***Bonneville-Jefferson Ground Water District's Responses to the Surface Water Coalition's First Discovery Requests*** on January 18, 2023, on counsel for A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the "Surface Water Coalition", "Coalition", or "SWC"), as indicated in the Certificate of Service.

DATED this 18<sup>th</sup> day of January, 2023.

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**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

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

IN THE MATTER OF IGWA'S  
 SETTLEMENT AGREEMENT MITIGATION  
 PLAN

Docket No. CM-MP-2016-001

**NOTICE OF SERVICE OF CAREY  
 VALLEY GROUND WATER  
 DISTRICT'S RESPONSES TO THE  
 SURFACE WATER COALITION'S  
 FIRST DISCOVERY REQUESTS**

PLEASE TAKE NOTICE that Carey Valley Ground Water District served *Carey Valley Ground Water District's Responses to the Surface Water Coalition's First Discovery Requests* on January 18, 2023, on counsel for A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the "Surface Water Coalition", "Coalition", or "SWC"), as indicated in the Certificate of Service.

DATED this 18<sup>th</sup> day of January, 2023.

RACINE OLSON, PLLP

By: 

Elisheva M. Patterson, *Attorneys for Carey  
 Valley Ground Water District*

## CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2023, I served the foregoing document on the persons below via email as indicated:



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Jan 18, 2023

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STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT MITIGATION  
PLAN

Docket No. CM-MP-2016-001

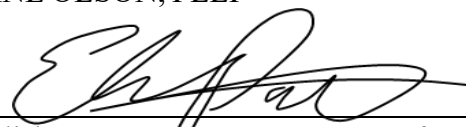
**NOTICE OF SERVICE OF FREMONT  
MADISON IRRIGATION DISTRICT'S  
RESPONSES TO THE SURFACE  
WATER COALITION'S FIRST  
DISCOVERY REQUESTS**

PLEASE TAKE NOTICE that Fremont Madison Irrigation District served ***Fremont Madison Irrigation District's Responses to the Surface Water Coalition's First Discovery Requests*** on January 18, 2023, on counsel for A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the "Surface Water Coalition", "Coalition", or "SWC"), as indicated in the Certificate of Service.

DATED this 18<sup>th</sup> day of January, 2023.

RACINE OLSON, PLLP

By: \_\_\_\_\_

  
Elisheva M. Patterson, *Attorneys for*  
*Fremont Madison Irrigation District*

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Jan 18, 2023

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**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT MITIGATION  
PLAN

Docket No. CM-MP-2016-001

**NOTICE OF SERVICE OF JEFFERSON  
CLARK GROUND WATER DISTRICT'S  
RESPONSES TO THE SURFACE  
WATER COALITION'S FIRST  
DISCOVERY REQUESTS**

PLEASE TAKE NOTICE that Jefferson Clark Ground Water District served *Jefferson Clark Ground Water District's Responses to the Surface Water Coalition's First Discovery Requests* on January 18, 2023, on counsel for A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the "Surface Water Coalition", "Coalition", or "SWC"), as indicated in the Certificate of Service.

DATED this 18<sup>th</sup> day of January, 2023.

RACINE OLSON, PLLP

By: 

Elisheva M. Patterson, *Attorneys for*  
*Jefferson Clark Ground Water District*

## CERTIFICATE OF SERVICE

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Jan 18, 2023

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## STATE OF IDAHO

## DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION  
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HELD BY AND FOR THE BENEFIT OF A&B  
IRRIGATION DISTRICT, AMERICAN  
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IRRIGATION DISTRICT, NORTH SIDE  
CANAL COMPANY, AND TWIN FALLS  
CANAL COMPANY

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT MITIGATION  
PLAN

Docket No. CM-MP-2016-001

**NOTICE OF SERVICE OF MADISON  
GROUND WATER DISTRICT'S  
RESPONSES TO THE SURFACE  
WATER COALITION'S FIRST  
DISCOVERY REQUESTS**

PLEASE TAKE NOTICE that Madison Ground Water District served ***Madison Ground Water District's Responses to the Surface Water Coalition's First Discovery Requests*** on January 18, 2023, on counsel for A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the "Surface Water Coalition", "Coalition", or "SWC"), as indicated in the Certificate of Service.

DATED this 18<sup>th</sup> day of January, 2023.

RACINE OLSON, PLLP

By: 

Elisheva M. Patterson, *Attorneys for*  
*Madison Ground Water District*

## CERTIFICATE OF SERVICE

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Jan 18, 2023

DEPARTMENT OF  
WATER RESOURCES

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*Attorneys for IGWA*

## STATE OF IDAHO

## DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT MITIGATION  
PLAN

Docket No. CM-MP-2016-001

**NOTICE OF SERVICE OF MAGIC  
VALLEY GROUND WATER  
DISTRICT'S RESPONSES TO THE  
SURFACE WATER COALITION'S  
FIRST DISCOVERY REQUESTS**

PLEASE TAKE NOTICE that Magic Valley Ground Water District served *Magic Valley Ground Water District's Responses to the Surface Water Coalition's First Discovery Requests* on January 18, 2023, on counsel for A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the "Surface Water Coalition", "Coalition", or "SWC"), as indicated in the Certificate of Service.

DATED this 18<sup>th</sup> day of January, 2023.

RACINE OLSON, PLLP

By: 

Elisheva M. Patterson, *Attorneys for Magic  
Valley Ground Water District*

## CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2023, I served the foregoing document on the persons below via email as indicated:



Elisheva M. Patterson

Gary Spackman, Director Garrick Baxter, Deputy Attorney General IDAHO DEPT. OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098	<a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a> <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a>
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*Attorneys for IGWA*

**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT MITIGATION  
PLAN

Docket No. CM-MP-2016-001

**NOTICE OF SERVICE OF NORTH  
SNAKE GROUND WATER DISTRICT'S  
RESPONSES TO THE SURFACE  
WATER COALITION'S FIRST  
DISCOVERY REQUESTS**

PLEASE TAKE NOTICE that North Snake Ground Water District served *North Snake Ground Water District's Responses to the Surface Water Coalition's First Discovery Requests* on January 18, 2023, on counsel for A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the "Surface Water Coalition", "Coalition", or "SWC"), as indicated in the Certificate of Service.

DATED this 18<sup>th</sup> day of January, 2023.

RACINE OLSON, PLLP

By: 

Elisheva M. Patterson, *Attorneys for North  
Snake Ground Water District*

## CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2023, I served the foregoing document on the persons below via email as indicated:

  
Elisheva M. Patterson

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RECEIVED

Jan 25, 2023

DEPARTMENT OF  
WATER RESOURCES

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**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

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

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

Docket No. CM-DC-2010-001

Docket No. CM-MP-2016-001

**Notice of Conditional Withdrawal of  
Representation of Bonneville-Jefferson  
Ground Water District**

Pursuant to IDAPA 37.01.01.204, Thomas J. Budge and Elisheva M. Patterson of the firm Racine Olson, PLLP, hereby provide notice that they conditionally withdraw as counsel for Bonneville-Jefferson Ground Water District ("BJGWD"), an associational member of Idaho Ground Water Appropriators, Inc. ("IGWA"), in the above-captioned matters. This withdrawal is contingent upon the Director granting BJGWD's Motion to Intervene and/or the Director accepting BJGWD's Substitution of Counsel which were filed January 4, 2023, in this matter.

DATED January 25, 2023.

RACINE OLSON, PLLP

By: \_\_\_\_\_

Thomas J. Budge

*Attorneys for IGWA*

## CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2023, I served the foregoing document on the persons below via email as indicated:

  
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## STATE OF IDAHO

## DEPARTMENT OF WATER RESOURCES

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

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

**Witness and Exhibit Disclosure  
Stipulation**

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

Idaho Ground Water Appropriators, Inc., 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, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, Wendell, Ammon, Idaho Falls, and Pocatello, by and through their respective attorneys of record, hereby stipulate to the following deadlines for disclosure of witnesses and exhibits in advance of the hearing set for February 8-10, 2023:


- Each party shall disclose its witnesses and exhibits to the other parties by January 27, 2023.
- The parties shall stipulate as to the authenticity and admissibility of exhibits by February 3, 2023.
- The parties shall file witness and exhibit lists with the Department by February 3, 2023. Exhibit numbers shall be pre-marked, as follows:
  - Common exhibits: 1-99
  - IGWA: 100-199
  - SWC: 200-299
  - Cities: 300-399

Exhibits and witnesses not identified in accordance with this stipulation may not be utilized at the hearing without a stipulation of the parties or approval of the hearing officer. As an exception, non-disclosed witnesses and exhibits may be utilized at any time for rebuttal, cross-examination, and illustrative purposes.




DATED this 26th day of January, 2023.


RACINE OLSON, PLLP

By:   
Thomas J. Budge  
*Attorneys for IGWA*

BARKER ROSHOLT & SIMPSON, LLP

By:   
John K. Simpson  
Travis L. Thompson  
*Attorneys for A&B Irrigation District,  
Burley Irrigation District, Milner  
Irrigation District, North Side Canal  
Company, and Twin Falls Canal Company*

FLETCHER LAW OFFICE

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

SOMACH SIMMONS & DUNN

By: \_\_\_\_\_  
Sarah A Klahn  
*Attorneys for City of Pocatello*

DATED this 26th day of January, 2023.

RACINE OLSON, PLLP

By: \_\_\_\_\_  
Thomas J. Budge  
*Attorneys for IGWA*


BARKER ROSHOLT & SIMPSON, LLP

By: \_\_\_\_\_  
John K. Simpson  
Travis L. Thompson  
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Burley Irrigation District, Milner  
Irrigation District, North Side Canal  
Company, and Twin Falls Canal Company*

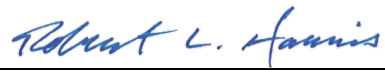
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District*

SOMACH SIMMONS & DUNN

By:  \_\_\_\_\_  
Sarah A Klahn  
*Attorneys for City of Pocatello*

HOLDEN, KIDWELL, HAHN & CRAPO,  
PLLC

By:   
Robert L. Harris  
*Attorneys for City of Idaho Falls and City  
of Ammon*


MCHUGH BROMLEY, PLLC

By: \_\_\_\_\_  
Candice McHugh  
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Carey, Declo, Dietrich, Gooding,  
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Richfield, Rupert, Shoshone and Wendell*

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Hazelton, Heyburn, Jerome, Paul,  
Richfield, Rupert, Shoshone and Wendell*

## CERTIFICATE OF SERVICE

I hereby certify that on this 26<sup>th</sup> day of January, 2023, I served the foregoing document on the persons below via email as indicated:

  
Thomas J. Budge

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Jan 27, 2023

DEPARTMENT OF  
WATER RESOURCES

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*Attorneys for Bonneville-Jefferson Ground Water District (BJGWD)*

**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

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

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

Docket No. CM-DC-2010-001

Docket No. CM-MP-2016-001

**BJGWD'S WITNESS AND EXHIBIT  
DISCLOSURE**

The Bonneville-Jefferson Ground Water District (hereafter "BJGWD") hereby provides  
the following witness and exhibit disclosures.<sup>1</sup>

<sup>1</sup> These disclosures are subject the Director granting BJGWD's *Motion to Intervene* and/or recognizing BJGWD's *Substitution of Counsel* and considering the arguments presented BJGWD's *Response in Opposition to SWC's Motion for Summary Judgment* filed on January 4, 2023.

BJGWD the right to call any witness disclosed, identified, or called by any party to this matter. BJGWD further intends to call the following witnesses:

- Stephanie Mickelsen: Chair of the BJGWD Board. Stephanie may testify as to all matters in this matter. This witness is available through counsel.
- Kirk Schwieder: BJGWD Board Member. Kirk may testify as to all matters in this matter. This witness is available through counsel.
- Alan Jackson: District Manager for the Bingham Ground Water District. Alan may testify as to all matters in this matter. This witness is available through counsel.

BJGWD further reserves the right to rely upon any exhibit disclosed, identified, or presented by any party to this matter. BJGWD also intends and reserves the right to present the following as exhibits:

- Any and all records of the Idaho Department of Water Resources pertaining to this matter.

BJGWD proposes that its exhibit numbers shall be pre-marked, as follows:

- BJGWD: 400-499

DATED: January 27, 2023

OLSEN TAGGART PLLC

/s/ Skyler C. Johns

SKYLER C. JOHNS



## CERTIFICATE OF SERVICE

I hereby certify that on this 77th day of January, 2023, I served the foregoing document on the persons below via email as indicated:

/s/ Michelle J. Castro

Gary Spackman, Director Garrick Baxter, Deputy Attorney General IDAHO DEPT. OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098	<a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a> <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a>
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#### 4 BJDWD'S WITNESS AND EXHIBIT DISCLOSURE

Jan 27, 2023

DEPARTMENT OF  
WATER RESOURCES

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## STATE OF IDAHO

## DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT MITIGATION  
PLAN

Docket No. CM-MP-2016-001

**NOTICE OF SERVICE OF ABERDEEN-  
AMERICAN FALLS GROUND WATER  
DISTRICT'S SUPPLEMENTAL  
RESPONSES TO THE SURFACE  
WATER COALITION'S FIRST  
DISCOVERY REQUESTS**

PLEASE TAKE NOTICE that Aberdeen-American Falls Ground Water District served *Aberdeen-American Falls Ground Water District's Supplemental Responses to the Surface Water Coalition's First Discovery Requests* on January 27, 2023, on counsel for A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the "Surface Water Coalition", "Coalition", or "SWC"), as indicated in the Certificate of Service.

DATED this 27th day of January, 2023.

RACINE OLSON, PLLP

By: 

Elisheva M. Patterson, *Attorneys for Aberdeen-  
American Falls Ground Water District*

**ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT'S SUPPLEMENTAL RESPONSES TO  
THE SURFACE WATER COALITION'S FIRST DISCOVERY REQUESTS**

1

## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2023, I served the foregoing document on the persons below via email as indicated:

  
Elisheva M. Patterson

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*Attorneys for IGWA*

RECEIVED

Jan 27, 2023

DEPARTMENT OF  
WATER RESOURCES

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT MITIGATION  
PLAN

Docket No. CM-MP-2016-001

**NOTICE OF SERVICE OF BINGHAM  
GROUND WATER DISTRICT'S  
SUPPLEMENTAL RESPONSES TO THE  
SURFACE WATER COALITION'S  
FIRST DISCOVERY REQUESTS**

PLEASE TAKE NOTICE that Bingham Ground Water District served ***Bingham Ground Water District's Supplemental Responses to the Surface Water Coalition's First Discovery Requests*** on January 27, 2023, on counsel for A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the "Surface Water Coalition", "Coalition", or "SWC"), as indicated in the Certificate of Service.

DATED this 27th day of January, 2023.

RACINE OLSON, PLLP

By: 

Elisheva M. Patterson, *Attorneys for*  
*Bingham Ground Water District*

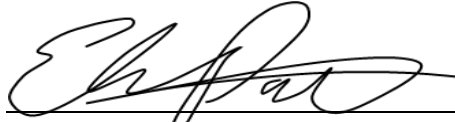
**BINGHAM GROUND WATER DISTRICT'S SUPPLEMENTAL RESPONSES TO THE SURFACE  
WATER COALITION'S FIRST DISCOVERY REQUESTS**

1

000373

## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2023, I served the foregoing document on the persons below via email as indicated:



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Jan 27, 2023

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## STATE OF IDAHO

## DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION  
OF WATER TO VARIOUS WATER RIGHTS  
HELD BY AND FOR THE BENEFIT OF A&B  
IRRIGATION DISTRICT, AMERICAN  
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IN THE MATTER OF IGWA'S  
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PLAN

Docket No. CM-MP-2016-001

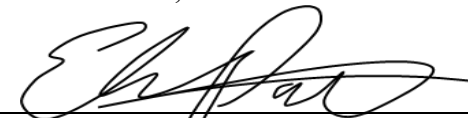
**NOTICE OF SERVICE OF IDAHO  
GROUND WATER APPROPRIATORS,  
INC.'S SUPPLEMENTAL RESPONSES  
TO THE COALITION OF CITIES'  
FIRST SET OF DISCOVERY  
REQUESTS**

PLEASE TAKE NOTICE that Idaho Ground Water Appropriators, Inc. ("IGWA") served ***Idaho Ground Water Appropriators, Inc.'s Supplemental Responses to the Coalition of Cities' First Set of Discovery Requests*** on January 27, 2023, on counsel for Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone and Wendell ("Coalition of Cities") as indicated in the Certificate of Service.

DATED this 27th day of January, 2023.

RACINE OLSON, PLLP

By: \_\_\_\_\_



Elisheva M. Patterson  
*Attorneys for IGWA*

## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2023, I served the foregoing document on the persons below via email as indicated:



Elisheva M. Patterson

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

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT  
MITIGATION PLAN

Docket No. CM-MP-2016-001

**NOTICE OF SERVICE OF SURFACE  
WATER COALITION'S RESPONSES  
TO POCATELLO AND COALITION  
OF CITIES FIRST SET OF  
DISCOVERY**

TO: The Hearing Officer of the Department and all parties and attorneys of record:

PLEASE TAKE NOTICE that Travis L. Thompson, on behalf of A&B IRRIGATION  
DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH  
SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS

**NOTICE OF SERVICE OF SURFACE WATER COALITION'S RESPONSES TO POCATELLO AND  
COALITION OF CITIES FIRST SET OF DISCOVERY-**

RESERVOIR DISTRICT #2, AND MINIDOKA IRRIGATION DISTRICT has served the  
**SURFACE WATER COALITION'S RESPONSES TO POCATELLO AND COALITION  
OF CITIES FIRST SET OF DISCOVERY** on the following via email:

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DATED this 27<sup>th</sup> day of January, 2023.

**BARKER ROSHOLT & SIMPSON LLP**

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Travis L. Thompson  
*Attorneys for A&B Irrigation District,  
Burley Irrigation District, Milner Irrigation  
District, NSCC and TFCC*

**FLETCHER LAW OFFICE**

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

## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2023, I served a true and correct copy of the foregoing *Notice of Service of Surface Water Coalition's Responses to Pocatello and Coalition of Cities First Set of Discovery* on the following by the method indicated:

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/s/ Travis L. Thompson  
Travis L. Thompson

**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 Nos.    CM-MP-2016-001  
                     CM-DC-2010-001

**ORDER DENYING SWC'S  
MOTION FOR SUMMARY  
JUDGMENT & CONDITIONALLY  
GRANTING BJGWD'S PETITION  
TO INTERVENE**

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

**BACKGROUND**

On September 8, 2022, the Director of the Idaho Department of Water Resources ("Director") issued a *Final Order Regarding Compliance with Approved Mitigation Plan* ("Compliance Order"). The Compliance Order concluded that, in 2021, the Idaho Ground Water Appropriators, Inc. ("IGWA") failed to comply with its approved Mitigation Plan in the Surface Water Collation ("SWC") delivery call.<sup>1</sup> The Compliance Order also approved the SWC's and IGWA's September 7, 2022 *Settlement Agreement* to remedy IGWA's breach.

On September 22, 2022, IGWA timely filed a *Petition for Reconsideration and Request for Hearing* ("Petition"). The Petition requested that the Director amend the Compliance Order to "withdraw those parts . . . that adjudicate IGWA's contractual obligations under the Settlement Agreement . . ." or in the alternative, set the matter for a merits hearing. *Petition* at 7.

On October 13, 2022, the Director issued an order denying IGWA's petition for reconsideration, granting IGWA's request for a hearing, and setting a prehearing conference. The prehearing conference was held on November 10, 2022. On December 7, 2022, the Director issued an *Order Authorizing Discovery; Notice of Hearing*, scheduling a three-day hearing for February 8–10, 2023. Formal discovery is ongoing between the parties.<sup>2</sup>

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<sup>1</sup> For purposes of this order, the term "Mitigation Plan" refers to the four agreements comprising IGWA's approved mitigation plan: (1) the SWC-IGWA Agreement, (2) the First Addendum, (3) the A&B-IGWA Agreement, and (4) the Second Addendum. *See Compliance Order* at 1–3 (discussing the Mitigation Plan background). In addition to the Mitigation Plan itself, the Director has issued: (1) the May 2, 2016 *Final Order Approving Stipulated Mitigation Plan* regarding the first three agreements above, and (2) the May 9, 2017 *Final Order Approving Amendment to Stipulated Mitigation Plan* regarding the Second Addendum.

<sup>2</sup> In addition to requesting a hearing with the Department, IGWA also filed a *Petition for Judicial Review* on October 24, 2022. *IGWA v. Idaho Dep't of Water Res.*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho). The district court dismissed IGWA's petition and remanded to IDWR on December 12, 2022.



On December 21, 2022, the SWC filed *Surface Water Coalition's Motion for Summary Judgment* and *Surface Water Coalition's Memorandum in Support of Motion for Summary Judgment* ("SWC Memorandum").

On January 4, 2023, IGWA filed *IGWA's Response in Opposition to SWC's Motion for Summary Judgment* ("IGWA's Response"). Also on January 4, 2023, the Bonneville-Jefferson Ground Water District ("BJGWD") filed a *Petition to Intervene* ("BJGWD's Petition") and *BJGWD's Response in Opposition to SWC's Motion for Summary Judgment* ("BJGWD's Response").

On January 9, 2023, the SWC filed *Surface Water Coalition's Opposition to Bonneville-Jefferson Ground Water District's Motion to Intervene / Motion to Strike Response* ("SWC's Opposition").

On January 11, 2023, the SWC filed *Surface Water Coalition's Reply in Support of Summary Judgment Motion* ("SWC's Reply").

On January 17, 2023, BJGWD filed *BJGWD's Reply and Objection to SWC's Opposition to Bonneville-Jefferson Ground Water District's Motion to Intervene / Motion to Strike*.

On January 25, 2023, IGWA's counsel of record filed a *Notice of Conditional Withdrawal of Representation of Bonneville-Jefferson Ground Water District*.

#### **APPLICABLE LAW**

The Department's Rules of Procedure, IDAPA 37.01.01, govern the pending motions 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 37.01.01.230.03. Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). The moving party bears the burden of proving the absence of a material fact. *Sadid v. Idaho State University*, 151 Idaho 932, 938, 265 P.3d 1144, 1150 (2011); see also I.R.C.P. 56(c). Evidence and inferences must be liberally construed in favor of the non-moving party. *Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S.*, 159 Idaho 679, 685, 365 P.3d 1033, 1040 (2016).

Rules of Procedure 350 through 353 govern petitions to intervene. "A person who is not already a party to a contested case and who has a direct and substantial interest in the proceeding may petition for an order granting intervention as a party to a contested case" IDAPA 37.01.01.350. "Petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, or by the date of the initial prehearing conference, whichever is earlier . . . ." IDAPA 37.01.01.352. "If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a contested case and does not unduly broaden the issues, the agency shall grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties." IDAPA 37.01.01.353.01. The

agency may, however, grant an untimely petition “for good cause” or conditionally grant an untimely petition “to prevent undue broadening of the issues, or for other reasons.” IDAPA 37.01.01.353.02.

## ANALYSIS

### 1. SWC’s Motion for Summary Judgment.

In the Compliance Order, the Director concluded certain IGWA members breached the Mitigation Plan, that senior surface water right holders were materially injured by the breach, and that IGWA should implement the remedy agreed to in its September 7, 2022 *Settlement Agreement* with the SWC. *Compliance Order* at 13–16.

The SWC contends summary judgment is proper because no material facts are in dispute. *SWC Memorandum* at 5. The SWC further contends IGWA’s requested hearing is overly burdensome, pointless, and should be vacated. *SWC’s Reply* at 5–6. The SWC concedes, however, that it has not requested summary judgment on the ultimate issue of whether IGWA was in breach. *Id.* at 14. Meanwhile, IGWA asserts there are genuine issues of material fact and that an evidentiary hearing is necessary. *IGWA’s Response* at 3. IGWA further contends the Director erred in issuing the Compliance Order and should therefore withdraw it. *Id.* at 10.

The Director has reviewed the briefings and concludes that the motion for summary judgment should be denied. IGWA should be allowed to make its case to the Director. Moreover, the SWC erroneously frames the issue as solely a contract interpretation inquiry. *See SWC Memorandum* at 10. Whether the Director erred requires more than interpreting the Mitigation Plan. As the district court recently observed, “this is not a situation involving the Director interpreting an independent contract between the parties outside the scope of his authority.” Order Granting Mot. to Dismiss at 7–8, *IGWA v. Idaho Dep’t of Water Res.*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho Dec. 8, 2022). Rather, this matter involves compliance with “an ongoing mitigation plan under the umbrella of an active delivery call.” *Id.* at 7. The Director finds it appropriate to evaluate the Compliance Order based on a fully developed evidentiary record. Accordingly, the SWC’s motion for summary judgment should be denied.

### 2. BJGWD’s Petition to Intervene.

BJGWD requests intervention “to preserve and not waive certain legal arguments and defenses not raised in IGWA’s Response Brief.” *BJGWD’s Petition* at 1–2. More specifically, BJGWD seeks to raise a variety of breach of contract defenses, including unjust enrichment, legal impracticality, unclean hands, and lack of damages. *BJGWD’s Response* at 3–8. The SWC articulates a variety of reasons BJGWD’s request to intervene should be denied, most notably that BJGWD is already a party and its Petition is both untimely and meritless. *SWC’s Opposition* at 4–6.

IDAPA 37.01.01.002.12 defines a “party” as “[e]ach person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, including an applicant, petitioner, respondent, protestant or intervenor.” BJGWD is a member of IGWA, but not a named or admitted party.

Here, the Director agrees BJGWD has a substantial interest in the proceeding because it is a signatory to the Mitigation Plan. In light of the *Notice of Conditional Withdrawal of Representation of Bonneville-Jefferson Ground Water District* filed by IGWA’s counsel of record, the Director further concludes BJGWD’s interests are not adequately represented. However, IDAPA 37.01.01.352 states that “[p]etitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, or by the date of the initial prehearing conference, whichever is earlier . . . .” The prehearing conference was held on November 10, 2022. BJGWD filed its petition to intervene on January 4, 2023, rendering it untimely.

The untimeliness of BJGWD’s Petition is a pivotal factor because the 2023 irrigation season is fast approaching, and all parties have previously expressed a desire for an expeditious resolution. Therefore, pursuant to IDAPA 37.01.01.353.02, the Director will grant BJGWD’s Petition on the condition that it may not broaden the issues beyond those presented by the existing parties on or before January 4, 2023. Therefore, BJGWD may not, for example, argue the breach of contract defenses referenced in BJGWD’s Response, including unjust enrichment, legal impracticality, unclean hands, and lack of damages. Doing so would unduly broaden the issues at this stage of the proceeding. Additionally, as noted above, this is not a mere contract dispute between independent parties. The parties’ dispute over the Mitigation Plan touches on “final order[s] of the Director issued in accordance with the CM Rules. The final order[s] approve[] an ongoing mitigation plan under the umbrella of an active delivery call.” Order Granting Mot. to Dismiss at 7–8, *IGWA v. Idaho Dep’t of Water Res.*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho Dec. 8, 2022) (citation omitted).

## ORDER

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

(1) The *Motion for Summary Judgment* filed by the Surface Water Coalition is hereby DENIED.

(2) The *Petition to Intervene* filed by the Bonneville-Jefferson Ground Water District is hereby GRANTED, subject to the conditions and limitation addressed above. BJGWD is bound by all previous orders and notices previously entered in this matter pursuant to IDAPA 37.01.01.351.03.

DATED this 27<sup>th</sup> day of January 2023.

  
GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

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ORDER DENYING SWC'S MOTION FOR SUMMARY JUDGMENT & CONDITIONALLY GRANTING BJGWD'S PETITION TO INTERVENE—Page 5

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ORDER DENYING SWC'S MOTION FOR SUMMARY JUDGMENT & CONDITIONALLY GRANTING BJGWD'S PETITION TO INTERVENE—Page 6

RECEIVED

Feb 03, 2023

DEPARTMENT OF  
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**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

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

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

Docket No. CM-DC-2010-001

Docket No. CM-MP-2016-001

**BJGWD'S WITNESS AND EXHIBIT  
LIST**

The Bonneville-Jefferson Ground Water District (hereafter "BJGWD") hereby provides  
the following witness and exhibit list.

BJGWD intends to call the following witnesses:

- Stephanie Mickelsen: Chair of the BJGWD Board.
- Kirk Schwieder: BJGWD Board Member.

- Alan Jackson: District Manager for the Bingham Ground Water District.

BJGWD intends to utilize any exhibit or witness offered by the parties in this case. BJGWD reserves the right to utilize non-disclosed witnesses and exhibits at any time for rebuttal, cross-examination, and illustrative purposes.

DATED: February 3, 2023

OLSEN TAGGART PLLC

/s/ *Skyler C. Johns*

SKYLER C. JOHNS

## CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 2023, I served the foregoing document on the persons below via email as indicated:

/s/ Skyler C. Johns

Gary Spackman, Director Garrick Baxter, Deputy Attorney General IDAHO DEPT. OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098	<a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a> <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a>
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Feb 03, 2023

DEPARTMENT OF  
WATER RESOURCES

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## STATE OF IDAHO

## DEPARTMENT OF WATER RESOURCES

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

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

**IGWA's Witness and  
 Exhibit Disclosure**

IN THE MATTER OF IGWA'S SETTLEMENT  
 AGREEMENT MITIGATION PLAN

Idaho Ground Water Appropriators, Inc., ("IGWA"), acting for and on behalf of North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry's Fork Ground Water District, submits the following witness and exhibit lists pursuant to the *Witness and Exhibit Disclosure Stipulation* filed January 26, 2023, in this matter.

## WITNESSES

1. Jaxon Higgs
2. Tim Deeg

Counsel for IGWA and the SWC have stipulated that Mr. Higgs and Mr. Deeg may testify on behalf of IGWA and its member ground water districts collectively. Therefore, IGWA does not anticipate calling other witnesses. However, IGWA reserves the right to call the

following witnesses if needed:

3. Mat Weaver
4. Wayne Jensen
5. Craig Evans
6. Leta Hansen
7. Kirk Jacobs
8. Jeff Raybould
9. Jason Webster
10. Dean Stevenson
11. Lynn Carlquist
12. Randy Brown
13. Any witness disclosed by any other party
14. Any witness needed to authenticate any exhibit

### **EXHIBITS**


Enclosed herewith are two exhibits lists. The “Common Exhibits” list is submitted jointly by IGWA and the SWC. The “IGWA Exhibits” list is submitted by IGWA.

DATED this 3<sup>rd</sup> day of February, 2023.

RACINE OLSON, PLLP

By:   
Thomas J. Budge  
*Attorneys for IGWA*

I hereby certify that on this 26<sup>th</sup> day of January, 2023, I served the foregoing document on the persons below via email as indicated:

  
Thomas J. Budge

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<b>Common Hearing Exhibits</b>			
<b>#</b>	<b>Description</b>	<b>Authenticity</b>	<b>Admissibility</b>
01	20150630 IGWA-SWC Settlement Agreement	Stipped	Stipped
02	20151014 Addendum to Settlement Agreement	Stipped	Stipped
03	20161214 Second Addendum to Settlement Agreement	Stipped	Stipped
04	20151007 A&B Agreement	Stipped	Stipped
05	20160309 SWCs and IGWAs Stipulation Mitigation Plan and Request for Order	Stipped	Stipped
06	20160422 Motion for Order Approving Stipulation	Stipped	Stipped
07	20170207 Stipulation Amended Mitigation Plan and Request for Order	Stipped	Stipped
08	20220726 Notice of Status Conference	Stipped	Stipped
09	20220721 SWC's Notice of Steering Impasse – Request of Status Conference	Stipped	Stipped
10	20220803 IGWA's Response to SWC Notice of Steering Impasse	Stipped	Stipped
11	20220812 IGWA's Supplemental Response to SWC Notice of Steering Impasse	Stipped	Stipped
12	20220818 Notice of Intent to Take Official Notice	Stipped	Stipped
13	20220823 IGWA Objection to Notice of Intent to Take Official Notice	Stipped	Stipped
14	20220908 Final Order Re Compliance with Approved Mitigation Plan	Stipped	Stipped
15	20170331 Districts Settlement Agreement Implementation Report	Stipped	Stipped
16	20180330 Districts 2017 Settlement Agreement Performance Report	Stipped	Stipped
17	20190401 Districts 2018 Settlement Agreement Performance Report – 1	Stipped	Stipped
18	20200401 Districts 2019 Settlement Agreement Performance Report1 – FINAL	Stipped	Stipped
19	20210401 Districts 2020 Settlement Agreement Performance Report	Stipped	Stipped
20	20220401 IGWA Performance Report	Stipped	Stipped
21	2022 Settlement Performance Report Recharge Documentation 20220401	Stipped	Stipped
22	20170401 Settlement Agreement Performance Report v5	Stipped	Stipped
23	20180330 Settlement Agreement Performance Report Spreadsheet	Stipped	Stipped
24	20190401 Settlement Agreement Performance Report Spreadsheet1	Stipped	Stipped
25	2020 Settlement Agreement Performance Spreadsheet 20200326	Stipped	Stipped
26	2021 Settlement Agreement Performance Spreadsheet 20210330	Stipped	Stipped
27	2022 Settlement Performance Report Spreadsheet 20220401	Stipped	Stipped
28	IDWR review of Cities 2021 Performance Report	Stipped	Stipped
29	IDWR review of IGWA 2016 Progress Report_FINAL	Stipped	Stipped
30	IDWR review of IGWA 2017 Performance Report_v1	Stipped	Stipped
31	IDWR review of IGWA 2018 Performance Report (1)	Stipped	Stipped
32	IDWR review of IGWA 2018 Performance Report	Stipped	Stipped
33	IDWR review of IGWA 2019 Performance Report	Stipped	Stipped
34	IDWR review of IGWA 2020 Performance Report	Stipped	Stipped
35	IDWR review of IGWA 2021 Performance Report	Stipped	Stipped

<b>IGWA's Hearing Exhibits</b>			
<b>#</b>	<b>Description</b>	<b>Authenticity</b>	<b>Admissibility</b>
<b>101</b>	20150528 Weaver Presentation	Stipped	
<b>102</b>	20150702 Q&A from Legal Counsel to IGWA	Stipped	
<b>103</b>	20150707 Letter from Legal Counsel to IGWA	Stipped	
<b>104</b>	20150715 District Meeting Schedule Re SWC-IGWA Settlement Agreement	Stipped	
<b>105</b>	20150729 (Bingham) Special Meeting Notice	Stipped	
<b>106</b>	20150731 Letter from SWC to IDWR	Stipped	
<b>107</b>	20150804 Higgs Presentation to IGWA Board	Stipped	
<b>108</b>	20150923 Higgs Presentation to IGWA Board	Stipped	
<b>109</b>	20150923 Term Sheet Implementation Agenda	Stipped	
<b>110</b>	20151006 Higgs Preliminary Usage 2	Stipped	
<b>111</b>	20151107 Higgs TWG Presentation to IGWA Board	Stipped	
<b>112</b>	20160104 (Magic Valley) MV 5 yr Summary Letter Final 1-4-16	Stipped	
<b>113</b>	20160608 Letter from Randy Budge to SWC Attorneys	Stipped	
<b>114</b>	20161103 Final Allocation 2016	Stipped	
<b>115</b>	20161115 (Magic Valley) Membership Meeting HIGGS crated 11-15-2016	Stipped	
<b>116</b>	20170331 District 2016 Settlement Agreement Implementation Report	Stipped	Stipped
<b>117</b>	20171215 SWID Mitigation Agreement	Stipped	Stipped
<b>118</b>	240k AF Annual Conservation	Stipped	
<b>119</b>	Baseline Option Example	Stipped	
<b>120</b>	Fixed Diversion Cap Chart	Stipped	
<b>121</b>	Mitigation Balance (2021) Five Year Average Chart		
<b>122</b>	Palmer Drought Severity Index 2010-2021		

Feb 06, 2023

DEPARTMENT OF  
WATER RESOURCES

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

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

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

IN THE MATTER OF IGWA'S )  
SETTLEMENT AGREEMENT )  
MITIGATION PLAN )

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

**NOTICE OF SERVICE OF  
SURFACE WATER COALITION'S  
WITNESS AND EXHIBIT LIST**



TO: HEARING OFFICER / PARTIES' COUNSEL OF RECORD

COME NOW, A&B IRRIGATION DISTRICT ET AL. (collectively "Surface Water Coalition"), by and through its counsel of record, BARKER ROSHOLT & SIMPSON LLP and FLETCHER LAW OFFICE and pursuant to the *Witness and Exhibit Disclosure Stipulation* hereby provides the following list of witnesses and exhibits that may be called and offered at the hearing in the above-referenced matter:

**Witnesses:**

Any witness called by IDWR or any other party to this matter

Mat Weaver – IDWR

Brian Olmstead

SWC further reserves the right to call rebuttal witnesses as necessary.

**Exhibits:**

Any exhibits offered by IDWR or any other party to this contested case that are admitted into evidence. All common exhibits identified on IGWA's list, plus the following:

T. Thompson Letter to R. Budge (4/14/17)

R. Budge Letter to T. Thompson (4/20/17))

SWC further reserves the right to offer rebuttal exhibits as necessary.

DATED this 4<sup>th</sup> day of February, 2023.

**BARKER ROSHOLT & SIMPSON LLP**

**FLETCHER LAW OFFICE**

/S/ TRAVIS L. THOMPSON  
Travis L. Thompson  
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Burley Irrigation District, Milner Irrigation  
District, NSCC and TFCC*

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

**SWC WITNESS / EXHIBIT LIST**

**2**

## CERTIFICATE OF SERVICE

I hereby certify that on this 4<sup>th</sup> day of February 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

<p>Director Gary Spackman Garrick Baxter Sarah Tschohl Idaho Dept. of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a> <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a></p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only  <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a> <a href="mailto:emcgarry@usbr.gov">emcgarry@usbr.gov</a></p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only  <a href="mailto:tony.olenichak@idwr.idaho.gov">tony.olenichak@idwr.idaho.gov</a></p>
<p>T.J. Budge Elisheva M. Patterson Racine Olson, PLLP P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only <a href="mailto:tj@racineolson.com">tj@racineolson.com</a> <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a></p>	<p>Sarah A. Klahn Dylan Thompson Somach Simmons &amp; Dunn 2033 11<sup>th</sup> Street, Ste. 5 Boulder, CO 80302 *** service by electronic mail only  <a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>	<p>David Gehlert ENRD – DOJ 999 18<sup>th</sup> St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only  <a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>	<p>Robert E. Williams Williams, Meservy &amp; Larsen LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only  <a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>	<p>Corey Skinner IDWR – Southern Region 650 Addison Ave. W., Ste. 500 Twin Falls, ID 83301 *** service by electronic mail only  <a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>
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---	--	--

/s/ Travis L. Thompson  
Travis L. Thompson

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

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

Docket No. CM-MP-2016-001

**AMENDED FINAL ORDER  
REGARDING COMPLIANCE  
WITH APPROVED MITIGATION  
PLAN**

IN THE MATTER OF IGWA’S SETTLEMENT  
AGREEMENT MITIGATION PLAN

This order resolves a dispute over the requirements of an approved mitigation plan in the above-captioned matter. This order amends and replaces the *Final Order Regarding Compliance with Approved Mitigation Plan* issued on September 8, 2022. In this order, the Director concludes that the Idaho Ground Water Appropriators, Inc.’s approved mitigation plan unambiguously requires it to reduce its ground water diversions by 240,000 acre-feet (“ac-ft”) each year—meaning that averaging is prohibited. The Director also concludes that the Idaho Ground Water Appropriators, Inc.’s mitigation plan unambiguously prohibits it from apportioning A&B Irrigation District or Southwest Irrigation District a percentage of its annual reduction obligation.<sup>1</sup>

**BACKGROUND**

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

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

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<sup>1</sup> The parties also refer to the annual reduction obligation as a “conservation obligation” because the parties have agreed to count certain recharge activities towards IGWA’s diversion reduction obligation. In this order, reduction obligation is synonymous with conservation obligation.

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

<sup>3</sup> For purposes of this order, references to IGWA include only the following eight ground water districts and one irrigation district, which are the signatories to the Mitigation Plan: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Fremont Madison Irrigation District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc. (“SWC-IGWA Agreement”).

In October of 2015, the SWC and IGWA entered into an *Addendum to Settlement Agreement* (“First Addendum”). Also, in October of 2015, the A&B Irrigation District (“A&B”) and IGWA entered into a separate agreement (“A&B-IGWA Agreement”).

On March 9, 2016, the SWC and IGWA submitted the *Surface Water Coalition’s and IGWA’s Stipulated Mitigation Plan and Request for Order* (“Request for Order”) to the Director of the Idaho Department of Water Resources (“Department”). Attached to the Request for Order as Exhibits B, C, and D were the SWC-IGWA Agreement, the First Addendum, and the A&B-IGWA Agreement. These documents were submitted as a stipulated mitigation plan in response to the SWC’s delivery call (Docket No. CM-DC-2010-001). *Request for Order* at 3.

In the SWC-IGWA Agreement, the SWC and IGWA members agreed, among other things, that “[t]otal ground water diversion shall be reduced by 240,000 ac-ft annually.” *SWC-IGWA Agreement* § 3.a.i. The SWC and IGWA also stipulated “that the mitigation provided by participating IGWA members under the [2015] Agreements is, provided the [2015] Agreements are implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member.” *Request for Order* ¶ 8. The SWC and IGWA agreed “[n]o ground water user participating in this [SWC-IGWA] Agreement will be subject to a delivery call by the SWC members as long as the provisions of the [SWC-IGWA] Agreement are being implemented.” *SWC-IGWA Agreement* § 5.

On May 2, 2016, the Director issued the *Final Order Approving Stipulated Mitigation Plan* (“Order Approving Mitigation Plan”), which approved the parties’ mitigation plan subject to conditions including the following: “a. All ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan.”; and “b. The ground water level goal and benchmarks referenced in the Mitigation Plan are applicable only to the parties to the Mitigation Plan.” *Order Approving Mitigation Plan* at 4.

On December 14, 2016, the SWC and IGWA entered into the *Second Addendum to Settlement Agreement* (“Second Addendum”). The *Second Addendum* amended the *SWC-IGWA Agreement* by providing additional details concerning the implementation of certain sections, most notably sections 3.a (Consumptive Use Volume Reduction); 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a. (Adaptive Water Management). *Compare SWC-IGWA Agreement* §§ 3–4, with *Second Addendum* § 2. The *Second Addendum* also articulated the process by which the Steering Committee would address alleged breaches and further advised that if the parties couldn’t agree whether a breach had occurred, the Director was tasked with resolving the dispute and fashioning a remedy. *Second Addendum* § 2.c.iii-iv.

On February 7, 2017, the SWC and IGWA submitted the *Surface Water Coalition’s and IGWA’s Stipulated Amended Mitigation Plan and Request for Order* (“Second Request for

Order”). The SWC and IGWA requested that the Director issue an order approving the Second Addendum as an amendment to the mitigation plan. *Second Request for Order* ¶ 6.

On May 9, 2017, the Director issued the *Final Order Approving Amendment to Stipulated Mitigation Plan* (“Order Approving Amendment to Mitigation Plan”), approving the Second Addendum as an amendment to the parties’ mitigation plan subject to the following conditions:

- a. While the Department will exert its best efforts to support the activities of IGWA and the SWC, approval of the Second Addendum does not obligate the Department to undertake any particular action.
- b. Approval of the Second Addendum does not limit the Director’s enforcement discretion or otherwise commit the Director to a particular enforcement approach.

*Order Approving Amendment to Mitigation Plan* at 5.

During the 2021 irrigation season, IGWA’s obligations were set forth in six documents, collectively referred to herein as the “Mitigation Plan,” which were admitted by stipulation at the hearing held February 8, 2023:

- (1) the SWC-IGWA Agreement (Exhibit 1);
- (2) the A&B-IGWA Agreement (Exhibit 4);
- (3) the First Addendum (Exhibit 2);
- (4) the Order Approving Mitigation Plan (Exhibit 36);
- (5) the Second Addendum (Exhibit 3); and
- (6) the Order Approving Amendment to Mitigation Plan (Exhibit 37).<sup>4</sup>

## **B. IGWA’s 2021 breach of the Mitigation Plan.**

On April 1, 2022, IGWA’s counsel sent *IGWA’s 2021 Performance Report* to representatives of the SWC and the Department.

On May 18, June 27, and July 13, 2022, the joint SWC/IGWA steering committee referenced in the SWC-IGWA Agreement, and the Second Addendum met to review technical information, including *IGWA’s 2021 Performance Report*.

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<sup>4</sup> Rule 43.02 of the Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11) (“CM Rules”) states that upon receiving a proposed mitigation plan the Director will “consider the plan under the procedural provisions of Section 42-222, Idaho Code . . . .” Idaho Code § 42-222 states that the Director shall “examine all the evidence and available information and shall approve the change in whole, or in part, or *upon conditions*, provided no other water rights are injured thereby. . . .” (emphasis added). Accordingly, the Director can approve a mitigation plan “upon conditions.” The Director imposed conditions of approval in his Order Approving Mitigation Plan and Order Approving Amendment to Mitigation Plan and those conditions became part of the Mitigation Plan.

On July 21, 2022, the SWC filed *Surface Water Coalition's Notice of Steering Committee Impasse / Request for Status Conference* ("Notice"). In the Notice, the SWC alleged IGWA's members failed to reduce total ground water diversions by 240,000 ac-ft in 2021 as mandated under the Mitigation Plan. *Notice* at 2–3. The SWC further advised that the allegations of noncompliance were reviewed by the steering committee as required by the Mitigation Plan, that the SWC and IGWA disagreed on whether there was a breach, and that the Steering Committee was at an impasse. *Id.* at 3–4.

On July 26, 2022, the Director granted the SWC's request for a status conference and scheduled the status conference for August 5, 2022.

On August 3, 2022, IGWA filed *IGWA's Response to Surface Water Coalition's Notice of Impasse* ("Response"). In the Response, IGWA argued there was no breach in 2021 because each IGWA member met its proportionate share of the 240,000 ac-ft. reduction obligation. *Response* at 4–5. This conclusion, however, was based on IGWA's contention that the annual reduction obligation was measured on a five-year rolling average and that A&B and Southwest Irrigation District ("Southwest") were each responsible for a portion of the 240,000 ac-ft. reduction. *Id.*

On August 4, 2022, the SWC filed the *Surface Water Coalition's Reply to IGWA's Response* ("Reply"). In the Reply, the SWC argued IGWA's arguments had "no support in the actual [SWC-IGWA] Agreement and should be rejected on their face." *Reply* at 2. The SWC argued that non-parties, such as A&B and Southwest, were not responsible for any portion of the 240,000 ac-ft. reduction, and that the 240,000 ac-ft. reduction obligation was an annual requirement—not based on a five-year rolling average. *Id.* at 3–5.

On August 5, 2022, the Director held a status conference and advised the parties that, in the event of a breach, section 2.c.iv of the *Second Addendum* required him to "issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment." The Director initiated a discussion with counsel for the parties regarding possible curative remedies should the Director find a breach. The only concrete proposal, suggested by an attorney for the SWC, was an increase in diversion reduction in 2022 equal to the 2021 deficiency.

On August 12, 2022, IGWA filed *IGWA's Supplemental Response to Surface Water Coalition's Notice of Steering Committee Impasse* ("Supplemental Response"). In addition to expanding IGWA's five-year-rolling-average argument, the Supplemental Response raised two new procedural arguments. First, IGWA argued the Director should not act on the SWC's Notice until the SWC files a motion under the Department's rules of procedure. *Supplemental Response* at 2–3. Second, IGWA argued that, if the Director finds a breach of the Mitigation Plan, he must provide the breaching party with 90 days' notice and an opportunity to cure. *Id.* at 8–9.

### C. Stipulated Remedy.

On September 7, 2022, the SWC and IGWA executed another settlement agreement (“Remedy Agreement”). The Remedy Agreement addressed the breach alleged in the SWC’s notice and sought to ensure that “the Director d[id] not curtail certain IGWA members during the 2022 irrigation season.” *Remedy Agreement* ¶ E. To accomplish this, the parties stipulated:

**2021 Remedy.** As a compromise to resolve the parties’ dispute over IGWA’s compliance with the [SWC-IGWA] Agreement and Mitigation Plan in 2021, and not as an admission of liability, IGWA will collectively provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year. Such amounts will be in addition to the long-term obligations set forth in section 3 of the [SWC-IGWA] Agreement and approved Mitigation Plan. IGWA agrees to take all reasonable steps to lease the quantities of storage water set forth above from non-SWC spaceholders. If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA will make up the difference by either (a) leasing storage water from the SWC as described in section 2, or (b) undertaking diversion reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River. For example, if by April 1, 2023, IGWA has secured contracts for only 25,000 acre-feet of storage water, IGWA will either (a) lease 5,000 acre-feet of storage from the SWC, or (b) undertake 5,000 acre-feet of diversion reductions. The remedy described in this section shall satisfy IGWA’s obligation under the [SWC-IGWA] Agreement for 2021 only.

*Id.* § 1. The SWC and IGWA agreed to submit the Remedy Agreement to the Director “as a stipulated plan to remedy the alleged shortfall regarding IGWA’s 2021 groundwater reduction obligation as set forth in the SWC Notice.” *Id.* § 3. The Remedy Agreement contemplates that the Director will incorporate the terms of the 2021 remedy provision “as the remedy selected for the alleged shortfall in lieu of curtailment, and shall issue a final order regarding the interpretive issues raised by the SWC Notice.” *Id.* Additionally, both parties waived their right to appeal the stipulated remedy. *Id.*

On September 8, 2022, the Director issued a *Final Order Regarding Compliance with Approved Mitigation Plan* (“Compliance Order”), wherein the Director concluded that certain IGWA members breached the Mitigation Plan during the 2021 irrigation season and approved the parties’ Remedy Agreement as an appropriate contingency in lieu of curtailment for the breach. *Compliance Order* at 13–16.

### D. Post Compliance Order Filings.

On September 22, 2022, IGWA timely filed a *Petition for Reconsideration and Request for Hearing* requesting that the Director amend the Compliance Order to “withdraw those parts . . . that adjudicate IGWA’s contractual obligations under the [SWC-IGWA] Agreement . . .” or



in the alternative, set the matter for a merits hearing. *IGWA's Pet. for Reconsideration and Hearing* at 7.<sup>5</sup>

On October 13, 2022, the Director issued an order granting IGWA's request for a hearing. *Order Grant'g Req. for Hr'g; Notice of Prehr'g Conf.* at 1–2. The Director concluded IGWA's petition for reconsideration was moot since the Director was granting IGWA's request for a hearing. *Id.* at 2. The Director also set a prehearing conference for November 10, 2022. *Id.*

The prehearing conference was held as scheduled on November 10, 2022. On December 7, 2022, the Director issued an order scheduling a three-day hearing for February 8–10, 2023. *Order Authorizing Disc.; Notice of Hr'g* at 1–2.

On November 30, 2022, the Director issued the *Final Order Establishing 2022 Reasonable Carryover (Methodology Step 9)* (“2022 Step 9 Order”) in the SWC delivery call matter (Docket No. CM-DC-2010-001). The 2022 Step 9 Order gave ground water users 14 days to establish their ability to mitigate for their proportionate share of the reasonable carryover shortfall. *2022 Step 9 Order* at 6. On December 14, 2022, the Director issued the *Final Order Curtailing Ground Water Rights Junior to May 31, 1989* (“2022 Curtailment Order”). The 2022 Curtailment Order curtailed ground water users junior to May 31, 1989, who failed to establish their ability to mitigate for their share of the reasonable carryover shortfall. *2022 Curtailment Order* at 3. This curtailment order remains in place today.

On December 21, 2022, the SWC filed a *Motion for Summary Judgment* and a *Memorandum in Support of Motion for Summary Judgment* (“SWC Memorandum”). The SWC argued an evidentiary hearing was unnecessary and further argued the Director should grant summary judgment because no material facts were in dispute. *SWC Memorandum* at 5. The SWC framed the issue solely as a contract interpretation inquiry. *Id.* at 10.

On January 4, 2023, IGWA filed its *Response in Opposition to SWC's Motion for Summary Judgment* (“Response to SWC Motion”). IGWA argued a hearing was required because the *SWC-IGWA Agreement* was ambiguous and that it was entitled to a hearing pursuant to Idaho Code § 42-1701(A)(3). *Response to SWC Motion* at 11.

Also on January 4, 2023, the Bonneville-Jefferson Ground Water District (“BJGWD”) filed a *Petition to Intervene* (“BJGWD's Petition”) and a *Response in Opposition to SWC's Motion for Summary Judgment* (“BJGWD's Response to SWC Motion”). BJGWD requested intervention “to preserve and not waive certain legal arguments and defenses not raised in IGWA's Response Brief.” *BJGWD's Petition* at 1–2. More specifically, BJGWD sought intervention to raise a variety of breach of contract defenses, including unjust enrichment, legal impracticality, unclean hands, and lack of damages. *BJGWD's Response to SWC Motion* at 3–8.

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<sup>5</sup> In addition to requesting a hearing with the Department, on October 24, 2022, IGWA also filed a *Petition for Judicial Review* on October 24, 2022. See *IGWA v. Idaho Dep't of Water Res.*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho). The district court dismissed IGWA's petition for lack of jurisdiction on December 8, 2022.

On January 9, 2023, the SWC filed its *Opposition to Bonneville-Jefferson Ground Water District's Motion to Intervene / Motion to Strike Response*.

On January 11, 2023, the SWC filed its *Reply in Support of Summary Judgment Motion*.

On January 17, 2023, BJGWD filed its *Reply and Objection to SWC's Opposition to Bonneville-Jefferson Ground Water District's Motion to Intervene / Motion to Strike*.

On January 25, 2023, IGWA's counsel of record filed a *Notice of Conditional Withdrawal of Representation of Bonneville-Jefferson Ground Water District*.

On January 27, 2023, the Director issued an *Order Denying SWC's Motion for Summary Judgement & Conditionally Granting BJGWD's Petition to Intervene*.

#### **E. Hearing on February 8, 2023.**

The hearing IGWA requested began on February 8, 2023. The hearing was scheduled for three days but took only one. Thirty-nine common exhibits were admitted by stipulation (Exhibits 1–39).<sup>6</sup> IGWA introduced seven additional exhibits, marked as Exhibits 101, 107, 109, 114, 118, 119, and 120. The SWC introduced two exhibits, marked as Exhibits 200 and 201. IGWA called two witnesses, Jaxon Higgs and Timothy Deeg. Mr. Higgs is a professional geologist, has a master's degree in hydrology, and is a consultant for IGWA. Mr. Deeg was the Chairman of IGWA's Board for over twenty years. Mr. Deeg is also the Director of the Aberdeen-American Falls Groundwater District.

Neither the SWC nor BJGWD called any witnesses. At the conclusion of the hearing, BJGWD moved to adopt IGWA's arguments. All parties waived post-hearing briefing.

### **FINDINGS OF FACT**

1. The SWC-IGWA Agreement mandates that “[t]otal ground water diversions shall be reduced by 240,000 ac-ft annually.” *SWC-IGWA Agreement* § 3.a.i.

2. All members of the SWC except for A&B Irrigation District executed the SWC-IGWA Agreement. *A&B-IGWA Agreement* at 1.

3. The A&B-IGWA Agreement states in pertinent part that “A&B agrees to participate in the [SWC-IGWA] Agreement as a surface water right holder only. The obligations of Ground Water Districts set forth in Paragraphs 2-4 of the [IGWA-SWC] Settlement Agreement do not apply to A&B and its ground water rights.” *A&B-IGWA Agreement* ¶ 2.

4. Southwest Irrigation District (“Southwest”) did not sign the SWC-IGWA Agreement or any of the subsequent addendums. *SWC-IGWA Agreement* at 25.

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<sup>6</sup> Among these were IGWA's 2021 Performance Report (Exhibit 20) and summation of IGWA's 2021 Report (Exhibit 27).

5. The Order Approving Mitigation Plan approved the SWC-IGWA Agreement as a mitigation plan subject to the following conditions:

- a. All ongoing activities required pursuant to the Mitigation Plan *are the responsibility of the parties to the Mitigation Plan*.
- b. The ground water level goal and benchmarks referenced in the Mitigation Plan *are applicable only to the parties to the Mitigation Plan*.

*Order Approving Mitigation Plan* at 4 (emphasis added).

6. No party sought judicial review of the Order Approving Mitigation Plan.

7. The Second Addendum articulates the process by which the Steering Committee is to address alleged breaches, and further states that, if the parties cannot agree whether a breach had occurred, the Director is tasked with resolving the dispute and fashioning a remedy. *Second Addendum* § 2.c.iii-iv.

8. Section 2.a.i. of the Second Addendum required IGWA to annually submit to the Steering Committee its diversion and recharge data from the previous irrigation season. IGWA submitted the data each year from 2016 through 2021. *Compare id.* § 2.a.i., with IGWA’s Performance Reports [2016-2021], Exs. 15–20.

9. The Order Approving Amendment to Mitigation Plan approved the Second Addendum as an amendment to the parties’ mitigation plan subject to the following conditions:

- a. While the Department will exert its best efforts to support the activities of IGWA and the SWC, approval of the Second Addendum does not obligate the Department to undertake any particular action.
- b. Approval of the Second Addendum does not limit the Director’s enforcement discretion or otherwise commit the Director to a particular enforcement approach.

*Order Approving Amendment to Mitigation Plan* at 5.

10. The *Second Final Order* further states that “[t]he parties to the Mitigation Plan should be responsible for these activities and *the ground water level goal and benchmarks are only applicable to the parties to the Mitigation Plan as specified in the Mitigation Plan*.” *Id.* at 4 (emphasis added).

11. No party sought judicial review of the Second Final Order.

12. On April 1, 2022, IGWA’s sent its 2021 Performance Report to the SWC and the Department. IGWA’s 2021 Performance Reports, Ex. 20.

13. A spreadsheet included in the 2021 Performance Report summarizes IGWA's, A&B's, and Southwest's mitigation efforts during 2020. 2020 Performance Summary Table, Ex. 26. IGWA's summary spreadsheet is reproduced as Table 1 below. Important to the Director's consideration here, IGWA apportioned A&B and Southwest a share of the 240,000 ac-ft reduction obligation.

**Table 1:**

<b>2021 Performance Summary Table</b>							
	<b>Target Conservation</b>	<b>Baseline</b>	<b>2021 Usage</b>	<b>Diversion Reduction</b>	<b>Accomplished Recharge</b>	<b>Total Conservation</b>	<b>2021 Mitigation Balance</b>
American Falls-Aberdeen	33,715	286,448	291,929	-5,481	20,050	14,569	-19,146
Bingham	35,015	277,011	302,020	-25,009	9,973	-15,036	-50,052
Bonneville-Jefferson	18,264	156,287	158,212	-1,925	5,080	3,155	-15,109
Carey	703	5,671	4,336	1,335	0	1,335	632
Jefferson-Clark	54,373	441,987	405,131	36,856	5,881	42,737	-11,636
Henry's Fork <sup>1</sup>	5,391	73,539	65,323	8,216	3,000	15,189	9,798
Madison <sup>2</sup>		81,423	77,449	3,973			
Magic Valley	32,462	256,270	231,474	24,795	10,546	35,341	2,879
North Snake <sup>3</sup>	25,474	208,970	194,778	14,192	11,301	25,494	20
A&B <sup>4</sup>	21,660	-	-	-	-	21,660	0
Southwest ID <sup>4</sup>	12,943	-	-	-	-	12,943	0
Total:	<b>240,000</b>	<b>1,787,604</b>	<b>1,730,652</b>	<b>56,953</b>	<b>65,831</b>	<b>157,387</b>	<b>-82,613</b>
<b>Notes:</b>							
(1) Includes mitigation for Freemont- Madison Irrigation District, Madison Ground Water District and WD100. Mitigating by alternative means.							
(2) Madison baseline is preliminary estimate, see note on district breakdown.							
(3) North Snake GWD baseline includes annual average of 21,305 acre-feet of conversions.							
(4) A&B ID and Southwest ID Total Conservation is unknown and assumed to meet target.							

14. Table 2 illustrates IGWA’s 2020 Performance Summary Table with yellow highlighted columns added by the Director. The “Re-proportioning” column in Table 2 redistributes the 34,603 ac-ft IGWA assigned to A&B and Southwest. The yellow highlighted “Target Conservation” column evidences the reduction obligations of each IGWA member after the 34,603 ac-ft were re-proportioned to IGWA members who were parties to the Mitigation Plan.

**Table 2:**

2021 Performance Summary Table											
	IGWA Proportioning	[IGWA] Target Conservation	Re- proportioning	Target Conservation	Baseline	2021 Usage	Diversion Reduction	Accomplished Recharge	Total Conservation	[IGWA] 2021 Mitigation Balance	2021 Mitigation Balance
American Falls-Aberdeen	14.0%	33,715	16.4%	39,395	286,448	291,929	-5,481	20,050	14,569	-19,146	-24,826
Bingham	14.6%	35,015	17.0%	40,914	277,011	302,020	-25,009	9,973	-15,036	-50,052	-55,951
Bonneville-Jefferson	7.6%	18,264	8.9%	21,341	156,287	158,212	-1,925	5,080	3,155	-15,109	-18,185
Carey	0.3%	703	0.3%	821	5,671	4,336	1,335	0	1,335	632	513
Jefferson-Clark	22.7%	54,373	26.5%	63,533	441,987	405,131	36,856	5,881	42,737	-11,636	-20,796
Henry's Fork <sup>1</sup>	2.2%	5,391	2.6%	6,299	73,539	65,323	8,216	3,000	15,189	9,798	8,890
Madison <sup>2</sup>					81,423	77,449	3,973				0
Magic Valley	13.5%	32,462	15.8%	37,931	256,270	231,474	24,795	10,546	35,341	2,879	-2,590
North Snake <sup>3</sup>	10.6%	25,474	12.4%	29,765	208,970	194,778	14,192	11,301	25,494	20	-4,272
A&B <sup>4</sup>	9.0%	21,660	--	--	-	-	-	-	21,660	0	--
Southwest ID <sup>4</sup>	5.4%	12,943	--	--	-	-	-	-	12,943	0	--
Total:	100%	240,000	100%	240,000	1,787,604	1,730,652	56,953	65,831	157,387	-82,613	-117,216
Notes:											
(1) Includes mitigation for Freemont- Madison Irrigation District, Madison Ground Water District and WD100. Mitigating by alternative means.											
(2) Madison baseline is preliminary estimate, see note on district breakdown.											
(3) North Snake GWD baseline includes annual average of 21,305 acre-feet of conversions.											
(4) A&B ID and Southwest ID Total Conservation is unknown and assumed to meet target.											

15. The spreadsheets summarizing IGWA’s performance from 2016 to 2021 do not include diversion reduction data for A&B or Southwest. [2017-2022] Settlement Agreement Performance Report Spreadsheet, Exs. 22–27.

16. Despite the lack of diversion reduction data in its 2022 Performance Report, IGWA nevertheless assigned A&B a reduction target of 21,660 ac-ft and Southwest a reduction target of 12,943 ac-ft—a reduction of 14.4% or 34,603 ac-ft. 2022 Settlement Agreement Performance Report Spreadsheet, Ex. 27; *see also supra* Tables 1 & 2.

17. When A&B and Southwest are collectively apportioned 34,603 ac-ft of IGWA’s conversation obligation, IGWA were 82,613 ac-ft short of its reduction obligation in 2021. 2022 Settlement Agreement Performance Report Spreadsheet, Ex. 27; *see also supra* Tables 1 & 2.

18. When A&B and Southwest are not apportioned 34,603 ac-ft, IGWA were 117,216 ac-ft short of its reduction obligation in 2021. *See supra* Table 2.

19. Based on the analysis in Table 2, American Falls-Aberdeen, Bingham, BJGWD, Jefferson-Clark, Magic Valley, and North Snake failed to satisfy their respective reduction requirements in 2021.

20. Seeking to avoid curtailment, IGWA and the SWC signed and submitted the Remedy Agreement, which requires IGWA to “provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year.” *Remedy Agreement* at 2.

21. The parties affirmatively waived their rights to appeal the stipulated remedy. *Remedy Agreement* ¶3, at 2–3.

22. On February 8, 2023, a hearing was held during which IGWA called two witnesses: Jaxon Higgs, a professional geologist with a master’s degree in hydrology and a IGWA consultant; and Timothy Deeg, who served as chairman of IGWA’s Board for 22 years and is currently IGWA’s Treasurer.

23. Mr. Higgs testified that in addition to IGWA, he also served as a consultant for Southwest.

24. Referencing the SWC-IGWA Agreement, Mr. Higgs admitted that while Southwest was listed as an IGWA member in a footnote, he was aware Southwest had never signed the SWC-IGWA Agreement. *See SWC-IGWA Agreement* at 22.

25. Mr. Higgs testified that Southwest did not sign the SWC-IGWA Agreement because it already had an interim agreement with the SWC and was waiting to finalize a long-term agreement with the SWC once the IGWA-SWC Agreement was finalized.

26. Mr. Higgs testified that Southwest has been performing under the separate agreement it entered with the SWC.

27. Mr. Deeg testified that he was involved in negotiating the SWC-IGWA Agreement but admitted that, with hindsight, the SWC-IGWA Agreement could have been written with greater specificity.

28. Mr. Higgs testified that he was not involved in negotiating the SWC-IGWA Agreement but did assist IGWA in implementing the SWC-IGWA Agreement.

29. Mr. Higgs testified that he began working with IGWA in the summer of 2015, and at that time, IGWA had not yet determined how the SWC-IGWA Agreement’s reduction obligation would be apportioned.

30. Referencing IGWA’s Exhibit 107, Mr. Higgs testified that he presented information to IGWA’s Board in July of 2015 concerning how to apportion the reduction requirements among the various districts, and that during that presentation, he apportioned A&B and Southwest a percentage of the 240,000 ac-ft. *See Ex. 107* at 10.

31. Mr. Higgs also testified that, in September of 2015, the Department presented information to various ground water districts, and at that time, IGWA had not yet determined how to apportion the 240,000 ac-ft reduction. *See Ex. 109* ¶7, at 2.

32. Mr. Higgs testified that he chose to apportion A&B and Southwest a share of the 240,000 ac-ft. because they are ground water pumpers in the ESPA, and he assumed A&B and Southwest were required to contribute to the 240,000 ac-ft reduction obligation.

33. Mr. Higgs conceded, however, that there were other ESPA ground water users, for which he did not apportion a share of the 240,000 ac-ft reduction requirement.

34. Mr. Deeg also testified that it was his opinion the 240,000 would be apportioned among all ESPA groundwater users, not just IGWA members, and that the possibility some ground water users might not be included in the 240,000 ac-ft obligation was a real “sore spot” among some ground water districts.

35. Mr. Higgs also admitted that the SWC-IGWA Agreement did not specifically articulate how the 240,000 ac-ft obligation would be apportioned.

36. Mr. Higgs further conceded that, while he was not tasked with interpreting the SWC-IGWA Agreement, the SWC-IGWA Agreement did not specifically state that IGWA would only be responsible for 205,000 ac-ft of reductions.

37. Mr. Higgs also admitted that the SWC-IGWA Agreement did not specifically authorize averaging.

38. Mr. Deeg likewise testified that the SWC-IGWA Agreement did not specify how the 240,000 ac-ft reduction obligation would be apportioned.

39. Mr. Deeg also testified that while his ground water district (Aberdeen-American Falls) allowed individual users to average their respective reduction requirements over a four-year period, the District itself did not average its yearly reduction obligation.

40. Mr. Higgs also conceded that, to his knowledge, the SWC had never agreed with IGWA’s contention that A&B and Southwest were responsible for a portion of the 240,000 ac-ft reduction obligation.

41. Mr. Higgs admitted knowing that the SWC had repeatedly objected to IGWA’s attempts to assign A&B and Southwest a portion of the 240,000 ac-ft reduction requirement. *See* April 14, 2017 Letter from SWC’s Counsel to IGWA’s counsel, Ex. 200; April 20, 2017 Letter from IGWA’s Counsel to SWC’s Counsel, Ex. 201.

42. Mr. Higgs also conceded he did not adjust his calculations concerning IGWA’s reduction obligations after the Director issued the Order Approving Mitigation Plan; indeed, Mr. Higgs conceded he never read the Director’s Order approving the Mitigation Plan.

43. Neither Mr. Higgs nor Mr. Deeg testified that the Order Approving Mitigation Plan or the Order Approving Amendment to Mitigation Plan were ambiguous or otherwise unclear concerning the apportionment of the 240,000 ac-ft reduction obligation.

## ANALYSIS AND CONCLUSIONS OF LAW

### A. The Mitigation Plan unambiguously requires IGWA to conserve 240,000 ac-ft each year—meaning averaging is prohibited.

The interpretation of a settlement agreement is “governed by the same rules and principles as are applicable to contracts generally.” *Budget Truck Sales, LLC v. Tilley*, 163 Idaho 841, 846, 419 P.3d 1139, 1144 (2018) (internal quotation omitted). The interpretation of a contract starts with the language of the contract itself and requires viewing the contract as a whole and in its entirety. *Clear Lakes Trout Co. v. Clear Springs Foods, Inc.*, 141 Idaho 117, 120, 106 P.3d 443, 446 (2005). “The meaning of an unambiguous contract should be determined from the plain meaning of the words.” *Id.* “Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact.” *Porcello v. Est. of Porcello*, 167 Idaho 412, 421, 470 P.3d 1221, 1230 (2020) (internal citations and quotations omitted). “Only when the language is ambiguous, is the intention of the parties determined from surrounding facts and circumstances.” *Clear Lakes Trout Co.*, 141 Idaho at 120.

Here, the *SWC-IGWA Agreement* states that the “[t]otal ground water diversion shall be reduced by 240,000 ac-ft annually.” *SWC-IGWA Agreement* § 3.a.i. (Emphasis added). IGWA contends the term “annually” is ambiguous because it “does not prescribe how annual groundwater conservation will be measured[.]” *IGWA’s Resp. in Opp. to SWC’s Mot. for Summ. J.* at 7. IGWA further contends that the 240,000 ac-ft conservation requirement is based on a multi-year rolling average. *Id.* at 7–10. Were IGWA’s argument to prevail, IGWA’s failure to conserve 240,000 ac-ft in one year would not necessarily constitute a breach of § 3.a.i. as the reduction obligation deficit could be recouped by reducing more than 240,000 ac-ft in other years. The Director rejects IGWA’s arguments because they are contrary to the plain and unambiguous language of the Mitigation Plan.

First, the term “annually” is unambiguous. The adverb “annually” derives from the adjective “annual,” which means “of or measured by a year” or “happening or appearing once a year; yearly.” *Annual*, Webster’s New World Dictionary (3d coll. Ed. 1994); *see also* Black’s Law Dictionary 58 (6<sup>th</sup> ed. 1991) (The term annually means “[i]n annual order or succession; yearly, every year, year by year. At the end of each and every year during a period of time. Imposed once a year, computed by the year. Yearly or once a year, but does not in itself signify what time in a year.”). Accordingly, the phrase “shall be reduced by 240,000 ac-ft annually” unambiguously requires IGWA to reduce ground water diversions by 240,000 ac-ft each and every year. *Clear Lakes*, 141 Idaho at 120, 106 P.3d at 446.

This understanding is reinforced by how the word “annually” is used in other provisions of the Mitigation Plan. For example, § 2.a.i of the Second Addendum requires IGWA to submit certain data to the Steering Committee “[p]rior to April 1 annually.” IGWA has complied with this requirement each and every year. *See* IGWA’s 2016-2021 Performance Reports & Summaries, Exs. 15–20, 22–27.

To support its averaging argument, IGWA points to § 3.e.iv of the SWC-IGWA Agreement which states: “When the ground water level goal is achieved for a five year rolling



average, ground water diversion reductions may be reduced or removed, so long as the ground water level goal is sustained.” (emphasis added). The problem with IGWA’s argument is that § 3.e.iv. simply states that a five-year rolling average will be used to determine whether IGWA has achieved the *ground water level goal* in § 3.e. Section 3.e.iv does not state or imply that IGWA’s 240,000 ac-ft *annual reduction obligation* found in § 3.a can be averaged over multiple years. To the contrary, the fact that § 3.e.iv references a five-year rolling average actually cuts against IGWA’s argument, as it demonstrates the parties knew how to draft a rolling-average provision had they intended § 3.a.i. to include one.

IGWA also argues its 240,000 ac-ft reduction should be averaged because IGWA used averaging to set its so-called “baseline.” *IGWA’s Resp. in Opp. to SWC’s Mot. for Summ. J.* at 7. Yet IGWA concedes its averaging process was not described or mandated in the SWC-IGWA Agreement. *Id.* at 9. The fact that IGWA chose to employ averaging when establishing a baseline so that it could apportion the 240,000 ac ft obligation among its members did not amend the SWC-IGWA Agreement’s unambiguous requirement that IGWA conserve 240,000 ac ft *annually*.

IGWA also contends it should be allowed to employ averaging because it conserves more than 240,000 ac-ft during cool wet years, meaning it should be allowed to conserve less in hot and dry years. *Id.* at 8–9. The fact that IGWA may conserve more than 240,000 ac-ft in cool wet years does not change its unambiguous obligation to conserve 240,000 ac-ft *annually*. Nor has IGWA pointed to any language in the Mitigation Plan authorizing this type of surplus & deficit accounting.

In sum, averaging is not permitted because the SWC-IGWA Agreement unambiguously requires IGWA to conserve 240,000 ac-ft each and every year.

**B. The Mitigation Plan unambiguously prohibits IGWA from apportioning A&B and Southwest a percentage of its annual reduction obligation.**

IGWA next asserts that the 240,000 ac-ft. reduction requirement under § 3.a.i. is not IGWA’s responsibility alone, but rather a shared responsibility amongst all groundwater users in the ESPA, including A&B and Southwest. *IGWA’s Resp. in Opp. to SWC’s Mot. for Summ. J.* at 4–6. Were IGWA’s argument to prevail, IGWA members who signed the Mitigation Plan would only be required to annually conserve 205,397 ac-ft—not 240,000 ac-ft— a reduction of 14.4% or 34,603 ac-ft. IGWA’s 2021 Performance Summary, Ex. 27.

To buttress this position, IGWA points to § 3.ii of the SWC-IGWA Agreement, which reads: “Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity.” *IGWA’s Resp. in Opp. to SWC’s Mot. for Summ. J.* at 4–5. IGWA argues that because A&B and Southwest pump groundwater in the ESPA, they must share in the 240,000 ac-ft reduction obligation. *Id.*

IGWA’s focus on § 3.ii of the SWC-IGWA Agreement is misguided. In construing a written instrument, the court must start with the language of the contract itself and requires

viewing the contract as a whole and in its entirety. *Clear Lakes Trout Co.*, 141 Idaho at 120. The court must “give meaning to all the provisions of the writing to the extent possible.” *Magic Valley Radiology Assocs., P.A. v. Pro. Bus. Servs., Inc.*, 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991). In this case, § 6 of the SWC-IGWA Agreement specifically states it does not cover non-participants: “Any ground water user not participating in this Settlement Agreement or otherwise hav[ing] another approved mitigation plan will be subject to administration.” *SWC-IGWA Agreement* § 6. Southwest never signed the SWC-IGWA Agreement, and A&B participated in the Mitigation Plan only as a member of the SWC: “A&B agrees to participate in the [SWC-IGWA] Settlement Agreement as a surface water right holder only. The obligations of Ground Water Districts set forth in Paragraphs 2-4 of the [IGWA-SWC] Settlement Agreement do not apply to A&B and its ground water rights.” *A&B-IGWA Agreement* ¶ 2.

Additionally, § 2.d.i. of the Second Addendum states that “[t]he terms of the Settlement and the Director’s Final Order approving the same as a mitigation plan” will control and satisfy any mitigation obligations. Both the Director’s Order Approving Mitigation Plan and Order Approving Amendment to Mitigation Plan are unequivocal that “[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibilities of the parties to the Mitigation Plan,” and that “[t]he ground water level goal and benchmarks referenced in the Mitigation Plan are applicable only to the parties to the Mitigation Plan.” *Order Approving Mitigation Plan* at 4; *Order Approving Amendment to Mitigation Plan* at 2.

In sum, the Mitigation Plan—when read as a whole and in its entirety—unambiguously excludes any ground water user that is not a party to the agreement from any obligation related to the annual 240,000 ac ft reduction target. The Mitigation Plan requires IGWA members alone to conserve 240,000 ac-ft each and every year. *Clear Lakes Trout Co.*, 141 Idaho at 120.

### **C. IGWA’s latent ambiguity argument also fails.**

IGWA argues in the alternative that the SWC-IGWA Agreement is latently ambiguous concerning whether IGWA alone is responsible for reducing 240,000 ac-ft. *IGWA’s Resp. in Opp. to SWC’s Mot. for Summ. J.* at 6–10. More specifically, IGWA contends a latent ambiguity exists concerning the 240,000 ac-ft reduction obligation under § 3.ii because the SWC-IGWA Agreement failed to explain how each district’s proportionate share of the 240,000 ac-ft reduction requirement would be calculated. *Id.* at 7.

“A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist.” *Porcello v. Est. of Porcello*, 470 P.3d 1221, 167 Idaho 412, 424 (2020) (internal citation and quotations omitted). To determine whether a latent ambiguity exists, the written instrument must be examined along with “other writings incorporated into the instrument” to determine whether an ambiguity exists and the reasonableness of the alternative meanings suggested by the parties. *Sommer, LLC*, 511 P.3d at 845. A latent ambiguity must be tethered to language in the written instrument. *Porcello*, 167 Idaho at 424. Parole evidence may be considered to “determine whether *language within the instrument* is reasonably susceptible of more than one meaning.” *Sommer*, 511 P.3d at 845 (emphasis in original).

The flaw in IGWA's argument is that not every phrase in a contract must be defined, nor is a contract rendered ambiguous by an undefined term. *Mut. Of Enumclaw v. Wilcox*, 123 Idaho 4, 8, 843 P.2d 154, 158 (1992). The SWC-IGWA Agreement is not ambiguous merely because it failed to articulate how IGWA must apportion the 240,000 ac-ft among its members. The absence of apportionment instructions does not substantiate IGWA's claim that it "reasonably accounted for diversions from A&B and Southwest in determining each of the signatory districts' proportionate groundwater conservation obligations." *IGWA's Resp. In Opp. to Summ. J.* at 7.

Section 6 of the SWC-IGWA Agreement expressly states that "[a]ny ground water user not participating in this Settlement Agreement or otherwise hav[ing] another approved mitigation plan will be subject to administration." *SWC-IGWA Agreement* § 6. IGWA's Agreement with A&B was likewise explicit that "A&B agrees to participate in the [SWC-IGWA] Settlement Agreement as a surface water right holder only. The obligations of Ground Water Districts set forth in Paragraphs 2-4 of the [IGWA-SWC] Settlement Agreement *do not apply to A&B* and its ground water rights." *A&B-IGWA Agreement* ¶ 2 (emphasis added). Additionally, the Director's orders approving the first and second mitigation plans clearly stated that "[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibilities of the parties to the Mitigation Plan." *Order Approving Mitigation Plan* at 4; *Order Approving Amendment to Mitigation Plan* at 2.

IGWA offered neither evidence nor argument that the Mitigation Plan—when read as a whole and in its entirety—was ambiguous concerning IGWA's obligation to conserve 240,000 ac-ft. IGWA's own witnesses undermined IGWA's latent ambiguity argument. For example, Mr. Higgs testified that IGWA was aware that A&B and Southwest each agreed to separate settlements with the SWC. Mr. Higgs also testified that he did not adjust his calculations in 2016 after the Director issued his Order Approving Mitigation Plan, which was explicit that "[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibilities of the parties to the Mitigation Plan." *Order Approving Mitigation Plan* at 4; *see also* Higgs Test..

The plain reading of the six documents that make up the Mitigation Plan renders IGWA's latent ambiguity argument untenable.

#### **D. Certain IGWA members breached the Mitigation Plan in 2021.**

Based on the foregoing, each IGWA member participating in the Mitigation Plan is obligated to reduce total ground water diversion (or provide equivalent private recharge) by each member's proportionate share of 240,000 ac-ft. every year. *SWC-IGWA Agreement* § 3.a.

Based on Table 2 as shown in Finding of Fact 14 above, Madison Ground Water District, Fremont Madison Irrigation District, and Carey Ground Water District satisfied their proportionate 2021 mitigation obligations in 2021 and would not be subject to curtailment. *See SWC-IGWA Agreement* § 3.a.ii (Each member "shall be responsible for reducing their proportionate share ..."). Based on the analysis in Table 2, Table 3 below identifies the IGWA ground water districts that did not fulfill their proportionate share of the total annual ground water reduction and the volume of each district's deficiency.

**Table 3:**

<b>Ground Water District</b>	<b>Deficiency (acre-feet)</b>
American Falls-Aberdeen	24,826
Bingham	55,951
Bonneville-Jefferson	18,185
Jefferson-Clark	20,796
Magic Valley	2,590
North Snake	4,272
<b>Total</b>	<b>126,620</b>

**E. The IGWA members in Table 3 are not covered by an effectively operating mitigation plan and IGWA must implement the 2021 remedy in the Remedy Agreement.**

In a delivery call under the CM Rules, out-of-priority diversion of water by junior priority ground water users is allowable only “pursuant to a mitigation plan that has been approved by the Director.” IDAPA 37.03.11.040.01.b. Junior-priority ground water users “covered by an approved *and effectively operating* mitigation plan” are protected from curtailment under CM Rule 42. IDAPA 37.03.11.042.02 (emphasis added). In other words, only those junior ground water users who are in compliance with an approved mitigation plan are protected from a curtailment order.

The Director has approved several mitigation plans when the joint administration of ground water and surface water has been imminent. Some of these approved mitigation plans have been contested by holders of senior priority water rights. In this case, however, because of the stipulated Mitigation Plan, the Director allowed significant latitude to the agreeing parties in accepting the provisions of the Mitigation Plan. Nonetheless, the courts have defined the Director’s responsibilities if the holders of junior priority water rights do not comply with the mitigation requirements.

In the *Rangen* case, Judge Eric Wildman addressed the Director’s responsibility when a mitigation plan fails. Mem. Decision & Order, *Rangen, Inc. v. Idaho Dep’t of Water Res.*, No. CV-2014-4970 (Twin Falls Cnty. Dist. Ct. Idaho June 1, 2015) [hereinafter “*Rangen June 1, 2015 Decision*”]. A mitigation plan that allows out-of-priority diversions must supply water to the holders of senior priority water rights during the time-of-need. The Court stated: “When the Director approves a mitigation plan, there should be certainty that the senior user’s material injury will be mitigated throughout the duration of the plan’s implementation. This is the price of allowing junior users to continue their offending out-of-priority water use.” *Rangen June 1, 2015 Decision* at 8. Judge Wildman previously held in an earlier case that the compensation for underperformance of the requirements of the mitigation plan cannot be delayed. See Mem. Decision & Order at 10, *Rangen, Inc. v. Idaho Dep’t of Water Res.*, No. CV-2014-2446 (Twin Falls Cnty. Dist. Ct. Idaho Dec. 3, 2014). Furthermore, without mitigation at the time-of-need, the holders of junior ground water rights could materially injure senior water rights by diverting out-of-priority with impunity.

Here, the Mitigation Plan obligates IGWA to reduce total diversions or recharge the equivalent of 240,000 ac-ft every year. Each IGWA member is annually responsible for their proportionate share of that total. But the Mitigation Plan is unique in that it contemplates delays in analyzing IGWA's mitigation efforts. These delays are inherent in the Steering Committee process the parties agreed to in the Second Addendum.

For example, section 2.a.i of the Second Addendum requires IGWA to submit, "[p]rior to April 1 annually," ground water diversion and recharge data (i.e., the types of data in the 2021 Performance Report) to the Steering Committee for the previous irrigation season. Further, the parties agreed to a process by which the Steering Committee evaluates IGWA's data from the previous irrigation season to assess whether a breach occurred in the previous season. *Second Addendum* § 2.c.i–.iv. Because IGWA is not obligated to submit its data to the Steering Committee until April 1 every year, the Steering Committee process necessarily begins well after the actions or inactions constituting a breach. Moreover, the process does not involve the Director until the Steering Committee finds a breach or, as here, reaches an impasse. *Id.* While the Director believes this process was developed and has been implemented by all parties in good faith, it nevertheless means that any breach will be addressed many months after it occurs.

A mitigation plan that depends on a prediction of compliance must include a contingency plan to mitigate if the predictive mitigation plan is not satisfied:

If junior users wish to avoid curtailment by proposing a mitigation plan, the risk of that plan's failure has to rest with junior users. Junior users know, or should know, that they are only permitted to continue their offending out-of-priority water use so long as they are meeting their mitigation obligations under a mitigation plan approved by the Director. IDAPA 37.03.11.040.01.a,b. If they cannot, then the Director must address the resulting material injury by turning to the approved contingencies. If there is no alternative source of mitigation water designated as the contingency, then the Director must turn to the contingency of curtailment. Curtailment is an adequate contingency if timely effectuated. In this same vein, if curtailment is to be used to satisfy the contingency requirement, junior users are on notice of this risk and should be conducting their operation so as to not lose sight of the possibility of curtailment.

*Rangen June 1, 2015 Decision* at 9.

In this case, certain holders of junior-priority water rights failed to satisfy their mitigation obligation in 2021. Out-of-priority diversions by the IGWA members in Table 3 above were not "pursuant to a mitigation plan that has been approved by the Director." IDAPA 37.03.11.040.01.b. The approved Mitigation Plan was not "effectively operating" with respect to those IGWA members in 2021. IDAPA 37.03.11.042.02. Consequently, the holders of senior water rights have been and are being materially injured by the failure of the juniors to fully mitigate during the 2021 irrigation season.

The CM Rules contemplate that out-of-priority diversions by junior-priority ground water users will be curtailed absent compliance with an approved mitigation plan. IDAPA

37.03.11.040.01. Nevertheless, curtailment may be avoided if an adequate, alternative source of mitigation water is designated as a contingency. *Rangen June 1, 2015 Decision* at 9. Therefore, the Director must determine if there is an adequate contingency for IGWA members' 2021 noncompliance with the Mitigation Plan.

The Mitigation Plan itself does not include a contingency in the event IGWA did not meet the 240,000 ac-ft reduction obligation, but the plan does contemplate the Director will "issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment." *Second Addendum* § 2.c.iv. The Director concludes the SWC and IGWA's Remedy Agreement provides a cure for the breach and constitutes an adequate contingency for IGWA members' noncompliance in 2021. Specifically, in section 1 of the Remedy Agreement, IGWA agrees to "collectively provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year." Moreover, the Remedy Agreement details IGWA's options in the event it cannot lease the necessary water from non-SWC spaceholders:

If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA will make up the difference by either (a) leasing storage water from the SWC as described in section 2, or (b) undertaking consumptive use reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River.

*Remedy Agreement* § 1. The SWC and IGWA agree their stipulated 2021 remedy should be the "remedy selected for the alleged [2021] shortfall in lieu of curtailment." *Id.* § 3. The Director agrees. The parties' remedy constitutes an appropriate contingency for IGWA members' noncompliance of the Mitigation Plan in 2021. Therefore, in lieu of curtailment, the Director will order that IGWA must implement the 2021 remedy in section 1 of the Remedy Agreement.

The parties affirmatively waived their rights to appeal the stipulated remedy. *Remedy Agreement* ¶¶3, 2–3. Neither party challenged the remedy at hearing.

**F. IGWA's procedural and evidentiary objections lack merit.**

The primary issues discussed at hearing were the issues of averaging and whether A&B and Southwest were to be included in the reduction calculation. However, prior to the hearing, IGWA raised a handful of procedural and evidentiary objections in connection with this matter. The Director stands by the analysis in the Compliance Order and adopts, by reference, the discussion in Section 5 of the Compliance Order. *See IGWA v. Idaho Dep't of Water Res.*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho).

## ORDER

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

1. To remedy noncompliance with the Mitigation Plan in 2021 only, IGWA must collectively supply to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year. Such amounts will be in addition to the long-term obligations set forth in section 3 of the 2015 SWC-IGWA Agreement and approved Mitigation Plan. IGWA must take all reasonable steps to lease the quantities of storage water set forth above from non-SWC spaceholders. If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA must make up the difference by either (a) leasing storage water from the SWC as described in section 2 of the Remedy Agreement, or (b) undertaking diversion reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River.
2. Except as necessary to implement paragraph 2 above, nothing in this order alters or amends the parties' Mitigation Plan or any condition in the Director's Order Approving Mitigation Plan or Order Approving Amendment to Mitigation Plan.
3. Failure to comply with the Mitigation Plan may result in curtailment.

DATED this 24th day of April 2023.

  
GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

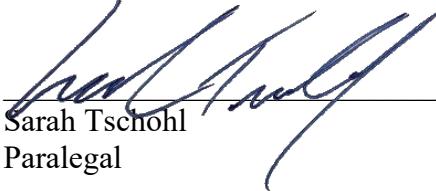
I HEREBY CERTIFY that on this 24th day of April 2023, the above and foregoing was served by the method indicated below and addressed to the following:

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\_\_\_\_\_  
Sarah Tschohl  
Paralegal

## EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
  - (a) The petition for reconsideration is disposed of; or
  - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

### **APPEAL OF FINAL ORDER TO DISTRICT COURT**

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

RECEIVED

May 02, 2023

DEPARTMENT OF  
WATER RESOURCES

Dylan Anderson (ISB# 9676)  
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Rexburg, Idaho 83440

Phone - (208) 684-7701  
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*Attorney for Bingham Groundwater District. (BGWD)*

**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

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

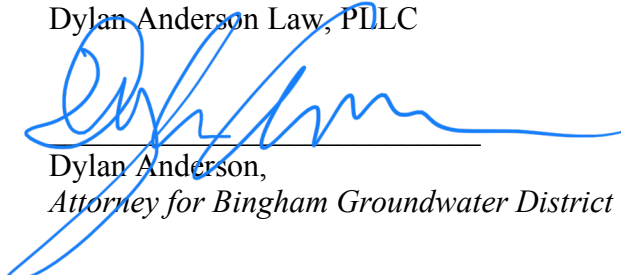
Docket No. CM-DC-2010-001  
Docket No. CM-MP-2016-001

**NOTICE OF SUBSTITUTION OF  
COUNSEL FOR BINGHAM GROUND  
WATER DISTRICT**


Pursuant to IDAPA 37.01.01.204, Dylan Anderson of Dylan Anderson Law, provides notice of substitution of counsel on behalf of Bingham Groundwater District. Bingham Ground Water District currently participates in this proceeding through Idaho Ground Water Appropriators, Inc. (IGWA). Pursuant to this substitution of counsel, Bingham Ground Water District will forthwith be represented independently of IGWA. This substitution will not cause any delay or enlarge the issues involved in this proceeding.

DATED this 2 day of May, 2023.

Dylan Anderson Law, PLLC

  
Dylan Anderson,  
*Attorney for Bingham Groundwater District*

RACINE OLSON, PLLP

  
Thomas J. Budge  
*Attorneys for IGWA*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2 day of May, 2023, a true and correct copy of the foregoing document was served via email to the following:

Idaho Dept. of Water Resources  
[file@idwr.idaho.gov](mailto:file@idwr.idaho.gov)

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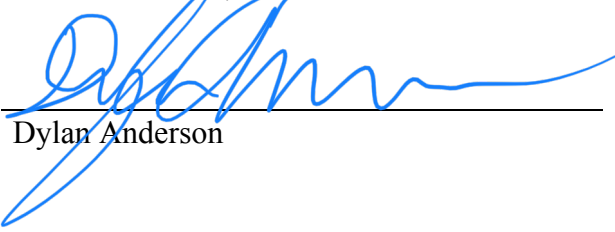
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Dylan Anderson Law, PLLC

By: \_\_\_\_\_

Dylan Anderson



# SETTLEMENT AGREEMENT PERFORMANCE REPORT

TO: IGWA-SWC Settlement Agreement Steering Committee  
FROM: Ground Water Districts  
DATE: April 1, 2022  
RE: 2021 Performance Report

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## Introduction

This document reports the Ground Water Districts' year 2021 performance under paragraph 3.a of the *SWC-IGWA Settlement Agreement*<sup>1</sup> which requires a 240,000 acre-feet reduction in ESPA groundwater withdrawals or equivalent private recharge. Paragraph 2.a. of the *Second Addendum to Settlement Agreement* requires the Districts to report to the Steering Committee by April 1 annually "their groundwater diversion and recharge data for the prior irrigation season and their proposed actions to be taken for the upcoming irrigation season, together with supporting information compiled by the Districts' consultants."

As explained below, the Districts' groundwater conservation efforts in 2021 totaled 122,784 acre-feet. This was a significant departure from the Districts' conservation during the 2016-2020 time period which averaged 373,096 acre-feet. The Districts faced exceptionally hot and dry weather conditions in 2021 that had not been experienced since the Settlement Agreement was entered into. These challenges have forced the Districts to revisit and adjust their groundwater conservation programs.

## 2021 Performance

A spreadsheet detailing the Districts' 2021 performance is attached to this report. The "Summary Table" tab provides a summary of each District's performance, including the diversion baseline, target conservation, usage, diversion reduction, recharge, total conservation, and mitigation balance.

The "Recharge Report" tab lists the recharge completed by each District, including the volume, source of water, recharge location, and date the recharge was performed. Documentation supporting the recharge data shown in the spreadsheet is also attached. A few items of supporting information are forthcoming as noted in the spreadsheet.

The spreadsheet also contains individual tabs for each District that list diversion volumes for each well by WMIS number. Where challenges or errors were encountered in the data for a particular well, notes have been added to the spreadsheet to explain how the District addressed it. For example, a few diversions could not be reliably calculated due to broken meters or other factors. In these instances, the well was assigned the baseline diversion value (i.e. no reduction in use) or PCC (power consumption coefficient) diversion volume. District consultants continue to work with District patrons and the Idaho Department of Water Resources to address questions and correct errors as needed.

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



The Districts' 240,000 acre-foot conservation obligation is measured from baseline groundwater diversions for the period 2010-2014. The baseline has been adjusted slightly since the original allocation to account for faulty or incomplete historic usage data and new groundwater users joining the Districts.

Several Districts fell short of their share of the 240,000 acre-foot obligation. This was due in part to the lack of rain combined with exceptional heat, and in part to the Districts being unable to secure as much water for recharge and conversions as anticipated. The Districts have responded by amending their conservation programs to require additional diversion reductions by their patrons, as explained below.

Because the SWC has made independent mitigation arrangements with A&B Irrigation District and Southwest Irrigation District, the spreadsheet assumes each of those Districts has satisfied its share of the total groundwater conservation.

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

### **2022 Conservation Programs**

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.

The Districts rely primarily upon a priority-based system of diversion reductions to conserve groundwater. They also use other tools such recharge, conversions, CREP, end-gun removals, and lease dry-ups to conserve groundwater. Districts that did not achieve their share of the 240,000 obligation in 2021 have made changes to their conservation programs to improve performance in 2022. For example, American Falls-Aberdeen Area Ground Water District and Bonneville-Jefferson Ground Water District lowered the diversion caps imposed on their patrons, and Bingham Ground Water District revised its reduction plan to impose strict priority-based diversion limits. An updated table summarizing the Districts' conservation programs for 2022 is attached.

By and large, District patrons have willingly made sacrifices to conserve water and comply with the District conservation programs by reducing irrigated acreage, growing crops that use less water, and carefully monitoring groundwater diversions. To enable Districts to more effectively address non-compliance, IGWA was successful in amending Idaho Code 42-5232 to allow stiff penalties for excess water use, and in enacting Idaho Code 42-5244A and 42-5244B to provide additional enforcement tools. The Districts have recently emphasized to their patrons the need to fully comply with their conservation programs in 2022.

### **Additional Information**

While not part of the annual reporting requirement under the Settlement Agreement, the Districts submit the following additional information on long-term practices previously implemented and continuing:

1. **Settlement Agreement 3.b.i.** IGWA delivered to the SWC 50,000 acre-feet of storage

accomplished through private leases of water from the Upper Snake reservoir system. Per the request of Twin Falls Canal Company, IGWA consented to a portion of this water being utilized by groundwater users in Basin 37 for mitigation purposes. The remainder was used by the SWC to meet irrigation demand. No portion of the 50,000 acre-feet was made available for recharge in 2021.

2. **Settlement Agreement 3.b.ii.** IGWA has used its best efforts to continue existing conversions in Water Districts 130 and 140. The Districts see conversions as an important key to long-term management of the ESPA. They continue to explore opportunities to expand conversions, particularly in the Bingham County, Bonneville County, and Power County areas.
3. **Settlement Agreement 3.c.** District patrons continue to honor the irrigation season restriction to April 1-October 31. As a practical matter, the diversion reductions imposed by the Districts have compelled patrons to limit diversions whenever possible.
4. **Settlement Agreement 3.d.** Most District patrons installed flow meters by the beginning of the 2018 irrigation season. IDWR has established and implemented a protocol for flowmeter compliance following the 2018 deadline in according with the Departments ESPA flow measurement orders. All District patrons have now installed flow meters or have obtained variances. The Department maintains records and reports on compliance, granted variances, approved delays and enforcement.
5. **Settlement Agreement 3.f.** The Districts continue to support the State's managed recharge program that seeks to achieve 250,000 acre-feet of recharge annually across the ESPA. The Department regularly reports on State recharge efforts. Expansion of the State program, particularly in the upper Snake River Basin, is important to long-term success of the ESPA recovery effort.
6. **Settlement Agreement 3.g.** IGWA and the Districts have and continue to support NRCS funded water conservations programs.

### **IDWR Review**

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

### **Sentinel Well Report**

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

## CONSERVATION PROGRAM SUMMARY - 2022

District	Diversion Reduction				Recharge	Other
	Tiers	AF Cap	Min %	Max %		
North Snake	3	2.0/2.2/2.4	none	50	As available	Conversions
Magic Valley	3	1.6/1.75/1.9	none	none	As available	Conversions End-gun removal, CREP
Carey Valley	0	% reduction based on historic use	12.4	12.4	As available	
American Falls - Aberdeen	3	1.58/1.76/2.0	none	22	As available	Water Bank Lease, CREP, conversions
Bingham	10	0.92 - 2.00	none	none	As available	End-gun removal, CREP, conversions
Bonneville- Jefferson	10	1.23 to 1.97	10	20	As available	End-gun removal, lease dry-ups, CREP, conversions
Jefferson-Clark	70	% reduction based on historic use	3.2	17.48	As available	\$50 acre CREP add-on, end-gun removal
Madison & Henry's Fork	Direct delivery 1,500 AF storage to IGWA and 3,000 AF annual recharge minimum.					

ORIGINAL

**SETTLEMENT AGREEMENT ENTERED INTO JUNE 30, 2015 BETWEEN PARTICIPATING MEMBERS OF THE SURFACE WATER COALITION<sup>1</sup> AND PARTICIPATING MEMBERS OF THE IDAHO GROUND WATER APPROPRIATORS, INC.<sup>2</sup>**

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

**1. Objectives.**

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

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

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

## 2. Near Term Practices.

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

## 3. Long Term Practices, Commencing 2016.

- a. *Consumptive Use Volume Reduction.*
  - i. Total ground water diversion shall be reduced by 240,000 ac-ft annually.
  - ii. Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity. Private recharge activities cannot rely on the Water District 01 common Rental Pool or credits acquired from third parties, unless otherwise agreed to by the parties.
- b. *Annual storage water delivery.*
  - i. IGWA will provide 50,000 ac-ft of storage water through private lease(s) of water from the Upper Snake Reservoir system, delivered to SWC 21 days after the date of allocation, for use to the extent needed to meet irrigation

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

- ii. IGWA shall use its best efforts to continue existing conversions in Water Districts 130 and 140.
- c. *Irrigation season reduction.*  
Ground water users will not irrigate sooner than April 1 or later than October 31.
- d. *Mandatory Measurement Requirement.*  
Installation of approved closed conduit flow meter on all remaining unmeasured and power consumption coefficient (PCC) measured ground water diversions will be completed by the beginning of the 2018 irrigation season. Measurement device installation will be phased in over three years, by ground water district, in a sequence determined by the parties. If an adequate measurement device is not installed by the beginning of the 2016 irrigation season, a cropping pattern methodology will be utilized until such measuring device is installed.
- e. *Ground Water Level Goal and Benchmarks.*
  - i. Stabilize and ultimately reverse the trend of declining ground water levels and return ground water levels to a level equal to the average of the aquifer levels from 1991-2001. Utilize groundwater levels in mutually agreed upon wells with mutually agreed to calculation techniques to measure ground water levels. A preliminary list of 19 wells has been agreed to by the parties, recognizing that the list may be modified based on additional technical information.
  - ii. The following benchmarks shall be established:
    - Stabilization of ground water levels at identified wells by April 2020, to 2015 ground water levels;
    - Increase in ground water levels by April 2023 to a point half way between 2015 ground water levels and the ground water level goal; and
    - Increase of ground water levels at identified wells by April 2026 to the ground water level goal.
  - iii. Develop a reliable method to measure reach gain trends in the Blackfoot to Milner reach within 10 years.
  - iv. When the ground water level goal is achieved for a five year rolling average, ground water diversion reductions may be reduced or removed, so long as the ground water level goal is sustained.
  - v. If any of the benchmarks, or the ground water level goal, is not achieved, adaptive measures will be identified and implemented per section 4 below.
- f. *Recharge.*  
Parties will support State sponsored managed recharge program of 250 KAF annual-average across the ESPA, consistent with the ESPA CAMP and the direction in HB

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

g. *NRCS Programs.*

Parties will support NRCS funded permanent water conservation programs.

h. *Conversions.*

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

i. *Trust Water Rights.*

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

j. *Transfer Processes.*

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

k. *Moratorium Designations.*

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

l. *IDWR Processes.*

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

m. *Steering Committee.*

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

**4. Adaptive Water Management Measures.**

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

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

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

**5. Safe Harbor.**

No ground water user participating in this Settlement Agreement will be subject to a delivery call by the SWC members as long as the provisions of the Settlement Agreement are being implemented.

**6. Non-participants.**

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

**7. Term.**

This is a perpetual agreement.

**8. Binding Effect.**

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

**9. Entire Agreement.**

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

**10. Effect of Headings.**

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

**11. Effective Date.**

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

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

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

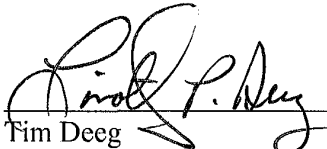


RACINE OLSON NYE BUDGE AND BAILEY, CHARTERED

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


Attorney for Idaho Ground Water Appropriators, Inc.

IDAHO GROUND WATER APPROPRIATORS, INC.

 7/1/2015  
Tim Deeg /Date

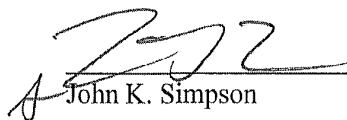
President

FLETCHER LAW OFFICE

 7-2-15  
W. Kent Fletcher Date

On Behalf of the Surface Water Coalition

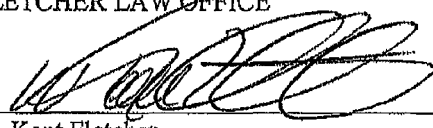
BARKER ROSHOLT AND SIMPSON LLP

 7/7/15  
John K. Simpson Date

On Behalf of the Surface Water Coalition

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

FLETCHER LAW OFFICE

  
W. Kent FletcherDate 7-7-15

MINIDOKA IRRIGATION DISTRICT

BY: Title: ChairmanDate 7-7-15

AMERICAN FALLS RESERVOIR DISTRICT NO. 2

BY: Title: ChairmanDate 7-1-15

11 | Page

BURLEY IRRIGATION DISTRICT

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

Attested by:

Lana K. Pincock  
Lana K. Pincock  
Secretary / Treasurer

12.1 | Page

MILNER IRRIGATION DISTRICT


BY: Scott B. Reading  
Title: Board Chairman Date: 7/23/2015




NORTH SIDE CANAL COMPANY

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

TWIN FALLS CANAL COMPANY

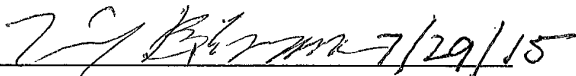
BY:   
Title: Chairman, Board Date: July 22, 2015

ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT

 7-16-15  
\_\_\_\_\_  
Nick Behrend Date

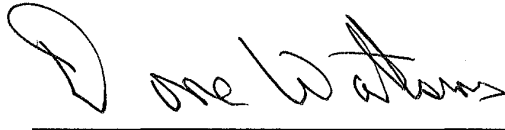
Chairman

BINGHAM GROUND WATER DISTRICT

 7/29/15  
Craig Evans Date

Chairman

BONNEVILLE-JEFFERSON GROUND WATER DISTRICT

 7/29/15

Dane Watkins

Date

Chairman

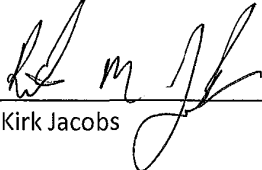
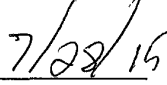
CAREY VALLEY GROUND WATER DISTRICT

  
Leta Hansen


  
Date

Chairman

JEFFERSON CLARK GROUND WATER DISTRICT


   
Kirk Jacobs Date  
Chairman

MADISON GROUND WATER DISTRICT

 7-23-15  
\_\_\_\_\_  
Jason Webster Date  
Chairman

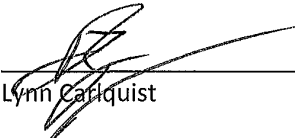


MAGIC VALLEY GROUND WATER DISTRICT

 7/14/2015  
Dean Stevenson Date

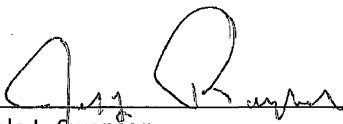
Chairman

NORTH SNAKE GROUND WATER DISTRICT

  
\_\_\_\_\_  
Lynn Carlquist  
Chairman

7/22/2015  
Date

FREEMONT MADISON IRRIGATION DISTRICT

  
\_\_\_\_\_  
Date ~~L. Swenson~~ Date  
Jeff Raybould  
Manager- Chairman

SOUTHWEST IRRIGATION DISTRICT

\_\_\_\_\_  
RANDY BROWN

\_\_\_\_\_  
Date

Chairman

## ADDENDUM TO SETTLEMENT AGREEMENT

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

### RECITALS

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

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

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

### COVENANTS

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

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

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

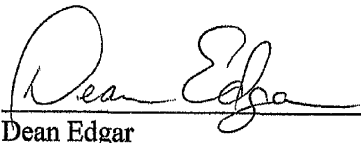
The parties have executed this Agreement on the date following their respective signatures.

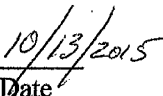
**SURFACE WATER COALITION:**

American Falls Reservoir District No. 2

Ellis Gooch      10-1-15  
Ellis Gooch      Date  
President

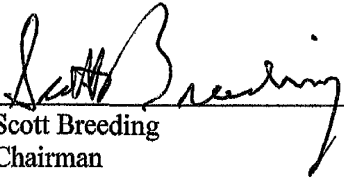
Burley Irrigation District

  
Dean Edgar  
Chairman

  
Date

ADDENDUM TO SETTLEMENT AGREEMENT 3

Milner Irrigation District

 10/14/15  
\_\_\_\_\_  
Scott Breeding                      Date  
Chairman

**ADDENDUM TO SETTLEMENT AGREEMENT      4**




Minidoka Irrigation District

Frank Hunt      Oct 13-2015  
Frank Hunt                      Date  
Chairman

ADDENDUM TO SETTLEMENT AGREEMENT      5

North Side Canal Company

  
\_\_\_\_\_  
John Beukers                      Date  
Chairman

ADDENDUM TO SETTLEMENT AGREEMENT    6

Twin Falls Canal Company

 10-13-15

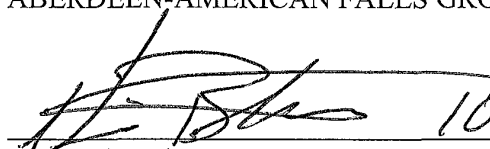
Dan Shewmaker  
Chairman

Date

ADDENDUM TO SETTLEMENT AGREEMENT 7


**IDAHO GROUNDWATER APPROPRIATOR'S, INC.:**

ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT

  
\_\_\_\_\_  
Nick Behrend Date 10-7-15  
Chairman

ADDENDUM TO SETTLEMENT AGREEMENT 8

BINGHAM GROUND WATER DISTRICT


  
\_\_\_\_\_  
Craig Evans  
Chairman

Date

Oct 8, 2015

ADDENDUM TO SETTLEMENT AGREEMENT 9

BONNEVILLE-JEFFERSON GROUND WATER DISTRICT

 10/7/15

Dane Watkins  
Chairman

Date

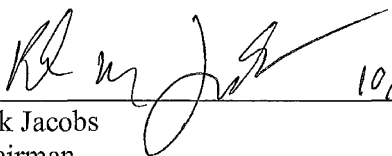
ADDENDUM TO SETTLEMENT AGREEMENT 10

CAREY VALLEY GROUND WATER DISTRICT

 10/7/15  
Leta Hansen Date  
Chairman

ADDENDUM TO SETTLEMENT AGREEMENT 11

JEFFERSON CLARK GROUND WATER DISTRICT

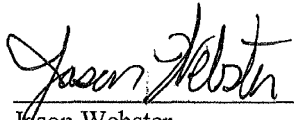
  
Kirk Jacobs  
Chairman

10/13/15  
Date

ADDENDUM TO SETTLEMENT AGREEMENT 12

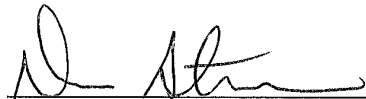


MADISON GROUND WATER DISTRICT

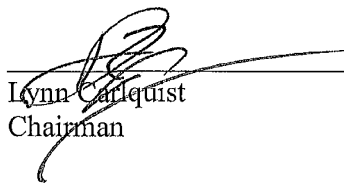
 10-19-15  
Jason Webster Date  
Chairman

ADDENDUM TO SETTLEMENT AGREEMENT 13


MAGIC VALLEY GROUND WATER DISTRICT

 10/7/2015  
Dean Stevenson Date  
Chairman

NORTH SNAKE GROUND WATER DISTRICT

 10/7/2015  
\_\_\_\_\_  
Lynn Carlquist Date  
Chairman

FREEMONT MADISON IRRIGATION DISTRICT

  
\_\_\_\_\_  
Date L. Swenson Date  
Manager Jeff Raybould  
Chairman

## SECOND ADDENDUM TO SETTLEMENT AGREEMENT

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

### RECITALS

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

### COVENANTS

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

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

2. **Implementation of Settlement Agreement.** The Parties will work cooperatively in implementing the terms of the Settlement Agreement, to wit: Sections 3.a (Consumptive Use Volume Reduction), 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a (Adaptive Water Management) as follows:

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

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

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

- i. The Parties and their consultants will work with the Department to collect, process, archive and submit sentinel well data to the Steering Committee within 30 days of collection.
- ii. The Parties and their consultants will use the *Technique For Calculating Groundwater Level Index and Determining Compliance with Settlement* ("Calculation Technique") to determine if the groundwater level benchmarks and goal are met by June 1 of the year identified. This information shall be provided for use by the Steering Committee. Following experience with the Calculation Technique the technical working group may recommend amendments for approval by the Steering Committee.
- iii. The Parties will request the Department to verify each District's annual diversion volume, and other diversion reduction data (recharge, CREP, conversions, end-gun removals, etc.) to confirm the accuracy of the data. The Department's analysis shall be provided to the Steering Committee no later than July 1 for the previous irrigation season.
- iv. Any District may elect to report to the Department and request enforcement against any individual member of that District that is not in compliance with any mitigation plan or activity implemented by the District. Such members will not be protected under the Settlement Agreement. It is the Parties' intent that the Director will evaluate the breach and, if a breach is found to exist, provide notice of violation and opportunity to cure to the breaching member. If the member fails to cure the breach the Parties will request the Director to issue an order

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

c. Section 3.m (Steering Committee):

- i. The Steering Committee will review the technical information supplied by the Department together with technical reports compiled by the Parties' consultants.
- ii. If, based on the information reported and available, the Surface Water Coalition and IGWA find that the Long Term Practices as set forth in paragraph 3 of the Agreement have been performed but the groundwater level benchmarks or goal set forth in 3.e.ii have not been met, the Steering Committee shall recommend additional actions to be undertaken by the Districts pursuant to 3.m.iii of the Settlement Agreement. If the Surface Water Coalition and IGWA do not agree upon additional actions prior to March 1 of the following year, the Steering Committee will request that the Director issue an order requiring additional actions to be undertaken by the Districts to achieve the benchmarks or goal not met.
- iii. If, based on the information reported and available, the Steering Committee finds any breach of the Long Term Practices as set forth in paragraph 3 of the Agreement, the Steering Committee shall give ninety (90) days written notice of the breach to the breaching party specifying the actions that must be taken to cure such breach. If the breaching party refuses or fails to take such actions to cure the breach, the Steering Committee shall report the breach to the Director with all supporting information, with a copy provided to the breaching party. If the Director determines based on all available information that a breach exists which has not been cured, the Steering Committee will request that the Director issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to immediate curtailment pursuant to CM Rule 40.05.
- iv. If the Surface Water Coalition and IGWA do not agree that a breach has occurred or cannot agree upon actions that must be taken by the breaching party to cure the breach, the Steering Committee will report the same to the Director and request that the Director evaluate all available information, determine if a breach has occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.
- v. The Steering Committee will submit a report to the Parties and the Department prior to May 1 annually reporting on: (a) progress on implementation and achieving the benchmarks and goals of the

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

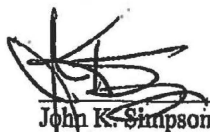
d. Section 4 (Adaptive Water Management Measures):

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


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

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



**SURFACE WATER COALITION:****BARKER RSHOLT & SIMPSON LLP**  
\_\_\_\_\_  
John K. Simpson      Date 1/5/17

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

**FLETCHER LAW OFFICE**  
\_\_\_\_\_  
W. Kent Fletcher      Date 1-3-17

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

**SECOND ADDENDUM TO SETTLEMENT AGREEMENT****5**


AMERICAN FALLS RESERVOIR DISTRICT NO. 2

Ellis Gooch 1-3-17  
Ellis Gooch Date  
President

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

6

BURLEY IRRIGATION DISTRICT

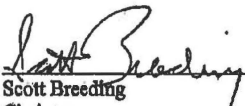
 12/13/2014  
\_\_\_\_\_  
Dean Edgar Date  
Chairman

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

7

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MILNER IRRIGATION DISTRICT

  
Scott Breeding  
Chairman

12/14/16  
Date

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

8

MINIDOKA IRRIGATION DISTRICT

Frank Hunt 12-20-16  
Frank Hunt Date  
Chairman

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

9

NORTH SIDE CANAL COMPANY

John Beukers 12-16-16  
John Beukers Date  
Chairman

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

10

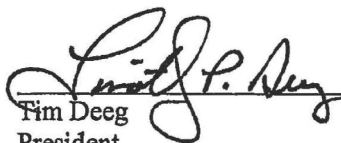
TWIN FALLS CANAL COMPANY

 12-13-16  
Dan Shewmaker Date  
Chairman

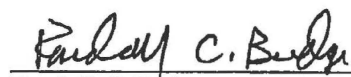
SECOND ADDENDUM TO SETTLEMENT AGREEMENT

11

**IDAHO GROUND WATER APPROPRIATORS, INC.:**

 12/14/16  
Tim Deeg Date  
President


**RACINE OLSEN NYE BUDGE & BAILEY, CHTD.**

 12/14/16  
Randall C. Budge Date

Attorneys for Idaho Ground Water Appropriators, Inc. et al.



ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT


  
Nick Behrend  
Chairman

12-14-16  
Date

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

13

BINGHAM GROUND WATER DISTRICT

  
\_\_\_\_\_  
Craig Evans                      12-14-14  
Chairman                      Date

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

14

BONNEVILLE-JEFFERSON GROUND WATER DISTRICT

 12/14/16

Dane Watkins  
Chairman

Date

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

15

CAREY VALLEY GROUND WATER DISTRICT

Leta Hansen 12/26/16  
Leta Hansen Chairman Date

JEFFERSON CLARK GROUND WATER DISTRICT

  
Kirk Jacobs  
Chairman

  
Date

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

17

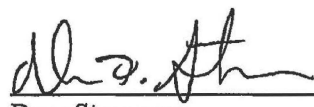
MADISON GROUND WATER DISTRICT

 1-9-17  
Jason Webster Date  
Chairman

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

18

MAGIC VALLEY GROUND WATER DISTRICT

 12/14/16  
\_\_\_\_\_  
Dean Stevenson Date  
Chairman

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

19

NORTH SNAKE GROUND WATER DISTRICT

 \_\_\_\_\_  
Lynn Carlquist  
Chairman

12/14/16  
Date

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

20



FREEMONT MADISON IRRIGATION DISTRICT

Dale L. Swenson, 12-14-16  
Dale L. Swenson Date  
Manager

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

21

## AGREEMENT

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

## RECITALS

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

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

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

## COVENANTS

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

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

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

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

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

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

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

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

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

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

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

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

A&B IRRIGATION DISTRICT


 10-12-15  
Harold Mohlman Date  
Chairman

SETTLEMENT AGREEMENT (A&B / GROUND WATER DISTRICTS)

2

**IDAHO GROUNDWATER APPROPRIATOR'S, INC.:**

ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT



10-7-15

Nick Behrend  
Chairman

Date

**SETTLEMENT AGREEMENT (A&B / GROUND WATER DISTRICTS)**

**3**

BINGHAM GROUND WATER DISTRICT

Craig Evans      Oct 8, 2015  
Craig Evans      Date  
Chairman

BONNEVILLE-JEFFERSON GROUND WATER DISTRICT

Dane Watkins  
Chairman

Date

CAREY VALLEY GROUND WATER DISTRICT

Leta Hansen      10/7/15  
Leta Hansen      Date  
Chairman

JEFFERSON CLARK GROUND WATER DISTRICT

 10/13/15  
Kirk Jacobs Date  
Chairman

SETTLEMENT AGREEMENT (A&B / GROUND WATER DISTRICTS)

7




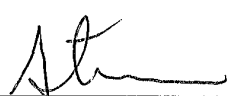
MADISON GROUND WATER DISTRICT

Jason Webster      10-19-15  
Jason Webster      Date  
Chairman

SETTLEMENT AGREEMENT (A&B / GROUND WATER DISTRICTS)

8

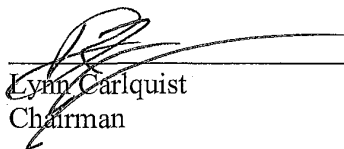
MAGIC VALLEY GROUND WATER DISTRICT

  10/7/2015  
\_\_\_\_\_  
Dean Stevenson Date  
Chairman

SETTLEMENT AGREEMENT (A&B / GROUND WATER DISTRICTS)

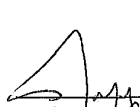

9

NORTH SNAKE GROUND WATER DISTRICT

  
\_\_\_\_\_  
Lynn Carlquist  
Chairman

*10/7/2015*  
\_\_\_\_\_  
Date

FREMONT MADISON IRRIGATION DISTRICT

   
\_\_\_\_\_  
Dale L. Swenson      Jeff Raybould      Date  
Manager              Chairman

MAR 09 2016

DEPARTMENT OF  
WATER RESOURCES

John K. Simpson, ISB #4242  
Travis L. Thompson, ISB #6168  
Paul L. Arrington, ISB #7198  
BARKER ROSHOLT & SIMPSON LLP  
195 River Vista Place, Suite 204  
Twin Falls, Idaho 83301-3029  
Telephone: (208) 733-0700  
Facsimile: (208) 735-2444

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

Randall C. Budge, ISB #1949  
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Irrigation District*

**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES**

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT  
MITIGATION PLAN

Docket No. CM-MP-2016- 001

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

**SURFACE WATER COALITION'S AND IGWA'S STIPULATED  
MITIGATION PLAN AND REQUEST FOR ORDER -**

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

### STIPULATION

1. The Eastern Snake Plain Aquifer (ESPA) supplies groundwater to approximately one million irrigated acres and to numerous cities, businesses, dairies, factories and homes; and
2. The ESPA is hydraulically connected to the Snake River and discharges to the Snake River via tributary springs, which supply surface water for multiple beneficial uses, including aquaculture, hydropower, and the irrigation of approximately one million acres; and
3. Since 1952 the total volume of water stored in the ESPA has decreased due to increasing direct diversions of ground water, increasingly efficient surface water irrigation practices, and other factors; and
4. Current ESPA water levels and total storage content, after more than six decades of decline, are inadequate to provide a reasonably safe supply of water for sustainable surface and groundwater irrigation, hydropower, aquaculture, municipal and industrial uses, the curtailment of which would cause severe economic harm to the State of Idaho
5. In 2015, historic settlement agreements, identified herein, were entered into between the following surface water right holders: A & B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company, collectively known as the Surface Water Coalition (SWC); and the following ground water right holders: Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Groundwater District, Fremont-Madison Irrigation District, Anheuser-Busch, United Water, Glanbia Foods, City of Blackfoot, City of American Falls, City of Jerome, City of Rupert, City of Heyburn, City of Paul, City of Chubbuck and City of Hazelton, collectively known as the Idaho Ground Water Appropriators, Inc.; (IGWA) for the purpose of resolving pending water delivery calls and provide for on-going management of the ESPA to address the current hydrologic conditions identified in paragraphs nos. 3 and 4;
6. Attached hereto as **Exhibits B and C** respectively are true and correct copies of the *Settlement Agreement entered into June 30, 2015, between participating members of the Surface Water Coalition and participating members of the Idaho Ground Water Appropriators, Inc. and Addendum to Settlement Agreement* (collectively the "SWC-IGWA Settlement Agreement").

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

8. The parties hereby incorporate and submit the SWC-IGWA Settlement Agreement and the A&B-IGWA Agreement (collectively, the “Agreements”) as a stipulated mitigation plan in reference to the Surface Water Coalition delivery call (IDWR Docket No. CM-DC-2010-001). The Coalition stipulates that the mitigation provided by participating IGWA members under the Agreements is, provided the Agreements are implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member.

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

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

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

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

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

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

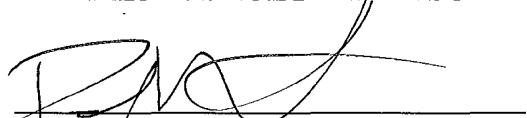
Agreement Mitigation Plan; or, secure Director approval of an individual mitigation plan which complies with CMR 43 and provides adequate mitigation to help achieve the groundwater level goal and benchmarks set forth in the SWC-IGWA Settlement Agreement.

Therefore, the parties request that the Director:

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

DATED this \_\_\_\_ day of March, 2016.

**BARKER ROSHOLT & SIMPSON LLP**

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

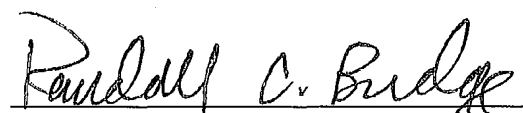
*Attorneys for A&B Irrigation District,  
Burley Irrigation District, Milner Irrigation  
District, North Side Canal Company, and  
Twin Falls Canal Company*

**FLETCHER LAW OFFICE**

  
\_\_\_\_\_  
W. Kent Fletcher

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

**RACINE OLSON NYE BUDGE & BAILEY, CHTD.**

  
\_\_\_\_\_  
Randall C. Budge

*Attorneys for Idaho Ground Water Appropriators, Inc.*

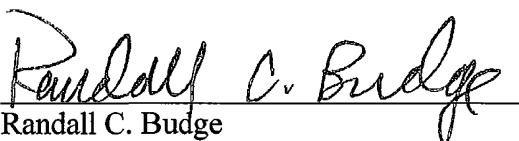


### CERTIFICATE OF SERVICE

I hereby certify that on this 1<sup>st</sup> day of March, 2016, I served a true and correct copy of the foregoing *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* on the following by the method indicated:

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

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

**EXHIBIT A**

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

**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES**

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT  
MITIGATION PLAN

Docket No. CM-MP-2016-\_\_\_\_\_

**FINAL ORDER**

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

IT IS HEREBY ORDERED as follows:

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

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

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

b. Section 3.m. Steering Committee:

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

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

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

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

c. Section 4. Adaptive Water Management Measures:

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

2. On-going measures:

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

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

4. This is a FINAL ORDER of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.
5. Unless the right to a hearing before the Director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the Director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the Director to contest the action. The person shall file with the Director, within fifteen (15) days after receipt of written notice of the action issued by the Director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the Director and requesting a hearing. See Idaho Code § 42-1701A(3).
6. Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying a petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.
7. Nothing in this Order shall modify or change the rights of the parties to the settlement agreement between the Surface Water Coalition and the participating groundwater districts, dated June 30, 2015. This Order and mitigation plan deal with the rights and obligations of the parties to the Agreement only.

Dated this \_\_\_\_\_ day of March, 2016.

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GARY SPACKMAN  
Director



## **EXHIBIT B**

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

**SETTLEMENT AGREEMENT ENTERED INTO JUNE 30, 2015 BETWEEN PARTICIPATING  
MEMBERS OF THE SURFACE WATER COALITION<sup>1</sup> AND PARTICIPATING MEMBERS OF THE  
IDAHO GROUND WATER APPROPRIATORS, INC.<sup>2</sup>**

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

**1. Objectives.**

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

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

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

## 2. Near Term Practices.

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

## 3. Long Term Practices, Commencing 2016.

- a. *Consumptive Use Volume Reduction.*
  - i. Total ground water diversion shall be reduced by 240,000 ac-ft annually.
  - ii. Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity. Private recharge activities cannot rely on the Water District 01 common Rental Pool or credits acquired from third parties, unless otherwise agreed to by the parties.
- b. *Annual storage water delivery.*
  - i. IGWA will provide 50,000 ac-ft of storage water through private lease(s) of water from the Upper Snake Reservoir system, delivered to SWC 21 days after the date of allocation, for use to the extent needed to meet irrigation

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

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

c. *Irrigation season reduction.*

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

d. *Mandatory Measurement Requirement.*

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

e. *Ground Water Level Goal and Benchmarks.*

- i. Stabilize and ultimately reverse the trend of declining ground water levels and return ground water levels to a level equal to the average of the aquifer levels from 1991-2001. Utilize groundwater levels in mutually agreed upon wells with mutually agreed to calculation techniques to measure ground water levels. A preliminary list of 19 wells has been agreed to by the parties, recognizing that the list may be modified based on additional technical information.
- ii. The following benchmarks shall be established:
  - o Stabilization of ground water levels at identified wells by April 2020, to 2015 ground water levels;
  - o Increase in ground water levels by April 2023 to a point half way between 2015 ground water levels and the ground water level goal; and
  - o Increase of ground water levels at identified wells by April 2026 to the ground water level goal.
- iii. Develop a reliable method to measure reach gain trends in the Blackfoot to Milner reach within 10 years.
- iv. When the ground water level goal is achieved for a five year rolling average, ground water diversion reductions may be reduced or removed, so long as the ground water level goal is sustained.
- v. If any of the benchmarks, or the ground water level goal, is not achieved, adaptive measures will be identified and implemented per section 4 below.

f. *Recharge.*

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

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

g. *NRCS Programs.*

Parties will support NRCS funded permanent water conservation programs.

h. *Conversions.*

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

i. *Trust Water Rights.*

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

j. *Transfer Processes.*

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

k. *Moratorium Designations.*

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

l. *IDWR Processes.*

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

m. *Steering Committee.*

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

**4. Adaptive Water Management Measures.**

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

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

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

**5. Safe Harbor.**

No ground water user participating in this Settlement Agreement will be subject to a delivery call by the SWC members as long as the provisions of the Settlement Agreement are being implemented.

**6. Non-participants.**

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

**7. Term.**

This is a perpetual agreement.

**8. Binding Effect.**

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

**9. Entire Agreement.**

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

**10. Effect of Headings.**

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

**11. Effective Date.**

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

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

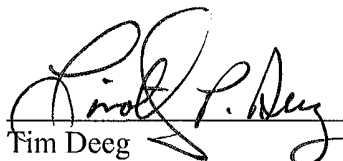
The parties have executed this Agreement on the date following their respective signatures.

RACINE OLSON NYE BUDGE AND BAILEY, CHARTERED

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

Attorney for Idaho Ground Water Appropriators, Inc.

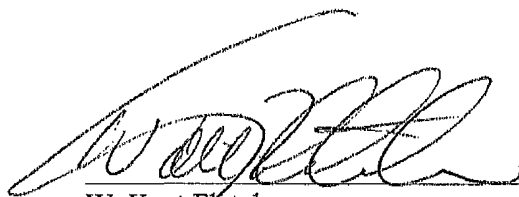
IDAHO GROUND WATER APPROPRIATORS, INC.

 7/1/2015  
Tim Deeg /Date

President

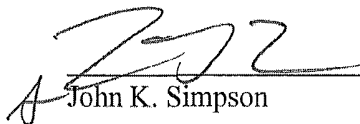


FLETCHER LAW OFFICE

 7-2-15  
W. Kent Fletcher Date

On Behalf of the Surface Water Coalition

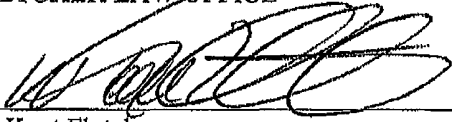
BARKER ROSHOLT AND SIMPSON LLP

 7/7/15  
John K. Simpson Date

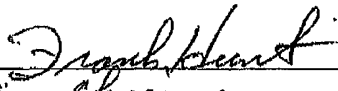
On Behalf of the Surface Water Coalition

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


FLETCHER LAW OFFICE

  
W. Kent Fletcher Date 7-7-15

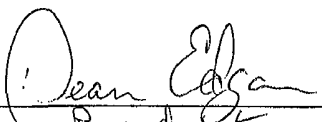
MINIDOKA IRRIGATION DISTRICT

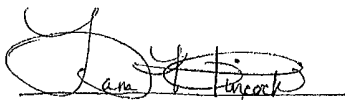
BY:   
Title: Chairman Date 7-7-15

AMERICAN FALLS RESERVOIR DISTRICT NO. 2

BY:   
Title: Chairman Date 7-1-15

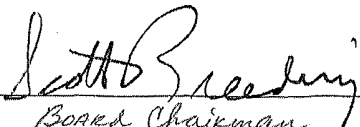
BURLEY IRRIGATION DISTRICT

BY:   
Title: President Date: July 14, 2015

Attested by:  
  
Lana K. Pincok  
Secretary / Treasurer

12.1 | Page

MILNER IRRIGATION DISTRICT

BY:   
Title: Board Chairman Date: 7/23/2015

NORTH SIDE CANAL COMPANY


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

TWIN FALLS CANAL COMPANY

BY: *Jan R. Hunsaker*  
Title: *Chair. BOB* Date: *July 22, 2015*

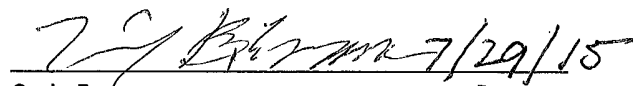


ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT

 7-16-15  
\_\_\_\_\_  
Nick Behrend Date

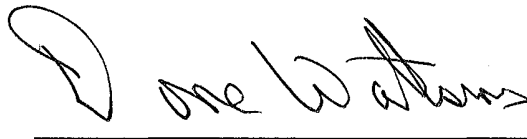
Chairman

BINGHAM GROUND WATER DISTRICT

  
\_\_\_\_\_  
Craig Evans Date

Chairman

BONNEVILLE-JEFFERSON GROUND WATER DISTRICT


 7/29/15

Dane Watkins

Date

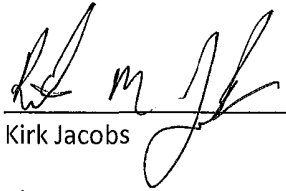
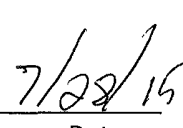
Chairman

CAREY VALLEY GROUND WATER DISTRICT


 7/27/15  
Leta Hansen Date

Chairman


JEFFERSON CLARK GROUND WATER DISTRICT

   
Kirk Jacobs Date  
Chairman

MADISON GROUND WATER DISTRICT

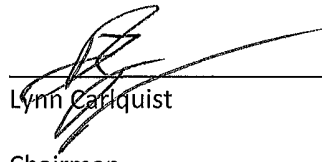
 7-23-15  
Jason Webster Date  
Chairman

MAGIC VALLEY GROUND WATER DISTRICT

 7/14/2015  
Dean Stevenson Date

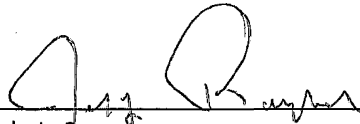
Chairman

NORTH SNAKE GROUND WATER DISTRICT

  
\_\_\_\_\_  
Lynn Carlquist      7/22/2015      Date  
Chairman



FREMONT MADISON IRRIGATION DISTRICT

  
\_\_\_\_\_  
Dale L. Swenson Date  
Jeff Raybould  
Manager Chairman

SOUTHWEST IRRIGATION DISTRICT

---

RANDY BROWN

Date

Chairman

## **EXHIBIT C**

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

## ADDENDUM TO SETTLEMENT AGREEMENT

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

### RECITALS

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

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

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

### COVENANTS

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

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

convenience and reference and shall not be construed as interpretations of the text. Ex. 05 Page 041

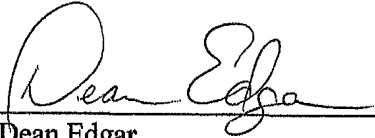
The parties have executed this Agreement on the date following their respective signatures.

**SURFACE WATER COALITION:**

American Falls Reservoir District No. 2

<u>Ellis Gooch</u>	<u>10-1-15</u>
Ellis Gooch	Date
President	

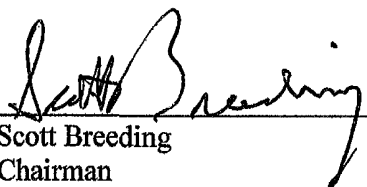
Burley Irrigation District

  
\_\_\_\_\_  
Dean Edgar  
Chairman

10/13/2015  
\_\_\_\_\_  
Date

**ADDENDUM TO SETTLEMENT AGREEMENT 3**

Milner Irrigation District

 10/14/15  
\_\_\_\_\_  
Scott Breeding      Date  
Chairman

**ADDENDUM TO SETTLEMENT AGREEMENT      4**


Minidoka Irrigation District

Frank Hunt      oct 13-2015  
Frank Hunt      Date  
Chairman

ADDENDUM TO SETTLEMENT AGREEMENT      5

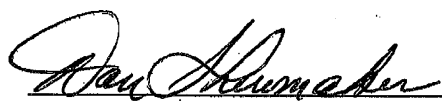


North Side Canal Company

  
\_\_\_\_\_  
John Beukers  
Chairman

\_\_\_\_\_  
Date

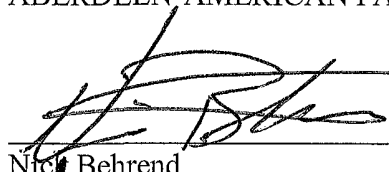
Twin Falls Canal Company

 10-13-15  
Dan Shewmaker Date  
Chairman

ADDENDUM TO SETTLEMENT AGREEMENT 7

**IDAHO GROUNDWATER APPROPRIATOR'S, INC.:**


ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT

 10-7-15

Nick Behrend  
Chairman

Date

BINGHAM GROUND WATER DISTRICT

  
\_\_\_\_\_  
Craig Evans  
Chairman

Date

Oct 8, 2015

BONNEVILLE-JEFFERSON GROUND WATER DISTRICT

 10/7/15

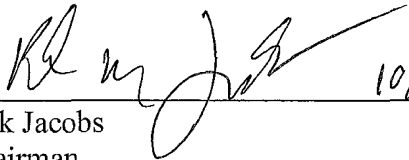
Dane Watkins  
Chairman

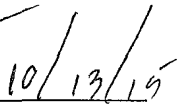
Date

CAREY VALLEY GROUND WATER DISTRICT


Leta Hansen      10/7/15  
Leta Hansen      Date  
Chairman

JEFFERSON CLARK GROUND WATER DISTRICT

  
Kirk Jacobs  
Chairman

  
Date

MADISON GROUND WATER DISTRICT

 10-19-15  
Jason Webster Date  
Chairman

ADDENDUM TO SETTLEMENT AGREEMENT 13



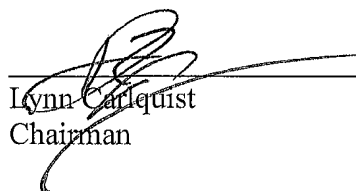
MAGIC VALLEY GROUND WATER DISTRICT

 10/7/2015

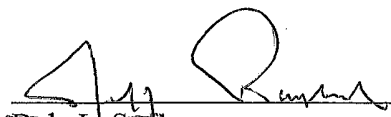
Dean Stevenson  
Chairman

Date

NORTH SNAKE GROUND WATER DISTRICT

 10/7/2015  
\_\_\_\_\_  
Lynn Carlquist Date  
Chairman

FREEMONT MADISON IRRIGATION DISTRICT

  
\_\_\_\_\_  
Dale L. Swenson Date  
Manager Jeff Rybould  
Chairman

## **EXHIBIT D**

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

## AGREEMENT

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

## RECITALS

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

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

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

## COVENANTS

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

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

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

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

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

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

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

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

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

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

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

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

A&B IRRIGATION DISTRICT

  
Harold Mohlman  
Chairman

Date


10-12-15

SETTLEMENT AGREEMENT (A&B / GROUND WATER DISTRICTS)

2

**IDAHO GROUNDWATER APPROPRIATOR'S, INC.:**

ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT

 10-7-15  
Nick Behrend Date  
Chairman

BINGHAM GROUND WATER DISTRICT

*Craig Evans* *Oct 8, 2015*  
Craig Evans Date  
Chairman



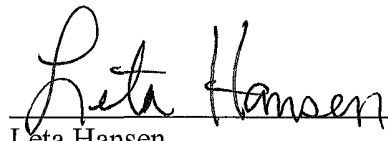
BONNEVILLE-JEFFERSON GROUND WATER DISTRICT

Dane Watkins  
Chairman

Date

CAREY VALLEY GROUND WATER DISTRICT

 10/7/15  
Leta Hansen Date  
Chairman

JEFFERSON CLARK GROUND WATER DISTRICT

 10/13/15  
Kirk Jacobs Date  
Chairman

MADISON GROUND WATER DISTRICT

 10-19-15

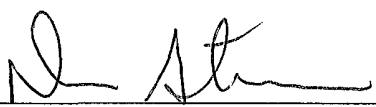
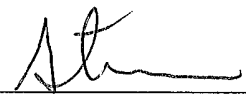
Jason Webster  
Chairman

Date

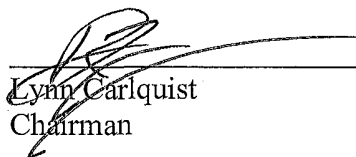
SETTLEMENT AGREEMENT (A&B / GROUND WATER DISTRICTS)

8

MAGIC VALLEY GROUND WATER DISTRICT

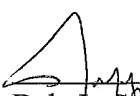
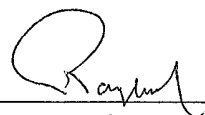
  10/7/2015  
\_\_\_\_\_  
Dean Stevenson Date  
Chairman

NORTH SNAKE GROUND WATER DISTRICT

  
\_\_\_\_\_  
Lynn Carlquist  
Chairman

10/7/2015  
Date

FREEMONT MADISON IRRIGATION DISTRICT

   
Dale L. Swenson Date  
Manager Jeff Raybould  
Chairman

A. Dean Tranmer, ISB No. 2793  
 City of Pocatello  
 P. O. Box 4169  
 Pocatello, ID 83201  
 Telephone: (208) 234-6149  
[dtranmer@pocatello.us](mailto:dtranmer@pocatello.us)

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 Mitra M. Pemberton  
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[sarahk@white-jankowski.com](mailto:sarahk@white-jankowski.com)  
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**BARKER, ROSHOLT & SIMPSON, LLC**  
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 Twin Falls, ID 83301-3029  
 Telephone: (208) 733-0700  
[tlr@idahowaters.com](mailto:tlr@idahowaters.com)  
[jks@idahowaters.com](mailto:jks@idahowaters.com)  
[pla@idahowaters.com](mailto:pla@idahowaters.com)

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

W. Kent Fletcher, ISB No. 2248  
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 Burley, ID 83318  
 Telephone (208) 678-3250  
[wkf@pmt.org](mailto:wkf@pmt.org)

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



*Attorneys for Idaho Ground Water  
Appropriators, Inc.*

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

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

IN THE MATTER OF THE MITIGATION  
PLAN FILED BY THE CITY OF POCATELLO

IN THE MATTER OF THE MITIGATION  
PLAN FILED BY THE COALITION OF CITIES

IN THE MATTER OF THE CITY OF IDAHO  
FALLS MITIGATION PLAN FOR THE  
SURFACE WATER COALITION CALL

Docket Nos. CM-MP-2016-001,  
CM-MP-2015-001, CM-MP-2015-004,  
CM-MP-2015-005

**MOTION FOR ORDER APPROVING  
STIPULATION TO  
CONDITIONALLY WITHDRAW  
PROTESTS**

The City of Idaho Falls (the "City"), an Idaho municipal corporation, the City of Pocatello ("Pocatello") an Idaho municipal corporation, the Coalition of Cities ("COC") (collectively "cities"), the Surface Water Coalition and the Idaho Ground Water Appropriators (collectively,

MOTION FOR ORDER APPROVING STIPULATION TO CONDITIONALLY WITHDRAW PROTESTS

PAGE 2

“Parties”), by and through their above-identified counsel, hereby submits this *Motion for Order Approving Stipulation to Conditionally Withdraw Protests*.

The Parties hereby stipulate as follows:

1. The *Surface Water Coalition’s and IGWA’s Stipulated Mitigation Plan and Request for Order* (the “SWC/IGWA Plan”) was filed with the Idaho Department of Water Resources (“IDWR” or “Department”) on March 9, 2016, and the Cities timely filed protest on April 4, 2016.
2. To resolve the Idaho Falls and Pocatello’s Protests of the SWC/IGWA Plan, the Parties agree:
  - a. Pocatello and Idaho Falls are not participants in the SWC/IGWA Plan and are not bound by any of the terms or conditions found therein.
  - b. SWC and IGWA will not ask the Department to impose the obligations and goals of the SWC/IGWA Plan on any of the cities, despite the fact that the March 9, 2016, SWC/IGWA Request for Order at paragraph 14 requests such relief.
  - c. The Pocatello and Idaho Falls Protests to the IGWA/SWC Plan are to be withdrawn upon entry of an order of the Department approving the SWC/IGWA Plan which includes the following provisions, or provisions in substantially the same form or content:
    - “The SWC/IGWA Plan requires numerous on-going activities, such as monitoring, reporting, and verification of data. The parties to the SWC/IGWA Plan should be responsible for these activities.”

- “The SWC/IGWA Plan includes reference to certain hydrologic goals and benchmarks. The goals and benchmarks are applicable only to the parties to the SWC/IGWA Plan.”<sup>1</sup>
  - “Approval of the SWC/IGWA Plan does not begin the process of establishing the Eastern Snake Plain Aquifer (“ESPA”) as a ‘ground water management area’ pursuant to Idaho Code § 42-233b. Any such action to establish the ESPA as a ‘ground water management area’ pursuant to Idaho Code § 42-233b shall only be addressed through a separate administrative proceeding designated for that purpose.”
- d. In the event the above provisions or provisions in substantially the same form or content are not included in the order approving the SWC/IGWA Plan, this stipulation shall be null and void.
3. The *Joint Motion for Order Entering Settlement Between Pocatello, Coalition of Cities, Idaho Falls and the Surface Water Coalition* (“Cities’ Plan”) was filed with the Department on March 15, 2016 and IGWA timely filed a protest on April 18, 2016.
4. In order to resolve the Protest to the Cities’ Plan:
- a. SWC agrees to provide a letter to IGWA by May 5, 2016, stating that, in the event SWC determines it does not require the 2600 acre-feet of storage water provided pursuant to the Cities Plan in 2016 for irrigation purposes, the SWC commits to using that 2600 acre-feet of water for recharge instead.

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<sup>1</sup> Similar language for paragraphs 1 and 2 herein are found in the *Final Order Approving Mitigation Plan for 2016*, In the Matter of Southwest and Goose Creek Irrigation Districts Mitigation Plan for the Surface Water Coalition Delivery Call, Docket No. CM-MP-2010-01, March 29, 2016, at 3.

- b. Upon receipt of the above-referenced letter, IGWA will file a formal withdrawal of its Protest to the Cities Plan.

Therefore, the Parties request that the Director enter an order approving this Stipulation.


DATED this 22<sup>nd</sup> day of April, 2016.


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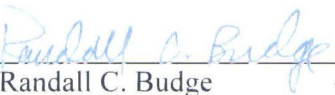
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#2 and Minidoka Irrigation District

By   
Randall C. Budge 4/20/2016

By  for \_\_\_\_\_  
W. Kent Fletcher

By   
Thomas J. Budge 4/20/2016

MOTION FOR ORDER APPROVING STIPULATION TO CONDITIONALLY WITHDRAW PROTESTS

PAGE 7



# **CERTIFICATE OF SERVICE**

I hereby certify that on this 22<sup>nd</sup> day of April, 2016, I caused to be served a true and correct copy of the foregoing **MOTION FOR ORDER APPROVING STIPULATION TO CONDITIONALLY WITHDRAW PROTESTS** in **Docket Nos. CM-MP-2016-001; CM-MP-2015-001, CM-MP-2015-004, CM-MP-2015-005** upon the following by the method indicated:



Sarah Klahn, White & Jankowski, LLP

Gary Spackman, Director State of Idaho, Dept of Water Resources 322 E Front St P.O. Box 83720 Boise ID 83720-0098 deborah.gibson@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Federal Express (208-287-4942) <input type="checkbox"/> Facsimile 208-287-6700 <input checked="" type="checkbox"/> Email
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Garrick L. Baxter Deputy Attorneys General – IDWR P.O. Box 83720 Boise ID 83720-0098 garrick.baxter@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Facsimile 208-287-6700 <input checked="" type="checkbox"/> Email
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Kathleen Carr US Dept Interior 960 Broadway Ste 400 Boise ID 83706 kathleenmarion.carr@sol.doi.gov	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile 208-334-1907 <input checked="" type="checkbox"/> Email

MOTION FOR ORDER APPROVING STIPULATION TO CONDITIONALLY WITHDRAW PROTESTS

PAGE 8

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Robert L. Harris Holden, Kidwell, Hahn & Crapo, PLLC P.O. Box 50130 1000 Riverwalk Drive, Ste. 200 Idaho Falls, ID 83405 rharris@holdenlegal.com	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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MOTION FOR ORDER APPROVING STIPULATION TO CONDITIONALLY WITHDRAW PROTESTS

PAGE

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FEB 07 2017

DEPARTMENT OF  
WATER RESOURCES

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**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES**

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

IN THE MATTER OF IGWA'S  
SETTLEMENT AGREEMENT  
MITIGATION PLAN

Docket No. CM-MP-2016-001

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

**SURFACE WATER COALITION'S AND IGWA'S STIPULATED  
MITIGATION PLAN AND REQUEST FOR ORDER -**

**1**

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

### STIPULATION


1. In 2015, historic settlement agreements, identified herein, were entered into between the following surface water right holders: A & B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company, collectively known as the Surface Water Coalition (SWC); and the following ground water right holders: Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Groundwater District, Fremont-Madison Irrigation District, Anheuser-Busch, United Water, Glanbia Foods, City of Blackfoot, City of American Falls, City of Jerome, City of Rupert, City of Heyburn, City of Paul, City of Chubbuck and City of Hazelton, collectively known as the Idaho Ground Water Appropriators, Inc.; (IGWA) for the purpose of resolving pending water delivery calls and provide for on-going management of the ESPA.
2. Following execution of the agreement the parties filed the *Stipulated Mitigation Plan and Request for Order* with the Director on March 9, 2016. The parties adopt and incorporate that stipulation.
3. The Director approved the stipulated mitigation plan. See *Final Order Approving Stipulated Mitigation Plan* (May 2, 2016).
4. The parties recently executed the *Second Addendum to Settlement Agreement* (Ex. A) which provides further details concerning implementation of the agreement addressing Sections 3.a (Consumptive Use Volume Reduction); 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a (Adaptive Water Management).
5. The parties hereby incorporate and submit the *Second Addendum to Settlement Agreement* as a proposed amendment to the stipulated mitigation plan filed and approved by the Director last year.
6. The parties stipulate and request that the Director issue an Order approving the *Second Addendum to Settlement Agreement* as an amendment to the previously approved mitigation plan under CMR 43.

Therefore, the parties request that the Director:

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

DATED this 7<sup>th</sup> day of February, 2017.

**BARKER ROSHOLT & SIMPSON LLP**

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

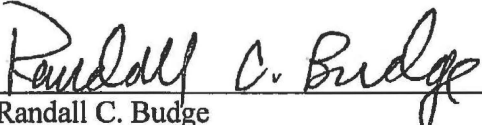
*Attorneys for A&B Irrigation District,  
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District, North Side Canal Company, and  
Twin Falls Canal Company*

**FLETCHER LAW OFFICE**

  
\_\_\_\_\_  
W. Kent Fletcher

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

**RACINE OLSON NYE BUDGE & BAILEY, CHTD.**

  
\_\_\_\_\_  
Randall C. Budge


*Attorneys for Idaho Ground Water Appropriators, Inc.*

### CERTIFICATE OF SERVICE

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

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

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Travis L. Thompson

# Exhibit A

## SECOND ADDENDUM TO SETTLEMENT AGREEMENT

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

### RECITALS

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

### COVENANTS

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

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



2. **Implementation of Settlement Agreement.** The Parties will work cooperatively in implementing the terms of the Settlement Agreement, to wit: Sections 3.a (Consumptive Use Volume Reduction), 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a (Adaptive Water Management) as follows:

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

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

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

- i. The Parties and their consultants will work with the Department to collect, process, archive and submit sentinel well data to the Steering Committee within 30 days of collection.
- ii. The Parties and their consultants will use the *Technique For Calculating Groundwater Level Index and Determining Compliance with Settlement* ("Calculation Technique") to determine if the groundwater level benchmarks and goal are met by June 1 of the year identified. This information shall be provided for use by the Steering Committee. Following experience with the Calculation Technique the technical working group may recommend amendments for approval by the Steering Committee.
- iii. The Parties will request the Department to verify each District's annual diversion volume, and other diversion reduction data (recharge, CREP, conversions, end-gun removals, etc.) to confirm the accuracy of the data. The Department's analysis shall be provided to the Steering Committee no later than July 1 for the previous irrigation season.
- iv. Any District may elect to report to the Department and request enforcement against any individual member of that District that is not in compliance with any mitigation plan or activity implemented by the District. Such members will not be protected under the Settlement Agreement. It is the Parties' intent that the Director will evaluate the breach and, if a breach is found to exist, provide notice of violation and opportunity to cure to the breaching member. If the member fails to cure the breach the Parties will request the Director to issue an order

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

c. Section 3.m (Steering Committee):

- i. The Steering Committee will review the technical information supplied by the Department together with technical reports compiled by the Parties' consultants.
- ii. If, based on the information reported and available, the Surface Water Coalition and IGWA find that the Long Term Practices as set forth in paragraph 3 of the Agreement have been performed but the groundwater level benchmarks or goal set forth in 3.e.ii have not been met, the Steering Committee shall recommend additional actions to be undertaken by the Districts pursuant to 3.m.iii of the Settlement Agreement. If the Surface Water Coalition and IGWA do not agree upon additional actions prior to March 1 of the following year, the Steering Committee will request that the Director issue an order requiring additional actions to be undertaken by the Districts to achieve the benchmarks or goal not met.
- iii. If, based on the information reported and available, the Steering Committee finds any breach of the Long Term Practices as set forth in paragraph 3 of the Agreement, the Steering Committee shall give ninety (90) days written notice of the breach to the breaching party specifying the actions that must be taken to cure such breach. If the breaching party refuses or fails to take such actions to cure the breach, the Steering Committee shall report the breach to the Director with all supporting information, with a copy provided to the breaching party. If the Director determines based on all available information that a breach exists which has not been cured, the Steering Committee will request that the Director issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to immediate curtailment pursuant to CM Rule 40.05.
- iv. If the Surface Water Coalition and IGWA do not agree that a breach has occurred or cannot agree upon actions that must be taken by the breaching party to cure the breach, the Steering Committee will report the same to the Director and request that the Director evaluate all available information, determine if a breach has occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.
- v. The Steering Committee will submit a report to the Parties and the Department prior to May 1 annually reporting on: (a) progress on implementation and achieving the benchmarks and goals of the

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

d. Section 4 (Adaptive Water Management Measures):


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

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

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


**SURFACE WATER COALITION:**

**BARKER ROSHOLT & SIMPSON LLP**

  
\_\_\_\_\_  
John K. Simpson                      Date                      1/5/17

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

**FLETCHER LAW OFFICE**

  
\_\_\_\_\_  
W. Kent Fletcher                      Date                      1-3-17

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

**SECOND ADDENDUM TO SETTLEMENT AGREEMENT**

**5**

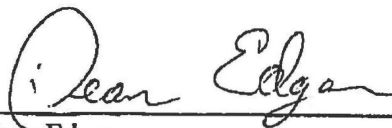
AMERICAN FALLS RESERVOIR DISTRICT NO. 2

Ellis Gooch 1-3-17  
Ellis Gooch Date  
President

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

6

BURLEY IRRIGATION DISTRICT

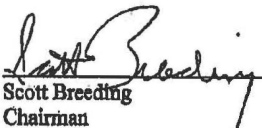
 12/13/2014  
\_\_\_\_\_  
Dean Edgar Date  
Chairman

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

7

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MILNER IRRIGATION DISTRICT

 12/14/16  
\_\_\_\_\_  
Scott Breeding      Date  
Chairman

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

8

MINIDOKA IRRIGATION DISTRICT

Frank Hunt 12-20-16  
Frank Hunt Date  
Chairman

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

9




NORTH SIDE CANAL COMPANY

John Beukers 12-16-16  
John Beukers Date  
Chairman

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

10

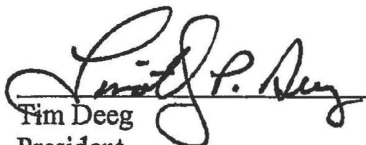
TWIN FALLS CANAL COMPANY

 12-13-16  
Dan Shewmaker Date  
Chairman

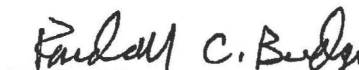
SECOND ADDENDUM TO SETTLEMENT AGREEMENT

11

**IDAHO GROUND WATER APPROPRIATORS, INC.:**


 12/14/16  
Tim Deeg                      Date  
President

**RACINE OLSEN NYE BUDGE & BAILEY, CHTD.**

 12/14/16  
Randall C. Budge                      Date

Attorneys for Idaho Ground Water Appropriators, Inc. et al.

ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT


  
Nick Behrend  
Chairman

12-14-16  
Date

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

13

BINGHAM GROUND WATER DISTRICT

 12-14-14  
Craig Evans Date  
Chairman

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

14

BONNEVILLE-JEFFERSON GROUND WATER DISTRICT

 12/14/16

\_\_\_\_\_  
Dane Watkins  
Chairman

\_\_\_\_\_  
Date

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

15

CAREY VALLEY GROUND WATER DISTRICT

Leta Hansen 12/26/16  
Leta Hansen Chairman Date

JEFFERSON CLARK GROUND WATER DISTRICT

  
Kirk Jacobs  
Chairman

  
Date

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

17



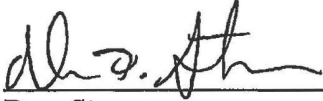
MADISON GROUND WATER DISTRICT

 1-9-17  
\_\_\_\_\_  
Jason Webster Date  
Chairman

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

18

MAGIC VALLEY GROUND WATER DISTRICT

 12/14/16  
\_\_\_\_\_  
Dean Stevenson Date  
Chairman

NORTH SNAKE GROUND WATER DISTRICT

  
Lynn Carlquist  
Chairman

12/14/16  
Date

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

20

FREEMONT MADISON IRRIGATION DISTRICT

Dale L. Swenson      12-14-16  
Dale L. Swenson      Date  
Manager

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

21

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

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

Docket No. CM-DC-2010-001

Docket No. CM-MP-2016-001

**NOTICE OF STATUS CONFERENCE**

**BACKGROUND**

On July 21, 2022, the Surface Water Coalition (“SWC”) filed with the Idaho Department of Water Resources (“Department”) the *Surface Water Coalition’s Notice of Steering Committee Impasse/Request for Status Conference* (“Request”) in the above-captioned matters.<sup>1</sup> In the Request, the SWC alleges that the ground water districts are not complying with the stipulated mitigation plan approved by the Director on May 2, 2016.<sup>2</sup> *Request* at 2. The SWC states that the allegations of noncompliance have been reviewed by the steering committee, as required by the approved mitigation plan, and that the SWC and the Idaho Ground Water Appropriators, Inc. (“IGWA”) have reached an impasse on whether there has been a breach. *Id.* at 3-4. The SWC requests the Director set a status conference to discuss the allegations of noncompliance. *Id.* at 4. The SWC also requests a status conference to discuss discrepancies between the numbers in IGWA’s 2021 performance report and IDWR’s verification report. *Id.*

The Director will grant the SWC’s request for a status conference. The status conference will be set for August 5, 2022, at the time and location described below.

**NOTICE OF STATUS CONFERENCE**

The Director hereby notifies the parties that a status conference in this matter will be held on **August 5, 2022, at 10:00 a.m. (MST)**, at the Department’s State Office, located at 322 E.

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

<sup>2</sup> After May 2, 2016, the parties agreed to modify their stipulated mitigation plan. On May 9, 2017, the Director issued a *Final Order Approving Amendment to Stipulated Mitigation Plan* (“Amended Plan”). The Amended Plan includes a process that calls for the parties to first raise compliance disputes with the joint steering committee. *Second Addendum to Settlement Agreement* at 3 (December 14, 2016).

Front Street, 6th Floor, Boise, Idaho. All parties to the matter must be represented at the status conference in person or by video conference.

To join the conference via computer or smartphone, please click the following Webex link, follow the prompts, and wait to be admitted by the meeting host:

<https://idahogov.webex.com/idahogov/j.php?MTID=m78f1a435dac9d9b4b55cfcfd62d74668>

To join the conference via telephone, please dial 1(415) 655-0001 (US Toll) and enter the following meeting access code when prompted: **2465 943 7520**

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

The conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations to attend, participate in, or understand the conference, please advise the Department no later than five (5) days before the conference. Inquiries for special accommodations should be directed to Sarah Tschohl, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4800.

Dated this 26<sup>th</sup> day of July 2022.



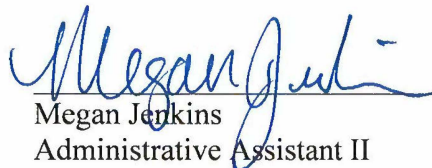
GARY SPACKMAN  
Director

# **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26<sup>th</sup> day of July 2022, the above and foregoing, was served by the method indicated below, and addressed to the following:

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

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

  
Megan Jenkins  
Administrative Assistant II



John K. Simpson, ISB #4242  
 Travis L. Thompson, ISB #6168  
 Michael A. Short, ISB #10554  
**BARKER ROSHOLT & SIMPSON LLP**  
 163 Second Ave. West  
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 Twin Falls, Idaho 83303-0063  
 Telephone: (208) 733-0700  
 Email: [jks@idahowaters.com](mailto:jks@idahowaters.com)  
[tlr@idahowaters.com](mailto:tlr@idahowaters.com)  
[mas@idahowaters.com](mailto:mas@idahowaters.com)

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

W. Kent Fletcher, ISB #2248  
**FLETCHER LAW OFFICE**  
 P.O. Box 248  
 Burley, Idaho 83318  
 Telephone: (208) 678-3250  
 Email: [wkf@pmt.org](mailto:wkf@pmt.org)

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

**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 )

\_\_\_\_\_)  
 )  
 IN THE MATTER OF IGWA'S )  
 SETTLEMENT AGREEMENT )  
 MITIGATION PLAN )  
 )  
 \_\_\_\_\_)

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

**SURFACE WATER COALITION'S  
 NOTICE OF STEERING  
 COMMITTEE IMPASSE / REQUEST  
 FOR STATUS CONFERENCE**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively hereafter referred to as the “Surface Water Coalition”, “Coalition”, or “SWC”), by and through their counsel of record, and hereby provide the following notice and request related to the above-captioned matters.

## **I. Ground Water Districts’ Compliance with Approved Mitigation Plan**

The Director approved the stipulated mitigation plan submitted by SWC and IGWA on May 2, 2016. *See Final Order Approving Stipulated Mitigation Plan*. Pursuant to the plan the signatory<sup>1</sup> ground water districts and their members agreed to “a total ground water diversion reduction of 240,000 acre-feet annually.” *See Order* at 2. On Friday April 1, 2022, counsel for IGWA submitted the districts’ 2021 performance report. As detailed in that report, the signatory ground water districts only performed 56,953 acre-feet in diversion reductions and 65,831 acre-feet in recharge for a total of 122,784 acre-feet. IDWR recently submitted its verification report on June 30, 2022. *See Brian Ragan June 30, 2022 Memo*. IDWR’s numbers differed from IGWA’s in that IDWR assumed (0) diversion for various wells within Carey Valley and North Snake Ground Water Districts. *See id. at 3, Table 2 Notes*. Further, IDWR’s reduction calculations were significantly different than IGWA’s resulting in IDWR using a diversion reduction value of 66,586 acre-feet compared to IGWA’s number of 56,952 acre-feet. The Coalition requests further review of this issue given the large disparity. IDWR also used a smaller recharge value which was 1,514 acre-feet less than IGWA’s. *See Memo at 5, Table 4*.

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<sup>1</sup> The nine signatory ground water districts are Aberdeen-American Falls, Bingham, Bonneville-Jefferson, Carey Valley, Fremont Madison Irrigation District, Jefferson-Clark, Madison, Magic Valley, and North Snake. A&B Irrigation District and Southwest Irrigation District are not part of the districts’ obligation under the settlement agreement or mitigation plan. IGWA has erroneously included A&B and SWID as part of its 240,000 af calculations every year, but until this year the nine districts have exceeded the 240,000 af reduction requirement. The Coalition expressly requests the Director to address this issue as well.

Regardless, even assuming IDWR's number is correct (which the Coalition disputes and requests further review and audit), the nine signatory ground water districts' 2021 actions were at least 109,097 acre-feet short of what is required by the stipulated mitigation plan and the Director's order approving the same. Consequently, IGWA and its junior priority ground water right members are not operating in accordance with the approved plan and are failing to mitigate the material injury to the Coalition members. *See* CM Rule 40.05. The over-pumping in 2021 has caused additional depletions to reach gains which have resulted in reduced water supplies to the Coalition's storage and natural flow water rights, both through the winter of 2021-22 and throughout the 2022 irrigation season.

The Surface Water Coalition requests the Director to address what actions he intends to take in response to this non-compliance and enforcement of the order approving the mitigation plan.

## **II. Steering Committee Impasse**

In the *Response to Request for Status Conference*, the Director noted the following:

The first step is to have the steering committee review the available technical information. . . . If the SWC and IGWA do not agree that a breach has occurred or cannot agree upon actions that must be taken by the breaching party to cure the breach, the steering committee will report this to the Director and ask the Director to determine if a breach has occurred.

*Response at 2.*

The Steering Committee held meetings on May 18<sup>th</sup>, June 27<sup>th</sup>, and most recently on July 13<sup>th</sup>. The above-referenced technical information was reviewed and the SWC stated its position that a breach occurred due to the signatory ground water districts' non-performance of the long-term diversion reduction actions in 2021. IGWA disagreed.

Accordingly, SWC hereby provides the Director with the requested notice that the Steering Committee reached an impasse and did not agree that a breach occurred in 2021.

### **REQUEST FOR STATUS CONFERENCE**

The Coalition respectfully requests the Director set a status conference to address the above following issues regarding IGWA's approved mitigation plan:

- 1) IGWA's annual diversion reduction requirement (annual or average?)
- 2) What that requirement is? (240,000 af or something less?)
- 3) Whether IGWA complied in 2021 based upon its technical information and IDWR's review of the same (as identified in April 1 and June 30 reports)
- 4) Disparity in those reports (what was the actual number for both diversion reduction and recharge that occurred in 2021)
- 5) Director's planned action in response to IGWA's non-compliance with mitigation plan.

The Coalition is fully committed to the Settlement Agreement, the stipulated mitigation plan, and their effective and successful implementation. To Coalition would request a status conference be set as soon as possible to address the above pending issues.

DATED this 21<sup>st</sup> day of July, 2022.

**BARKER ROSHOLT & SIMPSON LLP**



John K. Simpson  
Travis L. Thompson

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

**FLETCHER LAW OFFICE**



for  
W. Kent Fletcher

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

## CERTIFICATE OF SERVICE

I hereby certify that on this 21<sup>st</sup> day of July, 2022, I served a true and correct copy of the foregoing *Surface Water Coalition's Notice of Steering Committee Impasse / Request for Status Conference* on the following by the method indicated:

<p>Director Gary Spackman Garrick Baxter Sarah Tschohl State of Idaho Dept of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail</p> <p><a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a></p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only</p> <p><a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a> <a href="mailto:emcgarry@usbr.gov">emcgarry@usbr.gov</a></p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only</p> <p><a href="mailto:tony.olenichak@idwr.idaho.gov">tony.olenichak@idwr.idaho.gov</a></p>
<p>Randy Budge T.J. Budge Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only</p> <p><a href="mailto:randy@racineolson.com">randy@racineolson.com</a> <a href="mailto:tjb@racineolson.com">tjb@racineolson.com</a></p>	<p>Sarah A. Klahn Dylan Thompson Somach Simmons &amp; Dunn 2033 11<sup>th</sup> Street, Ste. 5 Boulder, CO 80302 *** service by electronic mail only</p> <p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>	<p>David Gehlert ENRD – DOJ 999 18<sup>th</sup> St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only</p> <p><a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only</p> <p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>	<p>Robert E. Williams Williams, Meservy &amp; Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only</p> <p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>	<p>Corey Skinner IDWR – Southern Region 650 Addison Ave. W., Ste. 500 Twin Falls, ID 83301 *** service by electronic mail only</p> <p><a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>
<p>Robert L. Harris Holden, Kidwell, Hahn &amp; Crapo. PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only</p> <p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>	<p>Kathleen Carr US Dept Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway, Ste. 400 Boise, ID 83706 *** service by electronic mail only</p> <p><a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a></p>	<p>Candice McHugh Chris Bromley McHugh Bromley, PLLC 380 South 4<sup>th</sup> Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only</p> <p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a> <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>

<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only <a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>	<p><b><i>COURTESY COPY TO:</i></b> William A. Parsons Parsons, Smith &amp; Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>	
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Travis L. Thompson

Thomas J. Budge, ISB #7465  
 RACINE OLSON, PLLP  
 201 E. Center St. / P.O. Box 1391  
 Pocatello, Idaho 83204-1391  
 (208) 232-6101 – phone  
 tj@racineolson.com

*Attorneys for Idaho Ground Water Appropriators, Inc.*

**STATE OF IDAHO**  
**DEPARTMENT OF WATER RESOURCES**

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

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

**IGWA's Response to Surface Water  
 Coalition's Notice of Steering  
 Committee Impasse**

IN THE MATTER OF IGWA'S SETTLEMENT  
 AGREEMENT MITIGATION PLAN

Idaho Ground Water Appropriators, Inc. ("IGWA")<sup>1</sup> submits this response to the Surface Water Coalition's Notice of Impasse / Request for Status Conference ("SWC Notice") filed July 21, 2022, in this matter.

The SWC Notice requests a status conference to address several issues related to IGWA's compliance with section 3.a.i. of the IGWA-SWC Settlement Agreement. The SWC Notice was filed pursuant to section 2.c.iv of the Second Addendum to Settlement Agreement which allows the Director to "evaluate all available information, determine if a breach occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment."

On July 26, 2022, the Director issued a Notice of Status Conference granting the SWC's request and scheduling a status conference on August 5, 2022. The Notice of Status Conference does not ask IGWA file a response to the SWC Notice. Nevertheless, to better inform the Director of the issues before him, IGWA provides this response. IGWA reserves the right to

<sup>1</sup> IGWA is an umbrella organization that represents the interests of the nine ground water districts who are parties to the IGWA-SWC Settlement Agreement: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Henry's Fork Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

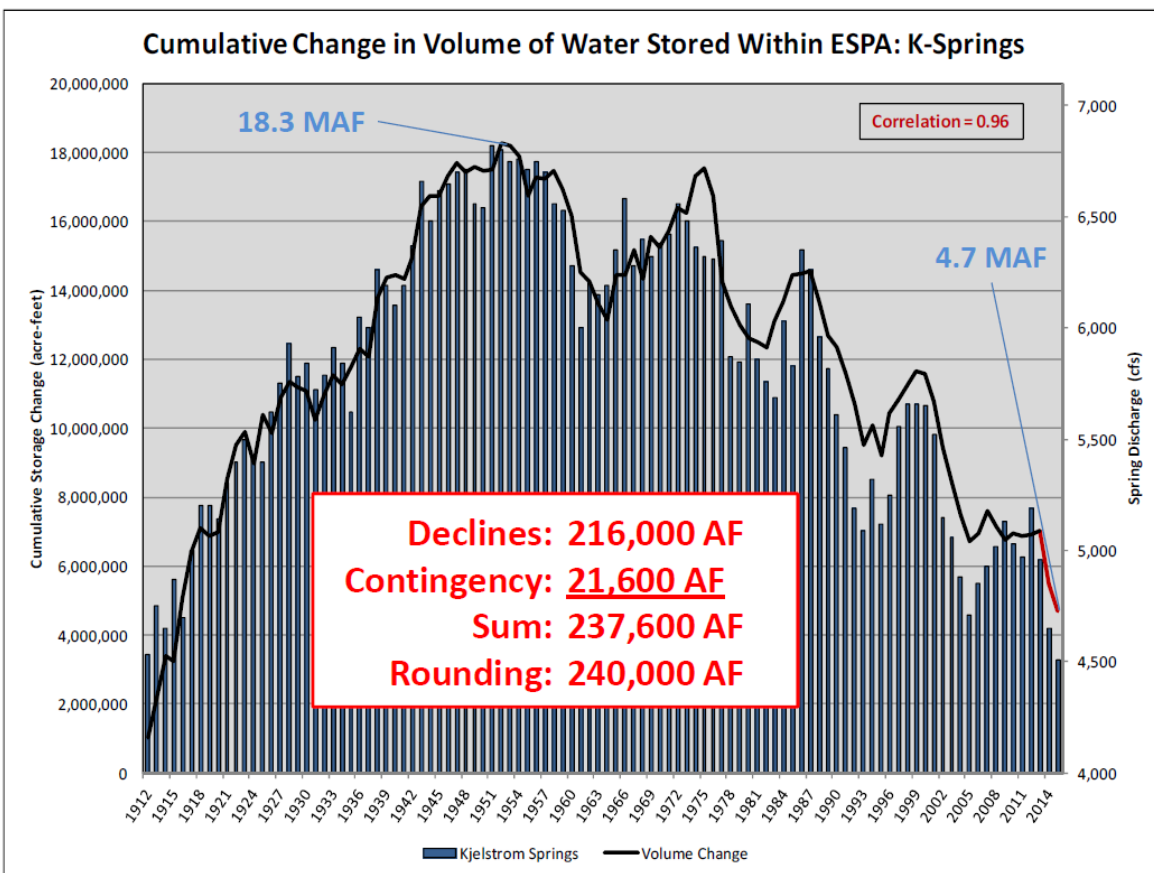
supplement this response based on information presented at the August 5 status conference.

The SWC Notice lists five questions related to IGWA's compliance with section 3.a.i of the Settlement Agreement. (SWC Notice, p. 4.) Answers to those questions depend on two primary issues: (i) whether the districts represented by IGWA bear responsibility for the full 240,000 acre-feet of groundwater conservation or only their proportionate share, and (ii) whether each district's diversion reduction is measured on an annual or an average basis.

As explained below, IGWA is in compliance with section 3.a.i because (a) the plain language of the Agreement provides that each participating district is responsible for its "proportionate share" of the 240,000 acre-feet, (b) the Agreement states that compliance will be measured on a five-year rolling average, and (c) each district's conservation activities have exceeded its proportionate share of 240,000 acre-feet over the last five years.

**A. Each ground water district is responsible for its "proportionate share" of the 240,000 acre-feet of groundwater conservation.**

The IGWA-SWC Settlement Agreement was entered into after a prolonged period of litigation between the SWC and IGWA. The parties determined that, instead of periodic curtailments under the Methodology Order, a more effective way to provide a secure water supply for the SWC is through a long-term program to reverse the trend of declining ESPA water levels which supply water to the Blackfoot to Minidoka reach of the Snake River. The following chart served as the centerpiece of the settlement negotiations:





In the decades preceding the settlement, the ESPA experienced an average annual decline of 216,000 acre-feet. To arrest this decline and place the ESPA on a path to recovery, the parties agreed that a 240,000 acre-foot change in the water budget was warranted. The State of Idaho stepped up to assist with the recovery by committing to perform at least 250,000 acre-feet of managed aquifer recharge on average.

One point of concern for IGWA was that it did not want to bear responsibility to mitigate for groundwater diversions by non-IGWA members. IGWA expected A&B Irrigation District, Southwest Irrigation District, cities, and others to mitigate for their own water use. Accordingly, section 3.a.i contemplates an aquifer-wide reduction in groundwater use. It reads: “Total ground water diversion shall be reduced by 240,000 ac-ft annually.” It does not read: “IGWA will reduce ground water diversions by 240,000 ac-ft.” This distinction is significant. Other provisions in the Agreement impose obligations on IGWA and its members specifically, including section 2.a (“IGWA on behalf of its member districts will acquire a minimum of 110,000 ac-ft for assignment”), section 3.b.i (“IGWA will provide 50,000 ac-ft of storage water through private leases”), section 3.b.ii (“IGWA shall use its best efforts to continue existing conversions in Water Districts 130 and 140”), and section 3.f (“IGWA’s contributions to the State sponsored recharge program will be targeted for infrastructure and operations above American Falls”). By contrast, section 3.a.i is general in nature. It does not require IGWA to reduce diversions by 240,000 acre-feet because the decline in aquifer storage was the product of all groundwater diversions from the ESPA, not just IGWA’s diversions, and the parties expected that all groundwater users would be required to provide mitigation, not just IGWA.

Section 3.a.ii of the Agreement confirms that the districts represented by IGWA are responsible only for their “proportionate share” of the aquifer recovery goal: “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.” (Emphasis added.) Because IGWA districts do not account for all pumping from the ESPA, they are responsible for mitigating for only their proportionate share. The parties contemplated that A&B Irrigation District, Southwest Irrigation District, cities, and other non-IGWA members would be required to provide additional mitigation, above and beyond the mitigation provided by IGWA, to aid in recovering the ESPA.

And that’s what happened. The SWC entered into separate settlement agreements with A&B Irrigation District, Southwest Irrigation District, and the Coalition of Cities. The A&B agreement states that “[t]he obligations of Ground Water Districts set forth in paragraph 2-4 of the Settlement Agreement do not apply to A&B and its ground water rights.” This does not mean that IGWA is responsible to mitigate for A&B’s proportionate share of the 240,000 acre-feet; it means that A&B would provide its own mitigation via conversions under the terms of its settlement agreement. The Coalition of Cities agreement similarly states that “aquifer enhancement activities performed by the Signatory Cities under this Agreement shall be in addition to aquifer enhancement activities performed by IGWA under the IGWA-SWC Settlement Agreement or by the IWRB under Idaho Senate Concurrent Resolution no. 136 (2016).” While many of the cities are members of IGWA districts or are located within the boundaries of IGWA districts, the mitigation provided by the Coalition of Cities would be in addition to, and would not be credited toward, IGWA’s mitigation under the IGWA-SWC Settlement Agreement.

Consistent with the foregoing, IGWA has from the outset allocated to its members a proportionate share of the 240,000 acre-feet. To calculate IGWA’s proportionate share, IGWA

deducted groundwater diversions within A&B Irrigation District, Southwest Irrigation District, and Falls Irrigation District, as set forth in IGWA's first performance report in 2016:

<b>2016 Performance Summary Table</b>		
<b>(all values in acre-feet)</b>		
	<b>Diversion Baseline</b>	<b>Target Conservation</b>
Aberdeen - American Falls GWD	271,989	33,595
Bingham GWD	282,476	34,890
Bonneville - Jefferson GWD	147,337	18,198
Carey Valley GWD	5,671	700
Jefferson - Clark GWD	438,634	54,178
Fremont-Madison ID/Madison GWD <sup>1</sup>	43,491	5,372
Magic Valley GWD	261,877	32,346
A&B ID <sup>3</sup>	174,735	21,582
North Snake GWD <sup>2</sup>	205,501	25,382
Southwest ID <sup>3</sup>	104,417	12,897
Falls ID <sup>3</sup>	6,968	861
<b>Total:</b>	<b>1,943,096</b>	<b>240,000</b>

At the time, IGWA had not queried diversion data for cities and other non-IGWA members who make up a small percentage of diversions from the ESPA. In hindsight, such other use should also have been allocated a proportionate share of the 240,000 acre-feet.

In 2017 the SWC asked IGWA to remove A&B, Southwest, and Falls from the 240,000 acre-feet allocation because they were not signatory to the Settlement Agreement. IGWA agreed to remove Falls because its diversions are relatively small, partly outside the ESPA boundary, and under very old priority dates. IGWA refused to remove A&B or Southwest because their pumping contributes significantly to SWC reach gains, and section 3.a.ii protects IGWA from having to mitigate for non-IGWA members.

IGWA's performance reports have continuously allocated to IGWA districts a proportionate share of the 240,000 acre-feet. To now require IGWA to bear responsibility for the full 240,000 acre-feet would undermine the basis of the bargain and contradict the plain language of the Settlement Agreement and the parties' course of dealings.

**B. The Settlement Agreement provides that compliance with section 3.a.i will be measured on a five-year rolling average.**

While section 3.a.i of the Agreement clearly requires each district to reduce its diversions by a proportionate share of 240,000 acre-feet, it does not explain how those reductions will be measured. It would be simple if the amount of groundwater pumped from the ESPA were static, but it is not—more water is naturally pumped during hot and dry years than in cool and wet years. Reducing groundwater diversions by 240,000 acre-feet (approximately 12% of total groundwater use) would still result in IGWA pumping more water in dry years and less water in wet years—it would simply be 12% less than would have otherwise been pumped.

In an ideal world we would know how much groundwater would be diverted in a given year without conservation measures in place, and then compare that with actual diversions to

determine whether each district conserved its proportionate share of 240,000 acre-feet. Of course, that's impossible because farmers cannot farm the same land in the same year both with and without conservation measures in place.

The only way to determine whether IGWA is conserving water is to compare diversions before the Settlement Agreement with diversions after the Settlement Agreement. And since groundwater diversions naturally fluctuate from year-to-year, diversions must be compared over a multi-year period if the comparison is to be reliable. Fortunately, section 3.e.iv of the Agreement does explain how this will be done. It states: "When the ground water level goal is achieved for a *five-year rolling average*, ground water diversion reductions may be reduced or removed, so long as the ground water level goal is sustained."<sup>2</sup> (Emphasis added.)

Since compliance is measured on a five-year average, IGWA used a five-year average for the period 2010-2014 to define the pre-Settlement Agreement baseline from which groundwater conservation will be measured. The five-year average used to define the baseline has been reported to the SWC and to IDWR from the outset of the Settlement Agreement.

**C. Each ground water district's conservations efforts exceeded its proportionate share of 240,000 acre-feet over the five-year period 2017-2021.**

IGWA's collective share of 240,000 acre-feet is 205,397 acre-feet. For the five-year period 2017-2021, IGWA's average conservation was 347,220 acre-feet per year—an excess of 141,823 acre-feet. Individually, each ground water district exceeded its proportionate share of the 240,000 acre-feet by at least 27 percent as shown in the table below. While 2021 was especially challenging due to lack of rain, exceptionally dry weather, a constrained surface water supply, and other factors, each IGWA district remains in compliance with section 3.a.i of the Settlement Agreement.

IGWA Conservation 2017-2021								
	Target Conservation	2017	2018	2019	2020	2021	Average	% of Target
American Falls-Aberdeen	33,715	95,851	66,779	78,288	50,335	14,569	61,164	181%
Bingham	35,015	84,437	48,161	66,316	38,728	-15,036	44,521	127%
Bonneville-Jefferson	18,264	68,346	32,365	33,133	11,033	3,155	29,606	162%
Carey	703	4,535	4,284	4,787	2,308	1,335	3,450	491%
Jefferson-Clark	54,373	126,756	86,656	59,755	67,457	42,737	76,672	141%
Henry's Fork / Madison	5,391	33,661	57,021	60,537	67,892	15,189	46,860	869%
Magic Valley	32,462	36,872	45,295	67,501	34,726	35,341	43,947	135%
North Snake <sup>3</sup>	25,474	44,925	42,436	56,420	35,720	25,494	40,999	161%
A&B <sup>4</sup>								
Southwest ID <sup>4</sup>								
Total:	205,397	495,383	382,997	426,737	308,199	122,784	347,220	


<sup>2</sup> A five-year average is also used to measure compliance under the Cities Settlement Agreement and to measure compliance with ground water management plans in the Oakley Valley.

## CONCLUSION

For the foregoing reasons, IGWA respectfully requests that the Director confirm that each participating ground water district is responsible for its “proportionate share” of the 240,000 acre-feet, that compliance is measured on a five-year rolling average, and that IGWA is in compliance with the Settlement Agreement for the period 2017-2021.

DATED this 3<sup>rd</sup> day of August, 2022.

RACINE OLSON, PLLP

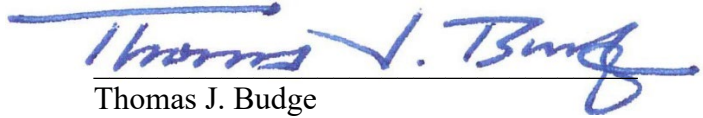


Thomas J. Budge

*Attorneys for Idaho Ground Water  
Appropriators, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that on this 3<sup>rd</sup> day of August, 2022, I served the foregoing document on the persons below via email:

  
 Thomas J. Budge

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## STATE OF IDAHO

### DEPARTMENT OF WATER RESOURCES

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

Docket No. CM-DC-2010-001

Docket No. CM-MP-2016-001

#### **IGWA's Supplemental Response to Surface Water Coalition's Notice of Steering Committee Impasse**

IN THE MATTER OF IGWA'S SETTLEMENT  
 AGREEMENT MITIGATION PLAN

Idaho Ground Water Appropriators, Inc. ("IGWA")<sup>1</sup> submits this supplemental response to the Surface Water Coalition's Notice of Impasse / Request for Status Conference ("SWC Notice") filed July 21, 2022, in this matter.

The SWC Notice asks the Director of the Idaho Department of Water Resources ("IDWR" or "Department") to address certain issues related to IGWA's compliance with the IGWA-SWC Settlement Agreement. In response, the Director issued a Notice of Status Conference on July 26, 2022, and held a status conference on August 5, 2022. The Notice of Status Conference did not request briefing, affidavits, or oral argument. On August 3, 2022, IGWA filed a written response to the SWC Notice to better inform the Director of the issues before him. IGWA's response reserved the right to provide supplemental information following

<sup>1</sup> IGWA is an umbrella organization that represents the interests of the nine ground water districts who are parties to the IGWA-SWC Settlement Agreement: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Henry's Fork Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

the conference.

IGWA submits this supplemental response primarily to show that the rules of procedure of the Department preclude the Director from making a decision on the issues raised in the SWC Notice until the SWC files a proper motion and the parties file briefs and supporting affidavits.

Should the Director elect to decide the issues without a motion, briefs, and affidavits, this supplemental response provides additional information to demonstrate that compliance with section 3.a of the Agreement should be measured on a five-year rolling average based on the plain language of the Agreement. If the Director finds that the plain language does not warrant a five-year average, then the Agreement is ambiguous and parol evidence must be introduced to determine the intent of the parties as to how compliance is measured. This must be done before the Director can take action on the SWC Notice.

Lastly, IGWA submits supplemental information to address an issue that was not listed in the SWC Notice but was raised by the Director at the August 5 status conference; namely, whether a breaching party must be given an opportunity to cure the breach. If the Director determines that a breach occurred, the Agreement explicitly requires that the breaching party be given 90 days to cure the breach.

**A. IDWR rules of procedure require the SWC to file a motion, and that parties be permitted to submit briefs and supporting affidavits, before the Director decides the issues listed in the SWC Notice.**

The SWC Notice asked that the Director set a “status conference” to address five issues listed in the SWC Notice. Accordingly, the Director scheduled a “status conference.” The designation of the August 5 meeting as a status conference is significant because status conferences are not typically used to make decisions on the merits of a case; they are used to address procedural matters and stipulations of the parties in accordance with rules 510 and 511 of the Department’s rules of procedure. Decisions on contested matters are typically made after the filing of briefs, affidavits, and a hearing in accordance with rules 550-562.

Since the August 5 meeting was designated a status conference, IGWA did not anticipate that the Director would take formal argument and issue a decision on the issues listed in the SWC Notice. However, the Director solicited oral argument at the status conference and stated that he intended to issue a written decision in 2-3 weeks.

For the Director to decide the issues listed in the SWC Notice, the SWC Notice must be treated as a “motion” under the rules of procedure. Rule 220 defines “motion” as “a request to the agency to take an action in a contested case.” (IDAPA 37.01.01.220.) The SWC Notice does not qualify as a motion because it does not contain the information required by rule 300.02, which requires the moving party to fully state “the facts upon which it is based” and “the relief sought,” among other things. (IDAPA 37.01.01.220.) The SWC did not submit affidavits setting forth facts in support of the SWC Notice, nor does the SWC Notice state the relief sought; it simply asks the Director to “address” the issues listed. Since the SWC Notice does not qualify as a motion under rule 220, the director cannot take action on the issues listed in the SWC Notice.

Even if the SWC Notice qualified as a motion, the Director cannot issue a decision without following the procedures required by rule 220.02, including the filing of briefs and supporting affidavits by the SWC, the filing of briefs and supporting affidavits by responding parties, the filing of a reply brief by the SWC, and oral argument if requested. In this case, no supporting brief or affidavit was filed by the SWC, the status conference was held prior to the deadline set forth in the rules for filing responsive briefs and affidavits, and no party was advised that the



Director intended to take action on the SWC Notice.

Therefore, IGWA respectfully requests that the Director decline to take action on the issues listed in the SWC Notice for failure to comply with applicable rules of procedure.

If the Director elects to take action without requiring a motion, briefs, and affidavits, the Director should consider the information provided below.

**B. Compliance with section 3.a of the Settlement Agreement must be measured on a five-year rolling average based on the plain language of the Agreement.**

The SWC Notice asks whether IGWA's conservation obligation under section 3.a of the Settlement Agreement is measured annually or on an average. (SWC Notice, p. 4.) Section 3.a.i reads: "Total ground water diversion shall be reduced by 240,000 ac-ft annually." It does not state how the reduction (commonly referred to as "conservation") is to be measured.

There is no dispute that section 3.a.i of the Agreement contemplates 240,000 acre-feet of groundwater conservation "annually." The question is how to measure annual conservation. IGWA and the SWC have presented two different methods by which compliance with section 3.a could be measured. IGWA contends that compliance should be determined on a five-year rolling average. The SWC contends that compliance should be measured by taking average groundwater diversions from 2010-2014, reducing the average by 240,000 acre-feet, and treating the reduced average as a fixed diversion cap.

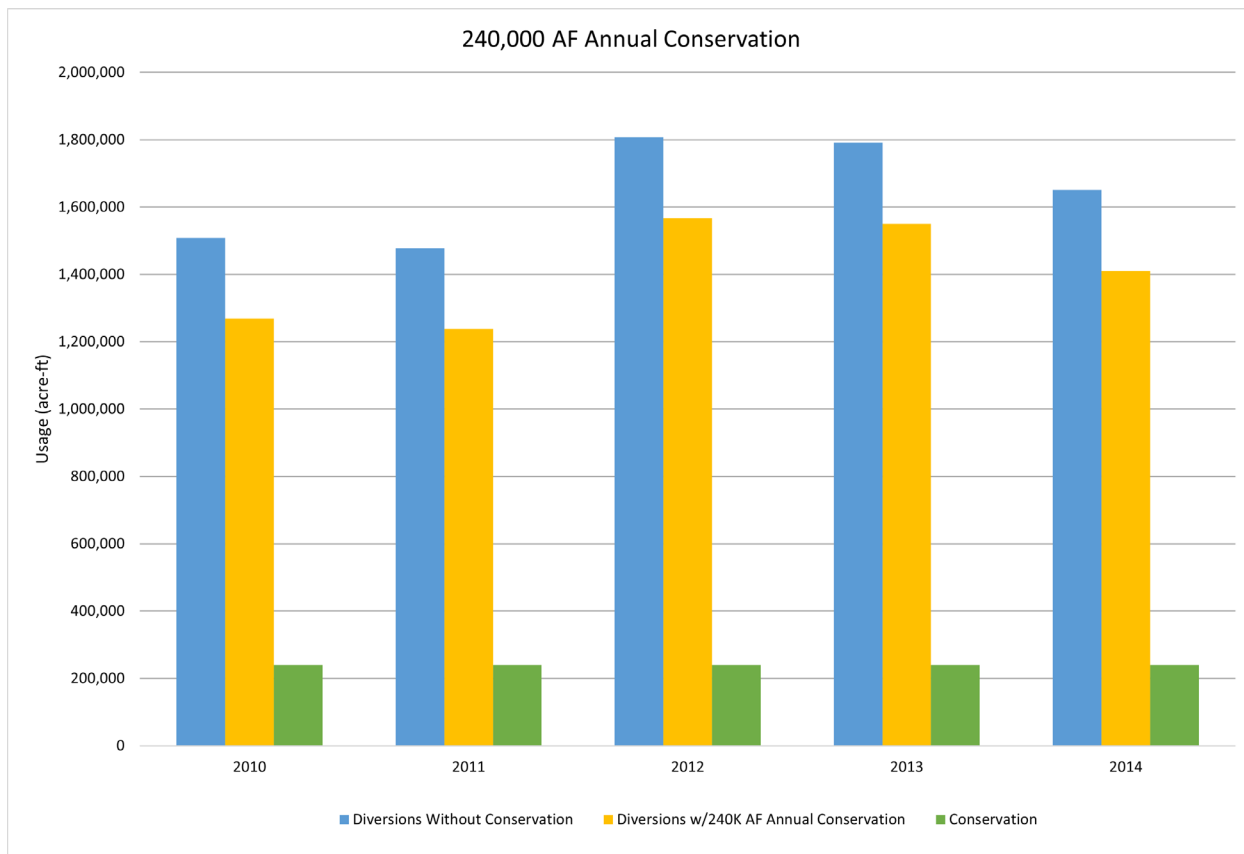
When interpreting a contract, it must be read "as a whole, not by an isolated phrase." *McFarland v. Liberty Ins. Corp.*, 164 Idaho 611, 618 (2019) (quoting *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 663 (2005)). "Although reading a term or provision in isolation can create an ambiguity, reading the [contract] as a whole can remove the ambiguity by rendering one of the possible interpretations unreasonable." *Id.*

As explained below, use of a five-year average as proposed by IGWA is grounded in the plain language of the Agreement. The SWC's fixed cap proposal is not, and it leads to a result that contradicts the plain language of the Agreement.

Looking backward, we know how much groundwater would have been pumped if 240,000 acre-feet were conserved annually in the years leading up the Agreement, because we know how much groundwater was diverted during those years without conservation. The following chart shows actual diversions from 2010-2014 versus diversions that would have occurred with 240,000 acre-feet of conservation annually:<sup>2</sup>

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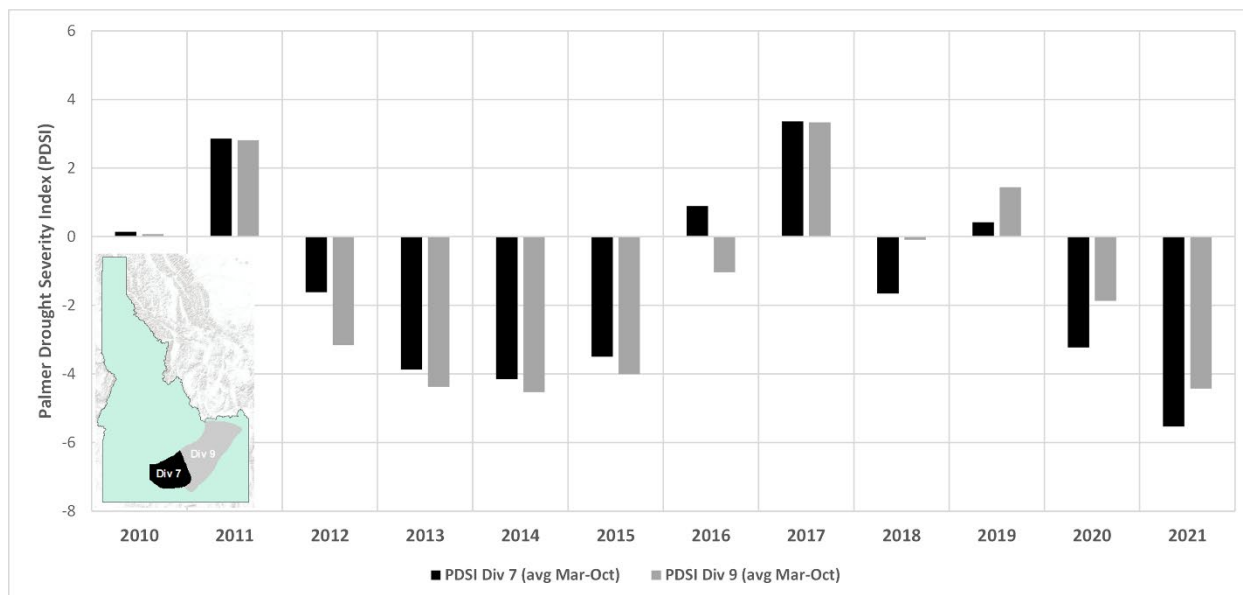
<sup>2</sup> Diversion volumes exclude usage from 192 wells in Madison Ground Water District and Henry's Fork Ground Water District that were not under measurement orders during the 2010-2014 time period. To account for null values within the WMIS database, an averaging factor was applied. Adjustments were made to some diversions to correct errors, as identified in IGWA's annual performance reports submitted to the SWC and IDWR.



The above chart shows that groundwater diversions fluctuate considerably based on climatic conditions. When the Agreement was signed in 2015, the parties could not foretell how much snow, rain, wind, and heat would occur in future years, and they knew that groundwater diversions would continue to fluctuate post-Agreement. Had groundwater users opted to achieve groundwater conservation solely by drying up farmland, groundwater diversions post-Agreement would continue to follow a pattern similar to what is shown by the yellow bars in the chart.

As expected, climatic conditions have varied considerably since the Settlement Agreement was signed in 2015, as shown by the Palmer Drought Severity Index for the Eastern Snake River Plain:<sup>3</sup>

<sup>3</sup> The Palmer Drought Severity Index (PDSI; Palmer, 1965) is a common measure of agricultural water supply conditions and is prominently used for drought monitoring. The PDSI incorporates current and precedent hydrologic components including precipitation, temperature, potential evaporative demand, and water-holding capacity of soils to determine the cumulative departure in the surface water balance. Negative values of the PDSI reflect drier-than-normal conditions and positive values reflect wetter-than-normal conditions. A value of -2.0 or lower is considered moderate drought, -3.0 and lower is considered severe drought, and values lower than -4.0 are considered extreme drought. The National Oceanic and Atmospheric Administration (NOAA) divides the lower 48 states into 344 divisions for the calculation of the PDSI. Climate Divisions 7 and 9 cover the Eastern Snake River Plain.

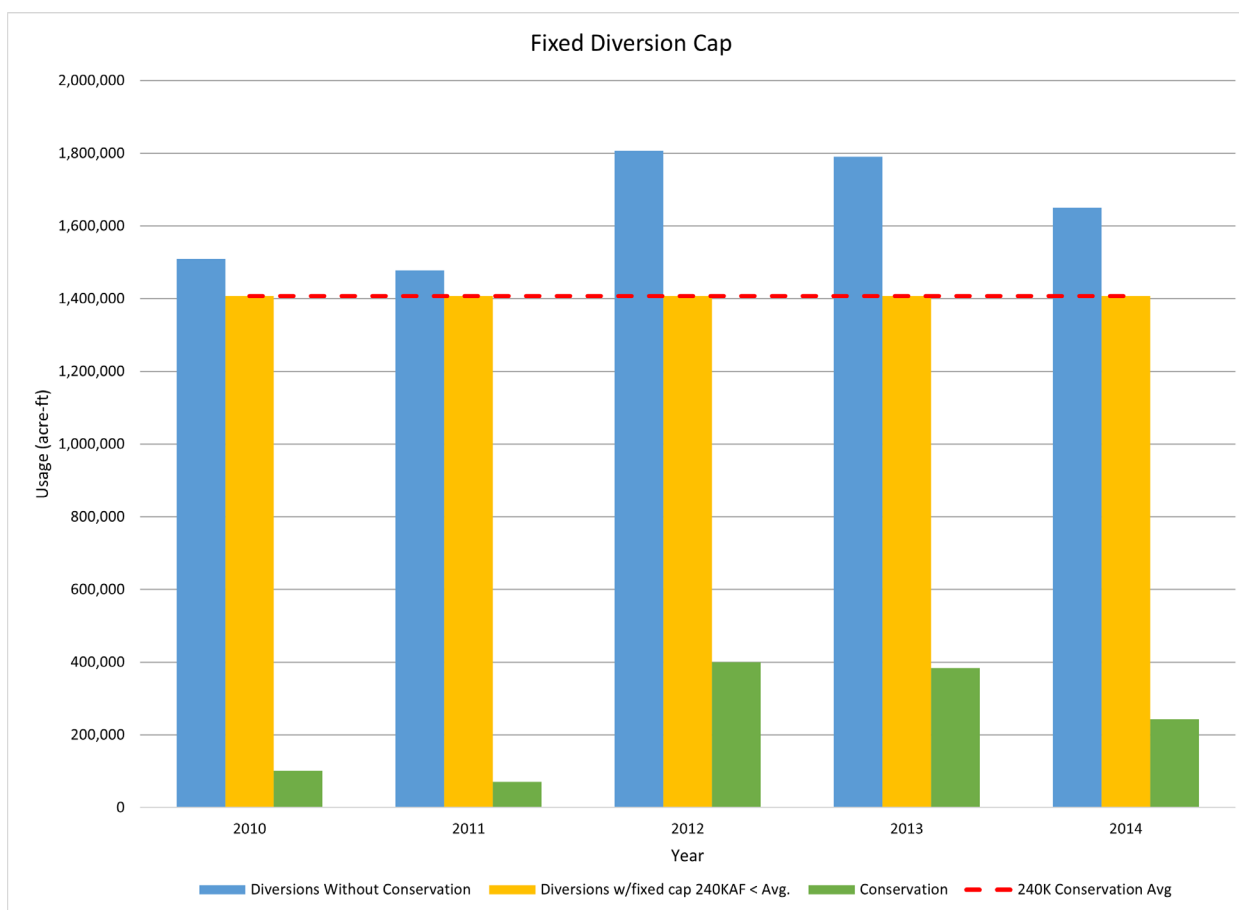


When the Settlement Agreement was signed in 2015, neither IGWA nor the SWC could foresee what climatic conditions would occur in future years. And it is impossible to measure groundwater conservation prospectively by comparing diversions both with and without taking conservation actions, because farmers cannot farm the same land in the same year both with and without conservation actions. An alternative method of measuring compliance is necessary.

The SWC has proposed that compliance be measured by using average diversions from 2010-2014 time period to establish a fixed diversion cap that is 240,000 acre-feet less than the average. While such a method is possible, it is incompatible with the plain language of the Agreement in two important respects.

First, the Agreement does not state in any way, shape, or form that average diversions from 2010-2014 would be utilized to impose a fixed diversion cap. Had that been the intent of the parties, section 3.a of the Agreement should say something like: “Total ground water diversions shall be reduced by 240,000 acre-feet annually from average diversions during the time period 2010-2014.” Instead, it states simply: “Total ground water diversions shall be reduced by 240,000 acre-feet annually.”

Second, imposing a fixed diversion cap contradicts the expectation that 240,000 acre-feet of conservation occur “annually.” The fixed cap method proposed by the SWC would require IGWA to conserve far more than 240,000 acre-feet in some years and far less than 240,000 acre-feet in other years. To illustrate, had the SWC’s method been imposed from 2010-2014, only 71,033 acre-feet of conservation would have been required to comply with the Agreement in year 2011, whereas 400,125 acre-feet of conservation would have been required in year 2012 to comply with the Agreement, as shown in the table below. This is incompatible with the plain language requiring 240,000 acre-feet of conservation “annually.”



In practice, the fixed cap method would be much more drastic if applied prospectively because it would force groundwater irrigators to make planting decisions every year based on the hottest and driest summer possible. When farmers make planting decisions in the spring, they have no idea how much rain will fall, how much wind will blow, and what air temperatures will be in May, June, July, or August. If they are required to assume the worst-case scenario every year, they will be forced to conserve far more than 240,00 acre-feet most years in order to squeak by with 240,000 acre-feet of conservation on the driest and hottest of years. This is not what they agreed to. They agreed to conserve their proportionate share of 240,000 acre-feet “annually.”

IGWA’s proposed method for measuring compliance more accurately reflects annual conservation and is grounded in the plain language of the Agreement. IGWA proposes that conservation be measured by comparing pre-Agreement diversions with post-Agreement diversions. Since groundwater diversions naturally fluctuate from year-to-year based on climatic conditions, the comparison must occur over a multi-year period to be reliable.

IGWA utilized average diversions during the five-year period immediately preceding the Agreement (2010-2014) to define the baseline against which post-Agreement conservation will be measured because the Agreement calls for compliance to be measured on a five-year average. The purpose of conserving 240,000 acre-feet under section 3.a is to “reverse the trend of declining ground water levels and return ground water levels to a level equal to the average of the aquifer levels from 1991-2001” as set forth in section 3.e.i. The Agreement provides that compliance with the groundwater level goal will be measured on “a five-year rolling average.” Because the groundwater level goal and groundwater conservation are interlinked, compliance

with the conservation obligation must be congruently measured on a five-year average. This is the only method of compliance that is grounded in the plain language of the Agreement.

Therefore, if the Director elects to decide whether IGWA is in compliance with section 3.a of the Agreement without requiring a motion from the SWC or briefs or affidavits from the parties, IGWA respectfully requests that he determine that compliance be measured on a five-year rolling average in accordance with the plain language of the Agreement. Based on a five-year average, each ground water district is currently in compliance as shown in the table below:

MITIGATION BALANCE (2021)	
5-Year Average	
American Falls-Aberdeen	27,449
Bingham	9,506
Bonneville-Jefferson	11,342
Carey	2,747
Jefferson-Clark	22,299
Henry's Fork / Madison	41,469
Magic Valley	11,485
North Snake	15,525

**C. If the Director determines that the plain language does not provide for a five-year rolling average, then the Agreement is ambiguous and parole evidence must be introduced to determine the intent of the parties.**

As stated above, the compliance method proposed by the SWC is nowhere to be found in the plain language of the Agreement. If the Director determines that a five-year rolling average is also not grounded in the plain language of the Agreement, then the Agreement is ambiguous as to how compliance is determined.

A contract is ambiguous if, after reading the agreement as a whole, there are “two different reasonable interpretations of the term.” *Swanson v. Beco Const. Co.*, 145 Idaho 59, 62 (2007). Ambiguity may be patent or latent. *Id.* “Idaho courts look solely to the face of a written agreement to determine whether it is patently ambiguous.” *Id.* (quoting *Ward v. Puregro Co.*, 128 Idaho 366, 369 (1996)). “A latent ambiguity is not evident on the face of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist.” *Id.* (quoting *In re Estate of Kirk*, 127 Idaho 817, 824 (1995)).

The parties have presented two different methods by which compliance with section 3.a may be determined. If the Director finds that the Agreement prescribes neither method, then IGWA and the SWC must be given an opportunity to introduce parole evidence to demonstrate the parties’ intent at the time the Agreement was entered into. *Simons v. Simons*, 134 Idaho 824, 828 (2000). IGWA will present evidence to show that, in addition to being consistent with the plain language of the Agreement, (a) individual IGWA members understood from the beginning that compliance would be based on an average, (b) the SWC acknowledged explicitly that compliance would be based on an average, (c) IGWA has provided far more than 240,000 acre-feet of conservation most years (compared to the baseline) with the expectation that the excess would carry forward via averaging, (d) a five-year average is used to measure compliance with diversion restrictions in critical ground water areas in the Oakley Valley, and (e) a five-year

average is used to measure compliance under the Cities' Settlement Agreement. The SWC acknowledged explicitly that compliance would be based on an average in the Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order filed March 9, 2016, which includes a proposed order stating that compliance with the 240,000 acre-feet obligation will be "based on a 3-year rolling average." The Director did not incorporate this into his order approving the mitigation plan, and IGWA ultimately implemented a five-year average based on the plain language of the Agreement and IGWA's determination that a five-year average more reliably reflects historic pumping levels than a three-year average. Had IGWA utilized a three-year average, the baseline would have been significantly higher; thus, the five-year average has benefitted the SWC by defining a lower baseline from which conservation is measured. Most importantly, the proposed order demonstrates that the parties contemplated from the beginning that compliance with section 3.a would be based on an average and not on the fixed cap method proposed by the SWC.

If parol evidence clarifies the intent of the parties, then the Director must construe the Agreement in accordance with that intent. *Id.* If parol evidence demonstrates that the parties did not reach agreement on a material term, then the Agreement is voidable: "where a contract is too vague, indefinite, and uncertain as to its essential terms, and not merely ambiguous, there has been no 'meeting of the minds' which is necessary for contract formation and courts will 'leave the parties as they found them.'" *Silicon Int'l Ore, LLC v. Monsanto Co.*, 155 Idaho 538, 551 (2013) (quoting *Griffith v. Clear Lakes Trout Co.*, 143 Idaho 733, 737 (2007)); *Brunobuilt, Inc. v. Strata, Inc.*, 166 Idaho 208, 217-18 (2020) (citation omitted). Parol evidence may also demonstrate that the Agreement is unenforceable because it is "a mere agreement to agree." *Id.* (quoting *Spokane Structures, Inc. v. Equitable Inv., LLC*, 148 Idaho 616, 621 (2010)).

Therefore, if the Director elects to take action without a motion, briefs, and affidavits, and if the Director determines that a five-year average is not called for by the plain language of the Agreement, he must solicit parol evidence to determine the intent of the parties before determining whether a breach has occurred.

**D. If the Director determines that a breach occurs, the breaching party must be given 90 days to cure the breach.**

At the August 5 status conference, the Director questioned whether he has authority to undertake curtailment if he finds that a breach occurred. Under section 2.c.iii of the Second Addendum to Settlement Agreement, if a breach occurs "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." In this instance, the Steering Committee reached an impasse as to whether a breach occurred, and no 90-day notice has been given. If the Director determines that a breach occurred, the matter must be remanded to the Steering Committee to determine what actions must be taken to cure the breach and then give the breaching party 90 days written notice to cure the breach. If the Director does not remand the matter to the Steering Committee, the Director must give 90 days written notice to the breaching party specifying actions that must be taken to cure the breach. One way or another, the Settlement Agreement entitles the breaching parties to 90 days notice and an opportunity to cure. The Director is not in a position to undertake curtailment until that happens.


It bears mentioning that an attempt to implement immediate curtailment would be catastrophic because the Department would be attempting to curtail groundwater irrigators who are almost all in compliance with the mitigation programs implemented by their respective

ground water district. The reason why IGWA pumped considerably more water in 2021 than in prior years is not because individual patrons refused to comply with their district's mitigation program; it is because every district's program includes averaging, and most patrons had accrued excess conservation in prior years that they were able to draw against in 2021.

The Settlement Agreement is unique because it requires groundwater conservation to occur long-term, both wet years and dry years, by all groundwater users (to differing degrees depending on priority), with each district implementing its own mitigation program tailored to the needs of its particular geographic area and membership. Simply reporting non-compliance to the Department curtailment would result in the wrong users being curtailed in many instances. This is why the Settlement Agreement requires a notice of breach and an opportunity to cure.

DATED this 12<sup>th</sup> day of August, 2022.

RACINE OLSON, PLLP




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Thomas J. Budge

*Attorneys for Idaho Ground Water  
Appropriators, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of August, 2022, I served the foregoing document on the persons below via email:

  
 Thomas J. Budge

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

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

Docket No. CM-MP-2016-001

**NOTICE OF INTENT TO TAKE  
OFFICIAL NOTICE OF IGWA'S  
2021 SETTLEMENT  
AGREEMENT PERFORMANCE  
REPORT AND SUPPORTING  
SPREADSHEET**

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

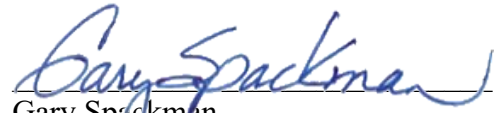
On August 5, 2022, the Director of the Idaho Department of Water Resources ("Department") held a status conference in response to a request by the Surface Water Coalition ("SWC"). During the conference, counsel for the SWC and the Idaho Ground Water Appropriators, Inc. ("IGWA") presented argument as to whether IGWA is in breach of a settlement agreement between the SWC and IGWA that serves as an approved mitigation plan in the SWC's delivery call. The SWC's allegations of breach are based on IGWA's 2021 Settlement Agreement Performance Report and supporting information contained in an electronic spreadsheet attached to the report. Although the SWC, IGWA, Director, and Department have copies of the report and spreadsheet, those documents are not in the agency record for this proceeding currently.

Rule 602 allows the Director to take official notice "of any facts that could be judicially noticed in the courts of Idaho and of generally recognized technical or scientific facts within the agency's specialized knowledge . . . ." IDAPA 37.01.01.602. Further, the Director "shall notify the parties of specific facts or material noticed and the source of the material noticed." *Id.* The notice must be provided "before the issuance of any order based in whole or in part on facts or material officially noticed." *Id.*

The Director hereby notifies the parties that he intends to take official notice of the facts and data in IGWA's 2021 Settlement Agreement Performance Report dated April 1, 2021, and the supporting spreadsheet attached to that report.

Concurrent with this notice, copies of those documents shall be posted to the Department's docket for this proceeding. Pursuant to Rule 602, any party may file a written objection "to contest and rebut the facts or material to be officially noticed" on or before August 25, 2022. IDAPA 37.01.01.602.

Dated this 18th day of August 2022.



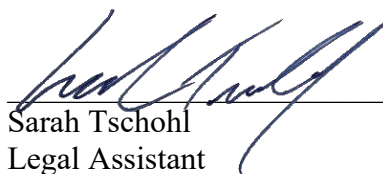
Gary Spackman  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of August 2022, the above and foregoing was served by the method indicated below and addressed to the following:

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## STATE OF IDAHO

### DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF IGWA'S SETTLE-  
 MENT AGREEMENT MITIGATION PLAN

Docket No. CM-MP-2016-001

### **IGWA's Objection to Notice of Intent to Take Official Notice of IGWA's 2021 Settlement Agreement Performance Report and Supporting Spreadsheet; and Request for Hearing**

Idaho Ground Water Appropriators, Inc. ("IGWA")<sup>1</sup> hereby objects to the *Notice of Intent to Take Official Notice of IGWA's 2021 Settlement Agreement Performance Report and Supporting Spreadsheet* ("Notice") issued August 18, 2022, in the above-captioned matter. As explained below, the Director cannot lawfully take official notice of IGWA's 2021 performance report<sup>2</sup> without granting a hearing and allowing IGWA to present evidence concerning the report and any action the Director may take in reliance thereon. For the Director to selectively take official notice of certain facts, while precluding the parties from presenting their own evidence to counter or rebut such facts, would violate the constitutional right to due process, the Idaho Administrative Procedures Act, and the rules of procedure of the Department, as explained below.

<sup>1</sup> IGWA is an umbrella organization that represents the common interests of the nine ground water districts who are parties to the IGWA-SWC Settlement Agreement: North Snake Ground Water District, Carey Valley Ground Water District, Magic Valley Ground Water District, American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Henry's Fork Ground Water District, and Madison Ground Water District.

<sup>2</sup> References to "IGWA's 2021 performance report" include the supporting spreadsheet.

Therefore, IGWA requests that the Director state the purpose for which he intends to take official notice of IGWA's 2021 performance report and hold an evidentiary hearing before taking any action in reliance thereon.

## Introduction

The Notice states that it is issued in response to a request by the Surface Water Coalition ("SWC") to address an alleged breach of the IGWA-SWC Settlement Agreement. As explained in *IGWA's Supplemental Response to Surface Water Coalition's Notice of Steering Committee Impasse* ("IGWA's Supplemental Response") filed August 12, 2018, in this matter, the Director cannot lawfully take action on the SWC request unless and until the SWC files a motion that complies with the rules of procedure of the Department, and the parties are given an opportunity to submit evidence and file briefs in accordance with the rules. (IGWA's Response, p. 2-3.) IGWA's Supplemental Response also explains that if the Director intends to look outside the four corners of the Agreement to interpret its meaning, Idaho law requires the Director to consider parol evidence to determine the intent of the parties at the time the Agreement was entered. *Id.* at 7-8.

The Notice does not request a motion from the SWC, nor set a hearing, nor otherwise invite evidence from the parties. From this, IGWA infers that the Director intends to take action on the issues listed in the *SWC's Notice of Steering Committee Impasse / Request for Hearing* without first holding a hearing to develop an evidentiary record. Should the Director take action to interpret the Agreement and determine whether a breach occurred, without allowing IGWA to present evidence concerning the issues, it would be an egregious violation of due process, in utter disregard of the Idaho Administrative Procedures Act and Department rules of procedure of the. Such reckless disregard of the law would necessitate an immediate appeal and request for stay, and would entitle IGWA to bring a cause of action against the Director under 42 U.S. Code section 1983 for deprivation of the civil rights of IGWA and its member districts, and a claim for attorney fees and costs under Idaho Code § 12-117 for acting without a reasonable basis in law or fact.

## Argument

### **A. Due Process entitles IGWA to a hearing and opportunity to present evidence.**

A fundamental right afforded by the United States Constitution is that "No state ... shall deprive any person of life, liberty, or property without due process of law." U.S. Const., Amend. 14 §1; Idaho Const. art. I, § 13. Under Idaho law, "individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state." *Nettleton v. Higginson*, 98 Idaho 87, 90 (1977). Due process applies to water right administration by the Department. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815-16 (2011).

Due process entitles property owners to "an opportunity for a hearing before he is deprived of any significant property interest." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). The United States Supreme Court has explained why a hearing is required:

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession

of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon application of and for the benefit of a private party.

*Id.* at 80-81. The hearing requirement “is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.” *Id.* at 90, fn 22.

Importantly, the opportunity for a hearing must be granted “*before* he is deprived of any significant property interest, except for extraordinary situations when some valid governmental interest is at stake that justifies postponing the hearing until after the event.” *Id.* at 81 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971) (emphasis in original)). The bar is high for depriving a property interest before holding a hearing. It is allowed only in “extraordinary” situations, after taking into account

the importance of the private interest at stake, the risk of an erroneous deprivation of rights given the processes at hand, the probable value, if any, of additional or substitute procedural safeguards and the government’s interest and including the function involved and the fiscal and administrative burdens that the additional and substitute procedural requirements would entail.

*LU Ranching Co. v. U.S. (In re Snake River Basin Adjudication Case No. 6)*, 138 Idaho 606, 608 (2003) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (internal quotations omitted)). Even if extraordinary situations warrant an immediate deprivation of property, a hearing still “must be granted at a meaningful time and in a meaningful manner.” *Id.* at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

In *Nettleton v Higginson*, the owner of a surface water right (Nettleton) argued that he is entitled to a hearing before his water right is curtailed. 98 Idaho 87 (1977). The court rejected that argument on the basis that Nettleton had not been deprived of a “significant property interest” since his water right was merely a claimed “constitutional use” right which had not been proven or decreed. *Id.* The court stated in dicta that administration of surface water rights by a watermaster under Idaho Code § 42-607 may constitute “extraordinary situations when postponement of notice and a hearing is justified,” but confined that reasoning to “the present case.” *Id.* at 92.

The Idaho Supreme Court has acknowledged important differences between the administration of surface water rights and ground water rights. In *American Falls Reservoir Dist. No. 2 vs. Idaho Dept. of Water Resources* (“AFRD2”), the Court reversed the district court’s conclusion that “when a junior diverts or withdraws water in times of water shortage, it is presumed there is injury to a senior,” reasoning that the conclusion was based on precedent in *Moe v. Harger*, 10 Idaho 302 (1904), which was “a case dealing with competing surface water rights and this case involves interconnected ground and surface water rights.” 143 Idaho 862, 877 (2007). “The issues presented,” the Court explained, “are simply not the same.” *Id.*

These differences compelled the Idaho legislature to adopt an entirely new section of code (the Ground Water Act) to address the special needs of groundwater administration. Unlike surface water administration under Idaho Code section 42-607, which involves rote regulation by a watermaster, administration under the Ground Water Act originally required that delivery calls be made in writing, under oath, stating “the facts upon which the claimant founds his belief that the use of his right is being adversely affected.” Idaho Code § 42-237b (repealed). If the Director found that the call meets the minimum statutory requirements, he “shall issue a notice setting the matter for



hearing before a local ground water board.” *Id.* Only after a hearing is held would a curtailment decision be made. Idaho Code § 42-237c (repealed). This process was followed in a delivery call by surface users against groundwater users in *Stevenson v. Steele*, 93 Idaho 4 (1969). The call was made at the beginning of the irrigation season, and the hearing was not completed until October. The decision was then appealed to the district court, followed by an appeal to the Idaho Supreme Court. The Supreme Court decision gives no indication that curtailment could have been warranted before the hearing was held.

The Court had much earlier emphasized the importance of fully examining all evidence before ordering curtailment of groundwater use. In *Jones v. Vanausdeln*, the Court refused to curtail groundwater pumping for lack of clear evidence that the senior was injured, explaining that “very convincing proof of the interference of one well with the flow of another should be adduced before a court of equity would be justified in restraining its proprietors from operating it on that ground.” 28 Idaho 743, 749 (1916).

More recently, the Court reaffirmed that when it comes to curtailing groundwater rights, “It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.” *AFRD2* 143 Idaho at 875 (emphasis added).

More recently still, in *Clear Springs Foods* delivery call case the Court held that “the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for a hearing.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815 (2011). The Court explained that a hearing must be held prior to ordering curtailment because “groundwater pumping did not cause a sudden loss of water discharge from the springs,” and “[c]urtailment would not quickly restore the spring flows.” *Id.*

In this case, there is no “extraordinary circumstance” that requires the director to interpret the IGWA-SWC Settlement Agreement without first holding a hearing and taking evidence from the parties. This situation does not involve priority administration by a watermaster under Idaho Code section 42-607; it involves a dispute over interpretation of a contract. Even when a breach occurs under the Agreement, the parties have agreed that immediate curtailment is unnecessary; rather, the Agreement establishes a steering committee which is vested with responsibility to identify actions to cure the breach, after which the breaching party must be given 90 days’ notice to implement the curative actions. Even after the Steering Committee reached an impasse, the SWC did not file a motion requesting curtailment; it asked only for a status conference, illustrating that the circumstances do require that the Director interpret the Agreement or take action to enforce the Agreement before holding a hearing.

The present circumstance illustrates why IGWA and the SWC formed a steering committee to identify curative actions, rather than simply turn a breaching party over to the Department for curtailment. First and foremost, the parties to the Agreement are ground water districts, yet curtailment would be imposed upon individual farmers within those districts, almost all of whom are in compliance with their district’s mitigation program. If the Director orders blanket curtailment of all members of a particular district, the result would curtailment of water users who individually are in compliance with their responsibilities under the Agreement, resulting in a government taking of private property without due process or just compensation. This is a major reason why a steering committee was formed to determine appropriate actions that must be taken to cure a breach.

In addition, curtailment by the Department would be ineffective during years when there is no curtailment date under the Methodology Order, and curtailment would not be pragmatic at other times, including the present circumstance. If the Director were to order curtailment now, with only

a few weeks left in the irrigation season, the consequences would be drastic (killed crops, breached contracts, loan defaults, etc.). This would not only hurt IGWA members, it would also hurt members of the SWC whose dairies and other businesses rely on commodities grown by IGWA members. By contrast, curtailment would accrue only a small amount of additional water to SWC storage accounts for use next year, which could be negated by above-average winter snowfall.

There is no reason why a hearing cannot be held before the Director undertakes to interpret or enforce the Agreement. Even if evidence presented at a hearing demonstrated that curtailment was justified sooner, impacts from continued pumping for the remainder of the 2022 irrigation season could be remedied by requiring ground water districts to deliver rented storage to the SWC or suffer additional diversion restrictions during the 2023 irrigation season.

**B. The Idaho Administrative Procedures Act also entitles IGWA to a hearing and opportunity to present evidence.**

To ensure that Idaho agencies provide due process, the Idaho Administrative Procedures Act (“APA”) states that any agency proceeding “which may result in the issuance of an order is a contested case” (Idaho Code § 67-5240), that a contested case may be disposed of informally only “by negotiation, stipulation, agreed settlement, or consent order” (Idaho Code § 67-5240); that formal disposition of a contested case requires a hearing “to assure that there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary” (Idaho Code § 67-5242(3)(a)); and that all parties shall have “the opportunity to respond and present evidence and argument on all issues involved” (Idaho Code § 67-5242(3)(b)).

The APA allows state agencies to take action without a hearing, but only “in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate government action.” Idaho Code § 67-5247(1). Even then, the agency must “proceed as quickly as feasible to complete any proceedings that could be required.” Idaho Code § 67-5247(4).

In this case, immediate curtailment is not necessary to avoid immediate danger to public health, safety, or welfare, as explained above. Therefore, the APA requires that a hearing be held, and that IGWA and the SWC be permitted to present evidence, before the Director can undertake to interpret or enforce the Agreement.

**C. Department rules of procedure also entitle IGWA to a hearing and opportunity to present evidence.**

In keeping with due process and the APA, the rules of procedure of the Department require the Department to “base its decision in a contested case on the official record in the case,” and to “maintain an official record including the items described in section 67-5249, Idaho Code” (Rule 650.01), to hold a hearing (Rules 550-553) where testimony is received under oath (Rule 558), and to take evidence “to assist the parties’ development of a record, not excluded to frustrate that development” (Rule 600).

Rule 602 allows the Director to take official notice of certain documents, but this must occur within the context of a contested case hearing. The rules neither contemplate nor allow the Director to selectively take judicial notice of hand-picked facts while depriving the parties of the opportunity to present evidence. Rule 602 specifically requires that “[p]arties must be given an opportunity to contest and rebut the facts or material officially noticed.”

Moreover, Rule 602 does not authorize the Director to take official notice of just any fact, but “of generally recognized technical or scientific data or facts within the agency’s specialized knowledge and records of the agency.” Rule 602. IGWA’s 2021 performance report was created by IGWA and is within the specialized knowledge of IGWA and its consultants. It was not created by Department staff and is not within the specialized knowledge of the Department. While IGWA or the SWC may be able to present it as evidence at a hearing, it does not fall within the category of facts for which the Department may take official notice.

**D. If the Director disregards IGWA’s constitutional due process rights, it will give rise to a cause of action under 42 U.S.C. § 1983.**

Federal law provides that any government actor who deprives the constitutional rights of any citizen of the United States “shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” 42 U.S.C.A. § 1983. If the Director takes action to interpret or enforce the Agreement without first holding a hearing, such action would entitle IGWA to bring a cause of action against the Director under 42 U.S.C. § 1983 for injunctive or declaratory relief for violation of groundwater users’ procedural due process rights and attorney’s fees and costs.

**E. If the Director disregards IGWA’s legal right to present evidence at a hearing before taking action, or disregards Idaho law governing contract interpretation, such action will likely entitle IGWA to recover attorney fees under Idaho Code § 42-117.**

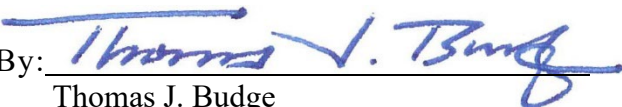
Idaho Code § 42-117 entitles the prevailing party in any proceeding involving a state agency as an adverse party to recover attorney’s fees and costs if the non-prevailing party “acted without a reasonable basis in fact or law.” The Director’s legal duty to hold a hearing and take evidence before acting to interpret or enforce the Agreement is unequivocal. It is not a matter of discretion. If the Director ignores that duty, without a reasonable basis in fact or law, IGWA will be entitled to recover attorney fees and costs under Idaho Code § 42-117.

**Request for Hearing.**

For the reasons set forth above, IGWA hereby requests that the Director refrain from interpreting or enforcing the Agreement without first holding a hearing and allowing IGWA and the SWC to present evidence concerning the matter.

DATED August 23, 2022.

RACINE OLSON, PLLP

By: 

Thomas J. Budge  
Attorneys for IGWA

## CERTIFICATE OF SERVICE

I hereby certify that on this 23<sup>rd</sup> day of August, 2022, I served the foregoing document on the persons below via email or as otherwise indicated:

  
 Thomas J. Budge

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

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

Docket No. CM-MP-2016-001

**FINAL ORDER REGARDING  
COMPLIANCE WITH APPROVED  
MITIGATION PLAN**

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

This Final Order resolves a dispute over the requirements of an approved mitigation plan in the above-captioned matter. In addition, this Final Order determines that there was a breach of the approved mitigation plan in 2021, and recognizes certain terms in a recent settlement between the parties as an appropriate remedy for that breach. It is only because of this negotiated remedy that curtailment is not necessary to address the 2021 breach.

**BACKGROUND**

On March 9, 2016, the Surface Water Coalition ("SWC")<sup>1</sup> and certain members of the Idaho Ground Water Appropriators, Inc. ("IGWA")<sup>2</sup> submitted to the Director of the Idaho Department of Water Resources ("Department") the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* ("Request for Order").

Attached to the Request for Order as Exhibits B and C respectively were the *Settlement Agreement Entered into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc.* ("SWC-IGWA Agreement"), and the *Addendum to Settlement Agreement* ("First Addendum"). Attached

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

<sup>2</sup> For purposes of this Final Order, references to IGWA include only the following eight ground water districts and one irrigation district, which are the signatories to the Mitigation Plan: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Fremont Madison Irrigation District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

to the Request for Order as Exhibit D was the October 7, 2015 *Agreement* (“A&B-IGWA Agreement”) between A&B Irrigation District (“A&B”) and the same IGWA members that entered into the SWC-IGWA Agreement. The SWC and IGWA submitted the SWC-IGWA Agreement, the First Addendum, and the A&B-IGWA Agreement (collectively, “2015 Agreements”) as a stipulated mitigation plan in response to the SWC delivery call (Docket No. CM-DC-2010-001). *Request for Order* at 3.

Through the SWC-IGWA Agreement, the SWC and IGWA members agreed, among other things, that “[t]otal ground water diversion shall be reduced by 240,000 ac-ft annually.” *SWC-IGWA Agreement* § 3.a.i.

The SWC and IGWA stipulated “that the mitigation provided by participating IGWA members under the [2015] Agreements is, provided the [2015] Agreements are implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member.” *Request for Order* ¶ 8. The SWC and IGWA agreed “[n]o ground water user participating in this [SWC-IGWA] Agreement will be subject to a delivery call by the SWC members as long as the provisions of the [SWC-IGWA] Agreement are being implemented.” *SWC-IGWA Agreement* § 5.

On May 2, 2016, the Director issued the *Final Order Approving Stipulated Mitigation Plan* (“First Final Order”). The First Final Order approved the 2015 Agreements as a mitigation plan subject to conditions, including: “a. All ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan.”; and “b. The ground water level goal and benchmarks referenced in the Mitigation Plan are applicable only to the parties to the Mitigation Plan.” *First Final Order* at 4.

On February 7, 2017, the SWC and IGWA submitted to the Department the *Surface Water Coalition’s and IGWA’s Stipulated Amended Mitigation Plan and Request for Order* (“Second Request for Order”). Attached to the Second Request for Order as Exhibit A was the *Second Addendum to Settlement Agreement* (“Second Addendum”) entered into on December 14, 2016, between the SWC and IGWA.

The Second Addendum amended the SWC-IGWA Agreement by providing “further details concerning implementation of the agreement addressing Sections 3.a (Consumptive Use Volume Reduction); 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a. (Adaptive Water Management).” *Second Request for Order* ¶ 4. The SWC and IGWA requested the Director issue an order approving the Second Addendum as an amendment to the mitigation plan. *Id.* ¶ 6.

On May 9, 2017, the Director issued the *Final Order Approving Amendment to Stipulated Mitigation Plan* (“Second Final Order”), approving the Second Addendum as an amendment to the parties’ mitigation plan subject to the following conditions:

- a. While the Department will exert its best efforts to support the activities of IGWA and the SWC, approval of the Second Addendum does not obligate the Department to undertake any particular action.

FINAL ORDER REGARDING COMPLIANCE WITH APPROVED MITIGATION PLAN—  
Page 2

- b. Approval of the Second Addendum does not limit the Director's enforcement discretion or otherwise commit the Director to a particular enforcement approach.

*Second Final Order* at 5.

Today, the mitigation plan stipulated by the SWC and IGWA and approved by the Director consists of four agreements: (1) the SWC-IGWA Agreement, (2) the First Addendum, (3) the A&B-IGWA Agreement, and (4) the Second Addendum. These four documents are collectively referred to in this order as the "Mitigation Plan."

Section 2.c.iv of the Second Addendum states:

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

On July 21, 2022, the SWC filed with the Department the *Surface Water Coalition's Notice of Steering Committee Impasse/Request for Status Conference* ("Notice"). In the Notice, the SWC alleged that in 2021 IGWA's members did not comply with the Mitigation Plan's requirement that IGWA reduce total ground water diversion by 240,000 acre-feet annually. *Notice* at 2–3. The SWC stated that the allegations of noncompliance have been reviewed by the steering committee, as required by the Mitigation Plan, and that the SWC and IGWA disagree on whether there has been a breach and the Steering Committee was at an impasse. *Id.* at 3–4. The SWC requested the Director schedule a status conference to discuss the allegations of noncompliance. *Id.* at 4. The SWC also requested a status conference to discuss discrepancies between the numbers in IGWA's 2021 Settlement Agreement Performance Report and the Department's verification report. *Id.* On July 26, 2022, the Director issued a *Notice of Status Conference* granting the SWC's request for a status conference and scheduled the status conference for August 5, 2022.

On August 3, 2022, IGWA filed *IGWA's Response to Surface Water Coalition's Notice of Impasse* ("Response"). The Response argues there was no breach in 2021 because each IGWA member met its proportionate share of the 240,000 acre-foot reduction obligation—as measured on a five-year rolling average and assuming that A&B and Southwest Irrigation District ("Southwest") are responsible for portions of the 240,000 acre-foot total.

On August 4, 2022, the SWC filed the *Surface Water Coalition's Reply to IGWA's Response* ("Reply"). The Reply contends that IGWA's arguments "have no support in the actual [SWC-IGWA] Agreement and should be rejected on their face." *Reply* at 2. Specifically, the Reply argues that non-parties, such as A&B and Southwest, are not responsible for any portion of the 240,000 acre-foot reduction obligation, and that the 240,000 acre-foot reduction obligation is an annual requirement, not based on a five-year rolling average. *Id.* at 3–5.

FINAL ORDER REGARDING COMPLIANCE WITH APPROVED MITIGATION PLAN—  
Page 3



On August 5, 2022, the Director held the status conference. Among other topics covered, counsel for the SWC and IGWA presented arguments as to whether IGWA breached the Mitigation Plan in 2021. During the status conference, the Director referenced Section 2.c.iv of the Second Addendum, which states that if the Director determines a breach, there is an expectation that the Director will “issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.” The Director initiated a discussion with counsel for the parties regarding possible curative remedies should the Director find a breach. The only concrete proposal, suggested by an attorney for the SWC, was an increase in diversion reduction in 2022 equal to the 2021 deficiency.

On August 12, 2022, IGWA filed *IGWA’s Supplemental Response to Surface Water Coalition’s Notice of Steering Committee Impasse* (“Supplemental Response”). In addition to expanding IGWA’s five-year-rolling-average argument, the Supplemental Response raises two new procedural arguments. First, IGWA argues the Director should not act on the SWC’s Notice until the SWC files a motion under the Department’s rules of procedure. *Supplemental Response* at 2–3. Second, IGWA argues that, if the Director finds a breach of the Mitigation Plan, he must provide the breaching party 90 days’ notice and an opportunity to cure. *Id.* 8–9.

On August 18, 2022, the Director issued a *Notice of Intent to Take Official Notice of IGWA’s 2021 Settlement Agreement Performance Report and Supporting Spreadsheet*. Pursuant to Rule 602 of the Department’s rules of procedure (IDAPA 37.01.01.602), this notice explained that the Director intended to take official notice of IGWA’s 2021 Settlement Agreement Performance Report and supporting spreadsheet (collectively, “2021 Performance Report”) and gave the parties one week to object in writing. IGWA filed *IGWA’s Objection to Notice of Intent to Take Official Notice of IGWA’s 2021 Settlement Agreement Performance Report and Supporting Spreadsheet; and Request for Hearing* (“Objection”) on August 23, 2022.

Also on August 18, 2022, the Director issued the *Order Revising July 2022 Forecast Supply (Methodology Steps 7–8)* (“2022 Step 7–8 Order”) in the SWC delivery call matter (Docket No. CM-DC-2010-001). The Director curtailed ground water users not covered by an approved mitigation plan whose ground water rights bear a priority date junior to March 25, 1981. *2022 Step 7–8 Order* at 12.

On September 7, 2022, the Department received a Settlement Agreement (“Remedy Agreement”), signed by IGWA and the SWC, that seeks to ensure “the Director does not curtail certain IGWA members during the 2022 irrigation season.” *Remedy Agreement* ¶ E. To accomplish this, the Remedy Agreement sets forth a stipulated remedy for the breach alleged in the SWC’s Notice:

**2021 Remedy.** As a compromise to resolve the parties’ dispute over IGWA’s compliance with the Settlement Agreement and Mitigation Plan in 2021, and not as an admission of liability, IGWA will collectively provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year. Such amounts will be in addition to the long-term obligations set forth in section 3 of the Settlement Agreement and approved Mitigation Plan. IGWA agrees to take all

reasonable steps to lease the quantities of storage water set forth above from non-SWC spaceholders. If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA will make up the difference by either (a) leasing storage water from the SWC as described in section 2, or (b) undertaking diversion reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River. For example, if by April 1, 2023, IGWA has secured contracts for only 25,000 acre-feet of storage water, IGWA will either (a) lease 5,000 acre-feet of storage from the SWC, or (b) undertake 5,000 acre-feet of diversion reductions. The remedy described in this section shall satisfy IGWA's obligation under the Settlement Agreement for 2021 only.

*Remedy Agreement* § 1. The SWC and IGWA agreed to submit the Remedy Agreement to the Director “as a stipulated plan to remedy the alleged shortfall regarding IGWA’s 2021 groundwater conservation obligation as set forth in the SWC Notice.” *Id.* § 3. The Remedy Agreement contemplates that the Director will incorporate the terms of the 2021 remedy provision “as the remedy selected for the alleged shortfall in lieu of curtailment, and shall issue a final order regarding the interpretive issues raised by the SWC Notice.” *Id.*

### APPLICABLE LAW

Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, states:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

Idaho Code § 42-1805(8) authorizes the Director to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.”

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

Pursuant to Chapter 52, Title 67, Idaho Code, and Sections 42-603 and 42-1805(8), Idaho Code, the Department promulgated the Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”), effective October 7, 1994. IDAPA 37.03.11.000–001.

The CM Rules “prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply.” IDAPA 37.03.11.001.

Under CM Rule 40.01, once the Director finds that material injury is occurring, he “shall” either:

- a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment; or
- b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

IDAPA 37.03.11.040.01.

CM Rule 42.02 states:

The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.

IDAPA 37.03.11.042.02.

Under Idaho law, a settlement agreement “stands on the same footing as any other contract and is governed by the same rules and principles as are applicable to contracts generally.” *Budget Truck Sales, LLC v. Tilley*, 163 Idaho 841, 846, 419 P.3d 1139, 1144 (2018) (internal quotation omitted). The interpretation of a contract starts with the language of the contract itself. “The meaning of an unambiguous contract should be determined from the plain meaning of the words. Only when the language is ambiguous, is the intention of the parties determined from surrounding facts and circumstances.” *Clear Lakes Trout Co. v. Clear Springs Foods, Inc.*, 141 Idaho 117, 120, 106 P.3d 443, 446 (2005) (citations omitted).

## FINDINGS OF FACT

The Mitigation Plan is comprised of four agreements between IGWA and certain members of the SWC. IGWA and all of the SWC members except A&B are signatories to the SWC-IGWA Agreement, the First Addendum, and the Second Addendum. Only IGWA and A&B are parties to the A&B-IGWA Agreement.

FINAL ORDER REGARDING COMPLIANCE WITH APPROVED MITIGATION PLAN—  
Page 6

A&B and members of the Southwest Irrigation District (“Southwest”) both pump ground water. Southwest did not sign the SWC-IGWA Settlement Agreement or any of the subsequent addendums. A&B participates in the Mitigation Plan only as a member of the SWC. *See A&B-IGWA Agreement* ¶ 2.

A&B and Southwest each agreed to separate settlements with the SWC, and the Department has approved the settlements as mitigation plans under the CM Rules. The separate settlements between the SWC, A&B, and Southwest are not at issue here.

Under the Mitigation Plan, a Steering Committee comprised of representatives of the SWC, IGWA, and the State meets at least once annually. *See SWC-IGWA Agreement* § 3.m. One of the responsibilities of the Steering Committee is to review progress on implementation and achieving benchmarks and the ground water goal set out in the Mitigation Plan. *Id.* The Steering Committee also reviews technical information from the Department and technical reports by SWC or IGWA consultants. *Second Addendum* § 2.c.i. The Steering Committee began meeting annually in 2016 and has met at least annually every year since. At these Steering Committee meetings, IGWA has prepared and presented a report summarizing compliance with annual reduction obligations. *See Second Addendum* § 2.a.i.

In its annual reports to the Steering Committee, IGWA has assigned to A&B and to Southwest a proportionate percentage and quantity of the 240,000 acre-foot reduction obligation agreed upon in the SWC-IGWA Agreement. *Response* at 3–4. Assigning portions of the 240,000 acre-foot total to A&B and Southwest effectively reduces the obligations of the IGWA signatories to the Mitigation Plan by 14.4%—more than 34,000 acre-feet. *See Response* at 4.

On April 1, 2021, IGWA’s counsel sent copies of IGWA’s 2021 Performance Report to representatives of the SWC and the Department. While the report was sent to the Department, it did not automatically become part of the agency record for this proceeding. On August 18, 2022, the Department provided notice to the parties that the Director intended to take official notice of IGWA’s 2021 Performance Report.<sup>3</sup> A spreadsheet included in the 2021 Performance Report summarizes IGWA’s, A&B’s, and Southwest’s mitigation efforts during 2021. IGWA’s summary spreadsheet is reproduced as Table 1 on the following page.

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<sup>3</sup> IGWA’s Objection to taking official notice of the 2021 Performance Report is addressed below in subsections 5.a and 5.b of the Analysis and Conclusions of Law.

TABLE 1

2021 Performance Summary Table							
	Target Conservation	Baseline	2021 Usage	Diversion Reduction	Accomplished Recharge	Total Conservation	2021 Mitigation Balance
American Falls-Aberdeen	33,715	286,448	291,929	-5,481	20,050	14,569	-19,146
Bingham	35,015	277,011	302,020	-25,009	9,973	-15,036	-50,052
Bonneville-Jefferson	18,264	156,287	158,212	-1,925	5,080	3,155	-15,109
Carey	703	5,671	4,336	1,335	0	1,335	632
Jefferson-Clark	54,373	441,987	405,131	36,856	5,881	42,737	-11,636
Henry's Fork <sup>1</sup>	5,391	73,539	65,323	8,216	3,000	15,189	9,798
Madison <sup>2</sup>		81,423	77,449	3,973			
Magic Valley	32,462	256,270	231,474	24,795	10,546	35,341	2,879
North Snake <sup>3</sup>	25,474	208,970	194,778	14,192	11,301	25,494	20
A&B <sup>4</sup>	21,660	-	-	-	-	21,660	0
Southwest ID <sup>4</sup>	12,943	-	-	-	-	12,943	0
Total:	240,000	1,787,604	1,730,652	56,953	65,831	157,387	-82,613
Notes:							
(1) Includes mitigation for Freemont- Madison Irrigation District, Madison Ground Water District and WD100. Mitigating by alternative means.							
(2) Madison baseline is preliminary estimate, see note on district breakdown.							
(3) North Snake GWD baseline includes annual average of 21,305 acre-feet of conversions.							
(4) A&B ID and Southwest ID Total Conservation is unknown and assumed to meet target.							

The parties to the Mitigation Plan have adopted a process under which the Steering Committee may resolve an alleged breach or noncompliance with the Mitigation Plan. *See Second Addendum* § 2.c.iii. Alternatively, if the SWC and IGWA do not agree that a breach has occurred, the Director may determine if a breach occurred and issue an order specifying actions the breaching party must take to cure the breach or be subject to curtailment. *Id.* § 2.c.iv.

On April 29, 2022, the SWC requested a status conference in this proceeding to discuss, among other matters, IGWA's compliance with the Mitigation Plan. SWC's Req. for Status Conf. at 2–3. The SWC alleged "IGWA and its junior priority ground water right members are not operating in accordance with the approved plan and are failing to mitigate the material injury to the [SWC] members." *Id.* at 3. Specifically, the SWC alleged, based on IGWA's 2021 Performance Report, that IGWA had not met its obligation under the Mitigation Plan to reduce total ground water diversion by 240,000 acre-feet in 2021. *Id.* at 2–3. On May 5, 2022, the Director issued a response, declining to immediately address the allegations until the Steering Committee had a chance to meet and review the technical information. Resp. to Req. for Status Conf.; Notice of Status Conf. at 2.

The Steering Committee met and reviewed technical information, including IGWA's 2021 Performance Report, on May 18, June 27, and July 13, 2022.

As noted in the background section above, on July 21, 2022, the SWC filed its Notice that the Steering Committee met and was at an impasse on whether IGWA had breached the Mitigation Plan in 2021. IGWA also concedes “the Steering Committee reached an impasse as to whether a breach occurred . . . .” *Supplemental Response* at 8. The parties to the Mitigation Plan, therefore, do not dispute that the Steering Committee’s principal members—the SWC and IGWA—do not agree that a breach of the Mitigation Plan occurred in 2021. Accordingly, the Director finds no further notice from the Steering Committee is required before he may consider whether a breach of the Mitigation Plan occurred in 2021 and, if so, the remedy.

The SWC and IGWA’s Remedy Agreement establishes a mutually agreed upon “compromise to resolve the parties’ dispute over IGWA’s compliance with the Settlement Agreement and Mitigation Plan in 2021.” Among other things, IGWA agreed to collectively supply the SWC “an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year.” *Remedy Agreement* § 1. Additionally:

If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA will make up the difference by either (a) leasing storage water from the SWC as described in section 2, or (b) undertaking diversion reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River.

*Id.* The parties further agreed this remedy “shall satisfy IGWA’s obligation under the [2015] Settlement Agreement for 2021 only.” *Id.*

## ANALYSIS AND CONCLUSIONS OF LAW

Because the SWC and IGWA disagree on whether a breach has occurred, the Director should evaluate the available information, determine if a breach of the Mitigation Plan has occurred, and determine an appropriate remedy for any such breach. *See Second Addendum* § 2.c.iv; *see also Remedy Agreement* § 3 (“The Director shall incorporate the terms of section 1 above as the remedy selected for the alleged shortfall in lieu of curtailment, and shall issue a final order regarding the interpretive issues raised by the SWC Notice.”). This is necessary to assess whether each IGWA member district’s “use of water under the[ir] junior-priority right[s] is covered by an approved and *effectively operating* mitigation plan.” IDAPA 37.03.11.042.02 (emphasis added); *see also SWC-IGWA Agreement* § 5 (“No ground water user participating in this Settlement Agreement will be subject to a delivery call by the SWC members as long as the provisions of the Settlement Agreement are being implemented.”).

### **1. The Mitigation Plan obligates IGWA to reduce total ground water diversions by 240,000 acre-feet every year.**

The Mitigation Plan obligates IGWA to reduce total ground water diversions, or conduct equivalent private recharge, by 240,000 acre-feet annually. Subsection 3.a of the SWC-IGWA Agreement states:

FINAL ORDER REGARDING COMPLIANCE WITH APPROVED MITIGATION PLAN—  
Page 9

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

The SWC argues that “240,000 ac-ft annually” in section 3.a.i means that the Mitigation Plan requires IGWA’s “signatory districts to reduce their total ground water diversion by 240,000 acre-feet per year.” *Reply* at 3. IGWA concedes that section 3.a.i “contemplates 240,000 acre-feet of groundwater conservation ‘annually.’” *Supplemental Response* at 3. However, IGWA argues its diversion reduction obligation is measured on a five-year rolling average. *Response* at 4–5; *Supplemental Response* at 3–7. If the mitigation obligation was measured as IGWA argues, then a year in which IGWA reduces ground water diversion by less than 240,000 acre-feet, such as 2021, would not necessarily constitute a breach of the obligation under section 3.a.i. *Id.*

IGWA’s argument is contrary to the plain language of the Mitigation Plan. The phrase “shall be reduced by 240,000 ac-ft annually” is unambiguous and must be enforced according to its plain terms. *See Clear Lakes*, 141 Idaho at 120, 106 P.3d at 446. The adverb “annually” derives from the adjective “annual,” which means “of or measured by a year” or “happening or appearing once a year; yearly.” *Annual*, Webster’s New World Dictionary (3d coll. ed. 1994). As a legal term of art, “annually” has the same essential meaning:

In annual order or succession; yearly, every year, year by year. At the end of each and every year during a period of time. Imposed once a year, computed by the year. Yearly or once a year, but does not in itself signify what time in a year.

*Black’s Law Dictionary* 58 (6th ed. 1991). The Mitigation Plan’s plain language, therefore, requires IGWA to reduce its ground water diversions by 240,000 acre-feet every year.

This understanding is reinforced by other Mitigation Plan provisions that use the word “annually.” For example, section 2.a.i of the Second Addendum requires IGWA to submit certain data to the Steering Committee “[p]rior to April 1 annually.” IGWA has done so every year. Likewise, section 2.c.v of the Second Addendum obligates the Steering Committee, which includes IGWA representatives, to “submit a report to the Parties and the Department prior to May 1 annually” on certain enumerated subjects. The Department receives these reports every year. Nothing in the Mitigation Plan suggests that the parties intended a different meaning for “annually” in section 3.a.i of the SWC-IGWA Agreement.

IGWA argues section 3.e.iv of the SWC-IGWA Agreement requires its obligation under section 3.a.i to be measured on a five-year rolling average. Section 3.e.iv states: “When the ground water level goal is achieved for a five year rolling average, ground water diversion reductions may be reduced or removed, so long as the ground water level goal is sustained.” (emphasis added). Under section 3.e.i of the SWC-IGWA Agreement, the ground water level

goal is to “return ground water levels to a level equal to the average of the aquifer levels from 1991-2001” as measured in certain mutually agreed upon wells using mutually agreed upon techniques. Considering the measurements contemplated by section 3.e.i, section 3.e.iv simply means that a five-year rolling average of *those measurements* will be used to determine if the ground water level goal is achieved. Section 3.e.iv does not say or imply that the ground water diversion reductions required under section 3.a.i are to be measured on a five-year rolling average. As explained above, the plain language of section 3.a.i imposes an annual—i.e., every year—obligation and thus does not allow for averaging over multiple years.

IGWA also argues that a five-year rolling average is required because it has averaged its annual diversions for the five years of 2010–2014 to determine historical annual diversion quantities as a baseline for the 240,000 acre-feet diversion reduction. But this averaging process is not described in the Settlement Agreement. IGWA calculated and reported annual reduction based on its own adopted baseline process. It cannot replace the clear requirement of an annual 240,000 acre-feet reduction with its own averaging process. Under the plain and unambiguous terms of the Mitigation Plan, IGWA has an obligation to reduce total ground water diversion by 240,000 acre-feet every year.

IGWA contends that the SWC, by arguing the reduction obligation applies every year, is seeking to establish a “fixed diversion cap.” *Supplemental Response* at 3–6. They claim the “fixed cap method proposed by the SWC would require IGWA to conserve far more than 240,000 acre-feet in some years and far less than 240,000 acre-feet in other years.” *Id.* at 5. This claim is a strawman. Nothing in the SWC’s filings in this matter states or implies they are seeking anything more (or less) than compliance with the annual 240,000 acre-foot diversion reduction obligation unambiguously set forth in the Mitigation Plan. Likewise, nothing in this order should be read to suggest that IGWA’s obligation under section 3.a.i of the SWC-IGWA Agreement is anything other than reducing total ground water diversion “by 240,000 acre-feet annually.”

**2. The 240,000 acre-foot diversion reduction obligation is the sole responsibility of IGWA members participating in the Mitigation Plan.**

As shown in Table 1 above, IGWA included conservation activities by A&B and Southwest in its calculation of “Total Conservation” for 2021. IGWA’s inclusion of A&B and Southwest in sharing the 240,000-acre foot reduction obligation is based on IGWA’s interpretation of the Section 3.ii of the SWC-IGWA Agreement, which reads: “Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity.” IGWA assumes that A&B and Southwest share in the reduction obligation because A&B and Southwest are both “Irrigation District[s] with members pumping from the ESPA.” *Response* at 3 (quoting *SWC-IGWA Agreement* § 3.a.ii).

Based on that assumption, IGWA’s performance reports have included volumetric diversion reduction obligations for A&B and Southwest. “IGWA has from the outset allocated to its members a proportionate share of the 240,000 acre-feet” after it “deducted groundwater diversions within A&B Irrigation District, Southwest Irrigation District,” and, for one year,



another irrigation district. *Response* at 3–4. This deduction, in effect, shifts a portion of the 240,000 acre-foot reduction obligation to A&B and Southwest, lowering IGWA’s aggregate share of the obligation by 14.4%—more than 34,000 acre-feet.

The basis for IGWA’s deduction is unclear. There are no reported data for diversion reductions for A&B and Southwest in any of IGWA’s reports. A&B and Southwest are subject to their own mitigation plans approved by the Department. Southwest is not a party to the Mitigation Plan at issue here. Additionally, in the A&B-IGWA Agreement, IGWA recognized that A&B was only a party to the Mitigation Plan as a surface water user, not as a ground water user. *A&B-IGWA Agreement* ¶ 2.

The SWC argues IGWA’s deduction is “an attempt to inject non-parties into this issue” and “is contrary to basic contract interpretation.” *Reply* at 3. The Director agrees.

The Mitigation Plan is comprised of a series of settlement agreements, which are construed in the same manner as contracts. *Budget Truck*, 163 Idaho at 846, 419 P.3d at 1144. “Non-parties are generally not bound by contracts they did not enter into.” *Greater Boise Auditorium Dist. v. Frazier*, 159 Idaho 266, 273 n.6, 360 P.3d 275, 282 n.6 (2015). Indeed, the SWC-IGWA Agreement specifically states it does not cover non-participants: “Any ground water user not participating in this Settlement Agreement or otherwise have [sic] another approved mitigation plan will be subject to administration.” *SWC-IGWA Agreement* § 6. Moreover, the Director’s First Final Order approved the 2015 Agreements as a mitigation plan subject to the following condition: “All ongoing activities required pursuant to the Mitigation Plan *are the responsibility of the parties to the Mitigation Plan.*” *First Final Order* at 4 (emphasis added). Moreover, the A&B-IGWA Agreement specifically provides that “[t]he obligations of the [IGWA] Ground Water Districts set forth in Paragraphs 2 – 4 of the [SWC-IGWA] Agreement do not apply to A&B and its ground water rights.” *A&B-IGWA Agreement* ¶ 2. The 240,000 acre-foot reduction obligation is among the obligations referenced in that provision. *SWC-IGWA Agreement* § 3.a.i.

Against this backdrop, it is untenable for IGWA to argue non-parties are included in the phrase “[e]ach Ground Water and Irrigation District” in section 3.a.ii of the SWC-IGWA Agreement. IGWA’s argument not only lacks support in the unambiguous language of the Mitigation Plan, it also violates an express condition in the Director’s approval of the 2015 Agreements. *First Final Order* at 4. Accordingly, when the agreement language assigns an obligation to “[e]ach” of the ground water districts and irrigation districts, it means each IGWA member district that signed the agreement is obligated for their proportionate share of the 240,000 acre-feet reduction. *SWC-IGWA Agreement* § 3.a.ii.

Therefore, the 240,000 acre-foot diversion reduction obligation is IGWA’s sole responsibility. A&B and Southwest are not responsible for any portion of the 240,000 acre-foot diversion reduction obligation. It follows that IGWA members participating in the Mitigation Plan “shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity.” *Id.*

### 3. Certain IGWA members breached the Mitigation Plan in 2021.

Based on the foregoing, each IGWA member participating in the Mitigation Plan is obligated to reduce total ground water diversion (or provide equivalent private recharge) by each member's proportionate share of 240,000 acre-feet every year. *SWC-IGWA Agreement* § 3.a.

Table 2 below shows IGWA's 2021 summary spreadsheet (Table 1) with yellow-highlighted columns added. The "Re-proportioning" column redistributes the 14.4% of "[IGWA] Target Conservation" that IGWA had assigned to A&B and Southwest. The yellow-highlighted "Target Conservation" column uses the re-proportioned shares of the total to compute proportionate obligations consistent with the plain language of the Mitigation Plan. The yellow-highlighted target conservation values are then compared to IGWA's 2021 reduction activities. Negative values in the yellow-highlighted "2021 Mitigation Balance" column identify IGWA members that did not fulfill their proportionate share of the 240,000 acre-foot reduction obligation in 2021.

**TABLE 2**

2021 Performance Summary Table											
	IGWA Proportioning	[IGWA] Target Conservation	Re- proportioning	Target Conservation	Baseline	2021 Usage	Diversion Reduction	Accomplished Recharge	Total Conservation	[IGWA] 2021 Mitigation Balance	2021 Mitigation Balance
American Falls-Aberdeen	14.0%	33,715	16.4%	39,395	286,448	291,929	-5,481	20,050	14,569	-19,146	-24,826
Bingham	14.6%	35,015	17.0%	40,914	277,011	302,020	-25,009	9,973	-15,036	-50,052	-55,951
Bonneville-Jefferson	7.6%	18,264	8.9%	21,341	156,287	158,212	-1,925	5,080	3,155	-15,109	-18,185
Carey	0.3%	703	0.3%	821	5,671	4,336	1,335	0	1,335	632	513
Jefferson-Clark	22.7%	54,373	26.5%	63,533	441,987	405,131	36,856	5,881	42,737	-11,636	-20,796
Henry's Fork <sup>1</sup>	2.2%	5,391	2.6%	6,299	73,539	65,323	8,216	3,000	15,189	9,798	8,890
Madison <sup>2</sup>					81,423	77,449	3,973				0
Magic Valley	13.5%	32,462	15.8%	37,931	256,270	231,474	24,795	10,546	35,341	2,879	-2,590
North Snake <sup>3</sup>	10.6%	25,474	12.4%	29,765	208,970	194,778	14,192	11,301	25,494	20	-4,272
A&B <sup>4</sup>	9.0%	21,660	--	--	-	-	-	-	21,660	0	--
Southwest ID <sup>4</sup>	5.4%	12,943	--	--	-	-	-	-	12,943	0	--
Total:	100%	240,000	100%	240,000	1,787,604	1,730,652	56,953	65,831	157,387	-82,613	--
Notes:											
(1) Includes mitigation for Fremont- Madison Irrigation District, Madison Ground Water District and WD100. Mitigating by alternative means.											
(2) Madison baseline is preliminary estimate, see note on district breakdown.											
(3) North Snake GWD baseline includes annual average of 21,305 acre-feet of conversions.											
(4) A&B ID and Southwest ID Total Conservation is unknown and assumed to meet target.											

Madison Ground Water District, Fremont Madison Irrigation District, and Carey Ground Water District satisfied their proportionate 2021 mitigation obligations in 2021. Based on the analysis in Table 2, Table 3 on the following page identifies the IGWA ground water districts that did not fulfill their proportionate share of the total annual ground water reduction and the volume of each district's deficiency.

TABLE 3

Ground Water District	Deficiency (acre-feet)
American Falls-Aberdeen	24,826
Bingham	55,951
Bonneville-Jefferson	18,185
Jefferson-Clark	20,796
Magic Valley	2,590
North Snake	4,272
<b>Total</b>	<b>126,620</b>

**4. The IGWA members in Table 3 are not covered by an effectively operating mitigation plan and IGWA must implement the 2021 remedy in the Remedy Agreement.**

In a delivery call under the CM Rules, out-of-priority diversion of water by junior priority ground water users is allowable only “pursuant to a mitigation plan that has been approved by the Director.” IDAPA 37.03.11.040.01.b. Junior-priority ground water users “covered by an approved *and effectively operating* mitigation plan” are protected from curtailment under CM Rule 42. IDAPA 37.03.11.042.02 (emphasis added). In other words, only those junior ground water users who are in compliance with an approved mitigation plan are protected from curtailment.

The Director has approved several mitigation plans when the joint administration of ground water and surface water has been imminent. Some of these approved mitigation plans have been contested by holders of senior priority water rights. In this case, however, because of the stipulated Mitigation Plan, the Director allowed significant latitude to the agreeing parties in accepting the provisions of the Mitigation Plan. Nonetheless, the courts have defined the Director’s responsibilities if the holders of junior priority water rights do not comply with the mitigation requirements.

In the *Rangen* case, Judge Eric Wildman addressed the Director’s responsibility when a mitigation plan fails. Mem. Decision & Order, *Rangen, Inc. v. Idaho Dep’t of Water Res.*, No. CV-2014-4970 (Twin Falls Cnty. Dist. Ct. Idaho June 1, 2015) [hereinafter “*Rangen June 1, 2015 Decision*”]. A mitigation plan that allows out-of-priority diversions must supply water to the holders of senior priority water rights during the time-of-need. The Court stated: “When the Director approves a mitigation plan, there should be certainty that the senior user’s material injury will be mitigated throughout the duration of the plan’s implementation. This is the price of allowing junior users to continue their offending out-of-priority water use.” *Rangen June 1, 2015 Decision* at 8. Judge Wildman previously held in an earlier case that the compensation for underperformance of the requirements of the mitigation plan cannot be delayed. See Mem. Decision & Order at 10, *Rangen, Inc. v. Idaho Dep’t of Water Res.*, No. CV-2014-2446 (Twin Falls Cnty. Dist. Ct. Idaho Dec. 3, 2014). Furthermore, without mitigation at the time-of-need, the holders of junior ground water rights could materially injure senior water rights by diverting out-of-priority with impunity.

FINAL ORDER REGARDING COMPLIANCE WITH APPROVED MITIGATION PLAN—  
Page 14

Here, the Mitigation Plan obligates IGWA to undertake total diversion reductions or equivalent recharge of 240,000 acre-feet every year. Each IGWA member is annually responsible for their proportionate share of that total. But the Mitigation Plan is unique in that it contemplates delays in analyzing IGWA's mitigation efforts. These delays are inherent in the Steering Committee process the parties agreed to in the Second Addendum.

For example, section 2.a.i of the Second Addendum requires IGWA to submit, "[p]rior to April 1 annually," ground water diversion and recharge data (i.e., the types of data in the 2021 Performance Report) to the Steering Committee for the previous irrigation season. Further, the parties agreed to a process by which the Steering Committee evaluates IGWA's data from the previous irrigation season to assess whether a breach occurred in the previous season. *Second Addendum* § 2.c.i–iv. Because IGWA is not obligated to submit its data to the Steering Committee until April 1 every year, the Steering Committee process necessarily begins well after the actions or inactions constituting a breach. Moreover, the process does not involve the Director until the Steering Committee finds a breach or, as here, reaches an impasse. *Id.* While the Director believes this process was developed and has been implemented by all parties in good faith, it nevertheless means that any breach will be addressed many months after it occurs.

A mitigation plan that depends on a prediction of compliance must include a contingency plan to mitigate if the predictive mitigation plan is not satisfied:

If junior users wish to avoid curtailment by proposing a mitigation plan, the risk of that plan's failure has to rest with junior users. Junior users know, or should know, that they are only permitted to continue their offending out-of-priority water use so long as they are meeting their mitigation obligations under a mitigation plan approved by the Director. IDAPA 37.03.11.040.01.a,b. If they cannot, then the Director must address the resulting material injury by turning to the approved contingencies. If there is no alternative source of mitigation water designated as the contingency, then the Director must turn to the contingency of curtailment. Curtailment is an adequate contingency if timely effectuated. In this same vein, if curtailment is to be used to satisfy the contingency requirement, junior users are on notice of this risk and should be conducting their operation so as to not lose sight of the possibility of curtailment.

*Rangen June 1, 2015 Decision at 9.*

In this case, certain holders of junior-priority water rights failed to satisfy their mitigation obligation in 2021. Out-of-priority diversions by the IGWA members in Table 3 above were not "pursuant to a mitigation plan that has been approved by the Director." IDAPA 37.03.11.040.01.b. The approved Mitigation Plan was not "effectively operating" with respect to those IGWA members in 2021. IDAPA 37.03.11.042.02. Consequently, the holders of senior water rights have been and are being materially injured by the failure of the juniors to fully mitigate during the 2021 irrigation season.

The CM Rules contemplate that out-of-priority diversions by junior-priority ground water users will be curtailed absent compliance with an approved mitigation plan. IDAPA 37.03.11.040.01. But curtailment may be avoided if an adequate, alternative source of mitigation water is designated as a contingency. *Rangen June 1, 2015 Decision* at 9. Therefore, the Director must determine if there is an adequate contingency for IGWA members' 2021 noncompliance with the Mitigation Plan.

The Mitigation Plan itself does not include a contingency in the event IGWA did not meet the 240,000 acre-foot reduction obligation, but it does contemplate the Director will "issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment." *Second Addendum* § 2.c.iv. The Director concludes the SWC and IGWA's Remedy Agreement provides a cure for the breach and constitutes an adequate contingency for IGWA members' noncompliance in 2021. Specifically, in section 1 of the Remedy Agreement, IGWA agrees to "collectively provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year." Moreover, the Remedy Agreement details IGWA's options in the event it cannot lease the necessary water from non-SWC spaceholders:

If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA will make up the difference by either (a) leasing storage water from the SWC as described in section 2, or (b) undertaking consumptive use reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River.

*Remedy Agreement* § 1. The SWC and IGWA agree their stipulated 2021 remedy should be the "remedy selected for the alleged [2021] shortfall in lieu of curtailment." *Id.* § 3. The Director agrees. The parties' remedy constitutes an appropriate contingency for IGWA members' noncompliance of the Mitigation Plan in 2021. Therefore, in lieu of curtailment, the Director will order that IGWA must implement the 2021 remedy in section 1 of the Remedy Agreement.

## **5. IGWA's procedural and evidentiary objections lack merit.**

IGWA has raised procedural and evidentiary objections in connection with this matter. For the reasons stated below, these objections lack merit.

### ***a. IGWA's request for a pre-decision hearing is denied.***

In its Objection, IGWA requests the Director "refrain from interpreting or enforcing the [SWC-IGWA] Agreement without first holding a hearing and allowing IGWA and the SWC to present evidence concerning the matter." *Objection* at 6. IGWA argues such a hearing is required by due process clauses in the United States Constitution and the Idaho Constitution, the Idaho Administrative Procedure Act, and the Department's rules of procedures. *Id.* 2–6. The Director disagrees that a pre-decision hearing is required in the circumstances of this case.

i. *The Remedy Agreement moots IGWA's due process argument.*

In general, due process requires notice and an opportunity to be heard when governmental action results in a deprivation of property. Water rights are property rights, so this general rule applies when water rights are curtailed. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 814, 252 P.3d 71, 95 (2011). However, due process “does not necessarily require a hearing before property is taken.” *Id.* This is because “due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (cleaned up). The Idaho Supreme Court has set out three requirements for the Director to consider before curtailing water rights before a hearing:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

*Clear Springs*, 150 Idaho at 814, 252 P.3d at 95 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972)).<sup>4</sup> “Whether or not curtailment of water use can be ordered without prior notice or an opportunity for a hearing depends upon whether the three requirements are met under the circumstances of a particular delivery call or curtailment.” *Id.* at 815, 252 P.3d at 96. All three requirements may be satisfied here, but the Director need not decide the issue because the Remedy Agreement makes curtailment unnecessary.

The due process issue raised in IGWA's Objection—which was filed weeks before the parties entered into the Remedy Agreement—presumes the Director would be ordering curtailment. The SWC and IGWA entered into the Remedy Agreement for the express purpose of avoiding curtailment during the 2022 irrigation season. *Remedy Agreement* ¶ E. As discussed above, the Remedy Agreement is an appropriate contingency and cure for IGWA members' noncompliance with the Mitigation Plan in 2021, and thus renders curtailment unnecessary. Indeed, IGWA agreed to “not seek review of the remedy” established in section 1 of the Remedy Agreement and incorporated into this order. *Id.* § 3. It follows that this order does not deprive IGWA of any property right. Because IGWA's argument depends on the Director curtailing IGWA's water rights, the due process issues presented in the Objection are moot in light of the

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<sup>4</sup> Despite recognizing the applicability of *Clear Springs* in this case, IGWA argues a different three-part test for determining whether a legal procedure satisfies due process. *Objection* at 3 (quoting *LU Ranching Co. v. U.S.*, 138 Idaho 606, 608, 67 P.3d 85, 87 (2003)). That test, which derives from the U.S. Supreme Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), is generalized, and the Idaho Supreme Court applied it in a case challenging the constitutionality of the procedures for claiming and adjudicating rights in the Snake River Basin Adjudication. *LU Ranching*, 138 Idaho 606, 67 P.3d 85. When faced with the specific due process question presented by IGWA (the propriety of curtailment before a hearing), the Idaho Supreme Court has applied the three requirements from *Fuentes*—both before and after it decided *LU Ranching* in 2003. *Clear Springs*, 150 Idaho at 814, 252 P.3d at 95; *Nettleton v. Higginson*, 98 Idaho 87, 92, 558 P.2d 1048, 1053 (1977).

Remedy Agreement. *See Farrell v. Whiteman*, 146 Idaho 604, 610, 200 P.3d 1153, 1159 (2009) (“An issue is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome.”)

ii. *Idaho Administrative Law does not require a hearing before the Director acts.*

IGWA argues that a pre-decision hearing is required under the Idaho Administrative Procedure Act and the Department’s rules of procedure. Regarding the Administrative Procedure Act, IGWA argues a hearing must be held in accordance with Idaho Code § 67-5242(3), except when immediate action without a hearing is authorized under Idaho Code § 67-5247. *Objection* at 5. This argument overlooks the statute governing hearings before the Director, which provides in pertinent part:

Unless the right to a hearing before the director . . . is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.

I.C. § 42-1701A(3). Section 42-1701A(3) is specific to “hearing[s] before the director” and entitles aggrieved persons to a hearing *after* the Director makes “any decision, determination, order or other action, including action upon any application for a[n] . . . approval . . . or similar form of permission required by law to be issued by the director.” *Id.*

The determination of IGWA’s compliance with its approved Mitigation Plan in this order is an action on a form of permission required by law to be issued by the director, and therefore § 42-1701A(3) governs. *See Valiant Idaho, LLC v. JV L.L.C.*, 164 Idaho 280, 289, 429 P.3d 168, 177 (2018) (“A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general. Thus, the more general statute should not be interpreted as encompassing an area already covered by one which is more specific.”). Section 42-1701A(3) allows for a post-decision hearing, and no statute otherwise provides for a hearing to determine compliance with a previously approved mitigation plan.

In addition, the Department’s rules of procedure do not require a pre-decision hearing. The various rules IGWA cites do not dictate *when* a hearing must be held. *Objection* at 5 (citing IDAPA 37.01.01.550–.553, .558, .600, .650.01). Those rules either provide procedures and evidentiary standards *for* a hearing, or require decisions to be based on the official record maintained by the Department. The Director is taking official notice of the 2021 Performance Report for the purpose of deciding this matter on the official record. With that record, the Director may, consistent with Idaho Code § 42-1701A, determine the meaning of the unambiguous Mitigation Plan and determine whether IGWA’s 2021 Performance Report demonstrates compliance with the Mitigation Plan without first holding an evidentiary hearing. However, to the extent it is a “person aggrieved,” IGWA would be entitled to a hearing on this final order pursuant to Idaho Code § 42-1701A(3) if it requests one.

FINAL ORDER REGARDING COMPLIANCE WITH APPROVED MITIGATION PLAN—  
Page 18

**b. It is appropriate for the Director to take official notice of IGWA’s 2021 Performance Report.**

IGWA’s Objection also argues the Director cannot take official notice of IGWA’s 2021 Performance Report under the standards in Rule 602 of the Department’s rules of procedure. *Objection* at 5–6 (quoting IDAPA 37.01.01.602). IGWA claims that Rule 602 allows the Director to take official notice but only “within in the context of a contested case hearing.” *Objection* at 5. But Rule 602 is not so limited. “The presiding officer may take official notice of any facts that could be judicially noticed in the courts of Idaho, of generally recognized technical or scientific data or facts within the agency’s specialized knowledge and records of the agency.” IDAPA 37.01.01.602. However, “[p]arties must be given an opportunity to contest and rebut the facts or material officially noticed.” *Id.* Accordingly, the presiding officer must first “notify the parties of specific facts or material noticed and the source of the material noticed,” and such “notice should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed.” *Id.*

The rule does not, as IGWA claims, preclude official notice outside the context of a hearing. Rather, the presiding officer may take official notice after notifying the parties, and the notice to the parties must occur, at the latest, before issuance of any order based on the officially noticed facts or material. That is what occurred here. The Director notified all parties that he intended to take official notice of the 2021 Performance Report on August 18, 2022, and IGWA filed its objection pursuant to that notice on August 24. The Director properly notified the parties before the issuance of this final order, and IGWA had the requisite opportunity to contest and rebut the facts and material officially noticed.

Instead of contesting or rebutting the 2021 Performance Report, IGWA simply argues the report does not qualify as “generally recognized technical or scientific data or facts within the agency’s specialized knowledge and records of the agency” under Rule 602. *Objection* at 6 (quoting IDAPA 37.01.01.602). The Director disagrees for two reasons. First, IGWA created the 2021 Performance Report for the specific purpose of documenting its compliance with an approved mitigation plan in a long-running and ongoing delivery call proceeding under the CM Rules. *See Second Addendum* § 2.a.i; *see also* IDAPA 37.03.11.040.01.b (allowing for “out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director”). The 2021 Performance Report contains ground water diversion and recharge data, which certainly are within the Director’s and Department’s specialized knowledge. *See, e.g.,* I.C. § 42-1701(2). Second, and independently, the 2021 Performance Report constitutes “records of the agency” because IGWA submitted it to the Department on April 1, 2022, so that the Department could perform the verification required under section 2.b.iii of the Second Addendum. IDAPA 37.01.01.602. IGWA has not argued the 2021 Performance Report is inaccurate or unreliable, nor has it offered anything to rebut the report’s clear showing that certain IGWA members failed to comply with the Mitigation Plan in 2021. It is therefore appropriate for the Director to take official notice of the 2021 Performance Report.



**c. A motion is not necessary for the Director to determine compliance with a previously approved Mitigation Plan.**

IGWA argues the Director cannot address the issues raised in the SWC's July 21 Notice of the Steering Committee impasse because the Notice does not qualify as a motion under Rule 220 of the Department's rules of procedure. *Supplemental Response* at 2 (citing IDAPA 37.01.01.220). Specifically, IGWA contends that the SWC's Notice is not supported by an affidavit setting forth the facts on which it is based and does not state the relief sought. *Id.*

The Director "liberally construe[s]" the Department's rules of procedure "to ensure just, speedy, and economical determinations of all issues presented to the agency." IDAPA 37.01.01.051. Accordingly, "[t]he agency may permit deviation from these rules when it finds that compliance with them is impracticable, unnecessary or not in the public interest." *Id.*

In this case, formal motion practice is unnecessary and not in the public interest. The SWC has filed two briefs and IGWA has filed three, defining their positions on the breach question and various other matters. *See generally Notice; Response; Reply; Supplemental Response; Objection.* The information necessary to evaluate IGWA's compliance with the Mitigation Plan in 2021 consists of the Mitigation Plan and IGWA's 2021 Performance Report. All this information is in the record. In fact, the parties have known of IGWA's deficient performance at least since IGWA reported it to the Steering Committee on April 1, 2022. This occurred because the Mitigation Plan expressly requires IGWA to submit its performance reports and supporting data to the Steering Committee "annually," and the Department, in turn, "annually" reviews that information. *Second Addendum* §§ 2.a.i, 2.c.v. In this context, a motion supported by an affidavit containing information the SWC, IGWA, and the Department have had since April 1, 2022 is unnecessary, and the delay associated with such a procedure is not in the public interest.

Motion practice also is not necessary, nor in the public interest, for ascertaining the relief the SWC seeks. The SWC has been candid and consistent in its view that IGWA did not comply with the Mitigation Plan. *E.g., SWC's Request for Status Conference* at 3 (Apr. 29, 2022) ("IGWA and its junior priority ground water right members are not operating in accordance with the approved plan and are failing to mitigate the material to the Coalition members."); *Reply* at 5 ("the data and plain language of the Agreement shows a clear breach . . ."). Furthermore, the SWC and IGWA have, through the Remedy Agreement, stipulated to the relief necessary to remedy the SWC's concerns.

Clearly, the SWC seeks a determination that IGWA did not comply with the Mitigation Plan in 2021. And both the SWC and IGWA have agreed on a remedy for that noncompliance. *Remedy Agreement* § 1. Requiring these matters to be set forth, again, in a motion would serve no purpose but delay. Here, delay is not in the public interest because of the time that has already elapsed since IGWA's deficient mitigation during 2021.

**d. The 90-day cure period is inapplicable when the Steering Committee does not agree that a breach has occurred.**

Delay is also inherent in IGWA's claim that it must be granted an additional 90 days to cure the breach. *See Supplemental Response* at 8–9. But the Mitigation Plan does not require the Director to provide a cure period when he determines a breach has occurred.

As IGWA notes, section 2.c.iii of the Second Addendum states that “*the Steering Committee* shall give ninety (90) days written notice of the breach to the breaching party specifying the actions that must be taken to cure such breach.” (emphasis added). That provision is inapplicable where, as here, there is an impasse on whether a breach occurred. Rather, when the SWC and IGWA do not agree a breach has occurred, the Mitigation Plan contemplates that the Director “evaluate all available information, determine if a breach has occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.” *Second Addendum* § 2.c.iv. Moreover, the Director approved the Second Addendum on the express condition that the “[a]pproval . . . does not limit the Director’s enforcement discretion or otherwise commit the Director to a particular enforcement approach.” *Second Final Order* at 5. The plain text of both the Second Addendum and the Director’s Second Final Order undermine IGWA’s claim that it is entitled to a 90-day cure period now that the matter is before the Director.

More significantly, the Remedy Agreement shows that the SWC and IGWA do not need additional time to identify a cure. The parties not only agree the 2021 remedy “shall satisfy IGWA’s obligation under the [2015] Settlement Agreement,” they also agreed to “not seek review of the remedy agreed to and incorporated into the Director’s Order.” *Remedy Agreement* §§ 1, 3. Through the Remedy Agreement, the parties have stipulated to a cure for the breach. An additional 90-day cure period is neither required nor necessary in these circumstances.

## ORDER

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

(1) The Director takes official notice of IGWA’s 2021 Performance Report.

(2) To remedy noncompliance with the Mitigation Plan in 2021 only, IGWA must collectively supply to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year. Such amounts will be in addition to the long-term obligations set forth in section 3 of the 2015 Settlement Agreement and approved Mitigation Plan. IGWA must take all reasonable steps to lease the quantities of storage water set forth above from non-SWC spaceholders. If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA must make up the difference by either (a) leasing storage water from the SWC as described in section 2 of the Remedy Agreement, or (b) undertaking diversion reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River.

FINAL ORDER REGARDING COMPLIANCE WITH APPROVED MITIGATION PLAN—  
Page 21

(3) Except as necessary to implement paragraph (2) above, nothing in this order alters or amends the Mitigation Plan or any condition of approval in the Director's First Final Order or Second Final Order in this matter.

DATED this 8th day of September 2022.

  
GARY SPACKMAN  
Director

FINAL ORDER REGARDING COMPLIANCE WITH APPROVED MITIGATION PLAN—  
Page 22

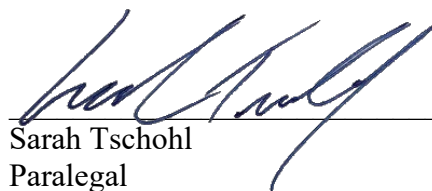
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of September 2022, the above and foregoing was served by the method indicated below and addressed to the following:

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FINAL ORDER REGARDING COMPLIANCE WITH APPROVED MITIGATION PLAN—  
Page 23

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<b>COURTESY COPY TO:</b> William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a>	<input checked="" type="checkbox"/> Email



Sarah Tschohl  
Paralegal

FINAL ORDER REGARDING COMPLIANCE WITH APPROVED MITIGATION PLAN—  
Page 24

## EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246, Idaho Code.

### PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

### REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

### APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

## SETTLEMENT AGREEMENT IMPLEMENTATION REPORT

**TO: Steering Committee**  
**FROM: Ground Water Districts**  
**DATE: April 1, 2017**  
**RE: 2016 Groundwater Diversion & Recharge Report**

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### Introduction

This Settlement Agreement Implementation Report is submitted in accordance with paragraph 3.a of the *SWC-IGWA Settlement Agreement*<sup>1</sup> which provides for a 240,000 acre-feet reduction in groundwater withdrawals from the ESPA or equivalent amount of private recharge. Paragraph 2.a. of the *Second Addendum to Settlement Agreement* provides for the submission an annual report of groundwater diversion and recharge data to the Steering Committee as follows:

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

For the past several months the Districts have been working diligently with their consultants to compile groundwater diversion and recharge data. This effort has no precedence and has proven to be difficult and time-consuming, requiring monumental effort by the Districts' leadership and their consultants. The Districts' have put forth great effort to compile complete and accurate data, yet given the magnitude of the task we acknowledge the possibility of errors. The Districts are committed to additional refinement and error correction as needed.

### 2016 Performance Spreadsheet

Attached is an excel spreadsheet. The 2016 Summary Table tab provides a summary of the mitigation performance of each District, including the diversion baseline, target conservation, adjusted baseline, 2016 usage, diversion reduction, recharge, total conservation, and mitigation balance.

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<sup>1</sup> The *Settlement Agreement* entered into June 30, 2015, between participating members of the Surface Water Coalition and participating members of Idaho Ground Water Appropriators, Inc. ("IGWA"), the *Addendum Agreement* between the same entered into October 15, 2015 ("First Addendum"), the *Agreement* between A&B Irrigation District and participating members of IGWA dated October 2, 2016, and *Second Addendum to Settlement Agreement* dated December 14, 2016, are referred to collectively as the "Settlement Agreement", approved as a CMR 43 Mitigation Plan by the Director's *Final Order Approving Stipulated Mitigation Plan* dated May 2, 2016.

The baseline reflects the 5-year average diversions within each District which was used to allocate the 240,000 acre-foot reduction among the Districts. As the Districts undertook to implement the Settlement Agreement, some wells were identified that were not previously included in the WMIS database or for other reasons had not been accounted for. The addition of these wells resulted in adjustments to the baseline in some of the Districts, as shown in the spreadsheet.

The usage column reflects total amount of groundwater diverted within each District in 2016. The supporting data for these figures is found in the individual tabs for each District which list each well by WMIS number and its total diversion in 2016. Where challenges or errors were encountered with certain wells, notes have been added to explain how the District addressed it. For example, a few diversions could not be reliably calculated due to broken meters or other factors. In these instances, the well was assigned the baseline diversion value (i.e. no reduction in use). Similarly, some Power Consumption Coefficient (PCC) calculations appear to have generated erroneous diversion results and will need to be revisited in 2017 and potentially corrected. The consultants continue to work with the District members to address questions and correct errors as needed. The Districts are committed to continue working with their consultants and with the Department in the next data verification stage to improve the process and accuracy of diversion data.

Because the SWC has made independent mitigation arrangements with A&B Irrigation District, Southwest Irrigation District, and Falls Irrigation District, the spreadsheet assumes each of those Districts has satisfied its share of the total diversion reduction.

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

### **2017 Mitigation Plans**

Attached is a table which summarizes the Districts' mitigation plans for the 2017 irrigation season. As can be seen, every District except for Carey Valley GWD utilizes a priority-based system to impose diversion reductions. Several of the Districts use other tools such recharge, conversions, CREP, end-gun removals and lease dry-ups. Experience will prove which tools are the most cost-effective means of recovering the Aquifer. Accordingly, we expect continued adjustments to mitigation efforts going forward.

### **Additional Information**

While not part of the annual reporting requirement under the Settlement Agreement, the Districts submit the following additional information on Long Term Practices implemented in 2016 per the Settlement Agreement, Section 3..



1. Settlement Agreement 3.b.i. – IGWA delivered to the SWC 50,000 AF of storage accomplished through private leases of water from the Upper Snake Reservoir system. It is unknown whether the delivery exceeded the SWC’s irrigation requirements which amount is required to be used for targeted conversions or recharge.
2. Settlement Agreement 3.b.ii. – IGWA has used its best efforts to continue existing conversions in Water Districts 130 and 140 and the possibility of increased conversions is being investigated
3. Settlement Agreement 3.c. – The irrigation season reduction has been accomplished. Groundwater users did not irrigate sooner than April 1 or later than October 31.
4. Settlement Agreement 3.d. – District members are continuing to install approved closed circuit flow meters in an effort to meet the completion deadline at the beginning of the 2018 irrigation season. The attached table reflects the Districts’ estimates of the flow meters installed to date and projected year-end. IGWA consultants are working with IDWR to create a protocol for flowmeter compliance following the 2018 deadline.
5. Settlement Agreement 3.f. – The Districts have and continue to support the State’s sponsored managed recharge program of 250K AF annual-average across the ESPA.
6. Settlement Agreement 3.g. – IGWA and the Districts have and continue to support NRCS funded permanent water conservations programs. These include WaterSmart grant funding of flow meter installations.

### **IDWR Review**

The *Second Addendum* provides for the Department to verify the data reported by the Districts to confirm accuracy:

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

A copy of this report will be submitted to the Department with a request that they commence verification.

### **Sentinel Well Report**

Additionally, pursuant to section 3.e. and paragraph 1.b.i. and ii. of the Settlement Agreement, the parties' consultants are to work with the Department to collect, process, archive, and submit Sentinel Well data to the Steering Committee within thirty (30) days of collection using the Calculation Technique. We understand this process will be initiated by the Technical Working Group formed under the Settlement Agreement.

## MITIGATION STRATEGIES SUMMARY - 2017

District	Diversion Reduction				Recharge	Other	% Meters Installed	
	Priority Tiers	AF Cap	Min %	Max %			Est. Current	Projected Year-End
North Snake	3	2.0/2.2/2.4	2.5	50	As available	Conversions	320/58%	70%
Magic Valley	3	1.6/1.75/1.9	none	none	As available	Conversions (5,000 ac) End Gun Removal, CREP	467/68%	75%
Carey Valley	No	% reduction based on historic use	12.6	12.6	As available from Little Wood R. and Fish Creek Res.		13/17=76%	100%
American Falls - Aberdeen	3	1.7/1.9/2.2	3	20	As available	Water Bank Lease for Mitigation, CREP	60%	75%
Bingham	3	% reduction based on historic use	5	12.6	As available	End Gun Removal, CREP	800/50%	75%
Bonneville-Jefferson	10	5% reduction based on historic use	4.5	5.5	20,000 af Additional as available	End gun removal Lease dry-ups, CREP	74%	85%
Jefferson-Clark	70	% reduction based on historic use	3.2	17.48	As available	\$50 acre CREP add-on, End Gun Removal	10%	45%
Madison & FMID	Direct delivery 1,500 AF storage to IGWA and 3,000 AF annual recharge minimum.						5%	30%

Notes:

- (1) Updated as of 3/30/17 and subject to ongoing changes based upon participants and diversion data revisions.
- (2) Implementation strategies developed by District Boards and implemented for 2016 and refined and modified for 2017 to meet requirements.
- (3) New groundwater district anticipated for groundwater users in FMID.

**2016 Performance Summary Table**

(all values in acre-feet)

	<b>Diversion Baseline</b>	<b>Target Conservation</b>	<b>Adjusted Baseline</b>	<b>2016 Usage</b>	<b>Diversion Reduction</b>	<b>Recharge</b>	<b>Total Conservation</b>	<b>Mitigation Balance</b>
Aberdeen - American Falls GWD	271,989	33,595	279,291	257,455	21,836	16,123	37,959	4,364
Bingham GWD	282,476	34,890	278,988	265,643	13,345	25,260	38,605	3,715
Bonneville - Jefferson GWD	147,337	18,198	150,838	148,298	2,540	10,612	13,152	-5,046
Carey Valley GWD	5,671	700	5,671	772	4,899	0	4,899	4,198
Jefferson - Clark GWD	438,634	54,178	438,979	416,405	22,574	32,193	54,767	589
Fremont-Madison ID/Madison GWD <sup>1</sup>	43,491	5,372	43,491	16,729	26,763	3,000	29,763	24,391
Magic Valley GWD	261,877	32,346	262,205	238,094	24,112	5,100	29,212	-3,134
A&B ID <sup>3</sup>	174,735	21,582	-	-	-	-	21,582	0
North Snake GWD <sup>2</sup>	205,501	25,382	205,219	173,992	31,228	0	31,228	5,846
Southwest ID <sup>3</sup>	104,417	12,897	-	-	-	-	12,897	0
Falls ID <sup>3</sup>	6,968	861	-	-	-	-	861	0
<b>Total:</b>	<b>1,943,096</b>	<b>240,000</b>	1,664,683	1,517,387	147,296	92,288	274,923	34,923

**Notes:**

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

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

(3) A&amp;B ID, Southwest ID and Falls ID Total Conservation is unknown and assumed to meet Target.

## SETTLEMENT AGREEMENT PERFORMANCE REPORT

**TO: Steering Committee**  
**FROM: Ground Water Districts**  
**DATE: April 1, 2018**  
**RE: 2016 Groundwater Diversion & Recharge Report**

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### Introduction

This Settlement Agreement Performance Report is submitted in accordance with paragraph 3.a of the *SWC-IGWA Settlement Agreement*<sup>1</sup> which provides for a 240,000 acre-feet reduction in groundwater withdrawals from the ESPA or equivalent amount of private recharge. Paragraph 2.a. of the *Second Addendum to Settlement Agreement* provides for the submission an annual report of groundwater diversion and recharge data to the Steering Committee as follows:

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

The Districts have been working diligently with their consultants to compile groundwater diversion and recharge data. This effort continues to be difficult and time-consuming, requiring monumental effort by the Districts' leadership and their consultants. The Districts' have put forth great effort to compile complete and accurate data, are and remain committed to additional refinement and error correction as needed.

### 2017 Performance Spreadsheet

Attached is an excel spreadsheet. The 2017 Summary Table tab provides a summary of the mitigation performance of each District, including the diversion baseline, target conservation, adjusted baseline, 2016 usage, diversion reduction, recharge, total conservation, mitigation balance and installed meters. Also attached is a PDF file containing additional information pertaining the recharge component which will be further supplemented as a part of the IDWR review process.

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<sup>1</sup> The *Settlement Agreement* entered into June 30, 2015, between participating members of the Surface Water Coalition and participating members of Idaho Ground Water Appropriators, Inc. ("IGWA"), the *Addendum Agreement* between the same entered into October 15, 2015 ("First Addendum"), the *Agreement* between A&B Irrigation District and participating members of IGWA dated October 2, 2016, and *Second Addendum to Settlement Agreement* dated December 14, 2016, are referred to collectively as the "Settlement Agreement", approved as a CMR 43 Mitigation Plan by the Director's *Final Order Approving Stipulated Mitigation Plan* dated May 2, 2016.

The baseline reflects the 5-year average diversions within each District which was used to allocate the 240,000 acre-foot reduction among the Districts. The adjustments to the baseline shown in the spreadsheet reflect diversions identified previously that were not participating in any mitigating district and corrections of faulty or incomplete historic usage data.

The usage column reflects total amount of groundwater diverted within each District in 2017. The supporting data for these figures is found in the individual tabs for each District which list each well by WMIS number and its total diversion in 2017. Where challenges or errors were encountered with certain wells, notes have been added to explain how the District addressed it. For example, a few diversions could not be reliably calculated due to broken meters or other factors. In these instances, the well was assigned the baseline diversion value (i.e. no reduction in use). Similarly, some Power Consumption Coefficient (PCC) calculations appear to have generated erroneous diversion results and will need to be revisited in 2018 and potentially corrected. The consultants continue to work with the District members to address questions and correct errors as needed. The Districts are committed to continue working with their consultants and with the Department in the next data verification stage to improve the process and accuracy of diversion data.

Because the SWC has made independent mitigation arrangements with A&B Irrigation District and Southwest Irrigation District., the spreadsheet assumes each of those Districts has satisfied its share of the total diversion reduction. Falls Irrigation District shown in the 2016 report has been removed pursuant to the request of the SWC because they are not included in the Settlement Agreement.

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

### **2018 Mitigation Plans**

Attached is a table which summarizes the Districts' mitigation plans for the 2018 irrigation season. As can be seen, every District except for Carey Valley GWD utilizes a priority-based system to impose diversion reductions. Several of the Districts use other tools such recharge, conversions, CREP, end-gun removals and lease dry-ups. Experience will prove which tools are the most cost-effective means of recovering the Aquifer. Accordingly, we expect continued adjustments to mitigation efforts going forward.

### **Additional Information**

While not part of the annual reporting requirement under the Settlement Agreement, the Districts submit the following additional information on Long Term Practices implemented in 2017 per the Settlement Agreement, Section

1. Settlement Agreement 3.b.i. – IGWA delivered to the SWC 50,000 AF of storage accomplished through private leases of water from the Upper Snake Reservoir system. The delivery exceeded the SWC’s irrigation requirements and the full amount was recharged pursuant to agreement with the IWRB.
2. Settlement Agreement 3.b.ii. – IGWA has used its best efforts to continue existing conversions in Water Districts 130 and 140 and the possibility of increased conversions is being investigated
3. Settlement Agreement 3.c. – The irrigation season reduction has been accomplished. Groundwater users did not irrigate sooner than April 1 or later than October 31.
4. Settlement Agreement 3.d. – District members are continuing to install approved closed circuit flow meters in an effort to meet the completion deadline at the beginning of the 2018 irrigation season. The attached table reflects the Districts’ estimates of the flow meters installed to date and projected year-end. IGWA consultants are working with IDWR to create a protocol for flowmeter compliance following the 2018 deadline. The projected year end 100% compliance assumes granted variances, approved delays or successful enforcement by the Department.
5. Settlement Agreement 3.f. – The Districts have and continue to support the State’s sponsored managed recharge program of 250K AF annual-average across the ESPA.
6. Settlement Agreement 3.g. – IGWA and the Districts have and continue to support NRCS funded permanent water conservations programs. These include WaterSmart grant funding of flow meter installations.

### **IDWR Review**

The *Second Addendum* provides for the Department to verify the data reported by the Districts to confirm accuracy:

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

A copy of this report will be submitted to the Department with a request that they commence verification.

### **Sentinel Well Report**

Additionally, pursuant to section 3.e. and paragraph 1.b.i. and ii. of the Settlement Agreement, the parties' consultants are to work with the Department to collect, process, archive, and submit Sentinel Well data to the Steering Committee within thirty (30) days of collection using the Calculation Technique. We understand this process will be initiated by the Technical Working Group formed under the Settlement Agreement.



## MITIGATION STRATEGIES SUMMARY - 2018

District	Diversion Reduction				Recharge	Other	% Meters Installed or Variance	
	Priority Tiers	AF Cap	Min %	Max %			Est. Current (4)	Proj. Year -End (5)
North Snake	3	2.0/2.2/2.4	none	50	As available	Conversions	75%	100%
Magic Valley	3	1.6/1.75/1.9	none	none	As available	Conversions (5,000 ac) End Gun Removal, CREP	85%	100%
Carey Valley	No	%reduction based on historic use	12.6	12.6	As available from Little Wood R. and Fish Creek Res.		90%	100%
American Falls - Aberdeen	3	1.7/1.9/2.2	none	22	As available	Water Bank Lease for Mitigation, CREP	80%	100%
Bingham	3	%reduction based on historic use	5	12.6	As available	End Gun Removal, CREP	60%	100%
Bonneville-Jefferson	10	5% reduction based on historic use	4.5	5.5	20,000 af Additional as available	End gun removal Lease dry-ups, CREP	85%	100%
Jefferson-Clark	70	%reduction based on historic use	3.2	17.48	As available	\$50 acre CREP add-on, End Gun Removal	70%	100%
Madison & Henry's Fork GWD (3)	Direct delivery 1,500 AF storage to IGWA and 3,000 AF annual recharge minimum.						25%	50% (6)

Notes:

- (1) Updated as of 3/30/17 and subject to ongoing changes based upon participants and diversion data revisions.
- (2) Implementation strategies developed by District Boards and implemented for 2016 and refined and modified for 2017 to meet requirements.
- (3) New Henry's Fork GWD formed in fall 2017 replaced FMID.
- (4) April 1 estimate with meter installations ongoing and multiple variance applications pending before IDWR.
- (5) Year-end meter percentages assume IDWR variances and enforcement of existing order.
- (6) IDWR granted one-year extension to Madison and Henry's Fork to 4/1/19 as newly formed Districts.

**2017 Performance  
Summary Table**  
(all values in acre-feet)

	<b>Diversion Baseline</b>	<b>Target Conservation</b>	<b>Adjusted Baseline</b>	<b>2017 Usage</b>	<b>Diversion Reduction</b>	<b>Recharge</b>	<b>Total Conservation</b>	<b>Mitigation Balance</b>	<b>Metered Diversions<sup>4</sup></b>
Aberdeen - American Falls GWD	271,989	33,715	285,585	240,361	45,224	50,627	95,851	62,136	360
Bingham GWD	282,476	35,015	281,918	231,152	50,766	33,671	84,437	49,422	286
Bonneville - Jefferson GWD	147,337	18,264	155,665	134,134	21,531	46,815	68,346	50,082	152
Carey Valley GWD	5,671	703	5,671	1,135	4,535	0	4,535	3,832	18
Jefferson - Clark GWD	438,634	54,373	438,814	370,936	67,878	58,878	126,756	72,383	272
Henry's Fork GWD <sup>1</sup>	43,491	5,391	45,648	14,987	30,661	3,000	33,661	28,270	16
Magic Valley GWD	261,877	32,462	262,471	233,600	28,872	8,000	36,872	4,410	358
A&B ID <sup>3</sup>	174,735	21,660	-	-	-	-	21,660	0	
North Snake GWD <sup>2</sup>	205,501	25,474	210,307	172,472	37,836	7,090	44,925	19,452	700
Southwest ID <sup>3</sup>	104,417	12,943	-	-	-	-	12,943	0	
<b>Total:</b>	<b>1,936,128</b>	<b>240,000</b>	1,686,080	1,398,777	287,303	208,081	529,987	289,987	2,162

**Notes:**

(1) Includes mitigation for Henry's Fork and Madison Ground Water Districts mitigating by alternative means.

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

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

(4) Reflects number of diversions with installed flowmeter as of Fall 2017. An update will be provided at the end of April.

## SETTLEMENT AGREEMENT PERFORMANCE REPORT

**TO: IGWA – SWC Steering Committee**  
**FROM: Ground Water Districts**  
**DATE: April 1, 2019**  
**RE: 2018 Groundwater Diversion & Recharge Report**

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### Introduction

This SWC-IGWA Settlement Agreement Performance Report (“Report”) is submitted in accordance with paragraph 3.a of the *SWC-IGWA Settlement Agreement*<sup>1</sup> which provides for a 240,000 acre-feet reduction in groundwater withdrawals from the ESPA or equivalent amount of private recharge. Paragraph 2.a. of the *Second Addendum to Settlement Agreement* provides for the submission an annual report of groundwater diversion and recharge data to the Steering Committee as follows:

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

The Districts continue to work diligently with their consultants to compile annual groundwater diversion and recharge data. The Districts’ and their consultants use their best efforts to compile complete and accurate data and remain committed to refinement and error correction on an ongoing basis as needed.

### 2018 Performance Spreadsheet

Attached is an excel spreadsheet. The 2018 Summary Table tab provides a summary of the mitigation performance of each District, including the diversion baseline, target conservation, adjusted baseline, 2017 usage, diversion reduction, recharge, total conservation, mitigation balance and installed meters. Also attached is a PDF file containing additional information pertaining the recharge component which will be further supplemented as a part of the IDWR review process.

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<sup>1</sup> The *Settlement Agreement entered into June 30, 2015, between participating members of the Surface Water Coalition and participating members of Idaho Ground Water Appropriators, Inc. (“IGWA”), the Addendum Agreement between the same entered into October 15, 2015 (“First Addendum”), the Agreement between A&B Irrigation District and participating members of IGWA dated October 2, 2016, and Second Addendum to Settlement Agreement dated December 14, 2016, are referred to collectively as the “Settlement Agreement”, approved as a CMR 43 Mitigation Plan by the Director’s Final Order Approving Stipulated Mitigation Plan dated May 2, 2016.*

The baseline reflects the 5-year average diversions within each District which was used to allocate the 240,000 acre-foot reduction among the Districts. The adjustments to the baseline shown in the spreadsheet reflect diversions identified previously that were not participating in any mitigating district and corrections of faulty or incomplete historic usage data.

The usage column reflects total amount of groundwater diverted within each District in 2018. The supporting data for these figures is found in the individual tabs for each District which list each well by WMIS number and its total diversion in 2018. Where challenges or errors were encountered with certain wells, notes have been added to explain how the District addressed it. For example, a few diversions could not be reliably calculated due to broken meters or other factors. In these instances, the well was assigned the baseline diversion value (i.e. no reduction in use). Similarly, some Power Consumption Coefficient (PCC) calculations appear to have generated erroneous diversion results and will need to be revisited and potentially corrected. The consultants continue to work with the District members to address questions and correct errors as needed. The Districts are committed to continue working with their consultants and with the Department in the next data verification stage to improve the process and accuracy of diversion data.

Because the SWC has made independent mitigation arrangements with A&B Irrigation District and Southwest Irrigation District., the spreadsheet assumes each of those Districts has satisfied its share of the total diversion reduction.

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

### **2019 Mitigation Plans**

Attached is a table which summarizes the Districts' mitigation plans for the 2019 irrigation season. As can be seen, every District except for Carey Valley GWD utilizes a priority-based system to impose diversion reductions. Several of the Districts use other tools such recharge, conversions, CREP, end-gun removals and lease dry-ups. As experience demonstrates the most cost-effective means of recovering the Aquifer continued adjustments to mitigation efforts are anticipated going forward.

### **Additional Information**

While not part of the annual reporting requirement under the Settlement Agreement, the Districts submit the following additional information on Long Term Practices implemented in 2018 per the Settlement Agreement, Section

1. Settlement Agreement 3.b.i. – IGWA delivered to the SWC 50,000 AF of storage accomplished through private leases of water from the Upper Snake Reservoir system. The delivery exceeded the SWC’s irrigation requirements and the full amount was recharged pursuant to agreement with the IWRB.
2. Settlement Agreement 3.b.ii. – IGWA has used its best efforts to continue existing conversions in Water Districts 130 and 140 and possibilities for increased conversions are investigated on an ongoing basis.
3. Settlement Agreement 3.c. – The irrigation season reduction has been accomplished. Groundwater users did not irrigate sooner than April 1 or later than October 31.
4. Settlement Agreement 3.d. – Most District members have installed approved closed circuit flow meters to meet the completion deadline at the beginning of the 2018 irrigation season. IDWR has established and implemented a protocol for flowmeter compliance following the 2018 deadline in accordance with the Department’s ESPA flow measurement orders. The Department maintains records and reports on compliance, granted variances, approved delays and enforcement..
5. Settlement Agreement 3.f. – The Districts have and continue to support the State’s sponsored managed recharge program of 250K AF annual-average across the ESPA.
6. Settlement Agreement 3.g. – IGWA and the Districts have and continue to support NRCS funded permanent water conservation programs. These include WaterSmart grant funding of flow meter installations.

### **IDWR Review**

The *Second Addendum* provides for the Department to verify the data reported by the Districts to confirm accuracy:

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

A copy of this report will be submitted to the Department with a request that they commence verification.

### **Sentinel Well Report**

Additionally, pursuant to section 3.e. and paragraph 1.b.i. and ii. of the Settlement Agreement, the parties' consultants are to work with the Department to collect, process, archive, and submit Sentinel Well data to the Steering Committee within thirty (30) days of collection using the Calculation Technique. This process is ongoing by the Department and the Technical Working Group formed under the Settlement Agreement.

## MITIGATION STRATEGIES SUMMARY - 2019

District	Diversion Reduction				Recharge	Other
	Priority Tiers	AF Cap	Min %	Max %		
North Snake	3	2.0/2.2/2.4	none	50	As available	Conversions
Magic Valley	3	1.6/1.75/1.9	none	none	As available	Conversions End Gun Removal, CREP
Carey Valley	No	%reduction based on historic use	12.6	12.6	As available from Little Wood R. and Fish Creek Res.	
American Falls - Aberdeen	3	1.7/1.9/2.2	none	22	As available	Water Bank Lease for Mitigation, CREP
Bingham	3	%reduction based on historic use	5	12.6	As available	End Gun Removal, CREP, Conversions
Bonneville-Jefferson	10	1.23 to 1.97	0	5.0	15,000 AF Additional as available	End gun removal Lease dry-ups, CREP
Jefferson-Clark	70	%reduction based on historic use	3.2	17.48	As available	\$50 acre CREP add-on, End Gun Removal
Madison & Henry's Fork GWD (3)	Direct delivery 1,500 AF storage to IGWA and 3,000 AF annual recharge minimum.					

Notes:

- (1) Updated as of 3/26/19 and subject to ongoing changes based upon participants and diversion data revisions.
- (2) Mitigation strategies are developed and implemented by each District Board and modified as needed on an ongoing basis to meet diversion reduction obligations.
- (3) New Henry's Fork GWD formed in fall 2017 replaced FMID.
- (4) In 2010, IDWR began to enforce flowmeter installation orders. Enforcement action and variance applications pending before

<b>2018 Performance Summary Table</b>								
(all values in acre-feet)								
	<b>Allocation Diversion Baseline</b>	<b>Target Conservation</b>	<b>Actual Baseline</b>	<b>2018 Usage</b>	<b>Diversion Reduction</b>	<b>Accomplished Recharge</b>	<b>Total Conservation</b>	<b>2018 Mitigation Balance</b>
Aberdeen - American Falls GWD	271,989	33,715	292,784	282,272	10,512	56,267	66,779	33,063
Bingham GWD	282,476	35,015	281,918	249,324	32,594	20,500	53,094	18,079
Bonneville - Jefferson GWD	147,337	18,264	155,718	134,853	20,865	11,500	32,365	14,101
Carey Valley GWD	5,671	703	5,671	1,387	4,284	0	4,284	3,581
Jefferson - Clark GWD	438,634	54,373	441,092	371,537	69,555	17,101	86,656	32,283
Henry's Fork GWD <sup>1</sup>	43,491	5,391	66,337	16,467	49,870	7,151	57,021	51,630
Magic Valley GWD	261,877	32,462	257,019	217,824	39,195	6,100	45,295	12,833
A&B ID <sup>3</sup>	174,735	21,660	-	-	-	-	21,660	0
North Snake GWD <sup>2</sup>	205,501	25,474	206,777	168,162	38,614	3,822	42,436	16,962
Southwest ID <sup>3</sup>	104,417	12,943	-	-	-	-	12,943	0
Total:	<b>1,936,128</b>	<b>240,000</b>	1,707,315	1,441,826	265,489	122,441	422,533	182,533
<b>Notes:</b>								
(1) Includes mitigation for Freemont- Madison Irrigation District, Madison Irrigation District and WD100. Mitigating by alternative means.								
(2) North Snake GWD baseline includes annual average of 21,305 acre-feet of conversions.								
(3) A&B ID and Southwest ID Total Conservation is unknown and assumed to meet Target.								



## SETTLEMENT AGREEMENT PERFORMANCE REPORT

**TO: IGWA – SWC Steering Committee**  
**FROM: Ground Water Districts**  
**DATE: April 1, 2020**  
**RE: 2019 Groundwater Diversion & Recharge Report**

---

### Introduction

This SWC-IGWA Settlement Agreement Performance Report (“Report”) is submitted in accordance with paragraph 3.a of the *SWC-IGWA Settlement Agreement*<sup>1</sup> which provides for a 240,000 acre-feet reduction in groundwater withdrawals from the ESPA or equivalent amount of private recharge. Paragraph 2.a. of the *Second Addendum to Settlement Agreement* provides for the submission an annual report of groundwater diversion and recharge data to the Steering Committee as follows:

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

The Districts continue to work diligently with their consultants and the Department to compile annual groundwater diversion and recharge data. The Districts’ and their consultants use their best efforts to compile complete and accurate data and remain committed to refinement and error correction on an ongoing basis as needed.

### 2019 Performance Spreadsheet

Attached is the Districts 2019 Performance Spreadsheet in excel format. The 2019 Summary Table tab provides a summary of the mitigation performance by District, including the diversion baseline, target conservation, adjusted baseline, usage, diversion reduction, recharge, total conservation, mitigation balance. Also attached is a PDF file containing additional information pertaining the recharge component which will be further supplemented as a part of the IDWR review process.

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<sup>1</sup> The *Settlement Agreement entered into June 30, 2015, between participating members of the Surface Water Coalition and participating members of Idaho Ground Water Appropriators, Inc. (“IGWA”)*, the *Addendum Agreement between the same entered into October 15, 2015 (“First Addendum”)*, the *Agreement between A&B Irrigation District and participating members of IGWA dated October 2, 2016*, and *Second Addendum to Settlement Agreement dated December 14, 2016*, are referred to collectively as the “Settlement Agreement”, approved as a CMR 43 Mitigation Plan by the Director’s *Final Order Approving Stipulated Mitigation Plan* dated May 2, 2016.

The baseline reflects the 5-year average diversions within each District which was used to allocate the 240,000 acre-foot reduction among the Districts. The adjustments to the baseline shown in the spreadsheet reflect diversions identified previously that were not participating in any mitigating district and corrections of faulty or incomplete historic usage data.

The usage column reflects total amount of groundwater diverted within each District in 2019. The supporting data for these figures is found in the individual tabs for each District which list each well by WMIS number and its total diversion in 2019. Where challenges or errors were encountered with certain wells, notes have been added to explain how the District addressed it. For example, a few diversions could not be reliably calculated due to broken meters or other factors. In these instances, the well was assigned the baseline diversion value (i.e. no reduction in use). The consultants continue to work with the District members and Department to address questions and correct errors as needed.

Because the SWC has made independent mitigation arrangements with A&B Irrigation District and Southwest Irrigation District., the spreadsheet assumes each of those Districts has satisfied its share of the total diversion reduction.

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

### **2020 Mitigation Plans**

Attached is a table which summarizes the Districts' mitigation plans for the 2020 irrigation season. As can be seen, every District except for Carey Valley GWD utilizes a priority-based system to impose diversion reductions. Several of the Districts use other tools such recharge, conversions, CREP, end-gun removals and lease dry-ups.

Continued adjustments to mitigation efforts are anticipated going forward based on cost and effectiveness.

### **Additional Information**

While not part of the annual reporting requirement under the Settlement Agreement, the Districts submit the following additional information on Long Term Practices previously implemented and continuing in 2019 per the Settlement Agreement:

1. Settlement Agreement 3.b.i. – IGWA delivered to the SWC 50,000 AF of storage accomplished through private leases of water from the Upper Snake Reservoir system. The delivery exceeded the SWC’s irrigation requirements and the full amount was recharged pursuant to agreement with the IWRB.
2. Settlement Agreement 3.b.ii. – IGWA has used its best efforts to continue existing conversions in Water Districts 130 and 140. IGWA districts have expanded their conversion programs and possibilities for additional conversions are investigated on an ongoing basis.
3. Settlement Agreement 3.c. – The irrigation season reduction has been accomplished. Groundwater users did not irrigate sooner than April 1 or later than October 31.
4. Settlement Agreement 3.d. – Most District members have installed approved closed circuit flow meters to meet the completion deadline at the beginning of the 2018 irrigation season. IDWR has established and implemented a protocol for flowmeter compliance following the 2018 deadline in according with the Departments ESPA flow measurement orders. The Department maintains records and reports on compliance, granted variances, approved delays and enforcement.
5. Settlement Agreement 3.f. – The Districts have and continue to support the State’s sponsored managed recharge program of 250K AF annual-average across the ESPA. The Department regularly reports on State recharge efforts.
6. Settlement Agreement 3.g. – IGWA and the Districts have and continue to support NRCS funded permanent water conservations programs. These include WaterSmart grant funding of flow meter installations.

### **IDWR Review**

The *Second Addendum* provides for the Department to verify the data reported by the Districts to confirm accuracy:

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

A copy of this report will be submitted to the Department with a request that they commence verification.

### **Sentinel Well Report**

Additionally, pursuant to section 3.e. and paragraph 1.b.i. and ii. of the Settlement Agreement, the parties' consultants continue to work with the Department to collect, process, archive, and submit Sentinel Well data to the Steering Committee within thirty (30) days of collection using the Calculation Technique. This process is ongoing by the Department and the Technical Working Group formed under the Settlement Agreement.

## MITIGATION STRATEGIES SUMMARY - 2020

District	Diversion Reduction				Recharge	Other
	Priority Tiers	AF Cap	Min %	Max %		
North Snake	3	2.0/2.2/2.4	none	50	As available	Conversions
Magic Valley	3	1.6/1.75/1.9	none	none	As available	Conversions End Gun Removal, CREP
Carey Valley	No	%reduction based on historic use	12.4	12.4	As available from Little Wood R. and Fish Creek Res.	
American Falls - Aberdeen	3	1.7/1.9/2.2	none	22	As available	Water Bank Lease for Mitigation, CREP
Bingham	3	%reduction based on historic use	5	12.6	As available	End Gun Removal, CREP, Conversions
Bonneville-Jefferson	10	1.23 to 1.97	0	5.0	15,000 AF Additional as available	End gun removal Lease dry-ups, CREP
Jefferson-Clark	70	%reduction based on historic use	3.2	17.48	As available	\$50 acre CREP add-on, End Gun Removal
Madison & Henry's Fork GWD (3)	Direct delivery 1,500 AF storage to IGWA and 3,000 AF annual recharge minimum.					

Notes:

- (1) Updated as of 3/26/19 and subject to ongoing changes based upon participants and diversion data revisions.
- (2) Mitigation strategies are developed and implemented by each District Board and modified as needed on an ongoing basis to meet diversion reduction obligations.
- (3) New Henry's Fork GWD formed in fall 2017 replaced FMID.

**2019 Performance Summary Table**

(all values in acre-feet)

	<b>Allocation Diversion Baseline</b>	<b>Target Conservation</b>	<b>Actual Baseline</b>	<b>2019 Usage</b>	<b>Diversion Reduction</b>	<b>Accomplished Recharge</b>	<b>Total Conservation</b>	<b>2019 Mitigation Balance</b>
Aberdeen - American Falls GWD	271,989	33,715	293,639	258,397	35,243	43,046	78,288	44,573
Bingham GWD <sup>4</sup>	282,476	35,015	281,885	250,260	31,625	22,072	53,697	18,681
Bonneville - Jefferson GWD	147,337	18,264	155,713	136,683	19,030	14,103	33,133	14,869
Carey Valley GWD	5,671	703	5,671	883	4,787	0	4,787	4,084
Jefferson - Clark GWD	438,634	54,373	441,135	388,213	52,922	6,833	59,755	5,382
Henry's Fork GWD <sup>1</sup>	43,491	5,391	72,995	15,458	57,537	3,000	60,537	55,146
Magic Valley GWD	261,877	32,462	257,491	196,490	61,001	6,500	67,501	35,039
A&B ID <sup>3</sup>	174,735	21,660	-	-	-	-	21,660	0
North Snake GWD <sup>2</sup>	205,501	25,474	207,880	156,351	51,530	4,890	56,420	30,946
Southwest ID <sup>3</sup>	104,417	12,943	-	-	-	-	12,943	0
<b>Total:</b>	<b>1,936,128</b>	<b>240,000</b>	1,716,410	1,402,735	313,675	100,443	448,721	208,721

**Notes:**

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

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

(3) A&amp;B ID and Southwest ID Total Conservation is unknown and assumed to meet Target.

(4) Preliminary baseline and usage numbers for Bingham GWD.

## SETTLEMENT AGREEMENT PERFORMANCE REPORT

**TO: IGWA – SWC Steering Committee**  
**FROM: Ground Water Districts**  
**DATE: April 1, 2021**  
**RE: 2020 Groundwater Diversion & Recharge Report**

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### Introduction

This SWC-IGWA Settlement Agreement Performance Report (“Report”) is submitted in accordance with paragraph 3.a of the *SWC-IGWA Settlement Agreement*<sup>1</sup> which provides for a 240,000 acre-feet reduction in groundwater withdrawals from the ESPA or equivalent amount of private recharge. Paragraph 2.a. of the *Second Addendum to Settlement Agreement* provides for the submission an annual report of groundwater diversion and recharge data to the Steering Committee as follows:

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

The Districts continue to work diligently with their consultants and the Department to compile annual groundwater diversion and recharge data. The Districts’ and their consultants use their best efforts to compile complete and accurate data and remain committed to refinement and error correction on an ongoing basis as needed.

### 2020 Performance Spreadsheet

Attached is the Districts 2020 Performance Spreadsheet in excel format. The 2020 Summary Table tab provides a summary of the mitigation performance by District, including the diversion baseline, target conservation, adjusted baseline, usage, diversion reduction, recharge, total conservation, mitigation balance. Also attached is a PDF file containing additional information pertaining the recharge component which will be further supplemented as a part of the IDWR review process.

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<sup>1</sup> The *Settlement Agreement entered into June 30, 2015, between participating members of the Surface Water Coalition and participating members of Idaho Ground Water Appropriators, Inc. (“IGWA”)*, the *Addendum Agreement between the same entered into October 15, 2015 (“First Addendum”)*, the *Agreement between A&B Irrigation District and participating members of IGWA dated October 2, 2016*, and *Second Addendum to Settlement Agreement dated December 14, 2016*, are referred to collectively as the “Settlement Agreement”, approved as a CMR 43 Mitigation Plan by the Director’s *Final Order Approving Stipulated Mitigation Plan* dated May 2, 2016.

The baseline reflects the 5-year average diversions within each District which was used to allocate the 240,000 acre-foot reduction among the Districts. The adjustments to the baseline shown in the spreadsheet reflect diversions identified previously that were not participating in any mitigating district and corrections of faulty or incomplete historic usage data.

The usage column reflects total amount of groundwater diverted within each District in 2020. The supporting data for these figures is found in the individual tabs for each District which list each well by WMIS number and its total diversion in 2020. Where challenges or errors were encountered with certain wells, notes have been added to explain how the District addressed it. For example, a few diversions could not be reliably calculated due to broken meters or other factors. In these instances, the well was assigned the baseline diversion value (i.e. no reduction in use). The consultants continue to work with the District members and Department to address questions and correct errors as needed.

Because the SWC has made independent mitigation arrangements with A&B Irrigation District and Southwest Irrigation District., the spreadsheet assumes each of those Districts has satisfied its share of the total diversion reduction.

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

### **2021 Mitigation Plans**

Attached is a table which summarizes the Districts' mitigation plans for the 2021 irrigation season. As can be seen, every District except for Carey Valley GWD utilizes a priority-based system to impose diversion reductions. Several of the Districts use other tools such recharge, conversions, CREP, end-gun removals and lease dry-ups.

Continued adjustments to mitigation efforts are anticipated going forward based on cost and effectiveness.

### **Additional Information**

While not part of the annual reporting requirement under the Settlement Agreement, the Districts submit the following additional information on Long Term Practices previously implemented and continuing in 2021 per the Settlement Agreement:



1. Settlement Agreement 3.b.i. – IGWA delivered to the SWC 50,000 AF of storage accomplished through private leases of water from the Upper Snake Reservoir system. The delivery exceeded the SWC’s irrigation requirements and the full amount was recharged pursuant to agreement with the IWRB.
2. Settlement Agreement 3.b.ii. – IGWA has used its best efforts to continue existing conversions in Water Districts 130 and 140. IGWA districts have expanded their conversion programs and possibilities for additional conversions are investigated on an ongoing basis.
3. Settlement Agreement 3.c. – The irrigation season reduction has been accomplished. Groundwater users did not irrigate sooner than April 1 or later than October 31.
4. Settlement Agreement 3.d. – Most District members have installed approved closed circuit flow meters to meet the completion deadline at the beginning of the 2018 irrigation season. IDWR has established and implemented a protocol for flowmeter compliance following the 2018 deadline in according with the Departments ESPA flow measurement orders. The Department maintains records and reports on compliance, granted variances, approved delays and enforcement.
5. Settlement Agreement 3.f. – The Districts have and continue to support the State’s sponsored managed recharge program of 250K AF annual-average across the ESPA. The Department regularly reports on State recharge efforts.
6. Settlement Agreement 3.g. – IGWA and the Districts have and continue to support NRCS funded permanent water conservations programs. These include WaterSmart grant funding of flow meter installations.

### **IDWR Review**

The *Second Addendum* provides for the Department to verify the data reported by the Districts to confirm accuracy:

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

A copy of this report will be submitted to the Department with a request that they commence verification.

### **Sentinel Well Report**

Additionally, pursuant to section 3.e. and paragraph 1.b.i. and ii. of the Settlement Agreement, the parties' consultants continue to work with the Department to collect, process, archive, and submit Sentinel Well data to the Steering Committee within thirty (30) days of collection using the Calculation Technique. This process is ongoing by the Department and the Technical Working Group formed under the Settlement Agreement.

## MITIGATION STRATEGIES SUMMARY - 2021

District	Diversion Reduction				Recharge	Other
	Priority Tiers	AF Cap	Min %	Max %		
North Snake	3	2.0/2.2/2.4	none	50	As available	Conversions
Magic Valley	3	1.6/1.75/1.9	none	none	As available	Conversions End Gun Removal, CREP
Carey Valley	No	%reduction based on historic use	12.4	12.4	As available from Little Wood R. and Fish Creek Res.	
American Falls - Aberdeen	3	1.7/1.9/2.2	none	22	As available	Water Bank Lease for Mitigation, CREP, Conversions
Bingham	3	%reduction based on historic use	5	12.6	As available	End Gun Removal, CREP, Conversions
Bonneville-Jefferson	10	1.23 to 1.97	0	5.0	15,000 AF Additional as available	End gun removal Lease dry-ups, CREP, Conversions
Jefferson-Clark	70	%reduction based on historic use	3.2	17.48	As available	\$50 acre CREP add-on, End Gun Removal
Madison & Henry's Fork GWD (3)	Direct delivery 1,500 AF storage to IGWA and 3,000 AF annual recharge minimum.					

Notes:

- (1) Updated as of 4/1/21 and subject to ongoing changes based upon participants and diversion data revisions.
- (2) Mitigation strategies are developed and implemented by each District Board and modified as needed on an ongoing basis to meet diversion reduction obligations.
- (3) New Henry's Fork GWD formed in fall 2017 replaced FMID.

## 2020 Performance Summary Table

	Target Conservation	Baseline	2020 Usage	Diversion Reduction	Accomplished Recharge	Total Conservation	2020 Mitigation Balance
American Falls-Aberdeen	33,715	286,677	273,547	13,130	37,205	50,335	16,620
Bingham	35,015	277,173	264,343	12,830	25,898	38,728	3,713
Bonneville-Jefferson	18,264	156,140	150,588	5,551	5,482	11,033	-7,230
Carey	703	5,671	3,363	2,308	0	2,308	1,605
Jefferson-Clark	54,373	441,711	400,468	41,244	26,213	67,457	13,084
Henry's Fork <sup>1</sup>	5,391	82,823	24,641	58,181	3,000	67,892	62,501
Madison <sup>2</sup>		83,889	77,178	6,711			
Magic Valley	32,462	256,097	228,005	28,092	6,634	34,726	2,264
North Snake <sup>3</sup>	25,474	207,689	176,809	30,880	4,839	35,720	10,246
A&B	21,660	-	-	-	-	21,660	0
Southwest ID	12,943	-	-	-	-	12,943	0
Total:	<b>240,000</b>	<b>1,797,869</b>	<b>1,598,941</b>	<b>198,928</b>	<b>109,272</b>	<b>342,803</b>	<b>102,803</b>

## 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.

## SETTLEMENT AGREEMENT PERFORMANCE REPORT

TO: IGWA-SWC Settlement Agreement Steering Committee  
 FROM: Ground Water Districts  
 DATE: April 1, 2022  
 RE: 2021 Performance Report

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### Introduction

This document reports the Ground Water Districts' year 2021 performance under paragraph 3.a of the *SWC-IGWA Settlement Agreement*<sup>1</sup> which requires a 240,000 acre-feet reduction in ESPA groundwater withdrawals or equivalent private recharge. Paragraph 2.a. of the *Second Addendum to Settlement Agreement* requires the Districts to report to the Steering Committee by April 1 annually "their groundwater diversion and recharge data for the prior irrigation season and their proposed actions to be taken for the upcoming irrigation season, together with supporting information compiled by the Districts' consultants."

As explained below, the Districts' groundwater conservation efforts in 2021 totaled 122,784 acre-feet. This was a significant departure from the Districts' conservation during the 2016-2020 time period which averaged 373,096 acre-feet. The Districts faced exceptionally hot and dry weather conditions in 2021 that had not been experienced since the Settlement Agreement was entered into. These challenges have forced the Districts to revisit and adjust their groundwater conservation programs.

### 2021 Performance

A spreadsheet detailing the Districts' 2021 performance is attached to this report. The "Summary Table" tab provides a summary of each District's performance, including the diversion baseline, target conservation, usage, diversion reduction, recharge, total conservation, and mitigation balance.

The "Recharge Report" tab lists the recharge completed by each District, including the volume, source of water, recharge location, and date the recharge was performed. Documentation supporting the recharge data shown in the spreadsheet is also attached. A few items of supporting information are forthcoming as noted in the spreadsheet.

The spreadsheet also contains individual tabs for each District that list diversion volumes for each well by WMIS number. Where challenges or errors were encountered in the data for a particular well, notes have been added to the spreadsheet to explain how the District addressed it. For example, a few diversions could not be reliably calculated due to broken meters or other factors. In these instances, the well was assigned the baseline diversion value (i.e. no reduction in use) or PCC (power consumption coefficient) diversion volume. District consultants continue to work with District patrons and the Idaho Department of Water Resources to address questions and correct errors as needed.

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

The Districts' 240,000 acre-foot conservation obligation is measured from baseline groundwater diversions for the period 2010-2014. The baseline has been adjusted slightly since the original allocation to account for faulty or incomplete historic usage data and new groundwater users joining the Districts.

Several Districts fell short of their share of the 240,000 acre-foot obligation. This was due in part to the lack of rain combined with exceptional heat, and in part to the Districts being unable to secure as much water for recharge and conversions as anticipated. The Districts have responded by amending their conservation programs to require additional diversion reductions by their patrons, as explained below.

Because the SWC has made independent mitigation arrangements with A&B Irrigation District and Southwest Irrigation District, the spreadsheet assumes each of those Districts has satisfied its share of the total groundwater conservation.

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

### **2022 Conservation Programs**

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.

The Districts rely primarily upon a priority-based system of diversion reductions to conserve groundwater. They also use other tools such as recharge, conversions, CREP, end-gun removals, and lease dry-ups to conserve groundwater. Districts that did not achieve their share of the 240,000 obligation in 2021 have made changes to their conservation programs to improve performance in 2022. For example, American Falls-Aberdeen Area Ground Water District and Bonneville-Jefferson Ground Water District lowered the diversion caps imposed on their patrons, and Bingham Ground Water District revised its reduction plan to impose strict priority-based diversion limits. An updated table summarizing the Districts' conservation programs for 2022 is attached.

By and large, District patrons have willingly made sacrifices to conserve water and comply with the District conservation programs by reducing irrigated acreage, growing crops that use less water, and carefully monitoring groundwater diversions. To enable Districts to more effectively address non-compliance, IGWA was successful in amending Idaho Code 42-5232 to allow stiff penalties for excess water use, and in enacting Idaho Code 42-5244A and 42-5244B to provide additional enforcement tools. The Districts have recently emphasized to their patrons the need to fully comply with their conservation programs in 2022.

### **Additional Information**

While not part of the annual reporting requirement under the Settlement Agreement, the Districts submit the following additional information on long-term practices previously implemented and continuing:

1. **Settlement Agreement 3.b.i.** IGWA delivered to the SWC 50,000 acre-feet of storage

accomplished through private leases of water from the Upper Snake reservoir system. Per the request of Twin Falls Canal Company, IGWA consented to a portion of this water being utilized by groundwater users in Basin 37 for mitigation purposes. The remainder was used by the SWC to meet irrigation demand. No portion of the 50,000 acre-feet was made available for recharge in 2021.

2. **Settlement Agreement 3.b.ii.** IGWA has used its best efforts to continue existing conversions in Water Districts 130 and 140. The Districts see conversions as an important key to long-term management of the ESPA. They continue to explore opportunities to expand conversions, particularly in the Bingham County, Bonneville County, and Power County areas.
3. **Settlement Agreement 3.c.** District patrons continue to honor the irrigation season restriction to April 1-October 31. As a practical matter, the diversion reductions imposed by the Districts have compelled patrons to limit diversions whenever possible.
4. **Settlement Agreement 3.d.** Most District patrons installed flow meters by the beginning of the 2018 irrigation season. IDWR has established and implemented a protocol for flowmeter compliance following the 2018 deadline in according with the Departments ESPA flow measurement orders. All District patrons have now installed flow meters or have obtained variances. The Department maintains records and reports on compliance, granted variances, approved delays and enforcement.
5. **Settlement Agreement 3.f.** The Districts continue to support the State’s managed recharge program that seeks to achieve 250,000 acre-feet of recharge annually across the ESPA. The Department regularly reports on State recharge efforts. Expansion of the State program, particularly in the upper Snake River Basin, is important to long-term success of the ESPA recovery effort.
6. **Settlement Agreement 3.g.** IGWA and the Districts have and continue to support NRCS funded water conservations programs.

### **IDWR Review**

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

### **Sentinel Well Report**

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

### CONSERVATION PROGRAM SUMMARY - 2022

District	Diversion Reduction				Recharge	Other
	Tiers	AF Cap	Min %	Max %		
North Snake	3	2.0/2.2/2.4	none	50	As available	Conversions
Magic Valley	3	1.6/1.75/1.9	none	none	As available	Conversions End-gun removal, CREP
Carey Valley	0	% reduction based on historic use	12.4	12.4	As available	
American Falls - Aberdeen	3	1.58/1.76/2.0	none	22	As available	Water Bank Lease, CREP, conversions
Bingham	10	0.92 - 2.00	none	none	As available	End-gun removal, CREP, conversions
Bonneville- Jefferson	10	1.23 to 1.97	10	20	As available	End-gun removal, lease dry-ups, CREP, conversions
Jefferson-Clark	70	% reduction based on historic use	3.2	17.48	As available	\$50 acre CREP add-on, end-gun removal
Madison & Henry's Fork	Direct delivery 1,500 AF storage to IGWA and 3,000 AF annual recharge minimum.					



# IGWA Leases

## Recharge Documentation

(for report spreadsheet items: 1.2, 1.3, 1.4, 6.2, 6.3, 7.2, 7.3, 7.4)

JAXON B. HIGGS P.G.  
Office Phone (208)650-6605  
Cell Phone (208)604-1281



355 West 500 South  
Burley, ID 83318  
jaxon@waterwellconsultants.com

March 30, 2021

Brian Ragan  
IDWR State Office

Dear Brian,

This purpose of this letter is to describe the lower valley ground water district leases made through IGWA for the 2021 Irrigation season. This water was used for soft conversions and recharge.

The three lower valley ground water districts and Southwest Irrigation District participated in 4 leases together. Copies of each lease is attached, and the breakdown of the volumes allocated to each district is presented in the chart below. Water District 1 pooled the water under IGWA's name from those leases and allowed IGWA to place that water without retaining the original source name. In the Settlement Agreement Performance Report spreadsheet, the associated entries state "Lower Valley IGWA Leases."

To avoid duplication, I placed this letter and copies of the original leases at the beginning of the recharge documentation under *IGWA Leases*. This documentation applies to the following districts: American Falls – Aberdeen, Magic Valley, and North Snake.

Please do not hesitate to contact me for clarification.

Sincerely,

A handwritten signature in black ink that reads "Jaxon Higgs". The signature is written in a cursive, flowing style.

Jaxon Higgs

JAXON B. HIGGS P.G.  
Office Phone (208)650-6605  
Cell Phone (208)604-1281



355 West 500 South  
Burley, ID 83318  
jaxon@waterwellconsultants.com

Original Lease		IGWA Allocation	
Entity	Volume (AF)	Entity	Volume (AF)
Tribal Lease 1	25,000	SWC	23,290
State of Wyoming	10,000	AFAGWD	7,500
FMID	1,500	MVGWD	6,500
Tribal Lease 2	20,000	NSGWD	16,500
Mitigation Inc.	5,000	SWID	7,908.7
Enterprize CC	1,000		61,698.7
<b>Total:</b>	<b>62,500</b>		
FMID to Upper Valley	<b>801.3</b>		
Remaining	61,698.7		

**SUMMARY:**  
No. 2021-1  
State of Wyoming  
Quantity: 10,000 AF  
UBOR Contract No. 1-07-10-W0823  
Palisades Reservoir

## **AGREEMENT FOR LEASE OF STORAGE WATER**

This Agreement for Lease of Storage Water ("Agreement") is made and entered into between the STATE OF WYOMING, acting through the WYOMING WATER DEVELOPMENT OFFICE, whose address is 6920 Yellowtail Road, Cheyenne, WY 82002, and IDAHO GROUND WATER APPROPRIATORS, INC. ("IGWA"), whose address is P.O. Box 1391, Pocatello, Idaho 83204, acting for and on behalf of its member Ground Water Districts. This Agreement replaces and supersedes all previous Agreements between the parties.

### **RECITALS**

1. The State of Wyoming contracted with the United States to acquire thirty three thousand (33,000) acre-feet of reservoir storage space reserved for obligations related to provisions of the Snake River Compact between the States of Wyoming and Idaho concerning use of the waters of the Snake River (Contract No. 1-07-10-W0823, signed October 31, 1990).
2. Pursuant to 1991 Wyoming Session Laws page 80, chapter 18, section 2, the State of Wyoming reserved the water allocated to the thirty three thousand (33,000) acre-feet owned under the contract with the United States for the following purposes in the following priority:
  - A. Meeting the requirements of the Snake River Compact;
  - B. Supplementing flows in the Snake River below Jackson Lake or maintaining water levels in Jackson Lake for the benefit of the fisheries; and
  - C. Selling water on a short term basis to Wyoming water users and the Idaho water bank.
3. The water storage account in Palisades Reservoir as described in the contract entered into between the State of Wyoming and the United States is administered by the director of the Wyoming Water Development Office with the advice of the Wyoming Game and Fish Department and approval of the Wyoming State Engineer (1991 Wyoming Session Laws p. 80, ch. 18, sec. 2(c)).
4. IGWA desires to lease storage water to satisfy mitigation obligations determined by the Director of the Idaho Department of Water Resources and related purposes, such as aquifer recharge and converting farmland from ground to surface water irrigation.

5. The amount of storage water IGWA needs for mitigation and related purposes may vary from year to year and also may change during the irrigation season.
6. The State of Wyoming desires to lease storage water to IGWA, and IGWA desires to lease storage water from the State of Wyoming, pursuant to the terms of this Agreement.

### **AGREEMENT**

In consideration of the mutual covenants contained herein, the parties agree as follows:

1. **Term of Agreement.** The term of this Agreement shall be for a period of five (5) years, commencing January 1, 2021, and terminating on December 31, 2025. This Agreement may be extended by mutual agreement of the parties, reduced to writing and signed by all parties.
2. **Lease of Storage Water.** Subject to the availability of storage water as described Paragraph 3 below, the State of Wyoming hereby grants to IGWA an annual lease to use up to a maximum of ten thousand (10,000) acre-feet of storage water allocated and available to the State of Wyoming as a space holder in the Upper Snake Reservoir System based upon the State of Wyoming's Storage Water Contract with the United States Bureau of Reclamation.
3. **Availability of Storage Water.** Storage water is available for lease under this Agreement only after the State of Wyoming first meets the requirements of the Snake River Compact and supplements flows in the Snake River below Jackson Lake or maintains water levels in Jackson Lake for the benefit of the fisheries. The amount of storage water available, if any, to lease under this Agreement in any year will be determined by referring to the previous water year's final accounting by the Idaho Water District 01 ("WD01") and the following provisions:
  - A. If the State of Wyoming's water storage account in Palisades Reservoir contains twenty five thousand (25,000) acre-feet or more according to WD01's final accounting for the previous water year, then five thousand (5,000) acre-feet is available for lease under this Agreement. Additionally, the parties will mutually decide by April 15 of that year the amount of storage water in excess of five thousand (5,000) acre-feet available for lease under this Agreement for that year, if any, up to ten thousand (10,000) acre-feet. If the parties are unable to mutually decide the amount of storage water available for lease in excess of five thousand (5,000) acre-feet under this provision, then no storage water in excess of five thousand (5,000) acre-feet is available for lease under this Agreement for that year.
  - B. If the State of Wyoming's storage account in Palisades Reservoir contains between fifteen thousand (15,000) and twenty four thousand nine hundred and ninety nine (24,999) acre-feet according to WD01's final accounting for the previous water year, then the parties will mutually decide by April 15 of that year the amount of storage water available for lease under this Agreement for that year. If the parties

Agreement for Lease of Storage Water Between the Wyoming Water Development Office  
and Idaho Ground Water Appropriators, Inc.

Page 2 of 8

are unable to mutually decide the amount of storage water available for lease under this provision, then no storage water is available for lease under this Agreement for that year.

- C. If the State of Wyoming's storage account in Palisades Reservoir contains fourteen thousand nine hundred and ninety nine (14,999) acre-feet or less according to WD01's final accounting for the previous water year, then no storage water is available to lease under this Agreement for that year.

- 4. **Leased Storage Amount.** The "Leased Storage Amount" shall be up to ten thousand (10,000) acre-feet, with the yearly amount available to be determined by applying the provisions of Paragraph 3 above, from the State of Wyoming's storage account in Palisades Reservoir for use by IGWA.

- A. **Delivery of Leased Storage Amount.** Upon request of IGWA, the Leased Storage Amount shall be transferred from the State of Wyoming's storage account (1) to other storage accounts, (2) to the Idaho State Water Supply Bank, or (3) to the Idaho Water District 01 Rental Pool, as required by IGWA for recharge, mitigation, or irrigation purposes. Said transfer shall constitute delivery of the Leased Storage Amount to IGWA. The Leased Storage Amount shall be measured and accounted for at Palisades Reservoir. IGWA shall assume any loss of any nature whatsoever occurring to the Leased Storage Amount after the transfer is effectuated. The State of Wyoming makes no warranty with respect to the quality of the Leased Storage Amount transferred to serve IGWA, it being understood that this is raw, untreated water as it occurs in Palisades Reservoir.

**B. Use of Leased Storage Amount**

- (i) This Agreement does not create any right for IGWA to lease storage water for use below Milner Dam.
- (ii) The Leased Storage Amount, once delivered to IGWA under this Agreement, may then be assigned and delivered by IGWA to any of its members or to any other person or entity for the authorized uses of recharge, mitigation, irrigation or other lawful use at any time up to December 1 of each year during the term of this Agreement. Any delivery of storage water by IGWA or beneficial use of the delivered water shall not constitute a waiver of IGWA's responsibilities for any payments or fees under this Agreement.
- (iii) The assignment, delivery, and use of the Leased Storage Amount will be determined by IGWA and is subject to the final accounting for the year by the Watermaster of Water District 1 and any applicable Water District 1 Rental Pool Procedures.

- C. **Non-Use of Leased Storage Amount.** Any portion of the Leased Storage Amount IGWA is unable to fully utilize or assign by December 1 of any year shall remain

Agreement for Lease of Storage Water Between the Wyoming Water Development Office  
and Idaho Ground Water Appropriators, Inc.



in the State of Wyoming's water storage account in Palisades Reservoir and then belong only to the State of Wyoming.

5. **Payments.** IGWA shall pay the following amounts:

- A. **Lease Payment.** IGWA shall pay to the State of Wyoming a "Lease Payment" each year calculated as follows: the Leased Storage Amount multiplied by the per acre-foot Idaho Water District 01 Rental Pool purchase price in effect for that year. IGWA shall pay the Lease Payment in two installments, with the first one-half (1/2) paid on or before July 15<sup>th</sup> and the second one-half (1/2) paid on or before November 15<sup>th</sup> of each year. IGWA is required to pay the Lease Payment whether or not IGWA uses or assigns the Leased Storage Amount.
- B. **Administrative Fees.** IGWA shall be responsible to pay all administrative fees in effect each year in anyway relating to the Leased Storage Amount under this Agreement, including, but not limited to: Idaho Water District 01 Rental Pool Administrative fees and Idaho Water Resource Board surcharges. Administrative fees shall be paid to the issuer of the fee on or before the due date specified by the fee issuer.
- C. **Replacement Water Fees and Impact Payments.** IGWA shall be responsible for paying any Idaho Water District 01 replacement water fees or impact payments in any way arising out of this Agreement. If the State of Wyoming is held responsible for paying replacement water fees or impact payments, IGWA shall indemnify and hold Wyoming harmless for such fees.

6. **Special Provisions.**

- A. **Assignment Prohibited and Contract Shall Not be Used as Collateral.** Neither party shall assign or otherwise transfer any of the rights or delegate any of the duties set out in this Agreement without the prior written consent of the other party. IGWA shall not use this Agreement, or any portion thereof, for collateral for any financial obligation without the prior written permission of the State of Wyoming.
- B. **Time is of the Essence.** Time is of the essence in all provisions of this Agreement.

7. **General Provisions.**

- A. **Applicable Law/Venue.** The construction, interpretation, and enforcement of this Agreement shall be governed by the laws of the State of Wyoming, without regard to conflicts of law principles. The Courts of the State of Wyoming shall have jurisdiction over this Agreement and the parties, and the venue shall be the Ninth Judicial District, Teton County, Jackson, Wyoming.
- B. **Compliance with Laws.** IGWA agrees that it will comply fully with all laws, orders, standards, or regulations under federal, state and local jurisdictions now or

Agreement for Lease of Storage Water Between the Wyoming Water Development Office  
and Idaho Ground Water Appropriators, Inc.

hereafter in force as may be applicable to the Leased Storage Amount or the facilities at which the Leased Storage Amount may be stored or used.

- C. **Entirety of Agreement.** This Agreement, consisting of eight (8) pages, represents the entire and integrated Agreement between the parties and supersedes all prior negotiations, representations, and agreements, whether written or oral. Any changes, modifications, revisions, or amendments to this Agreement which are mutually agreed upon by the parties to this Agreement shall be incorporated by written instrument, executed by all parties to this Agreement.
- D. **Force Majeure.** Neither party shall be liable for failure to perform under this Agreement if such failure to perform arises out of causes beyond the control and without the fault or negligence of the nonperforming party. Such causes may include, but are not limited to: acts of God or the public enemy, fires, floods, epidemics, quarantine restrictions, freight embargoes, and unusually severe weather. This provision shall become effective only if the party failing to perform immediately notifies the other party of the extent and nature of the problem, limits delay in performance to that required by the event, and takes all reasonable steps to minimize delays. This provision shall not be effective unless the failure to perform is beyond the control and without the fault or negligence of the nonperforming party. The parties intend and agree that this provision shall not in any way counteract the provisions in Paragraph 7.I. herein regarding the State of Wyoming's sovereign immunity.
- E. **Indemnification.** IGWA shall release, indemnify, and hold harmless the State of Wyoming, the Wyoming Water Development Commission, and its officers, agents, and employees from any and all claims, suits, liabilities, court awards, damages, costs, attorneys' fees, and expenses arising out of IGWA's failure to perform any of IGWA's duties and obligations hereunder or in connection with the negligent performance of IGWA's duties or obligations, including, but not limited to, any claims, suits, liabilities, court awards, damages, costs, attorneys' fees, and expenses arising out of IGWA's negligence or other tortious conduct.
- F. **Non-Waiver.** The failure of the State of Wyoming to insist on a strict performance of any of the terms and conditions hereof shall not be deemed a waiver of the rights or remedies that the State of Wyoming may have regarding that specific term or condition.
- G. **Notice.** All notices to be given with respect to this Agreement shall be in writing. Each notice shall be sent by registered or certified mail, postage prepaid, and return receipt requested, or by e-mail, or in person, to the party to be notified at the addresses set forth in Paragraphs 7.G.(i) through 7.G.(iii) herein.

Every notice, if mailed, shall be deemed to have been given at the time it shall be deposited in the United States mail in the manner prescribed herein. Notice sent by facsimile or e-mail shall be deemed to have been given at the time sent. Nothing



contained herein shall be construed to preclude personal service of any notice.

All notices by mail shall be delivered to the addresses listed below. In the event that any of the addresses listed below change, the party whose address has changed shall immediately notify the other party in writing.

- (i) For the purposes of notification under the terms of this Agreement other than to receive payments, the State of Wyoming's business address is the Wyoming State Engineer's Office, 122 West 25th Street, 2nd Floor West, Cheyenne, WY 82002. Email: [steve.wolff@wyo.gov](mailto:steve.wolff@wyo.gov).
- (ii) For the limited purposes of receiving payments under the terms of this Agreement, the State of Wyoming's business address is the Wyoming Water Development Office, 6920 Yellowtail Road, Cheyenne, Wyoming 82002. Email: [brandon.gebhart@wyo.gov](mailto:brandon.gebhart@wyo.gov).
- (iii) For the purposes of notification under the terms of this Agreement, IGWA's business address is:

IGWA: c/o Randall C. Budge, Secretary/General Counsel  
IGWA  
P.O. Box 1391  
Pocatello, Idaho 83204-1391  
Phone: 208-232-6101  
Fax: 208-232-6109  
Email: [randy@racineolson.com](mailto:randy@racineolson.com)

Copy to: Lynn Tominaga, Executive Director  
IGWA  
P.O. Box 2624  
Boise, Idaho 83701-2624  
Phone: 208-381-0294  
Fax: 208-381-5272  
Email: [lynn\\_tominaga@hotmail.com](mailto:lynn_tominaga@hotmail.com)

H. **Remedies for Breach.** If either party breaches this Agreement and such defaults are not cured within thirty (30) days after receipt of written notice thereof, either party, at its option, may elect any or all of the following cumulative remedies:

- (i) To terminate this Agreement.
- (ii) To seek specific performance of this Agreement.
- (iii) To pursue any and all other remedies under law.

- I. **Sovereign Immunity.** Pursuant to Wyo. Stat. § 1-39-104(a), the State of Wyoming and the Wyoming Water Development Commission expressly reserve sovereign immunity by entering into this Agreement and specifically retain all immunities and defenses available to them as sovereigns. The parties acknowledge that the State of Wyoming has sovereign immunity and only the Wyoming Legislature has the power to waive sovereign immunity. Designations of venue, choice of law, enforcement actions, and similar provisions shall not be construed as a waiver of sovereign immunity. The parties agree that any ambiguity in this Agreement shall not be strictly construed, either against or for either party, except that any ambiguity as to sovereign immunity shall be construed in favor of sovereign immunity.
- J. **Third Party Beneficiary Rights.** The parties do not intend to create in any other individual or entity the status of third party beneficiary, and this Agreement shall not be construed so as to create such status. The rights, duties, and obligations contained in this Agreement shall operate only between the parties to this Agreement and shall inure solely to the benefit of the parties to this Agreement. The provisions of this Agreement are intended only to assist the parties in determining and performing their obligations under this Agreement.
- K. **Counterparts.** This Agreement may be executed in counterparts. Each counterpart, when executed and delivered, shall be deemed an original and all counterparts together shall constitute one and the same Agreement. Delivery by IGWA of an originally signed counterpart of this Agreement by facsimile or PDF shall be followed up immediately by delivery of the originally signed counterpart to the State of Wyoming.
8. **Effective Date.** This Agreement is not valid and shall not become effective until it is signed by an authorized representative of the State of Wyoming and an authorized representative of IGWA, and has been approved by the Wyoming State Engineer and an authorized representative of A&I Procurement, and approved as to form by the Office of the Wyoming Attorney General. The effective date of this Agreement shall be the last date of signature, and the lease shall commence on the last date of signature or on the date specified in the Term of Agreement provision, whichever is later.

**THE REMAINDER OF THIS PAGE WAS INTENTIONALLY LEFT BLANK**

9. **Signatures.** The parties to this Agreement, through their duly authorized representatives, have executed this Agreement on the dates set out below, and certify that they have read, understood, and agree to the terms and conditions of this Agreement.

**IDAHO GROUND WATER APPROPRIATORS, INC. (Lessee)**

By: \_\_\_\_\_  
Tim Deeg, President

\_\_\_\_\_  
Date

Attest: \_\_\_\_\_  
Randall C. Budge, Secretary

\_\_\_\_\_  
Date

**STATE OF WYOMING (Lessor)**

  
\_\_\_\_\_  
Brandon Gebhart, Director  
Wyoming Water Development Office

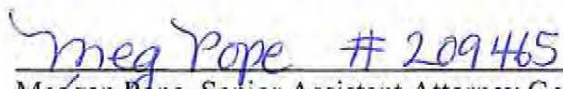
4/1/21  
\_\_\_\_\_  
Date

**WYOMING STATE ENGINEER'S APPROVAL**

  
\_\_\_\_\_  
Greg Lanning, Wyoming State Engineer

4.1.21  
\_\_\_\_\_  
Date

**WYOMING ATTORNEY GENERAL'S OFFICE: APPROVAL AS TO FORM**

  
\_\_\_\_\_  
Megan Pope, Senior Assistant Attorney General

1/11/2021  
\_\_\_\_\_  
Date

9. **Signatures.** The parties to this Agreement, through their duly authorized representatives, have executed this Agreement on the dates set out below, and certify that they have read, understood, and agree to the terms and conditions of this Agreement.

**IDAHO GROUND WATER APPROPRIATORS, INC. (Lessee)**

By:  1/5/2021  
 Tim Deeg, President Date

Attest:  1/5/2021  
 Randall C. Budge, Secretary Date

**STATE OF WYOMING (Lessor)**

\_\_\_\_\_  
 Brandon Gebhart, Director Date  
 Wyoming Water Development Office

**WYOMING STATE ENGINEER'S APPROVAL**

\_\_\_\_\_  
 Greg Lanning, Wyoming State Engineer Date

**WYOMING ATTORNEY GENERAL'S OFFICE APPROVAL AS TO FORM**

\_\_\_\_\_  
 Meagan Pope, Assistant Attorney General Date

AGREEMENT FOR LEASE OF STORAGE WATER - 9

June 10, 2021

## ONE-YEAR TRIBAL WATER LEASE AGREEMENT

This WATER LEASE ("**Lease Agreement**") is made and entered into by and between the SHOSHONE-BANNOCK TRIBES of the Fort Hall Reservation ("Tribes"), acting through the Tribal Lease Pool Committee in the operation of the Tribal Water Supply Bank and the Fort Hall Business Council, and the IDAHO GROUND WATER APPROPRIATORS, INC., a non-profit corporation, acting for and on behalf of North Snake Ground Water District, Magic Valley Ground Water District, and American Falls – Aberdeen Ground Water District, (collectively "IGWA") and is effective on the date executed by both parties hereto.

### RECITALS

A. Pursuant to *The 1990 Fort Hall Indian Water Rights Agreement*, the Tribes are entitled to federal storage contract rights, held in trust for the Tribes by the United States, in an amount of 2.8059% of the storage space in American Falls Reservoir and 6.9917% of the storage space in Palisades Reservoir. These contract storage rights are equivalent to full capacity volumes of 46,931 acre-feet in American Falls Reservoir and 83,900 acre-feet in Palisades Reservoir, and those water rights and the associated volumes of water are referred to herein as the "**Tribal Water Supply Bank**." Due to sedimentation, the maximum annual volumes accrued to each of the contract storage rights are less than the stated capacity volumes.

B. The Shoshone-Bannock Tribes have adopted the Shoshone-Bannock Tribal Water Supply Bank Rules, which have been duly approved by the Idaho Water Resources Board, for the purposes of leasing storage water held by the Tribes in American Falls Reservoir for delivery and use in the Snake River Basin anywhere within Idaho, and for leasing storage water held by the Tribes in Palisades Reservoir for delivery and use in the Snake River Basin above Milner Dam.

C. IGWA is a non-profit corporation which was established to represent its membership, which is currently comprised of eight groundwater districts, two irrigation districts, and numerous other municipal, commercial, and industrial groundwater users in Idaho. IGWA has entered into an agreement with the Surface Water Coalition to resolve disputes related to the impacts of groundwater use on surface water rights. IGWA desires to lease storage water from the Tribes based on the terms herein for use in meeting aspects of the agreement.

Now, therefore, and in consideration of the covenants, obligations, and other valuable consideration referred to herein, the Tribes and IGWA agree as follows:

1. Quantity of Leased Water. The water that is the subject of this Lease Agreement is referred to herein as the "**Lease Volume**". The quantity of Lease Volume shall be defined under the terms below.

a. The Tribes will commit to provide and IGWA will commit to rent from the Tribes a volume of 20,000 acre-feet, subject to the terms and conditions provided below.



June 10, 2021

b. The Lease Volume will be supplied from the Tribal Water Supply Bank, which is comprised of the Tribes' federal contract storage rights in American Falls and Palisades Reservoirs, as defined in the *1990 Fort Hall Indian Water Rights Agreement* and decreed in the Snake River Basin Adjudication. Subject to Section 1.f below, the Tribal Water Supply Bank water that will be available for the Lease Volume excludes all other water rights and water assets of the Tribes, and such water rights and assets are not a part of this Lease Agreement.

c. The Tribes hold a "**Reserve Supply**" equal to 25,276 acre-feet that was secured under a 2015 settlement agreement. The Tribes may request delivery of the Reserve Supply each year up to an annual volume of 10,000 acre-feet and the Reserve Supply is administered as Tribal storage allocation in American Falls Reservoir. The Tribes, in their sole discretion, may elect to use the Reserve Supply to fulfill Lease Volume commitments defined in Section 1.a above. The Reserve Supply will be provided through the Tribal Water Supply Bank.

2. Water Delivery and Administration. Delivery of the Lease Volume shall occur when the Lease Volume has been released from either Palisades or American Falls Reservoir, and appropriately deducted from the Tribes' storage account in these reservoirs. The Tribes and IGWA shall cooperatively work together to ensure the delivery of the Lease Volume to IGWA and the appropriate administration of such water.

a. The quantity of water to be leased under this Lease Agreement under Paragraph 1 will be reviewed by the Tribal Rental Pool Committee as required by the Shoshone-Bannock Tribal Water Supply Bank Rules.

b. Any carriage or other losses of Lease Volume that may occur downstream from American Falls Reservoir or Palisades Reservoir, as the source of water, shall be the responsibility of IGWA.

c. The scheduling of releases of the Lease Volume shall be in the sole discretion of IGWA, provided however, that IGWA will notify and cooperate with the Tribes and the U.S. Bureau of Reclamation (Reclamation) to implement any storage release request. The Tribes and IGWA will cooperate with Reclamation and Water District 1 in measuring and accounting for the Lease Volume at the outflow of American Falls Reservoir and/or Palisades Reservoir.

d. The Lease Volume shall only be available for use by IGWA or assignment to the Surface Water Coalition to satisfy IGWA's obligations and shall not otherwise be available for re-marketing or assignment to a third party, unless such re-marketing or assignment is agreed upon in writing by the Tribes.

3. Term. The term of this Lease Agreement shall be for one (1) year commencing on June 1, 2021 and terminating on October 31, 2021.

June 10, 2021

4. Agreement Contingencies. This Lease Agreement, and obligations hereunder, are expressly contingent upon:

- a. Acquiring all approvals that may be required for the rental, release, delivery, and use of the Lease Volume by IGWA;
- b. Payment by IGWA pursuant to Paragraph 5 below;
- c. Delivery of the Lease Volume by the Tribes to IGWA prior to October 31, 2021, subject to the provisions of Paragraphs 5-7 below.

5. Payment. The “**Lease Payment**” shall be \$1,100,000. IGWA shall be obligated to make the Lease Payment whether or not IGWA takes delivery of any amount of the Lease Volume by October 31, 2021.

6. Payment Schedule. The Lease Payment shall be payable by IGWA as follows:

- a. 50% of the Lease Payment is due by July 15, 2021;
- b. The balance of the Lease Payment is due by November 1, 2021;
- c. All payments are payable by wire transfer to the Tribes within five (5) business days of due date stated above.

7. Termination. Either the Tribes or IGWA may terminate this Lease Agreement in accordance with the provisions below:

- a. Either the Tribes or IGWA may terminate this Lease Agreement:
  - i. For any violation or breach of the terms of this Lease Agreement; or
  - ii. If any of the terms and conditions of any approval of the lease arrangement, or other applicable state or federal law, rule, or regulation, or the administration of the leased water, are inconsistent with the terms of this Lease Agreement.
- b. Termination shall be effective within 30 days of provision of written notice to the other party detailing the basis for such termination. The party against whom such termination is asserted shall have 30 days to cure the violation or breach that is the basis for the termination.
- c. Termination may be subject to the Conflict Resolution provisions of Section 8.e, if the party against whom termination is sought disagrees with the basis of the termination.
- d. In the event of any such termination, there shall be an accounting of lease payments paid by IGWA and leased water delivered by the Tribes as of the termination date. IGWA shall pay for all leased water delivered. In the event IGWA has submitted payment for

June 10, 2021

leased water that remains undelivered by the termination date, the Tribes shall refund any lease payments received for leased water that remains undelivered, and the Tribes will not be obligated to provide such water unless the parties otherwise agree in writing.

8. Miscellaneous Provisions.

a. Amendments. No amendment or modification of this Lease Agreement or its provisions shall be effective unless documented in writing and approved and executed by all parties with the same formality as this Lease Agreement.

b. Force Majeure. Delays or inability to perform any of the requirements of this Lease Agreement within the term or time limits prescribed herein shall be excused to the extent that performance is rendered impossible by any event beyond the control of either party including but not limited to drought, governmental acts or orders or restrictions, existing legal obligations, failure of suppliers, war, terrorism or any other reason where failure to perform is beyond the reasonable control of and is not caused by the conduct of the non-performing party. A force majeure event shall not include financial inability to complete performance of an obligation.

c. Notices. All notices and other communications under this Lease Agreement shall be in writing. Notices shall be deemed as duly received on the date of service, if served personally on the party to whom notice is to be given. Notices shall also be deemed as duly received five (5) days from the date said notice is mailed to the party to whom notice is to be given, either by first class mail, registered or certified, postage prepaid or by express delivery with handling prepaid, and properly addressed as follows:

If to the Shoshone-Bannock Tribes:

Chairman, Fort Hall Business Council  
Shoshone-Bannock Tribes  
P.O. Box 306  
Fort Hall, Idaho 83203

With a Copy to:

Tribal Water Engineer  
Shoshone-Bannock Tribes Water Resources Department  
P.O. Box 306  
Fort Hall, Idaho 83203  
Phone: (208) 239-4580

If to IGWA:

President  
Idaho Ground Water Appropriators, Inc.  
%Racine Olson, PLLC  
P.O. Box 1391  
Pocatello, ID 83204



June 10, 2021

With a Copy to:

Randall Budge, T.J. Budge, Counsel  
 Racine Olsen, PLLC  
 P.O. Box 1391  
 Pocatello, ID 83204  
 Phone: (208) 232-6101

- d. Compliance with Laws and Usage. The Parties, at their own expense, will comply with all federal, state, and tribal laws, ordinances, rules, and regulations applicable to this Lease Agreement and the business conducted pursuant thereto.
- e. Conflict Resolution. In the event of any dispute, claim, question, or disagreement arising from or relating to the Lease Agreement or the breach thereof, the Tribes and IGWA agree as follows:
- i. The Tribes and IGWA agree to initially submit such dispute to non-binding mediation in an effort to resolve the same.
  - ii. In the event that formal legal proceedings are commenced in connection with this Agreement, the parties agree that the Shoshone-Bannock Tribal Court shall be the sole, proper and exclusive forum and venue for such proceedings.
  - iii. The laws and regulations of the Shoshone-Bannock Tribes shall govern the interpretation of this Lease Agreement and/or any formal legal proceedings commenced regarding this Lease Agreement.
- f. Attorneys' Fees. In any action concerning the terms or enforcement of this Lease Agreement, the prevailing party shall be entitled to recover reasonable costs and attorneys' fees, including any costs and attorneys' fees incurred in appellate proceedings.
- g. Binding Effect. All of the covenants, conditions, and provisions of this Lease Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.
- h. Entire Agreement. This Lease Agreement constitutes the entire agreement between the parties and supersedes any prior understandings or oral or written agreements between the parties respecting the within subject matter.
- i. Severability. If any provision of this Lease Agreement shall ever be held to be invalid or unenforceable, such invalidity or unenforceability shall not affect any other provision of this Lease Agreement, but such other provisions shall continue in full force and effect.
- j. Headings. The headings of paragraphs and sections in this Lease Agreement are inserted only as a matter of convenience and for reference purposes, and they do not define, limit, or describe the scope of this Lease Agreement or the intent of any of the provisions thereof.

June 10, 2021

k. Sovereign Immunity. Neither the execution of this Lease Agreement, nor any provision contained herein shall be interpreted to act as a waiver of the Shoshone-Bannock Tribes' sovereign immunity. The Shoshone-Bannock Tribes hereby specifically reserves and retains its sovereign immunity and any rights appurtenant thereto. The Shoshone-Bannock Tribes' sovereign immunity from suit may only be waived by resolution of the Fort Hall Business Council.

l. Contract Interpretation. The parties have participated jointly in the negotiation and drafting of this Lease Agreement. In the event an ambiguity or question of intent or interpretation arises, this Lease Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Lease Agreement.

m. No Third Party Beneficiary. This Lease Agreement is exclusively for the benefit of and governs only the parties hereto. The Tribes and IGWA are the only parties to this Compact and are the only parties entitled to enforce the terms of this Lease Agreement. Nothing in this Lease Agreement gives, or is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly or otherwise, to third persons.

n. Indemnification. IGWA indemnifies the Tribes and its officers, subsidiaries, agents, and employees (the "Indemnitees") and IGWA shall hold the Indemnitees harmless for any damages, claims, demands, personal injury, illness, death, property damage, or other loss resulting in any manner in connection with IGWA's use of the water leased pursuant to this Lease Agreement.

o. No Waiver. Forbearance in enforcing any right or remedy under this Lease Agreement shall not be deemed a waiver nor shall it be the basis for an inference that any party hereto has waived any provision hereof or that a party has waived any right hereunder.

June 10, 2021

This Lease Agreement shall be signed in triplicate and shall be effective when signed by both the Tribes and IGWA.

SHOSHONE-BANNOCK TRIBES:

Date: July 8, 2021 By: Marlene Skunking for

Devon Boyer, Chairman  
Fort Hall Business Council

IDAHO GROUND WATER APPROPRIATORS, INC.

Date: June 21, 2021 By: [Signature]

Lynn Carlquist, Vice-President, Idaho Ground Water Appropriators, Inc.  
Chairman, North Snake Ground Water District

Date: 6-21-2021 By: Tim Deeg

Tim Deeg, Treasurer, Idaho Ground Water Appropriators, Inc.  
Director, American Falls – Aberdeen Ground Water District

## **STORAGE WATER LEASE**

This Storage Water Lease ("Lease") is entered into between MITIGATION, INC., whose address is 7466 S 15th W, Idaho Falls, Idaho 83402 ("Lessor"), and the IDAHO GROUND WATER APPROPRIATORS, INC., a non-profit corporation, acting for and on behalf of North Snake Ground Water District, Magic Valley Ground Water District, Southwest Irrigation District, and American Falls-Aberdeen Ground Water District, (collectively "IGWA"), whose address is P.O. Box 1391, Pocatello, Idaho 83204 ("IGWA").

### **RECITALS**

- A. Lessor has the right to use, lease, and assign storage water allocated and available to Lessor as a space holder in the Idaho Water District 1 reservoir system pursuant to Lessor's Storage Water Contracts with the United States Bureau of Reclamation ("Reclamation").
- B. IGWA desires to lease storage water to satisfy mitigation obligations determined by the Director of the Idaho Department of Water Resources ("Department") and related purposes, such as aquifer recharge and converting farmland from ground to surface water irrigation.
- C. Lessor desires to lease storage water to IGWA, and IGWA desires to lease storage water from Lessor, pursuant to the terms of this Lease.

### **LEASE**

- 1. **Storage Water Lease.** Lessor hereby leases to IGWA 5,000 acre feet of storage water for 2021 only, at which IGWA is required to pay rent as follow at \$60.00 per acre-foot.
- 2. **Term.** The initial term of this Lease shall be for a period of one (1) year, commencing January 1, 2021, and ending December 31, 2021.
- 3. **Payment of Rent.** IGWA will pay the rent to Lessor in two installments, first one-half (1/2) on or before November 1<sup>st</sup> of 2021 and the second one-half (1/2) paid on or before February 1, 2022.
- 4. **Administrative Fees.** IGWA will pay all administrative fees imposed by Water District 1 and the Idaho Water Resource Board.
- 5. **Use of Leased Water.**

5.1 The assignment, delivery, and use of leased storage water will be determined by IGWA and is subject to the final accounting for the year by the Watermaster of Water District 1 and any applicable Water District 1 Rental Pool Rules.

5.2 This Lease does not include any right to use storage water below Milner Dam.

5.3 The storage water available to IGWA under this Lease may be assigned and delivered by IGWA to any of its members or to any other person or entity for the authorized uses of recharge, mitigation, irrigation, or other lawful use at any time up to December 1 each year.

5.4 Any storage water not used or assigned by IGWA by December 1 shall remain in Lessor's Water District 1 storage account and then belong only to Lessor.

5.5 Lessor understands that any storage water leased may be subject to the Water District 1 Rental Pool Rules.

**6. Representations by Lessor.** Lessor covenants and represents that:

6.1 It will provide to IGWA all storage water leased under this Lease.

6.2 It is the true and lawful owner of the storage water and that nothing restricts or precludes Lessor from entering into this Lease.

**7. Breach.** If either party defaults in the performance of its obligations under this Lease, and such default is not cured within thirty (30) days after receipt of written notice thereof, the non-breaching party, at its option, may elect any or all of the following cumulative remedies:

(a) Terminate this Lease;

(b) Seek specific performance of this Lease;

**8. Assignment.** This Lease may not be assigned by IGWA without the express written consent of Lessor, but the storage water leased by IGWA under this Lease may be assigned or otherwise made available to any other person or entity.

**9. Dispute Resolution.** Any substantial dispute between the parties shall be resolved in accordance with the following provisions.

9.1 Good Faith Negotiation. Upon written notice from one party to the other, authorized representatives of the parties will attempt in good faith to resolve the dispute by negotiation.

9.2 Mediation. If the dispute cannot be resolved by good faith negotiation, either party may demand that the dispute be subjected to mediation by a mediator designated by mutual Lease of the parties. The mediation will be

held in Bannock County, Idaho, unless the parties mutually agree to a different location. Mediator costs will be split equally between the parties.

9.3 Litigation. Litigation is allowed between the parties only: (i) if the dispute is not resolved by mediation, (ii) for the purpose of enforcing a settlement Lease entered into between the parties, or (iii) to seek temporary injunctive relief if a party deems such action necessary to avoid irreparable damage. The pursuit or granting of temporary injunctive relief does not excuse the parties from participating in good faith negotiation and mediation as set forth above. The prevailing party in any litigation is entitled to recover reasonable attorney fees and costs.

9.4 Governing Law, Jurisdiction, and Venue. This Lease will be construed and interpreted in accordance with the laws of the State of Idaho. The parties agree that the courts of Idaho shall have exclusive jurisdiction, and agree that Bannock County is the proper venue.

9.5 Exclusive Procedures. The procedures specified in this section 11 are the exclusive procedures for the resolution of disputes between the parties. All applicable statutes of limitation shall be tolled while the negotiation and mediation procedures specified in section 11.1 and 11.2 are pending.

**10. Notices.** All notices given pursuant to this Lease must be in writing and shall be sent in one of the following manners: (a) by certified mail, return receipt requested, postage prepaid; (b) by recognized overnight courier such as Federal Express; (c) by facsimile transmission; (d) by email if the receiving party acknowledges receipt of the emailed notice. Notices shall be deemed received on the earlier of actual receipt, three days after mailing for certified mail and regular mail, the next business day if given by fax, or the date the receiving party acknowledges receipt of email notice.

**ADDRESSES TO BE USED FOR NOTICES AND DELIVERY OF LEASE PAYMENTS SHALL BE AS FOLLOWS:**

Landlord: Mitigation Inc,  
Alan Kelsch  
7466 S 15 th W/  
Idaho Falls, ID 83402

IGWA: c/o Randall C. Budge, General Counsel  
IGWA  
P.O. Box 1391

STORAGE WATER LEASE - 3

Pocatello, Idaho 83204-1391  
Phone: 208-232-6101  
Fax: 208-232-6109  
Email: [randy@racineolson.com](mailto:randy@racineolson.com)

Copy to: Bob Turner, Executive Director  
[bob.igwa@gmail.com](mailto:bob.igwa@gmail.com)

Either party may change its designated address by providing written notice of such change to the other party.

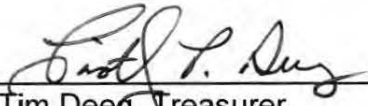
11. **Binding Effect.** This Lease shall be binding upon the respective heirs, successors, and assigns of the parties.

DATED this 11 day of June, 2021.

**LESSEE:**

IDAHO GROUND WATER  
APPROPRIATORS, INC.

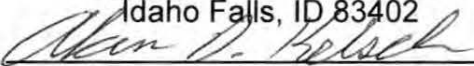
By: \_\_\_\_\_  
Lynn Carlquist, Vice-President,  
Idaho Ground Water Appropriators, Inc,  
and Chairman, North Snake Ground Water District

By:   
Tim Deeg, Treasurer,  
Idaho Ground Water Appropriators, Inc.,  
and Chairmen of American Falls-Aberdeen  
Ground Water District

**LESSOR:**

MITIGATION, INC.

Address: Alan Kelsch  
7466 S 15th W  
Idaho Falls, ID 83402

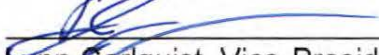
By:   
Title: Treasurer, Mitigation Inc



DATED this \_\_\_\_\_ day of June, 2021.

**LESSEE:**

IDAHO GROUND WATER  
APPROPRIATORS, INC.

By:   
Lynn Carlquist, Vice-President,  
Idaho Ground Water Appropriators, Inc.,  
and Chairman, North Snake Ground Water District

By: \_\_\_\_\_  
Tim Deeg, Treasurer,  
Idaho Ground Water Appropriators, Inc.,  
and Chairmen of American Falls-Aberdeen  
Ground Water District


**LESSOR:**

MITIGATION, INC.

Address: P.O. Box 1892  
Idaho Falls, ID 83403

By: \_\_\_\_\_  
Title: \_\_\_\_\_

## STORAGE WATER LEASE

 This Storage Water Lease ("Lease") is entered into between ENTERPRISE CANAL COMPANY, whose address is PO Box 583, Ririe, Idaho 83443-0583 ("Lessor"), and the IDAHO GROUND WATER APPROPRIATORS, INC., a non-profit corporation, acting for and on behalf of North Snake Ground Water District, Magic Valley Ground Water District, Southwest Irrigation District, and American Falls-Aberdeen Ground Water District, (collectively "IGWA"), whose address is P.O. Box 1391, Pocatello, Idaho 83204 ("IGWA").

### RECITALS

- A. Lessor has the right to use, lease, and assign storage water allocated and available to Lessor as a space holder in the Idaho Water District 1 reservoir system pursuant to Lessor's Storage Water Contracts with the United States Bureau of Reclamation ("Reclamation").
- B. IGWA desires to lease storage water to satisfy mitigation obligations determined by the Director of the Idaho Department of Water Resources ("Department") and related purposes, such as aquifer recharge and converting farmland from ground to surface water irrigation.
- C. Lessor desires to lease storage water to IGWA, and IGWA desires to lease storage water from Lessor, pursuant to the terms of this Lease.

### LEASE

- 1. **Storage Water Lease.** Lessor hereby leases to IGWA 1,000 acre feet of storage water for 2021 only, at which IGWA is required to pay rent as follow at \$60.00 per acre-foot.
- 2. **Term.** The initial term of this Lease shall be for a period of one (1) year, commencing January 1, 2021, and ending December 31, 2021.
- 3. **Payment of Rent.** IGWA will pay the rent to Lessor on or before August 1, 2021.
- 4. **Administrative Fees.** IGWA will pay all administrative fees imposed by Water District 1 and the Idaho Water Resource Board.
- 5. **Use of Leased Water.**

5.1 The assignment, delivery, and use of leased storage water will be determined by IGWA and is subject to the final accounting for the year by the Watermaster of Water District 1 and any applicable Water District 1 Rental Pool Rules.

5.2 This Lease does not include any right to use storage water below Milner Dam.

5.3 The storage water available to IGWA under this Lease may be assigned and delivered by IGWA to any of its members or to any other person or entity for the authorized uses of recharge, mitigation, irrigation, or other lawful use at any time up to December 1 each year.

5.4 Any storage water not used or assigned by IGWA by December 1 shall remain in Lessor's Water District 1 storage account and then belong only to Lessor.

5.5 Lessor understands that any storage water leased may be subject to the Water District 1 Rental Pool Rules.

**6. Representations by Lessor.** Lessor covenants and represents that:

6.1 It will provide to IGWA all storage water leased under this Lease.

6.2 It is the true and lawful owner of the storage water and that nothing restricts or precludes Lessor from entering into this Lease.

**7. Breach.** If either party defaults in the performance of its obligations under this Lease, and such default is not cured within thirty (30) days after receipt of written notice thereof, the non-breaching party, at its option, may elect any or all of the following cumulative remedies:

(a) Terminate this Lease;

(b) Seek specific performance of this Lease;

**8. Assignment.** This Lease may not be assigned by IGWA without the express written consent of Lessor, but the storage water leased by IGWA under this Lease may be assigned or otherwise made available to any other person or entity.

**9. Dispute Resolution.** Any substantial dispute between the parties shall be resolved in accordance with the following provisions.

9.1 Good Faith Negotiation. Upon written notice from one party to the other, authorized representatives of the parties will attempt in good faith to resolve the dispute by negotiation.

9.2 Mediation. If the dispute cannot be resolved by good faith negotiation, either party may demand that the dispute be subjected to mediation by a mediator designated by mutual Lease of the parties. The mediation will be

held in Bannock County, Idaho, unless the parties mutually agree to a different location. Mediator costs will be split equally between the parties.

9.3 Litigation. Litigation is allowed between the parties only: (i) if the dispute is not resolved by mediation, (ii) for the purpose of enforcing a settlement Lease entered into between the parties, or (iii) to seek temporary injunctive relief if a party deems such action necessary to avoid irreparable damage. The pursuit or granting of temporary injunctive relief does not excuse the parties from participating in good faith negotiation and mediation as set forth above. The prevailing party in any litigation is entitled to recover reasonable attorney fees and costs.

9.4 Governing Law, Jurisdiction, and Venue. This Lease will be construed and interpreted in accordance with the laws of the State of Idaho. The parties agree that the courts of Idaho shall have exclusive jurisdiction, and agree that Bannock County is the proper venue.

9.5 Exclusive Procedures. The procedures specified in this section 11 are the exclusive procedures for the resolution of disputes between the parties. All applicable statutes of limitation shall be tolled while the negotiation and mediation procedures specified in section 11.1 and 11.2 are pending.

**10. Notices.** All notices given pursuant to this Lease must be in writing and shall be sent in one of the following manners: (a) by certified mail, return receipt requested, postage prepaid; (b) by recognized overnight courier such as Federal Express; (c) by facsimile transmission; (d) by email if the receiving party acknowledges receipt of the emailed notice. Notices shall be deemed received on the earlier of actual receipt, three days after mailing for certified mail and regular mail, the next business day if given by fax, or the date the receiving party acknowledges receipt of email notice.

**ADDRESSES TO BE USED FOR NOTICES AND DELIVERY OF LEASE PAYMENTS SHALL BE AS FOLLOWS:**

Landlord: Enterprise Canal Company  
P. O. Box 583  
Ririe, Idaho  
83443-0583

IGWA: c/o Randall C. Budge, General Counsel  
IGWA  
P.O. Box 1391

STORAGE WATER LEASE - 3

Pocatello, Idaho 83204-1391  
Phone: 208-232-6101  
Fax: 208-232-6109  
Email: [randy@racineolson.com](mailto:randy@racineolson.com)

Copy to: Bob Turner, Executive Director  
[bob.igwa@gmail.com](mailto:bob.igwa@gmail.com)

Either party may change its designated address by providing written notice of such change to the other party.

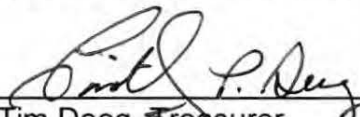
11. **Binding Effect.** This Lease shall be binding upon the respective heirs, successors, and assigns of the parties.

DATED this 11 day of June, 2021.

**LESSEE:**

IDAHO GROUND WATER  
APPROPRIATORS, INC.

By: \_\_\_\_\_  
Lynn Carlquist, Vice-President,  
Idaho Ground Water Appropriators, Inc.,  
and Chairman, North Snake Ground Water District

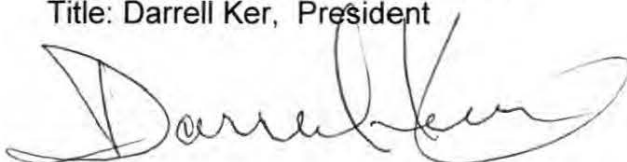
By:  \_\_\_\_\_  
Tim Deeg, Treasurer,  
Idaho Ground Water Appropriators, Inc.,  
and Chairmen of American Falls-Aberdeen  
Ground Water District

**LESSOR:**

ENTERPRISE CANAL  
COMPANY

Address: P.O. Box 583  
Ririe, Idaho, ID 83443


By: \_\_\_\_\_  
Title: Darrell Ker, President

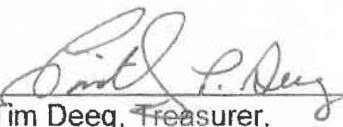


DATED this 11 day of June, 2021.

**LESSEE:**

IDAHO GROUND WATER  
APPROPRIATORS, INC.

By:   
Lynn Carlquist, Vice-President,  
Idaho Ground Water Appropriators, Inc.,  
and Chairman, North Snake Ground Water District

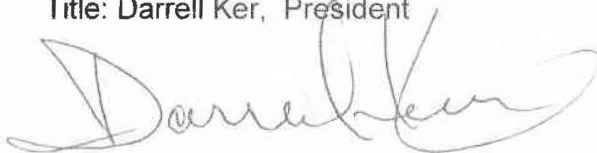
By:   
Tim Deeg, Treasurer,  
Idaho Ground Water Appropriators, Inc.,  
and Chairmen of American Falls-Aberdeen  
Ground Water District

**LESSOR:**

ENTERPRISE CANAL  
COMPANY

Address: P.O. Box 583  
Ririe, Idaho, ID 83443

By: \_\_\_\_\_  
Title: Darrell Ker, President



STORAGE WATER LEASE - 5

# American Falls - Aberdeen

## GWD

### Recharge Documentation

Report Entries 1.1-1.4



**From:** [Alan Jackson](#)  
**To:** [Jaxon Higgs](#)  
**Subject:** 2021 Recharge (or lack thereof)  
**Date:** Wednesday, March 30, 2022 10:05:16 AM

Jaxon,

Here is the summary of SRS recharge for last year. The first table shows the storage leases that were done for the recharge. The second table shows the distribution amount to each District. The ASCC recharge reported here is all that I know they did. They will likely report recharge allocations to individuals in the Districts but it's the same recharge that I've summed up here. Still working out the kinks in this accounting process. I suppose they get what they pay for.

Table of leases - 2021

Date	Lessor	Lessee	From Canal	To Canal	Ac-Ft
3/15/2021	Untied Canal Co	BGWD/AFAGWD	Trego	Danskin	800
3/15/2021	Untied Canal Co	BGWD/AFAGWD	Trego	Trego	158
3/15/2021	Wearyrick Ditch Co	BGWD/AFAGWD	Wearyrick	Wearyrick	173
3/15/2021	Peoples Canal Co	BGWD/AFAGWD	Peoples	Peoples	7,262
3/18/2021	Aberdeen-Springfield Canal Co	BGWD/AFAGWD	ASCC	ASCC	10,000
3/18/2021	Corbett Slough Ditch Co	BGWD/AFAGWD	Corbett	Corbett	241
3/22/2021	Parsons Ditch Co	BGWD/AFAGWD	Parsons	Parsons	230
3/29/2021	Blackfoot Irrigation Co	BGWD/AFAGWD	Blackfoot	Blackfoot	927
3/29/2021	Blackfoot Irrigation Co	BGWD/AFAGWD	Blackfoot	Blackfoot	568
4/6/2021	Watson Canal Co	BGWD/AFAGWD	Watson	Watson	113
11/10/2021	Riverside Canal Co	BGWD/AFAGWD	Riverside	Riverside	185
				Total	20,657

Recharge designation - 2021

District	Recharge (af)
BGWD	9,973
AFAGWD	10,684

Alan Jackson  
 Manager - Bingham Ground Water District  
 (208) 680-9838

Station	Storage Account	Supplier or Recipient	Purchaser	Rental Pool and Leases (AF)			Adjustments (Acre-Feet)					Return to Spaceholder (AF)	Notes
				Common Pool Rental	Private Lease (Supply (-) or Assignment (+))	Fre-Mad (Supply (-) or Assignment (+))	Palisades Water User (Supply (-) or Assignment (+))	Balanced Adjustments	Unbalanced Adjustments	Ground Water Exchange Pumping			
13058050	Century Holdings	Enterprize	Foster Land and Cattle		-1000								
13059523	Gem Lake Wildlife		City of Idaho Falls	70									
13059523	Gem Lake Wildlife	PWUI					6.2						
13059525	Snake River Valley	IWRB	IGWA		109.7								Recharge After 10/31
13059525	Snake River Valley	Surface Water Coalition	Bingham, Bonn-Jeff, Jeff-Clark		-5009								
13059525	Snake River Valley	Snake River Valley	Bonn-Jeff GWD		5000								Private Lease
13059525	Snake River Valley	Snake River Valley	Bonn-Jeff GWD		-5000								Private Lease
13059525	Snake River Valley	ESPAR			4910								IGWA Assignment
13059525	Snake River Valley	Snake River Valley	Bonn-Jeff GWD		-5000								Private Lease
13059525	Snake River Valley	Snake River Valley	Bonn-Jeff GWD		5000								Private Lease
13059525	Snake River Valley	ESPAR			194.2								IGWA Assignment
13061430	Blackfoot Irrigation Co	Blackfoot Irrigation Co	Bingham GWD/AFAGWD		927								
13061430	Blackfoot Irrigation Co	Blackfoot Irrigation Co	Bingham GWD/AFAGWD		-927								
13061430	Blackfoot Irrigation Co	Blackfoot Irrigation Co	Bingham GWD/AFAGWD		568								
13061430	Blackfoot Irrigation Co	Blackfoot Irrigation Co	Bingham GWD/AFAGWD		-568								
13061430	Blackfoot Irrigation Co	Surface Water Coalition	Bingham, Bonn-Jeff, Jeff-Clark		-500								
13061525	Peoples Canal	Peoples Canal	Bingham GWD/AFAGWD		7262								
13061525	Peoples Canal	Peoples Canal	Bingham GWD/AFAGWD		-7262								
13061525	Peoples Canal	Surface Water Coalition	Bingham, Bonn-Jeff, Jeff-Clark		-3749								
13061610	Aberdeen Springfield Canal Co	Aberdeen Springfield Canal Co	Bingham GWD/AFAGWD		10000								
13061610	Aberdeen Springfield Canal Co	Aberdeen Springfield Canal Co	Bingham GWD/AFAGWD		-10000								
13061650	Corbett	Corbett	Bingham GWD/AFAGWD		241								
13061650	Corbett	Corbett	Bingham GWD/AFAGWD		-241								
13061650	Corbett	Surface Water Coalition	Bingham, Bonn-Jeff, Jeff-Clark		-1150								
13061705	Riverside Canal	Surface Water Coalition	Bingham, Bonn-Jeff, Jeff-Clark		-80								
13061705	Riverside Canal	Riverside Canal	Bingham GWD/AFAGWD		-185								Private Lease
13061705	Riverside Canal	Riverside Canal	Bingham GWD/AFAGWD		185								Private Lease
13061995	Danskin	United Canal Co-Trego	Bingham GWD/AFAGWD		800								
13062050	United Canal Co-Trego	Danskin	Bingham GWD/AFAGWD		-800								
13062050	Trego	United Canal Co-Trego	Bingham GWD/AFAGWD		158								
13062050	United Canal Co-Trego	Trego	Bingham GWD/AFAGWD		-158								
13062050	Trego	Surface Water Coalition	Bingham, Bonn-Jeff, Jeff-Clark		-864								
13062051	Jensen Grove	ESPAR			2006.3								IGWA Assignment
13062503	Wearyrick	Wearyrick	Bingham GWD/AFAGWD		173								
13062503	Wearyrick	Wearyrick	Bingham GWD/AFAGWD		-173								
13062503	Wearyrick	Surface Water Coalition	Bingham, Bonn-Jeff, Jeff-Clark		-165								
13062506	Watson	Watson	Bingham GWD/AFAGWD		113								
13062506	Watson	Watson	Bingham GWD/AFAGWD		-113								
13062506	Watson	Surface Water Coalition	Bingham, Bonn-Jeff, Jeff-Clark		-50								
13062507	Parsons	Parsons	Bingham GWD/AFAGWD		230								
13062507	Parsons	Parsons	Bingham GWD/AFAGWD		-230								
13062507	Parsons	Surface Water Coalition	Bingham, Bonn-Jeff, Jeff-Clark		-120								
13075900	Shoshone-Bannock Tribes			24770									
13075900	Shoshone-Bannock Tribes			10000									
13075900	Shoshone-Bannock Tribes	Portnuef Rentals											Tony received phone call indicating no storage delivery
13075900	Shoshone-Bannock Tribes	Oltrogge Family Trust											
13075900	Shoshone-Bannock Tribes	IGWA	IGWA		-25000								Tribal Lease
13075900	Shoshone-Bannock Tribes	IGWA	IGWA		-20000								Tribal Lease
13076400	Falls Irrigation District	Southwest Irrigation District	Southwest Irrigation District		-8000								Private Lease
13077755	Call Farms	PWUI					831.8						
13077775	R Evans Pump			100									
13080000	Minidoka Irrigation District	NSCC	North Snake GWD		-10000								
13080000	Minidoka Irrigation District	AFRD #2	North Snake GWD		-5000								
13080000	Minidoka Irrigation District	Water Mitigation Coalition	Water Mitigation Coalition		-10000								Private Lease
13080000	Minidoka Irrigation District	Minidoka Credit						8370					Same amount every year
13080000	Minidoka Irrigation District	Burley Irrigation District	Magic Valley GWD		-1170								
13080000	Minidoka Irrigation District	AFRD #2	Magic Valley GWD		-4830								
13080000	Minidoka Irrigation District	North Snake GWD			1582								IGWA Assignment
13080000	Minidoka Irrigation District	Southwest Irrigation District	Southwest Irrigation District		-5000								Private Lease
13080500	Burley Irrigation District	Minidoka Credit						5130					Same amount every year
13080500	Burley Irrigation District		Craig Searle	100									

MAR 18 2021

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE APPLICATION**  
**FOR STORAGE**

United Canal Company-Trego (lessor) agrees to lease  
158 acre-feet of storage to BINGHAM GWD / AMERICAN FALLS-ABERDEEN GWD (lessee) for  
 the 2021 irrigation year at a price of \$ 0 per acre- foot according to the rules and  
 regulations contained in the Water District #1 Rental Pool Procedures.

Description of Lease:

The purpose for which the storage will be put to use: aquifer recharge

Point-of-Diversion for leased storage: 13062050 - Trego Canal

Place-of-use for leased storage: Trego canal service area

\*Lessee has until **November 30<sup>th</sup>** of the year of request to assign a point of diversion. If the water is not assigned and used on or before November 30<sup>th</sup>, any unused or unassigned storage will revert back to the lessor.

☐ If the purpose for which this leased storage will be put to use is **irrigation**, the Lessee, by checking this box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said land and was legally irrigated prior to the 2019 Irrigation year...or....had approved storage rentals or private leases applied to this place-of-use in any year from 2006 through 2018. Failure to meet these conditions contained in Rule 3.5 of the Rental Pool Procedures may be grounds for denying the application.

Signature of Lessee

Date

3/16/21

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

Signature of Lessor

Date

3/15/21

\*\*\*\* This lease application is good for one (1) irrigation year only. A new application must be submitted every year in which the storage is intended to be leased and used.

X An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease.

RECEIVED

MAR 18 2021

Department of Water Resources  
Eastern Region**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE APPLICATION  
FOR STORAGE**

United Canal Company - Trego (lessor) agrees to lease  
800 acre-feet of storage to BINGHAM GWD / AMERICAN FALLS-ABERDEEN GWD (lessee) for  
 the 20 21 irrigation year at a price of \$ 12 per acre-foot according to the rules and  
 regulations contained in the Water District #1 Rental Pool Procedures.

**Description of Lease:**

The purpose for which the storage will be put to use: aquifer recharge

Point-of-Diversion for leased storage: 130 61995 - Danskin canal

Place-of-use for leased storage: Danskin service area

\*Lessee has until **November 30<sup>th</sup>** of the year of request to assign a point of diversion. If the water is not assigned and used on or before November 30<sup>th</sup>, any unused or unassigned storage will revert back to the lessor.

☐ If the purpose for which this leased storage will be put to use is **irrigation**, the Lessee, by checking this box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said land and was legally irrigated prior to the 2019 Irrigation year...or....had approved storage rentals or private leases applied to this place-of-use in any year from 2006 through 2018. Failure to meet these conditions contained in Rule 3.5 of the Rental Pool Procedures may be grounds for denying the application.

Signature of Lessee

Date

3/16/21

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

Signature of Lessor

Date

3/15/21

\*\*\*\* This lease application is good for one (1) irrigation year only. A new application must be submitted every year in which the storage is intended to be leased and used.

X An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease.

MAR 18 2021

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE APPLICATION**  
**FOR STORAGE**

Department of Water Resources  
Eastern Region

Wearyrick Canal Co (lessor) agrees to lease  
173 acre-feet of storage to BINGHAM GWD / AMERICAN FALLS-ABERDEEN GWD (lessee) for  
 the 2021 irrigation year at a price of \$ 0 per acre- foot according to the rules and  
 regulations contained in the Water District #1 Rental Pool Procedures.

**Description of Lease:**

The purpose for which the storage will be put to use: aquifer recharge

Point-of-Diversion for leased storage: 13062503

Place-of-use for leased storage: Wearyrick service area

\*Lessee has until **November 30<sup>th</sup>** of the year of request to assign a point of diversion. If the water is not assigned and used on or before November 30<sup>th</sup>, any unused or unassigned storage will revert back to the lessor.

☐ If the purpose for which this leased storage will be put to use is **irrigation**, the Lessee, by checking this box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said land and was legally irrigated prior to the 2019 Irrigation year...or....had approved storage rentals or private leases applied to this place-of-use in any year from 2006 through 2018. Failure to meet these conditions contained in Rule 3.5 of the Rental Pool Procedures may be grounds for denying the application.

Signature of Lessee

Date

3/16/21

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

Signature of Lessor

Date

3/15/21

\*\*\*\* This lease application is good for one (1) irrigation year only. A new application must be submitted every year in which the storage is intended to be leased and used.

X An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease.

MAR 18 2021

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE APPLICATION**  
**FOR STORAGE**

Department of Water Resources  
Eastern Region

Peoples Canal & Irrigation Co (lessor) agrees to lease  
7,262 acre-feet of storage to BINGHAM GWD / AMERICAN FALLS-ABERDEEN GWD (lessee) for  
 the 2021 irrigation year at a price of \$ 0 per acre- foot according to the rules and  
 regulations contained in the Water District #1 Rental Pool Procedures.

**Description of Lease:**

The purpose for which the storage will be put to use: aquifer recharge

Point-of-Diversion for leased storage: 13061525 - Peoples Canal

Place-of-use for leased storage: Peoples Canal service area

\* Lessee has until **November 30<sup>th</sup>** of the year of request to assign a point of diversion. If the water is not assigned and used on or before November 30<sup>th</sup>, any unused or unassigned storage will revert back to the lessor.

☐ If the purpose for which this leased storage will be put to use is **irrigation**, the Lessee, by checking this box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said land and was legally irrigated prior to the 2019 Irrigation year...or....had approved storage rentals or private leases applied to this place-of-use in any year from 2006 through 2018. Failure to meet these conditions contained in Rule 3.5 of the Rental Pool Procedures may be grounds for denying the application.

Signature of <sup>Lessor</sup> [Signature] Date 3-15-2021  
Pues

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

Signature of <sup>lessee</sup> [Signature] Date 3/16/2021  
[Signature]

\*\*\*\* This lease application is good for one (1) irrigation year only. A new application must be submitted every year in which the storage is intended to be leased and used.

X An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease.



RECEIVED  
MAR 22 2021  
COLUMBIA COUNTY WATER DISTRICT

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE APPLICATION**  
**FOR STORAGE**

Aberdeen-Springfield Canal Co (lessor) agrees to lease  
10,000 acre-feet of storage to BINGHAM GWD / AMERICAN FALLS-ABERDEEN GWD (lessee) for  
the 2021 irrigation year at a price of \$ 0 per acre- foot according to the rules and  
regulations contained in the Water District #1 Rental Pool Procedures.

**Description of Lease:**

The purpose for which the storage will be put to use: again for recharge  
Point-of-Diversion for leased storage: Aberdeen Springfield Canal - 13061610  
Place-of-use for leased storage: ASCC service area

\* Lessee has until **November 30<sup>th</sup>** of the year of request to assign a point of diversion. If the water is not assigned  
and used on or before November 30<sup>th</sup>, any unused or unassigned storage will revert back to the lessor.

☐ If the purpose for which this leased storage will be put to use is **irrigation**, the Lessee, by checking this  
box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said  
land and was legally irrigated prior to the 2019 Irrigation year...or....had approved storage rentals or private leases  
applied to this place-of-use in any year from 2006 through 2018. Failure to meet these conditions contained in  
Rule 3.5 of the Rental Pool Procedures may be grounds for denying the application.

Signature of Lessee [Signature] Date 3/18/2021

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be  
reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water  
District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is  
to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation  
season following the lease.

Signature of Lessor [Signature] Date 3/18/2021

\*\*\*\* *This lease application is good for one (1) irrigation year only. A new application must be submitted every year  
in which the storage is intended to be leased and used.*

X An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-  
foot administrative fee must be received by Water District #1 prior to the approval of the storage  
lease.

MAR 22 2021

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE APPLICATION**  
**FOR STORAGE**

Idaho Department of Water Resources  
Eastern Region

Corbett Slough (lessor) agrees to lease  
241 acre-feet of storage to BINGHAM GWD / AMERICAN FALLS-ABERDEEN GWD (lessee) for  
 the 2021 irrigation year at a price of \$ 0 per acre- foot according to the rules and  
 regulations contained in the Water District #1 Rental Pool Procedures.

**Description of Lease:**

The purpose for which the storage will be put to use: aquifer recharge  
 Point-of-Diversion for leased storage: Corbett canal - 13061650  
 Place-of-use for leased storage: Corbett service area

\*Lessee has until **November 30<sup>th</sup>** of the year of request to assign a point of diversion. If the water is not assigned and used on or before November 30<sup>th</sup>, any unused or unassigned storage will revert back to the lessor.

☐ If the purpose for which this leased storage will be put to use is **irrigation**, the Lessee, by checking this box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said land and was legally irrigated prior to the 2019 Irrigation year...or....had approved storage rentals or private leases applied to this place-of-use in any year from 2006 through 2018. Failure to meet these conditions contained in Rule 3.5 of the Rental Pool Procedures may be grounds for denying the application.

Signature of Lessee

Date

3/18/2021

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

\*

Signature of Lessor

Date

Robert W. Olsen  
PRESIDENT Corbett Slough

March 17, 2021

\*\*\*\* This lease application is good for one (1) irrigation year only. A new application must be submitted every year in which the storage is intended to be leased and used.

X An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease.



MAR 22 2021

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE APPLICATION**  
**FOR STORAGE**

Idaho Water Resources  
Eastern Region

Parsons Canal (lessor) agrees to lease  
230 acre-feet of storage to BINGHAM GWD / AMERICAN FALLS-ABERDEEN GWD (lessee) for  
 the 2021 irrigation year at a price of \$ 0 per acre-foot according to the rules and  
 regulations contained in the Water District #1 Rental Pool Procedures.

**Description of Lease:**

The purpose for which the storage will be put to use: aquifer recharge  
 Point-of-Diversion for leased storage: Parsons canal - 13062507  
 Place-of-use for leased storage: Parsons canal service area

\*Lessee has until **November 30<sup>th</sup>** of the year of request to assign a point of diversion. If the water is not assigned and used on or before November 30<sup>th</sup>, any unused or unassigned storage will revert back to the lessor.

☐ If the purpose for which this leased storage will be put to use is **irrigation**, the Lessee, by checking this box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said land and was legally irrigated prior to the 2019 Irrigation year...or....had approved storage rentals or private leases applied to this place-of-use in any year from 2006 through 2018. Failure to meet these conditions contained in Rule 3.5 of the Rental Pool Procedures may be grounds for denying the application.

Signature of Lessee

Date

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

Signature of Lessor

Date

\*\*\*\* This lease application is good for one (1) irrigation year only. A new application must be submitted every year in which the storage is intended to be leased and used.

X An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease.

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE APPLICATION  
FOR STORAGE**

Blackfoot Irrigation Co (lessor) agrees to lease  
568 acre-feet of storage to BINGHAM GWD / AMERICAN FALLS-ABERDEEN GWD (lessee) for  
 the 2021 irrigation year at a price of \$ 12 per acre- foot according to the rules and  
 regulations contained in the Water District #1 Rental Pool Procedures.

**Description of Lease:**

The purpose for which the storage will be put to use: aquifer recharge

Point-of-Diversion for leased storage: Blackfoot Canal - 1306/430

Place-of-use for leased storage: Blackfoot Irr service area

\*Lessee has until **November 30<sup>th</sup>** of the year of request to assign a point of diversion. If the water is not assigned and used on or before November 30<sup>th</sup>, any unused or unassigned storage will revert back to the lessor.



If the purpose for which this leased storage will be put to use is **irrigation**, the Lessee, by checking this box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said land and was legally irrigated prior to the 2019 Irrigation year...or....had approved storage rentals or private leases applied to this place-of-use in any year from 2006 through 2018. Failure to meet these conditions contained in Rule 3.5 of the Rental Pool Procedures may be grounds for denying the application.

Signature of Lessee



Date

3/29/2021

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

Signature of Lessor



Date

3/29/21

\*\*\*\* This lease application is good for one (1) irrigation year only. A new application must be submitted every year in which the storage is intended to be leased and used.

X An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease.

## **WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE APPLICATION FOR STORAGE**

Blackfoot Irrigation Co (lessor) agrees to lease  
927 acre-feet of storage to BINGHAM GWD / AMERICAN FALLS-ABERDEEN GWD (lessee) for  
 the 2021 irrigation year at a price of \$ 0 per acre- foot according to the rules and  
 regulations contained in the Water District #1 Rental Pool Procedures.

### **Description of Lease:**

The purpose for which the storage will be put to use: aquifer recharge  
 Point-of-Diversion for leased storage: Blackfoot Irrigation - 13061430  
 Place-of-use for leased storage: Blackfoot Irr service area

\* Lessee has until **November 30<sup>th</sup>** of the year of request to assign a point of diversion. If the water is not assigned and used on or before November 30<sup>th</sup>, any unused or unassigned storage will revert back to the lessor.

☐ If the purpose for which this leased storage will be put to use is **irrigation**, the Lessee, by checking this box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said land and was legally irrigated prior to the 2019 Irrigation year...or....had approved storage rentals or private leases applied to this place-of-use in any year from 2006 through 2018. Failure to meet these conditions contained in Rule 3.5 of the Rental Pool Procedures may be grounds for denying the application.

Signature of Lessee

[Signature]

Date

3/29/2021

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

Signature of Lessor

[Signature]

Date

3/29/21

\*\*\*\* This lease application is good for one (1) irrigation year only. A new application must be submitted every year in which the storage is intended to be leased and used.

X An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease.



**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE APPLICATION**  
**FOR STORAGE**

Riverside Canal Co (lessor) agrees to lease  
185 acre-feet of storage to BINGHAM GWD / AMERICAN FALLS-ABERDEEN GWD (lessee) for  
 the 2021 irrigation year at a price of \$ 0 per acre-foot according to the rules and  
 regulations contained in the Water District #1 Rental Pool Procedures.

**Description of Lease:**

The purpose for which the storage will be put to use: groundwater recharge

Point-of-Diversion for leased storage: Riverside Canal

Place-of-use for leased storage: Riverside Canal

\*Lessee has until **November 30<sup>th</sup>** of the year of request to assign a point of diversion. If the water is not assigned and used on or before November 30<sup>th</sup>, any unused or unassigned storage will revert back to the lessor.

☐ If the purpose for which this leased storage will be put to use is irrigation, the Lessee, by checking this box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said land and was legally irrigated prior to the 2019 Irrigation year...or....had approved storage rentals or private leases applied to this place-of-use in any year from 2006 through 2018. Failure to meet these conditions contained in Rule 3.5 of the Rental Pool Procedures may be grounds for denying the application.

Signature of Lessee

[Signature]

Date

11/1/2021

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

Signature of Lessor

[Signature]

Date

11/10/2021

\*\*\*\* This lease application is good for one (1) irrigation year only. A new application must be submitted every year in which the storage is intended to be leased and used.

X An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease.

\$ 240.50

## **WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE APPLICATION FOR STORAGE**

Watson Canal Co (lessor) agrees to lease  
113 acre-feet of storage to BINGHAM GWD / AMERICAN FALLS-ABERDEEN GWD (lessee) for  
 the 20 21 irrigation year at a price of \$ 0 per acre- foot according to the rules and  
 regulations contained in the Water District #1 Rental Pool Procedures.

### **Description of Lease:**

The purpose for which the storage will be put to use: aquifer recharge  
 Point-of-Diversion for leased storage: Watson Canal - 13062506  
 Place-of-use for leased storage: Watson canal service area

\*Lessee has until November 30<sup>th</sup> of the year of request to assign a point of diversion. If the water is not assigned and used on or before November 30<sup>th</sup>, any unused or unassigned storage will revert back to the lessor.



If the purpose for which this leased storage will be put to use is irrigation, the Lessee, by checking this box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said land and was legally irrigated prior to the 2019 Irrigation year...or....had approved storage rentals or private leases applied to this place-of-use in any year from 2006 through 2018. Failure to meet these conditions contained in Rule 3.5 of the Rental Pool Procedures may be grounds for denying the application.

Signature of Lessee

[Signature]

Date

4/6/2021

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

Signature of Lessor

Karl L. Williams

Date

4-6-21

\*\*\*\* This lease application is good for one (1) irrigation year only. A new application must be submitted every year in which the storage is intended to be leased and used.

X

An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease.

**From:** [keithesplinh2o@gmail.com](mailto:keithesplinh2o@gmail.com)  
**To:** [Jaxon Higgs](#)  
**Cc:** [keithesplinh2o@gmail.com](mailto:keithesplinh2o@gmail.com)  
**Subject:** ESPAR 2021 Recharge  
**Date:** Thursday, March 31, 2022 9:15:17 AM  
**Attachments:** [October 2021 - SRVID Flow Totalization Report -.xlsx](#)  
[Bass Pond Cumulative Recharge 2021.xlsx](#)  
[2021 JG Inlet Totalization.xlsx](#)  
[Carter Cade Ac-ft 30Sep21-to-30Nov21\\_formula\\_worksheet.xlsx](#)  
[Cade Carter Record - WD1 Prelim.xlsx](#)  
[Re Assignment of Storage Water for Recharge.msg](#)

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Hi Jaxon,

Here are the basic facts of our 2021 recharge:

**Recharge done for groundwater districts.**

1. 4,910 acre feet done with water from the North Snake Groundwater District. My understanding is that half was for the Magic Valley Groundwater District and half for American Falls Aberdeen. **1.2, 6.3**  
 Recharge done by SRVID – report attached.
2. 5,000 acre feet done with water from American Falls Groundwater District.
  - a. Jensen Grove recharged 2,006.3 acre feet, report attached. **1.3**
  - b. Mattson-Craig Canal recharged 985.32 acre feet, report attached. **1.4**
  - c. Teton Bass Pond recharged 1,157.34 acre feet, report attached. **1.5**
  - d. Cade Carter Pit recharged 412 acre feet, report attached. (The dates in 2021.) **1.6**
  - e. SRVID recharged 439 acre feet, report attached. (From Steffler and Fransen pits. **1.7**

**Other water recharged for ESPAR members:**

3. 1,650 acre feet recharged by SRVID with their own storage water. The attached SRVID reports from the Steffler and Fransen pit show that recharge. **1.8**
4. 261 acre feet recharged early in 2021 by Cade Carter, with water rented from Mattson Craig late in 2020. (The total lease was for 500 acre feet. The balance was recharge in 2020 and reported last year.) **1.9**

This 1,911 acre feet will go to Chris Pratt and / or Falls Canyon Farms. I haven't received final word from them. **Both of these entities are in AFA GWD and the recharge is incorporated into the AFA totals. jbh**

Please let me know if you have any questions and I'll work on getting this in proper for later in April.

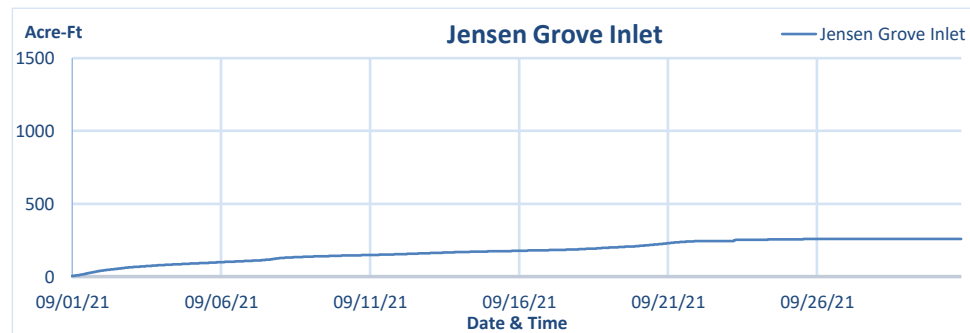
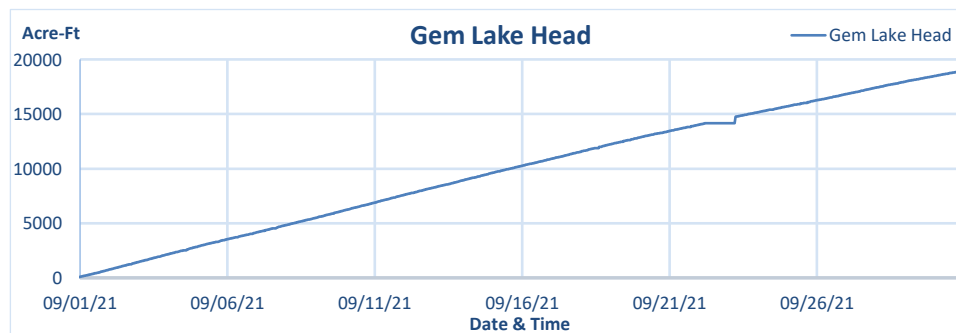
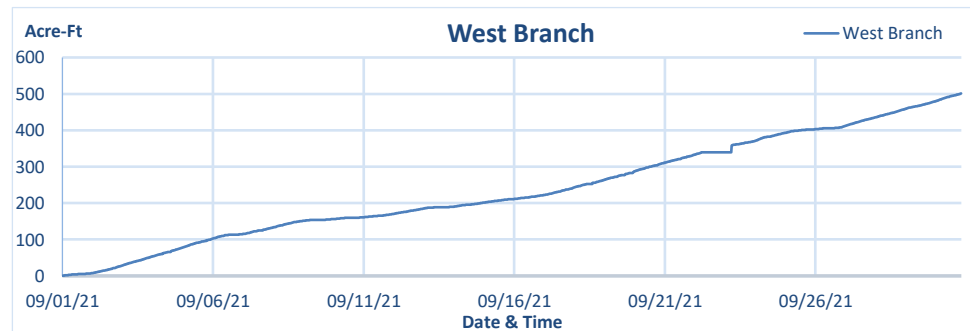
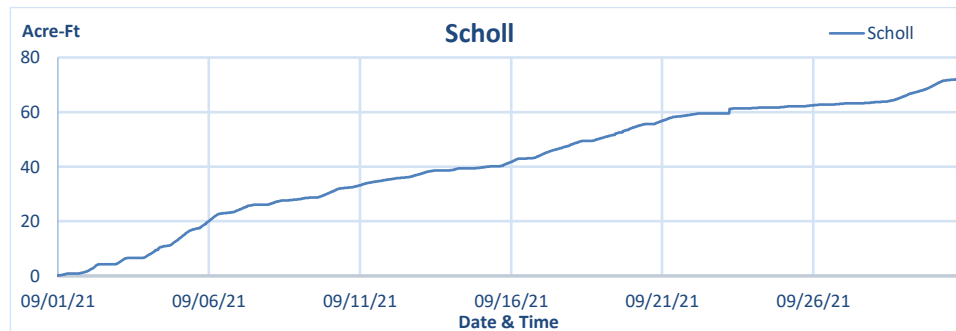
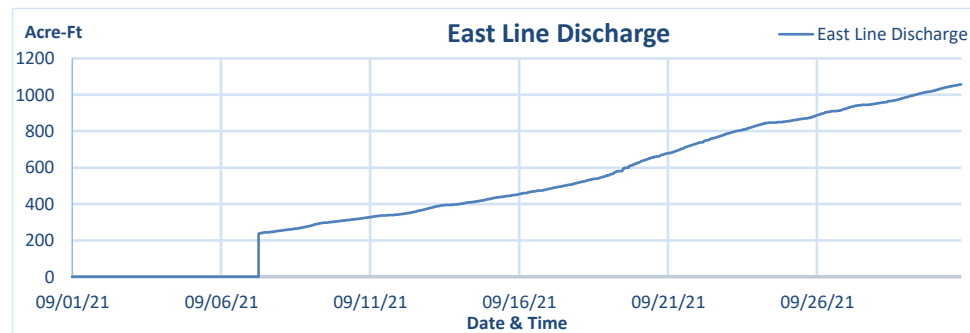
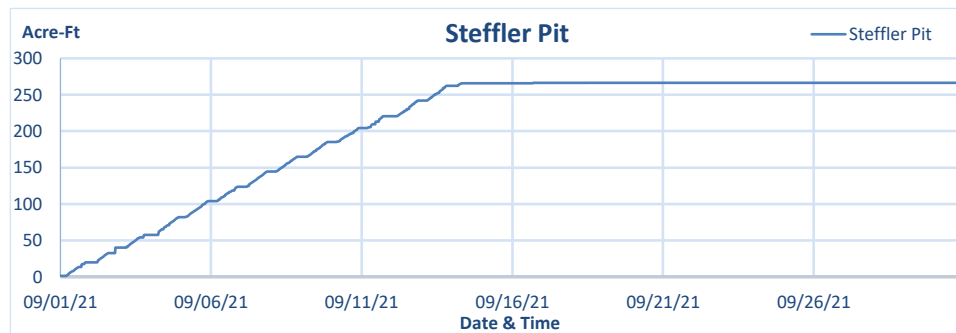
Thanks,  
Keith

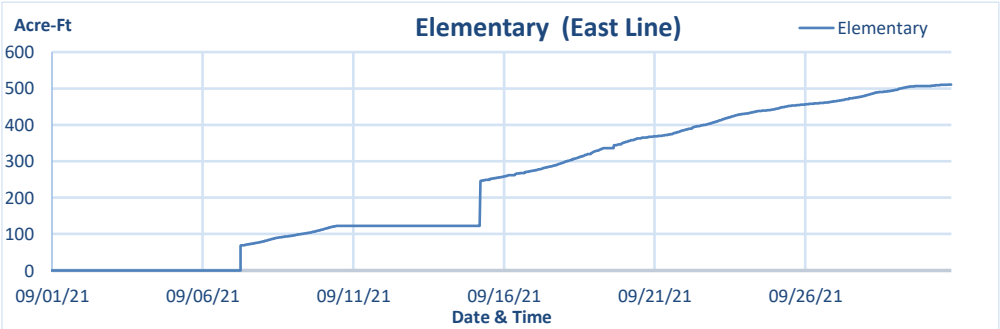
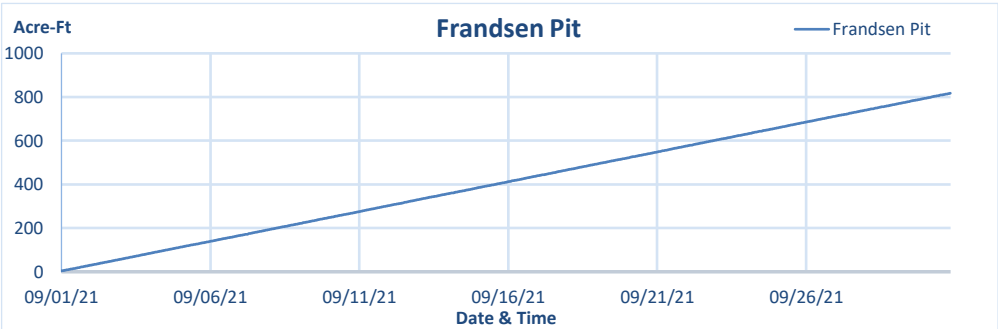
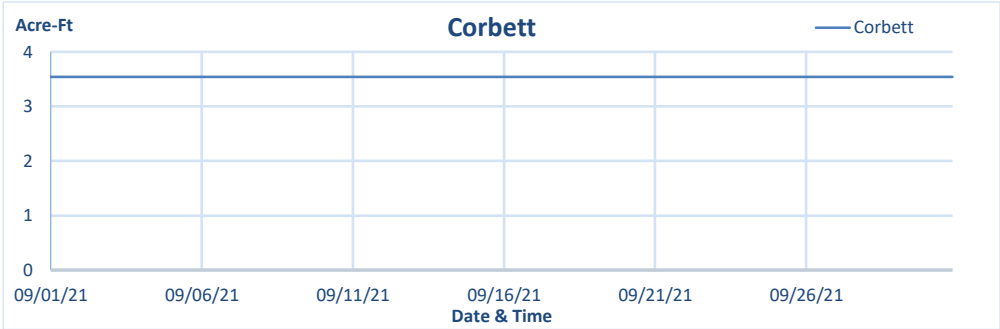
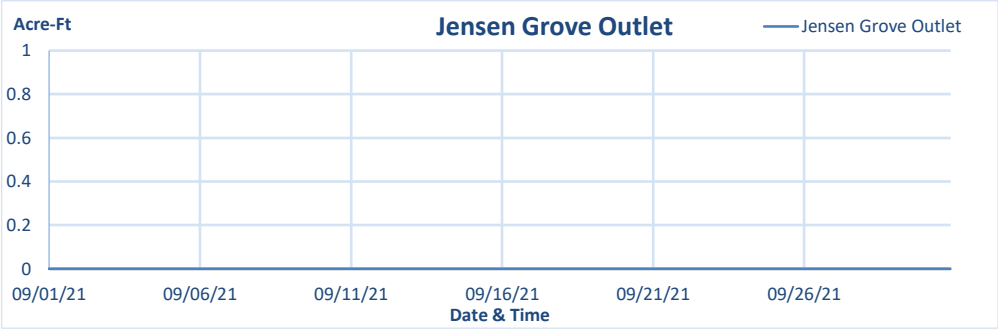
## Flow Totalization Report

September 1 - September 30

Steffler Pit	East Line Discharge	Scholl	West Branch	Gem Lake Head	Jensen Grove Inlet	Jensen Grove Outlet	Corbett	Frandsen Pit	Elementary
266.40	1056.98	72.25	501.18	18894.10	259.73	0.00	3.54	817.29	510.70

ALL VALUES IN ACRE-FEET





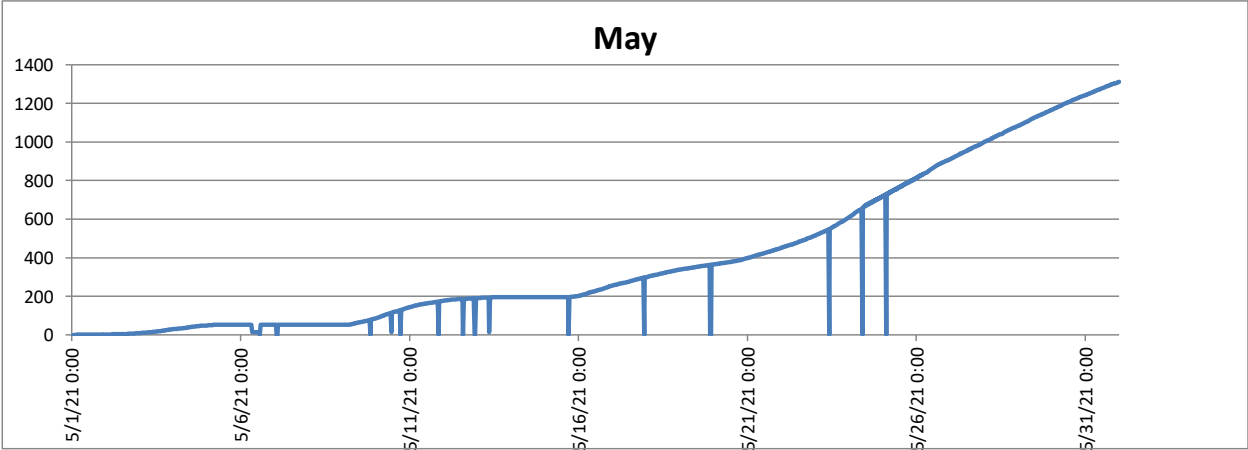
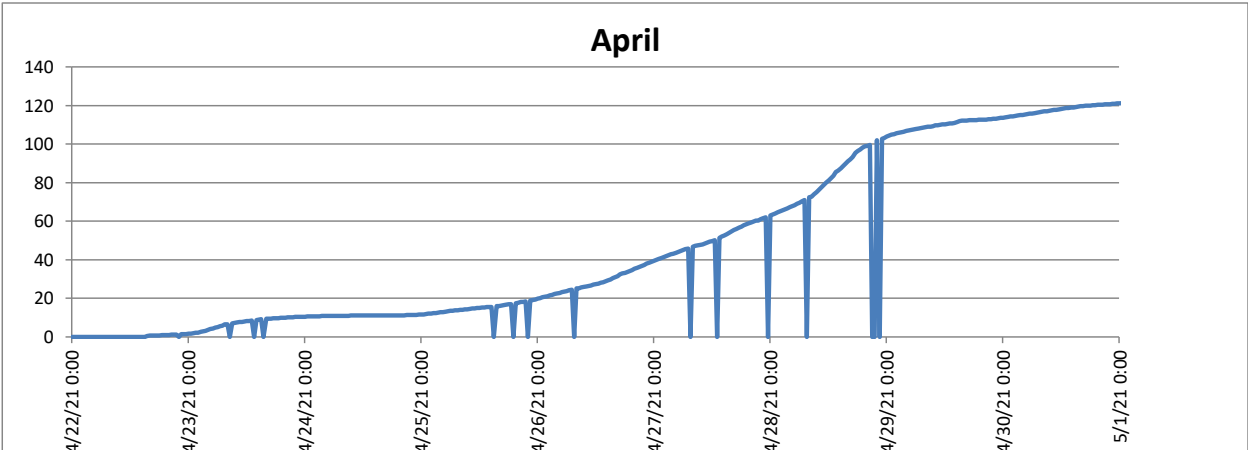
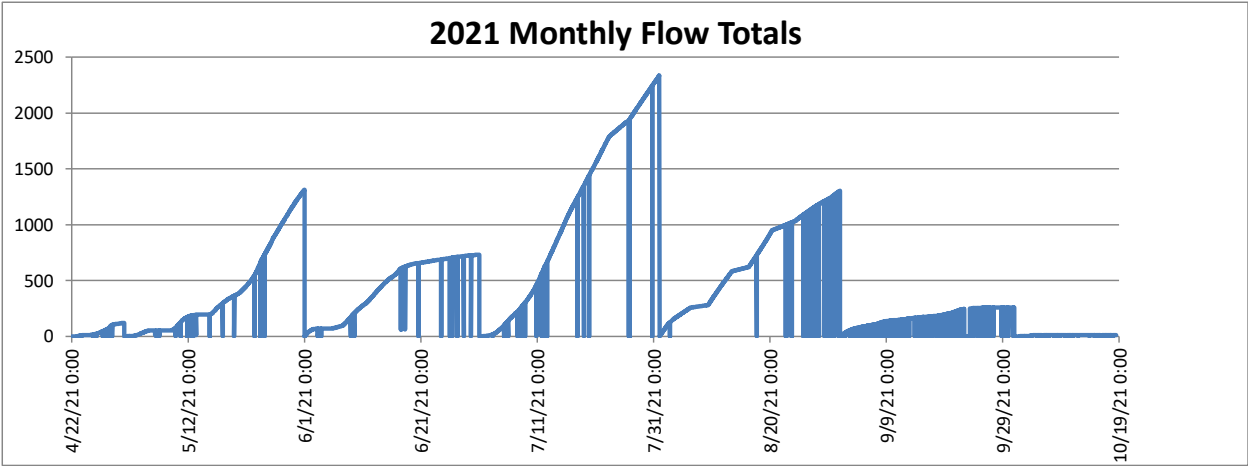


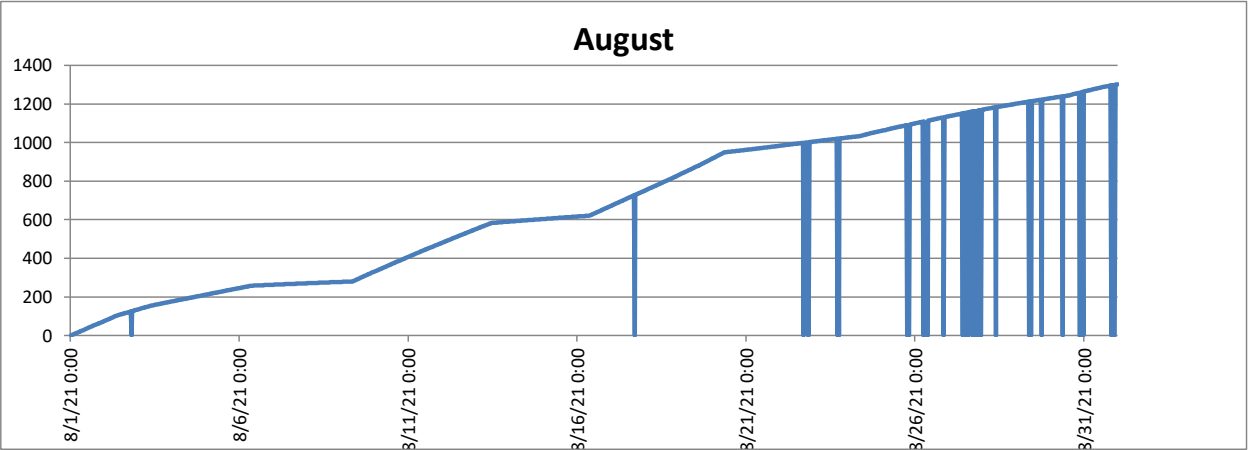
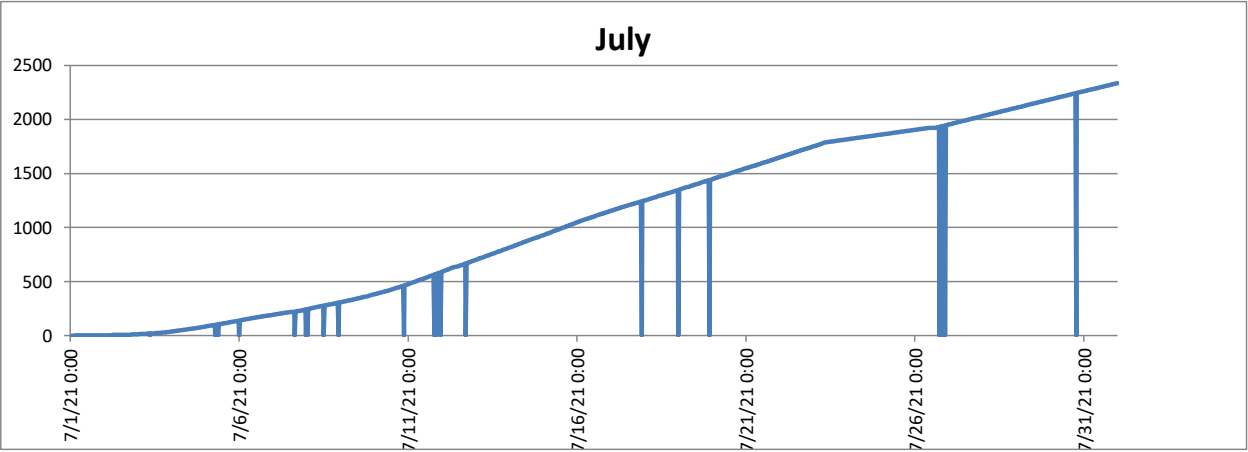
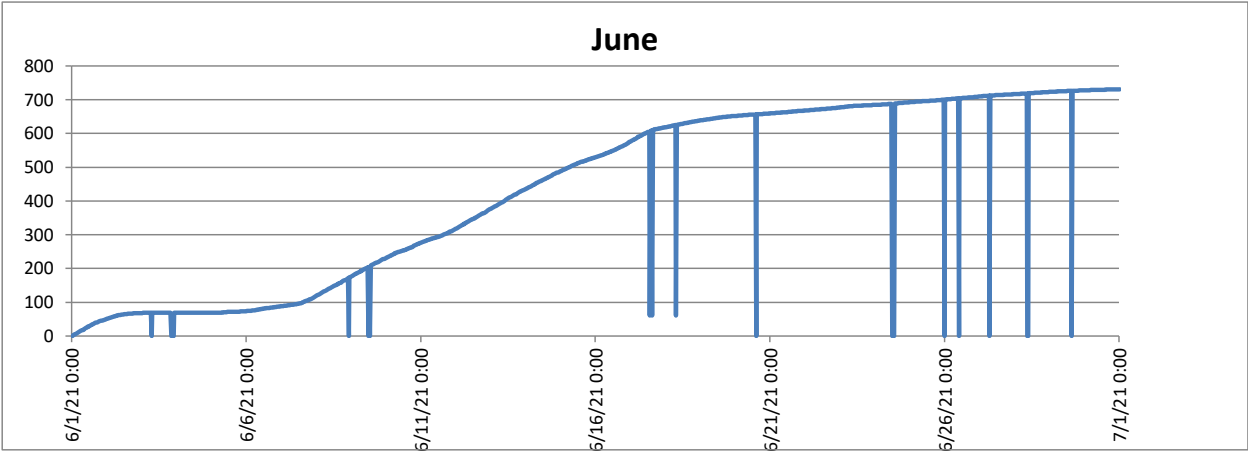
2021 Jensen Grove Inlet Station Flow Totalization

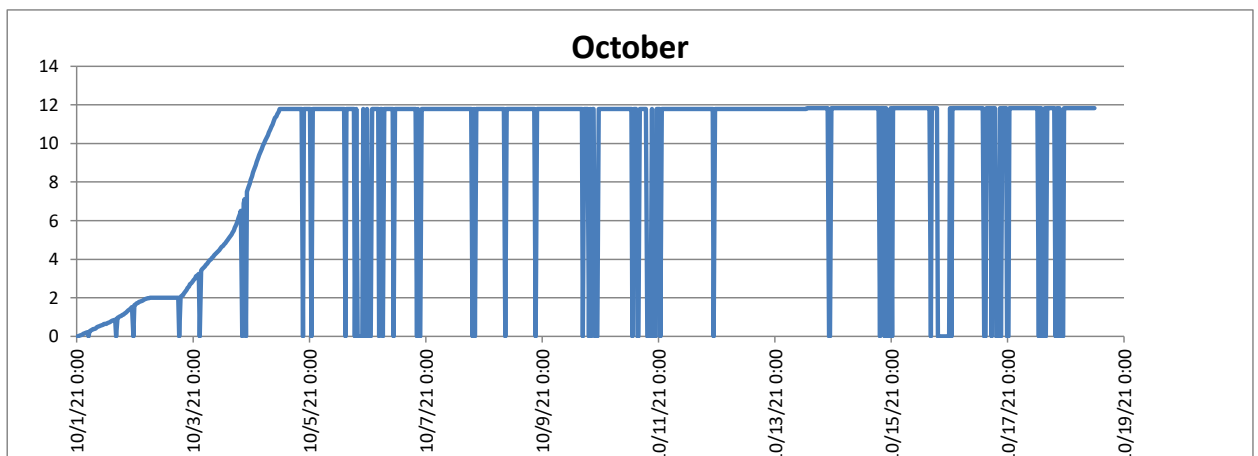
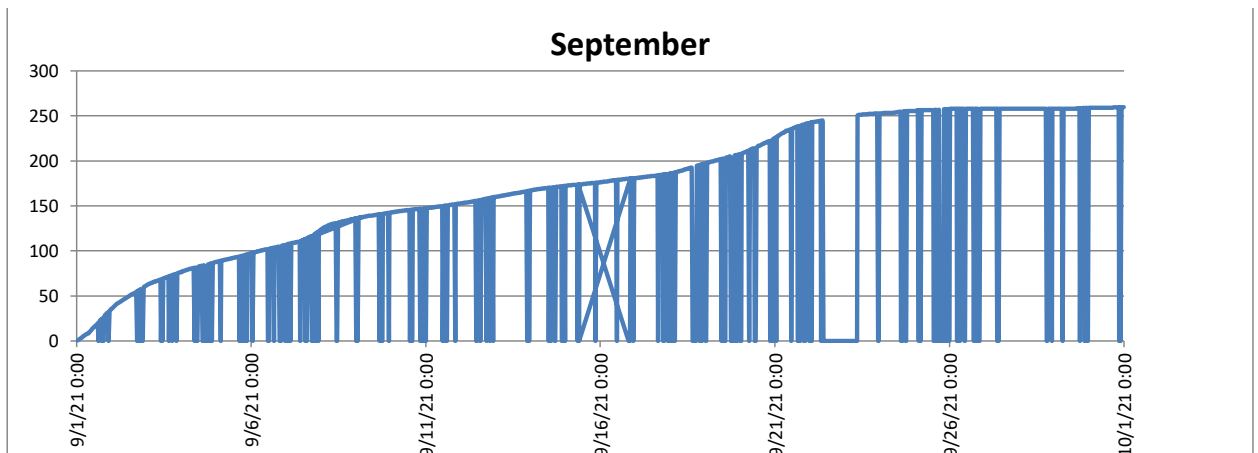
April 22nd to October 18th, 2021 Flow Total: 6074.4 Acre-Ft

April	May	June	July	August	September	October
121.17	1311.99	730.77	2336.79	1302.12	259.73	11.83

NOTE: All totals shown in acre-ft. Raw totalized flow values are calculated in the PLC and reset on the first of each month. See raw values for full details.







**Mattson-Craig Canal Recharge Data - provided by Keith Esplin, ESPAR**

CPU:Craig\_Ma

dsen\_Canal.CR

CR800 CR800.Std.32 800 Recharge

TIMESTAMP	Acre_Feet	Tot_Acre_Feet
9/15/2021	22.195	22.195
9/16/2021	37.653	59.848
9/17/2021	37.609	97.457
9/18/2021	37.522	134.979
9/19/2021	37.516	172.495
9/20/2021	37.524	210.019
9/21/2021	37.62	247.639
9/22/2021	37.52	285.159
9/23/2021	37.673	322.832
9/24/2021	37.475	360.307
9/25/2021	37.691	397.998
9/26/2021	37.648	435.646
9/27/2021	39.197	474.843
9/28/2021	41.342	516.185
9/29/2021	41.548	557.733
9/30/2021	41.567	599.3
10/1/2021	41.402	640.702
10/2/2021	41.495	682.197
10/3/2021	41.738	723.935
10/4/2021	40.291	764.226
10/5/2021	31.411	795.637
10/6/2021	29.132	824.769
10/7/2021	28.007	852.776
10/8/2021	17.669	870.445
10/9/2021	19.078	889.523
10/10/2021	18.806	908.329
10/11/2021	19.089	927.418
10/12/2021	17.653	945.071
10/13/2021	13.816	958.887
10/14/2021	9.424	968.311
10/15/2021	0.079	968.39

\*original data in 15 minute increments, condensed by jbh

**Bass Pond Cumulative Recharge 2021**

date	stage	CFS	AF	Cumulative AF
20-Sep-21	1.50	11.31	11.22	11.22
21-Sep-21	1.46	10.86	21.54	32.76
22-Sep-21	1.42	10.41	20.65	53.41
23-Sep-21	1.35	9.63	19.10	72.51
24-Sep-21	1.35	9.63	19.10	91.61
25-Sep-21	1.36	9.74	19.32	110.93
26-Sep-21	1.34	9.52	18.88	129.81
27-Sep-21	1.32	9.31	18.47	148.28
28-Sep-21	1.14	7.44	14.76	163.04
29-Sep-21	1.18	7.84	15.55	178.59
30-Sep-21	1.18	7.84	15.55	194.14
1-Oct-21	1.08	6.85	13.59	207.73
2-Oct-21	1.04	6.46	12.81	220.54
3-Oct-21	1.08	6.85	13.59	234.13
4-Oct-21	1.08	6.85	13.59	247.71
5-Oct-21	1.06	6.65	13.19	260.90
6-Oct-21	1.08	6.85	13.59	274.49
7-Oct-21	1.08	6.85	13.59	288.08
8-Oct-21	1.10	7.04	13.96	302.04
9-Oct-21	1.24	8.46	16.78	318.82
10-Oct-21	1.26	8.67	17.20	336.02
11-Oct-21	1.16	7.64	15.15	351.17
12-Oct-21	1.22	8.25	16.36	367.54
13-Oct-21	1.24	8.46	16.78	384.32
14-Oct-21	1.22	8.25	16.36	400.68
15-Oct-21	1.16	7.64	15.15	415.83
16-Oct-21	1.14	7.44	14.76	430.59
17-Oct-21	1.12	6.27	12.44	443.03
18-Oct-21	0.92	5.36	10.63	453.66
19-Oct-21	0.88	5.00	9.92	463.58
20-Oct-21	1.18	7.84	15.55	479.13
21-Oct-21	1.16	7.64	15.15	494.28
22-Oct-21	1.14	7.44	14.76	509.04
23-Oct-21	0.88	5.00	9.92	518.96
24-Oct-21	0.86	4.83	9.58	528.54
25-Oct-21	0.84	4.66	9.24	537.78
26-Oct-21	0.96	5.72	11.35	549.13
27-Oct-21	1.10	7.04	13.96	563.09
28-Oct-21	1.08	6.85	13.59	576.68
29-Oct-21	1.12	6.27	12.44	589.11
30-Oct-21	1.16	7.64	15.15	604.27
31-Oct-21	1.16	7.64	15.15	619.42
1-Nov-21	1.16	7.64	15.15	634.57
2-Nov-21	1.16	7.64	15.15	649.73
3-Nov-21	1.16	7.64	15.15	664.88

\*data provided by Keith Esplin, ESPAR

**Cade Carter Diversion Record**

Date	cfs-days	Cumulative AF
1/1/2021	2.28	4.52
1/2/2021	2.34	9.16
1/3/2021	2.42	13.96
1/4/2021	2.3	18.52
1/5/2021	1.97	22.43
1/6/2021	1.76	25.92
1/7/2021	1.67	29.23
1/8/2021	1.82	32.84
1/9/2021	1.13	35.08
1/10/2021	1.21	37.48
1/11/2021	1.1	39.66
1/12/2021	1.56	42.75
1/13/2021	1.93	46.58
1/14/2021	0.99	48.54
1/15/2021	1.15	50.82
1/16/2021	1.58	53.95
1/17/2021	1.67	57.26
1/18/2021	1.31	59.86
1/19/2021	0.86	61.57
1/20/2021	0.89	63.34
1/21/2021	1.33	65.98
1/22/2021	2.2	70.34
1/23/2021	2.42	75.14
1/24/2021	2.7	80.5
1/25/2021	2.62	85.7
1/26/2021	2.49	90.64
1/27/2021	2.7	96
1/28/2021	3.59	103.12
1/29/2021	2.84	108.75
1/30/2021	3.03	114.76
1/31/2021	2.9	120.51
2/1/2021	3.11	126.68
2/2/2021	3.38	133.38
2/3/2021	3.04	139.41
2/4/2021	3	145.36
2/5/2021	2.82	150.95
2/6/2021	2.83	156.56
2/7/2021	2.75	162.01
2/8/2021	2.55	167.07
2/9/2021	2.56	172.15
2/10/2021	2.92	177.94
2/11/2021	1.85	181.61
2/12/2021	2.19	185.95
2/13/2021	4.33	194.54
2/14/2021	3.55	201.58

Date	cfs-days	Cumulative AF
2/15/2021	3.46	208.44
2/16/2021	3.12	214.63
2/17/2021	6.96	228.44
2/18/2021	1.34	231.1
2/19/2021	3.08	237.21
2/20/2021	8.11	253.3
2/21/2021	7.83	268.83
2/22/2021	4.67	278.09
2/23/2021	2.33	282.71
2/24/2021	2.2	287.07
2/25/2021	1.9	290.84
2/26/2021	1.8	294.41
2/27/2021	2.05	298.48
2/28/2021	1.75	301.95
3/1/2021	2.32	306.55
3/2/2021	2.45	311.41
3/3/2021	2.21	315.79
3/4/2021	2.26	320.27
3/5/2021	2.29	324.81
3/6/2021	2.22	329.21
3/7/2021	2.37	333.91
3/8/2021	2.45	338.77
3/9/2021	2.72	344.17
3/10/2021	3.08	350.28
3/11/2021	2.94	356.11
3/12/2021	2.6	361.27
3/13/2021	2.58	366.39
3/14/2021	2.68	371.71
3/15/2021	3.04	377.74
3/16/2021	4.79	387.24
3/17/2021	5.48	398.11
3/18/2021	5.74	409.5
3/19/2021	7.79	424.95
3/20/2021	8.22	441.25
3/21/2021	4.72	450.61
3/22/2021	7.27	465.03
3/23/2021	6.27	477.47
3/24/2021	3.42	484.25
3/25/2021	2.47	489.15
3/26/2021	1.83	492.78
3/27/2021	3.24	499.21
3/28/2021	4.2	507.54
3/29/2021	6.48	520.39
3/30/2021	5.56	531.42
3/31/2021	3.94	539.23
4/1/2021	3.47	546.11

Date	cfs-days	Cumulative AF
4/2/2021	4.36	554.76
4/3/2021	5.77	566.2
4/4/2021	5.77	577.64
4/5/2021	6.63	590.79
4/6/2021	2.81	596.36
4/7/2021	0	596.36
4/8/2021	0	596.36
4/9/2021	0	596.36
4/10/2021	0	596.36
4/11/2021	2.17	600.66
4/12/2021	1.66	603.95
4/13/2021	0	603.95
4/14/2021	0	603.95
4/15/2021	0	603.95
4/16/2021	0.54	605.02
4/17/2021	4.63	614.2
4/18/2021	4.64	623.4
4/19/2021	1.18	625.74
4/20/2021	0	625.74
4/21/2021	0	625.74
4/22/2021	0	625.74
4/23/2021	0	625.74
4/24/2021	2.03	629.77
4/25/2021	4.75	639.19
4/26/2021	2.42	643.99
4/27/2021	0	643.99
4/28/2021	0	643.99
4/29/2021	0	643.99
4/30/2021	1.06	646.09
5/1/2021	6.12	658.23
5/2/2021	7.12	672.35
5/3/2021	3.58	679.45
5/4/2021	0	679.45

\*readings provided by Keith Esplin, ESPAR



# Bingham GWD

## Recharge Documentation

Report Entry 2.1

(all information included in AFA GWD  
labeled *Entries 1.1 & 2.1*)

**From:** [Alan Jackson](#)  
**To:** [Jaxon Higgs](#)  
**Subject:** 2021 Recharge (or lack thereof)  
**Date:** Wednesday, March 30, 2022 10:05:16 AM

Jaxon,

Here is the summary of SRS recharge for last year. The first table shows the storage leases that were done for the recharge. The second table shows the distribution amount to each District. The ASCC recharge reported here is all that I know they did. They will likely report recharge allocations to individuals in the Districts but it's the same recharge that I've summed up here. Still working out the kinks in this accounting process. I suppose they get what they pay for.

Table of leases - 2021

Date	Lessor	Lessee	From Canal	To Canal	Ac-Ft
3/15/2021	Untied Canal Co <b>copy of lease at WD01</b>	BGWD/AFAGWD	Trego	Danskin	800
3/15/2021	Untied Canal Co	BGWD/AFAGWD	Trego	Trego	158
3/15/2021	Wearyrick Ditch Co	BGWD/AFAGWD	Wearyrick	Wearyrick	173
3/15/2021	Peoples Canal Co	BGWD/AFAGWD	Peoples	Peoples	7,262
3/18/2021	Aberdeen-Springfield Canal Co	BGWD/AFAGWD	ASCC	ASCC	10,000
3/18/2021	Corbett Slough Ditch Co	BGWD/AFAGWD	Corbett	Corbett	241
3/22/2021	Parsons Ditch Co	BGWD/AFAGWD	Parsons	Parsons	230
3/29/2021	Blackfoot Irrigation Co <b>lease attached</b>	BGWD/AFAGWD	Blackfoot	Blackfoot	927
3/29/2021	Blackfoot Irrigation Co	BGWD/AFAGWD	Blackfoot	Blackfoot	568
4/6/2021	Watson Canal Co	BGWD/AFAGWD	Watson	Watson	113
11/10/2021	Riverside Canal Co	BGWD/AFAGWD	Riverside	Riverside	185
				Total	20,657

Recharge designation - 2021

District	Recharge (af)
BGWD	9,973
AFAGWD	10,684

Alan Jackson  
 Manager - Bingham Ground Water District  
 (208) 680-9838

# Bonneville-Jefferson GWD

## Recharge Documentation

Report Entries 3.1 & 3.2

**WATER DISTRICT #1 RENTAL POOL**  
**APPLICATION TO RENT STORAGE FROM THE COMMON POOL SUPPLY**

Bonneville Jefferson Ground Water District (applicant) hereby requests to rent <sup>80</sup>100 (acre-feet) of storage from the Water District #1 Rental Pool with the enclosed rental fees of \$20.00/AF for the irrigation season 2020. The acceptance and approval of this rental request by the Water District #1 Watermaster is subject to the adopted Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765.

**Description of Point of Diversion:**

Name of River or Stream from which rental is diverted: Snake River

Canal or Pump Name & location: Butte Market Lake 13057025

Place of Use description: Poitevin Canal Recharge Well

Water Right Appurtenant to Lands: \_\_\_\_\_



If the application is for an amount greater than 100 acre-feet for irrigation purposes, the Applicant, by checking this box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said land and was legally irrigated prior to the 2019 Irrigation year...or...had approved storage rentals or private leases applied to this place-of-use in any year from 2006 through 2018. Failure to meet these conditions contained in Rental Pool Procedure 3.4 may be grounds for denying the application.

**Applicant Signature and Address:**

Print Name: Bonneville Jefferson Ground Water District

Signature: [Signature]

Date: 9/17/2021

Address: PO Box 51121, Idaho Falls, ID 83405 Phone: 208-520-7632

If the applicant is pumping water from a canal that diverts water from the Snake River or its tributary and is applying to rent 100 ac-ft or less conveyed through the canal to the applicant's point of diversion, pursuant to Rule 5.2.104, the applicant must submit written consent from the canal operator to have the rental storage delivered through the canal.

Canal Operator Name and Title: Mark Muesel PRESIDENT

Canal Operator Consent Signature: [Signature]



#### Poitevin Injection Site Test 2021

Eighty acre-feet of water was rented from the common pool small rental bank of WD01 to test the injection well. Idaho Water Resource Board staff was on site to perform a slug test including reading flow rates. Bonneville Jefferson GWD consultants and Butte-Market Lake Canal Company watermaster monitored flow and took flowmeter readings. The test started September 29<sup>th</sup> at 1:30 PM and ended October 9<sup>th</sup> at 3:39 pm. McCrometer Ultramag serial number up 20-1362 started at 0.0 acre-ft and ended at 89.1 acre-ft.



### Poitevin Injection Site – Water Quality Monitoring Map



Snake River Valley Irrigation District (lessor) agrees to lease 5,000 acre-feet of storage to Bonneville Jefferson Ground Water District, a non-profit corporation,

**Description of Lease:**

The purpose for which the storage will be put to use: Recharge

Point-Of-Diversion for leased storage: Snake River Valley Irrigation District

Place-of-use for leased storage: Snake River Valley Irrigation District Recharge

\*Lessee has until **November 30<sup>th</sup>** of the year of request to assign a point of diversion. If the water is not assigned and used on or before **November 30<sup>th</sup>**, any unused or unassigned storage will revert back to the lessor.

☐ If the purpose for which this leased storage will be put to use is irrigation, the Lessee, by checking this box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said land and was legally irrigated prior to the 2021 Irrigation year...or.....had approved storage rentals or private leases applied to this place-of-use in any year from 2006 through 2020. Failure to meet these conditions contained in Rule 3.5 of the Rental Pool Procedures may be grounds for denying the application.

Signature of Lessee [Signature] Date Sept 16, 2021  
Bonneville Jefferson Ground Water District

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other space holders storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765 The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

Signature of Lessor [Signature] Date Sept 14-21  
Snake River Valley Irrigation District

\*\*\*\* This lease application is good for one (1) irrigation year only. A new application must be submitted every year in which the storage is intended to be lease and used.

       An Idaho Water Resources Board surcharge (10% if the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease.

## WATER LEASE AND AGREEMENT TO RECHARGE LEASED WATER

This Storage Water Lease and Agreement Concerning Recharge of Leased Water ("Lease") is entered effective this 1st day of January 2021 by and between Snake River Valley Irrigation District ("District"), an Idaho quasi-public entity, and Bonneville Jefferson Ground Water District ("GWD"), an Idaho Ground Water District.

### Recitals

- A. District is an irrigation district providing natural flow and storage water for irrigation of the lands of its patrons near Shelly, Idaho.
- B. GWD is an Idaho Ground Water District duly organized under the ground water district laws of the State of Idaho, whose members own ground water rights located within the boundaries of GWD in its designated area in Bonneville and Jefferson Counties, or those who have contracted with GWD in order to have coverage for mitigation of any impacts caused to senior water rights as a result of pumping its junior water rights from the Eastern Snake Plain Aquifer.
- C. District has storage water entitlements in American Falls and Pallsades Reservoirs and is willing to annually make certain amounts of its storage and natural flow recharge rights available to GWD for use in any mitigation or replacement water obligations GWD may have ("Rented Water")
- D. Furthermore, in order to make the Rented Water qualify as mitigation for GWD's needs, District is also willing to recharge the Rented Water at locations which are authorized for District's use and which will be recognized by the Idaho Department of Water Resources as required GWD mitigation credit for impacts agreed to be mitigated by Idaho Ground Water Appropriators ("IGWA") in fulfillment of GWD's portion of the agreement known as the 2015 IGWA/SWC settlement agreement. District will provide a report of the recharge that includes the total volume recharged, the amount of recharge delivered to each recharge site, and daily or weekly flow measurements to show when the recharge occurred.
- E. Therefore, the Parties wish to enter a two (2) year lease and recharge agreement upon the terms and conditions as described below:

### Terms of Lease

For valuable consideration described below, the parties covenant and agree as follows:

District does hereby lease to GWD and GWD hereby leases from District Rented Water from District's storage or District's recharge water right for the purpose of recharge credit towards GWD's portion of mitigation owed under the IGWA/SWC settlement agreement.

A. Two (2) year lease: Beginning January 1, 2021. Ending December 31, 2022

For a period of two (2) years with 3 one year options to renew beginning January 1, 2021, GWD shall lease and recharge up to 5,000-acre feet of Rented Water for the rental price of \$28.00 per acre foot, (\$21.00



for rental water and a \$7.00 carrying fee) payable one-half (50%) prior to recharge of Rented Water and the balance following the recharge of the total sum of Rented Water successfully recharged for each calendar year.

Recharge shall be done by District at locations chosen by District, which are available to District for such purposes and which are authorized by IDWR. GWD shall pay District the sum of \$7.00 per acre foot as a carrying fee for every acre foot of Rented Water recharged.

**B. Right of First Refusal for Additional Rented Water:**

District hereby grants to GWD a right of first refusal which is defined as follows: Should District desire to lease additional Rented Water to a third party Lessee, District shall obtain from such third party lessee a bona fide offer to lease such additional Rented Water, stating the terms and conditions upon which the lease is to be made. District shall give verbal notification to GWD of District's intention to lease.

If GWD fails to elect to exercise its right to match the terms and conditions of the proposed lease to a third party, then the District is free to lease the additional Rented Water to the third-party Lessee.

Notwithstanding the above, the right of first refusal shall not apply to leases District may make with ground water pumpers located within its own district boundaries.

**Administrative Fees.** GWD shall pay all administrative fees imposed by Water District 01 and the Idaho Water Resource Board.

**Required Approvals.** Each party shall be responsible for obtaining all approvals of this lease and recharge required by their members/electors as well as affiliated and state organizations, including approval of it as a private lease or two-party stored water lease under the Water District 1 Rental Pool Procedures for any stored water uses. If appropriate approvals are not provided within appropriate times, this lease shall, at either party's option, be null and void.

**Cooperation.** The parties agree to fully cooperate with each other in implementing the terms and conditions of this lease, including working with each other to obtain any state or federal approvals required to recharge and receive credit for recharge of the Rented Water

**Emergency.** If District determines that meeting the terms of this lease will leave its electors with materially insufficient irrigation water for the upcoming irrigation season, and to avoid such a shortage it must lease and recharge less than the full Rental Water, District shall notify GWD in writing by March 1 of such year of District's intent to implement such a reduction. Upon such notice District shall be allowed to reduce the Rental Water to a lesser amount.

**Breach.** If either party defaults in the performance of its obligations under this Lease, and such default is not cured within thirty (30) days after receipt of written notice thereof, the non-breaching party, at its option, may elect any or all of the following cumulative remedies:

- (a) Terminate this Lease;
- (b) Seek specific performance of this Lease.

Miscellaneous.

Any storage water not recharged during any calendar year shall remain in the District's Water District 01 account and belong to District.

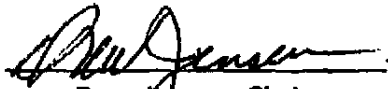
The lease may be subject to such other terms and conditions contained in Water District 01's rental pool procedures or the Idaho Water Resource Board's Rental Pool Rules.

This lease may be executed in counterparts.

The parties shall execute all additional documents or take all further actions reasonably necessary to fulfill the purposes of this lease.

This lease shall be binding on the parties, their successors and assigns.

Snake River Valley Irrigation District

 - Date 10-19-2020  
Drew Jensen - Chair

Bonneville Jefferson Groundwater District

 - Date 10/23/2020  
Stephanie Mickelsen - Chair

**Jaxon Higgs**

---

**From:** Bob Turner <bob.igwa@gmail.com>  
**Sent:** Friday, April 01, 2022 7:04 AM  
**To:** Jaxon Higgs  
**Subject:** Fwd: Flow totals for recharge from Snake River Irrigation

SRV report

----- Forwarded message -----

From: **David Christensen** <[davidcharles1500@gmail.com](mailto:davidcharles1500@gmail.com)>  
Date: Fri, Apr 1, 2022 at 6:50 AM  
Subject: Flow totals for recharge from Snake River Irrigation  
To: Bob Turner <[bob.igwa@gmail.com](mailto:bob.igwa@gmail.com)>

I sent reports for April, May, and June. We are using 2500 AF from Jensen Grove during that period, along 1,250 AF from our Steffler Pit and 1,250 AF from our Frandsen pit to get to the total of 5,000 AF required as per SRVID's contract with Bonneville/Jefferson for recharge. Please call with any questions. 208-520-4037.

Thank you.

David Charles Christensen

**Snake River Valley Irrigation District - Recharge Readings for BJGWD Recharge**

Readings in cumulative acre feet and reset every month.

Data condensed by JBH. Original provided by David Christensen.

Date	Reading Count	Steffler Pit	Jensen Grove Inlet	Jensen Grove Outlet	Frandsen Pit
4/6/2021	29	0.00	0.0	0.00	130.09
4/7/2021	49	0.00	0.0	0.00	147.13
4/8/2021	48	0.00	0.0	0.00	158.92
4/9/2021	48	0.00	0.0	0.00	178.50
4/10/2021	48	0.00	0.0	0.00	198.19
4/11/2021	48	0.00	0.0	0.00	217.76
4/12/2021	48	0.00	0.0	0.00	237.37
4/13/2021	48	0.00	0.0	0.00	256.99
4/14/2021	48	0.00	0.0	0.00	276.58
4/15/2021	48	0.00	0.0	0.00	296.23
4/16/2021	48	0.00	0.0	0.00	316.30
4/17/2021	48	0.00	0.0	0.00	335.58
4/18/2021	48	0.00	0.0	0.00	355.64
4/19/2021	48	0.00	0.0	0.00	375.20
4/20/2021	48	0.00	0.0	0.00	395.84
4/21/2021	48	0.00	0.0	0.00	423.27
4/22/2021	48	0.00	1.6	0.00	449.59
4/23/2021	48	0.00	10.5	0.00	477.08
4/24/2021	48	0.00	11.5	0.00	503.47
4/25/2021	48	0.00	19.5	0.00	530.31
4/26/2021	48	0.00	39.0	0.00	557.71
4/27/2021	48	0.00	0.0	0.00	583.98
4/28/2021	48	0.00	103.3	0.00	610.80
4/29/2021	48	0.00	113.5	0.00	638.25
4/30/2021	<b>48</b>	<b>0.00</b>	<b>121.0</b>	<b>0.00</b>	<b>664.63</b>
5/1/2021	48	0.00	2.5	0.00	26.13
5/2/2021	48	0.00	8.8	0.00	53.08
5/3/2021	48	0.00	29.1	0.00	80.17
5/4/2021	48	0.00	48.5	0.00	107.33
5/5/2021	48	0.00	52.9	0.00	134.19
5/6/2021	48	0.00	52.9	0.00	161.37
5/7/2021	48	0.00	52.9	0.00	188.65
5/8/2021	48	0.00	52.9	0.00	215.38
5/9/2021	48	0.00	85.1	0.00	241.98
5/10/2021	48	0.00	142.1	0.00	268.81
5/11/2021	48	0.00	176.1	0.00	296.20
5/12/2021	48	0.00	190.4	0.00	322.69
5/13/2021	48	0.00	195.1	0.00	350.23
5/14/2021	48	0.00	195.1	0.00	377.47
5/15/2021	48	0.00	200.9	0.00	404.13
5/16/2021	48	0.00	254.6	0.00	431.83

Date	Reading Count	Steffler Pit	Jensen Grove Inlet	Jensen Grove Outlet	Frandsen Pit
5/17/2021	48	0.00	297.9	0.00	458.32
5/18/2021	48	0.00	337.8	0.00	485.90
5/19/2021	48	0.00	365.2	0.00	513.10
5/20/2021	48	0.00	397.2	0.00	540.12
5/21/2021	48	0.00	449.0	0.00	566.40
5/22/2021	48	0.00	513.6	0.00	593.64
5/23/2021	48	0.00	607.8	0.00	621.46
5/24/2021	48	0.00	716.6	0.00	648.12
5/25/2021	48	0.00	810.1	0.00	674.95
5/26/2021	48	0.00	909.2	0.00	701.76
5/27/2021	48	0.00	997.3	0.00	729.41
5/28/2021	48	0.00	1080.7	0.00	756.17
5/29/2021	48	0.00	1164.4	0.00	783.38
5/30/2021	48	0.00	1240.7	0.00	810.65
<b>5/31/2021</b>	<b>48</b>	<b>0.00</b>	<b>1310.7</b>	<b>0.00</b>	<b>838.64</b>
6/1/2021	48	0.00	49.7	0.00	26.37
6/2/2021	48	0.00	68.2	0.00	54.47
6/3/2021	48	0.00	68.8	0.00	81.02
6/4/2021	48	0.00	68.8	0.00	108.95
6/5/2021	48	0.00	73.7	0.00	135.96
6/6/2021	48	0.00	87.8	0.00	163.80
6/7/2021	48	0.00	117.3	0.00	191.17
6/8/2021	48	0.00	174.2	0.00	218.38
6/9/2021	48	0.00	230.0	0.00	244.70
6/10/2021	48	1683.25	275.3	0.00	271.54
6/11/2021	48	1683.25	316.3	0.00	298.63
6/12/2021	48	1683.25	375.7	0.00	326.59
6/13/2021	48	1683.25	434.0	0.00	353.17
6/14/2021	48	1683.25	486.9	0.00	380.14
6/15/2021	48	1683.25	529.1	0.00	407.73
6/16/2021	48	1683.25	575.1	0.00	434.99
6/17/2021	48	0.00	618.0	0.00	462.45
6/18/2021	48	998.07	638.2	0.00	489.54
6/19/2021	48	1003.98	651.7	0.00	516.23
6/20/2021	48	1012.95	659.3	0.00	543.75
6/21/2021	48	1029.72	667.7	0.00	570.89
<b>6/22/2021</b>	<b>48</b>	<b>1061.02</b>	<b>677.0</b>	<b>0.00</b>	<b>598.72</b>

**Totals:            1061.02            2108.63            0.00            2102.00**

**Grand Total:       5272       \*total BJGWD portion is 5,000 acre-ft**

# Henry's Fork & Madison GWD

## Recharge Documentation

Report Entry 4.1

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

**WATER SUPPLY BANK LEASE CONTRACT No. 1335**

This Lease Contract ("**Lease**") is between the Idaho Water Resource Board ("**Board**"), and

**LESSOR:** EGIN BENCH CANALS INC  
PO BOX 15  
ST ANTHONY, ID 83445

SUPPORT DATA  
IN FILE # 21-12897

RECEIVED  
APR 22 2021  
DEPARTMENT OF  
WATER RESOURCES

**RECITALS**

1. The Board is authorized under chapter 17, title 42, Idaho Code to operate a water supply bank and to contract with lessors to act as an intermediary in facilitating the rental of water.
2. The Lessor has filed a completed application to lease water rights described below into the Water Supply Bank on forms supplied by the Idaho Department of Water Resources and received by the Department on October 19, 2020.
3. The Director of the Idaho Department of Water Resources has reviewed the application for compliance with the Water Supply Bank rules and has approved the Lease subject to conditions listed below.

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

## WATER SUPPLY BANK LEASE CONTRACT No. 1335

NOW, THEREFORE, in consideration of the mutual covenants and contracts herein contained, and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. **WATER RIGHTS:** The Lessor shall lease and the Board shall accept into the Bank the Applicant's water rights described as follows:

### Summary of Water Rights or Portions Leased to the Bank

Water Right No.	Priority Date	Source	Diversion Rate (CFS)	Acres (AC)	Diversion Volume (AF)
21-12897	4/25/1885	HENRYS FORK, tributary to SNAKE RIVER	14.7	448	Not Stated
21-12912	4/1/1939	HENRYS FORK, tributary to SNAKE RIVER	1.69	448	Not Stated
21-12934	3/1/1890	HENRYS FORK, tributary to SNAKE RIVER	14.7	448	Not Stated
<b>Total Annual Combined Limit</b>			<b>31.1</b>	<b>448</b>	<b>Not Stated</b>
21-12908	4/1/1939	HENRYS FORK, tributary to SNAKE RIVER	1.76	1073	Not Stated
21-12921	7/29/1892	HENRYS FORK, tributary to SNAKE RIVER	7.35	1073	Not Stated
21-12922	6/21/1888	HENRYS FORK, tributary to SNAKE RIVER	44.1	1073	Not Stated
<b>Total Annual Combined Limit</b>			<b>53.22</b>	<b>1073</b>	<b>Not Stated</b>
21-12910	4/1/1939	HENRYS FORK, tributary to SNAKE RIVER	2.57	534	Not Stated
21-12928	6/14/1895	HENRYS FORK, tributary to SNAKE RIVER	29.4	534	Not Stated
<b>Total Annual Combined Limit</b>			<b>31.9</b>	<b>534</b>	<b>Not Stated</b>
21-12961	2/9/1897	HENRYS FORK, tributary to SNAKE RIVER	16.2	271	Not Stated
21-12962	2/9/1897	HENRYS FORK, tributary to SNAKE RIVER	8.81	271	Not Stated
<b>Total Annual Combined Limit</b>			<b>16.2</b>	<b>271</b>	<b>Not Stated</b>
<b>Combined Limit Totals</b>			<b>132</b>	<b>2,326</b>	<b>Not Stated</b>



STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

## WATER SUPPLY BANK LEASE CONTRACT No. 1335

### Summary of Water Rights Elements Rentable From the Bank

Water Right	Diversion Rate (CFS)	Diversion Volume (AF)	Acres (Limited) (AC)	Rate Per Acre (CFS/AC)	Volume Per Acre (AF/AC)
21-12897	14.7	1,570	448	0.03	3.5
21-12922	44.1	3,760	1073	0.04	3.5
21-12934	14.7	1,570	448	0.03	3.5
21-12921	7.35	3,760	1073	0.01	3.5
21-12928	29.4	1,870	534	0.06	3.5
21-12961	16.2	949	271	0.06	3.5
21-12962	8.81	949	271	0.03	3.5
21-12912	1.69	1,570	448	0.01	3.5
21-12908	1.76	3,760	1073	0.01	3.5
21-12910	2.57	1,870	534	0.01	3.5
<b>Combined Limit Totals</b>	<b>132</b>	<b>8,140</b>	<b>2,326</b>	<b>0.06</b>	<b>3.5</b>

*\* The water right elements rentable have been reduced from the water right elements leased to account for combined limits.*

2. **COMPENSATION:** The Lessor shall accept and the Board shall pay compensation determined by the amount of water rented under the following rental rate during such times as the water is rented from the Bank over the term of this Lease.

**Minimum Payment Acceptable: Current Rental Rate**

3. **TERM OF LEASE:** The term of this lease shall be January 1, 2021 to December 31, 2025. This Lease shall bind the parties and take effect when both parties have signed it.
4. **WATER SUPPLY BANK CONDITIONS OF ACCEPTANCE:** The Lessor shall abide by all terms and conditions contained in the Water Supply Bank Conditions of Acceptance, attached hereto as "Attachment A" and incorporated herein by this reference.
5. **CHANGE OF WATER RIGHT:** This lease specifies water right elements including but not limited to: diversion rates; diversion volumes; number of acres authorized to be irrigated; places of use; points of diversion; beneficial uses; and seasons of use. During the term of this lease, if a water right is administratively changed due to a water right split and renumbering, this lease may be reduced by an equal amount to reflect the water right elements as legally defined under the water right. If a lease contract cannot be reduced sufficient to reflect the legal definition of a water right as amended through a water right split and/or water right transfer, the Board may release the water right from the Water Supply Bank.
6. **ASSIGNMENT OF CONTRACT:** This lease is between the Board and the Lessor, who is the recognized owner or designated representative of the recognized owners of water rights described herein. Should ownership of any part of a water right herein described change during the term of this lease, either through a water right split, a water right transfer, sale of property to which the water right is appurtenant, or through any other recognized water right reassignment, the lease benefits and obligations to the conditions of acceptance for any such water rights will be assigned to the new owners.
7. **DUPLICATE ORIGINAL:** This Lease is executed in duplicate. Each of the documents with an original signature of each party shall be an original.

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

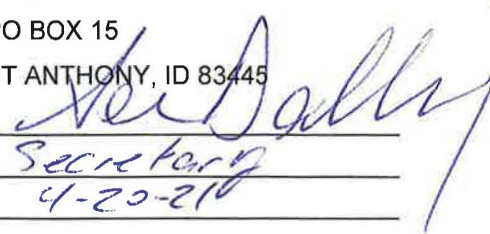
**WATER SUPPLY BANK LEASE CONTRACT No. 1335**

IN WITNESS WHEREOF, the parties have executed this Contract on the date following their respective signatures.

**LESSOR:** EGIN BENCH CANALS INC

PO BOX 15

ST ANTHONY, ID 83445

By 

Title Secretary

Date 4-20-21

**IDAHO WATER RESOURCE BOARD**

322 East Front Street

P.O. Box 83720

Boise, ID 83720-0098

By 

Brian Patton, Acting Administrator  
Idaho Water Resource Board

Date 4/23/21

Lease approved by IDWR 

Date 4/23/21



STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

## WATER SUPPLY BANK LEASE CONTRACT No. 1335

### ATTACHMENT A WATER SUPPLY BANK CONDITIONS OF ACCEPTANCE

The water rights or portions thereof leased to the bank are described as follows:

**Source and Location of Point(s) of Diversion for Water Right No(s): 21-12897, 21-12934, 21-12912**

HENRYS FORK      L 8SENE      Sec. 1      Twp 07N      Rge 40E      FREMONT County

**Source and Location of Point(s) of Diversion for Water Right No(s): 21-12922, 21-12921, 21-12908**

HENRYS FORK      L 6SENE      Sec. 1      Twp 07N      Rge 40E      FREMONT County

HENRYS FORK      L 7NENE      Sec. 33      Twp 08N      Rge 41E      FREMONT County

**Source and Location of Point(s) of Diversion for Water Right No(s): 21-12928, 21-12910**

HENRYS FORK      L 6NESE      Sec. 2      Twp 07N      Rge 40E      FREMONT County

**Source and Location of Point(s) of Diversion for Water Right No(s): 21-12961, 21-12962**

HENRYS FORK      L 4NWSE      Sec. 14      Twp 08N      Rge 41E      FREMONT County

Water Right	Beneficial Use	Season of Use			Diversion Rate (CFS)	Volume (AF)
		From		To		
21-12897	IRRIGATION	04/01	to	10/31	14.7 cfs	1,570 AF
21-12934	IRRIGATION	04/01	to	10/31	14.7 cfs	1,570 AF
21-12912	IRRIGATION	04/01	to	10/31	1.69 cfs	1,570 AF
21-12922	IRRIGATION	04/01	to	10/31	44.1 cfs	3,760 AF
21-12921	IRRIGATION	04/01	to	10/31	7.35 cfs	3,760 AF
21-12908	IRRIGATION	04/01	to	10/31	1.76 cfs	3,760 AF
21-12928	IRRIGATION	04/01	to	10/31	29.4 cfs	1,870AF
21-12910	IRRIGATION	04/01	to	10/31	2.57 cfs	1,870 AF
21-12961	IRRIGATION	04/01	to	07/01	16.2 cfs	949 AF
21-12962	IRRIGATION	07/02	to	10/31	8.81 cfs	949 AF
<b>Totals:</b>					132 cfs	8,140 AF

**PLACES OF USE TO BE IDLED UNDER THIS LEASE:**

**IRRIGATION;** Large POU Not Displayed, See attached Map

Total Acres: 2,326

### ADDITIONAL CONDITIONS OF ACCEPTANCE

1. The water rights referenced above will be rented from the bank at the current rental rate.
2. There is no rental payment to the lessor of the water right if the right or a part thereof is not rented from the bank.

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

## WATER SUPPLY BANK LEASE CONTRACT No. 1335

3. While a right is in the bank, the lessor may not use the right without approval of the Department even if the right is not rented from the bank. Any violation of the terms of this lease may result in enforcement procedures pursuant to Idaho Code § 42-351 for illegal diversion and use of water and may include civil penalties pursuant to Idaho Code § 42-1701B.
4. A right accepted into the bank stays in the bank until the Board releases it, or the lease term expires. A right may be released from the bank upon request, provided the Board approves the release. Unless approved by the Department, leased rights may not be immediately available for release.
5. While a water right is in the bank, forfeiture provisions are stayed pursuant to Idaho Code § 42-223(5).
6. Rental of water under this right is subject to the limitations and conditions of approval of the water right.
7. Failure of the right holder to comply with the conditions of acceptance is cause for the Director to rescind acceptance of the lease.
8. Acceptance of a right into the bank does not, in itself, confirm the validity of the right or any elements of the water right, or improve the status of the right including the notion of resumption of use. It does not preclude the opportunity for review of the validity of this water right in any other Department application process.
9. In accordance with Idaho Code § 42-248 and § 42-1409(6), all owners of water rights are required to notify the Department of any changes in mailing address or change in ownership of all or part of a water right. Notice must be provided within 120 days of the change.
10. If a water right leased into the Water Supply Bank is sold or conveyed during the lease term, and if the leased right was rented, the rental proceeds will be disbursed in the following manner regardless of any arrangements between the buyer(s) and seller(s) to the contrary:
  - a. Rental payments will go to the lessor(s) of record at the beginning of the rental season, even if the Department processes a Notice of Change in Water Right Ownership during the rental season.
  - b. New lessor(s) of record will receive payment for any subsequent rental seasons.
11. The water right(s) is leased to the bank subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources.
12. Unleased portions of rights 21-12897, 21-12912 and 21-12934 are limited to irrigation of a combined total of 5,654.6 acres in a single irrigation season.
13. Unleased portions of rights 21-12908, 21-12921 and 21-12922 are limited to irrigation of a combined total of 13,523.7 acres in a single irrigation season.
14. Unleased portions of rights 21-12928 and 21-12910 are limited to irrigation of a combined total of 6,737.8 acres in a single irrigation season.
15. Unleased portions of rights 21-12961 and 21-12962 are limited to irrigation of a combined total of 3,424.9 acres and a combined diversion rate of 203 cfs in a single irrigation season.
16. Unleased portions of rights 21-12897, 21-12912, 21-12934, 21-12908, 21-12921, 21-12922, 21-12910, 21-12928, 21-12961, and 21-12962 are limited to the irrigation of a combined total of 27,776.2 acres.
17. The unleased portion of water right 21-12922 is limited to a maximum diversion rate of 556 cfs from 4/1 – 7/1, and from 7/17 – 7/31, and a maximum diversion rate of 456 cfs from 7/2 – 7/16, and from 8/1 – 10/31



STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

**WATER SUPPLY BANK LEASE CONTRACT No. 1335**

18. The unleased portion of water right 21-12928 is limited to a maximum diversion rate of 371 cfs from 4/1 – 7/1, and from 7/17 – 7/31, and a maximum diversion rate of 331 cfs from 7/2 -7/16, and from 8/1 – 10/31
19. The unleased portion of water right 21-12934 is limited to a maximum diversion rate of 185 cfs from 4/1 – 7/1, and from 7/17 – 8/1, and a maximum diversion rate of 85.3 cfs from 7/2 -7/16, and from 8/2 – 10/31
20. Water is delivered through the Egin Canal for water rights 21-12897, 21-12912 and 21-12934.
21. Water is delivered through the St Anthony Union Canal and St. Anthony Union Feeder for water rights 21-12908, 21-12921 and 21-12922.
22. Water is delivered through the Independent Canal for water rights 21-12910 and 21-12928.
23. Water is delivered through the Last Chance Canal for water rights 21-12961 and 21-12962.
24. The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B(2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.

## Henry's Fork GWD &amp; Madison GWD Recharge 2021

Date	New Recharge Canal	Old Recharge Canal	Tibbits Pond
Measurement Equipment	Rated Channel Section + In-Situ Troll 300 Transducer with internal Data Logger	Rated Channel Section + In-Situ Troll 300 Transducer with internal Data Logger	Cipolletti Weir + In- Situ Troll 300 Transducer with internal Data Logger
	Acre Feet	Acre Feet	Acre Feet
1-Apr	15.0	0.0	0.0
2-Apr	39.6	0.0	0.0
3-Apr	40.1	0.0	0.0
4-Apr	35.5	0.0	0.0
5-Apr	34.1	0.0	0.0
6-Apr	34.4	0.0	0.0
7-Apr	29.2	0.0	0.0
8-Apr	22.8	0.0	0.0
9-Apr	16.3	0.0	0.0
10-Apr	42.0	0.0	0.0
11-Apr	63.0	0.0	0.0
12-Apr	55.1	0.0	0.0
13-Apr	47.7	0.0	0.0
14-Apr	36.5	36.9	0.0
15-Apr	35.1	38.7	0.0
16-Apr	35.3	40.7	0.0
17-Apr	34.5	45.4	0.0
18-Apr	27.8	54.9	0.0
19-Apr	22.2	54.3	0.0
20-Apr	48.4	62.1	0.0
21-Apr	58.4	57.1	0.0
22-Apr	29.3	57.1	0.0
23-Apr	11.4	53.6	0.0
24-Apr	9.8	60.7	0.0
25-Apr	34.4	54.9	0.0
26-Apr	24.4	54.3	0.0
27-Apr	6.4	51.4	0.0
28-Apr	3.0	51.4	0.0
29-Apr	0.0	0.0	4.1
30-Apr	0.0	44.4	3.0
1-May	0.0	47.4	5.0
2-May	0.0	52.2	6.0
3-May	0.0	61.3	16.2
4-May	0.0	56.7	19.1
5-May	0.0	59.9	18.8
6-May	0.0	48.8	10.9
7-May	0.0	46.0	6.9
8-May	0.0	54.5	8.3
9-May	0.0	57.7	7.6

10-May	0.0	46.0	11.5	
11-May	0.0	50.8	9.3	
12-May	0.0	52.2	10.3	
13-May	0.0	57.7	10.4	
14-May	0.0	45.4	21.9	
15-May	0.0	45.4	23.0	
16-May	0.0	54.9	21.8	
17-May	0.0	39.5	15.3	
18-May	0.0	30.5	7.8	
19-May	0.0	38.1	9.2	
20-May	0.0	44.6	14.8	
21-May	0.0	22.7	17.0	
Totals	891.5	1830.4	278.1	Total Acre Feet
				3000.0

# Jefferson-Clark GWD Recharge Documentation

Report Entries 5.1 & 5.2



Page 1

State of Idaho  
Department of Water Resources  
**Permit to Appropriate Water**  
NO. 32-13348

Priority: March 04, 2016

Maximum Diversion Rate: 10.00 CFS

This is to certify, that **RENO DITCH CO LLC**  
1032 GRANDVIEW DRIVE  
IVINS UT 84738

has applied for a permit to appropriate water from:

**Source:** BIRCH CREEK      **Tributary:** SINKS

and a permit is APPROVED for development of water as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>
GROUND WATER RECHARGE	01/01 to 12/31	10.00 CFS

**LOCATION OF POINT(S) OF DIVERSION:**

BIRCH CREEK      SE¼ SW¼      Sec. 34, Twp 09N, Rge 30E, B.M.      CLARK County

**PLACE OF USE:** GROUND WATER RECHARGE

Twp Rge Sec	NE				NW				SW				SE				Totals
08N 32E 12	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
09N 32E 36																	

**CONDITIONS OF APPROVAL**

1. Proof of application of water to beneficial use shall be submitted on or before **June 01, 2017**.
2. Subject to all prior water rights.
3. Rights 32-7128, 32-7136 and 32-13348 when combined shall not exceed a total diversion rate of 75 cfs.
4. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 32D.
5. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s).
6. Prior to diversion and use of water under this approval, the right holder shall obtain Bureau of Land Management authorization necessary to access the point of diversion or place of use or to convey water across federal land.
7. This right is subject to all applicable provisions of Section 42-234, Idaho Code.

Page 2

State of Idaho  
Department of Water Resources

# Permit to Appropriate Water

NO. 32-13348

8. Pursuant to Section 42-234(4), Idaho Code, to ensure that other water rights are not injured by the operations of the recharge project authorized by this right, the Director has authority to approve, disapprove, or require alterations in the methods employed to achieve ground water recharge.
9. Pursuant to Section 42-234(3), Idaho Code, the Director may reduce the amount of water that may be diverted for recharge purposes under this right even though there is sufficient water to supply the entire amount authorized for appropriation under this right.
10. This approval does not constitute approval by the Idaho Water Resource Board, which may also be required pursuant to Section 42-1737, Idaho Code.
11. The right holder shall record the daily quantity of water diverted for ground water recharge and shall report the diversion data for the prior calendar year to the Department by February 1 each year. Reporting shall occur in the manner specified by the Department, consistent with Section 42-701, Idaho Code. To facilitate this reporting requirement, the right holder shall install and maintain a totalizing measuring device approved by the Department at each point of diversion and at each point where water is delivered from the conveyance system into a designated recharge site.
12. Consistent with Section 42-234(5), Idaho Code, seepage from canals incidental to or coincident with delivery of irrigation water shall not be considered ground water recharge under this right. Canal seepage will be considered to be ground water recharge only when the canals are not conveying water for irrigation or other beneficial uses.
13. This right is not an authorization for the described recharge effort to be used as mitigation or credit for any other purpose. The sufficiency of the recharge effort authorized under this right for mitigation or credit for some other purpose may be determined by the Department upon proper submission of a mitigation plan pursuant to the Department's Rules of Conjunctive Management of Surface and Ground Water Resources, a mitigation plan to offset depletion in association with a water right application, a Management Program pursuant to Idaho Code Section 42-1416B, or any other proposal to utilize credit for the recharge effort.
14. This right does not grant any right-of-way or easement across the land of another.

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code. Witness the signature affixed below this 2nd day of May, 2016.



JAMES CEFALO

Water Resources Program Manager

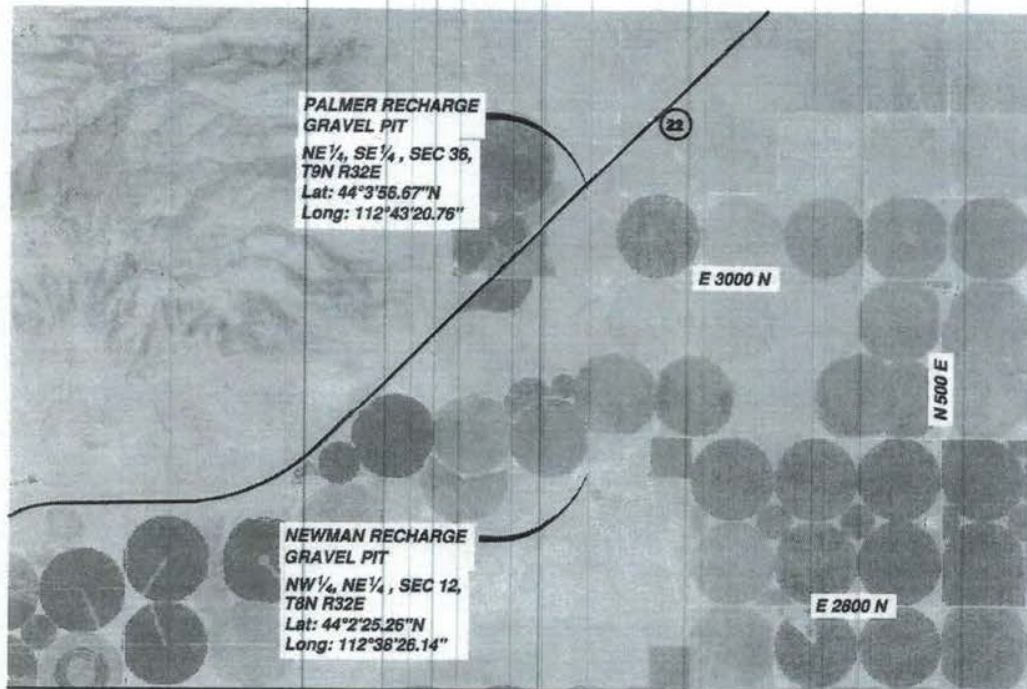


**RENO DITCH CO.**  
**RECHARGE PERMIT # 32-13348**  
**SOURCE: BIRCH CREEK**



PROJECT LOCATION

PROJECT AREA



VICINITY MAP



These pictures are our documentation of AF recharge water at our approved site for the 2021 crop year. Pre - Season meter reading was 3975.01, Post Season meter reading is 4,601.40, for a difference of 626.39 AF having been recharged.

We request 626.39 AF be credited towards our portions of the water management goals to conserve water and apply credit as needed to our three entities.

Thank you,

Lane Newman, L3 Partnership

Lewis Newman, L2 Partnership

Louise Newman, L1 Partnership

Mailed November 3, 2021

LANE NEWMAN

208 681 2536

lanenewmanfarms@gmail.com

From: Lane Newman lanenewmanfarms@gmail.com  
Subject: 21 recharge  
Date: Nov 3, 2021 at 9:01:20 AM  
To: Lane Newman lanenewmanfarms@gmail.com



4601.40 Nov. 1, 2021  
- 3975.01 Nov. 1, 2020  

---

626.39 AF  
of Recharge for 2021.





Ex. 21 Page 087





Ex. 21 Page 088



STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

**WATER SUPPLY BANK LEASE CONTRACT No. 1335**

This Lease Contract ("**Lease**") is between the Idaho Water Resource Board ("**Board**"), and

**LESSOR:** EGIN BENCH CANALS INC  
PO BOX 15  
ST ANTHONY, ID 83445

SUPPORT DATA  
IN FILE # 21-12897

RECEIVED  
APR 22 2021  
DEPARTMENT OF  
WATER RESOURCES

**RECITALS**

1. The Board is authorized under chapter 17, title 42, Idaho Code to operate a water supply bank and to contract with lessors to act as an intermediary in facilitating the rental of water.
2. The Lessor has filed a completed application to lease water rights described below into the Water Supply Bank on forms supplied by the Idaho Department of Water Resources and received by the Department on October 19, 2020.
3. The Director of the Idaho Department of Water Resources has reviewed the application for compliance with the Water Supply Bank rules and has approved the Lease subject to conditions listed below.

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

## WATER SUPPLY BANK LEASE CONTRACT No. 1335

NOW, THEREFORE, in consideration of the mutual covenants and contracts herein contained, and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. **WATER RIGHTS:** The Lessor shall lease and the Board shall accept into the Bank the Applicant's water rights described as follows:

### Summary of Water Rights or Portions Leased to the Bank

Water Right No.	Priority Date	Source	Diversion Rate (CFS)	Acres (AC)	Diversion Volume (AF)
21-12897	4/25/1885	HENRYS FORK, tributary to SNAKE RIVER	14.7	448	Not Stated
21-12912	4/1/1939	HENRYS FORK, tributary to SNAKE RIVER	1.69	448	Not Stated
21-12934	3/1/1890	HENRYS FORK, tributary to SNAKE RIVER	14.7	448	Not Stated
<b>Total Annual Combined Limit</b>			<b>31.1</b>	<b>448</b>	<b>Not Stated</b>
21-12908	4/1/1939	HENRYS FORK, tributary to SNAKE RIVER	1.76	1073	Not Stated
21-12921	7/29/1892	HENRYS FORK, tributary to SNAKE RIVER	7.35	1073	Not Stated
21-12922	6/21/1888	HENRYS FORK, tributary to SNAKE RIVER	44.1	1073	Not Stated
<b>Total Annual Combined Limit</b>			<b>53.22</b>	<b>1073</b>	<b>Not Stated</b>
21-12910	4/1/1939	HENRYS FORK, tributary to SNAKE RIVER	2.57	534	Not Stated
21-12928	6/14/1895	HENRYS FORK, tributary to SNAKE RIVER	29.4	534	Not Stated
<b>Total Annual Combined Limit</b>			<b>31.9</b>	<b>534</b>	<b>Not Stated</b>
21-12961	2/9/1897	HENRYS FORK, tributary to SNAKE RIVER	16.2	271	Not Stated
21-12962	2/9/1897	HENRYS FORK, tributary to SNAKE RIVER	8.81	271	Not Stated
<b>Total Annual Combined Limit</b>			<b>16.2</b>	<b>271</b>	<b>Not Stated</b>
<b>Combined Limit Totals</b>			<b>132</b>	<b>2,326</b>	<b>Not Stated</b>

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

## WATER SUPPLY BANK LEASE CONTRACT No. 1335

### Summary of Water Rights Elements Rentable From the Bank

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21-12908	1.76	3,760	1073	0.01	3.5
21-12910	2.57	1,870	534	0.01	3.5
<b>Combined Limit Totals</b>	<b>132</b>	<b>8,140</b>	<b>2,326</b>	<b>0.06</b>	<b>3.5</b>

*\* The water right elements rentable have been reduced from the water right elements leased to account for combined limits.*

2. **COMPENSATION:** The Lessor shall accept and the Board shall pay compensation determined by the amount of water rented under the following rental rate during such times as the water is rented from the Bank over the term of this Lease.

**Minimum Payment Acceptable: Current Rental Rate**

3. **TERM OF LEASE:** The term of this lease shall be January 1, 2021 to December 31, 2025. This Lease shall bind the parties and take effect when both parties have signed it.
4. **WATER SUPPLY BANK CONDITIONS OF ACCEPTANCE:** The Lessor shall abide by all terms and conditions contained in the Water Supply Bank Conditions of Acceptance, attached hereto as "Attachment A" and incorporated herein by this reference.
5. **CHANGE OF WATER RIGHT:** This lease specifies water right elements including but not limited to: diversion rates; diversion volumes; number of acres authorized to be irrigated; places of use; points of diversion; beneficial uses; and seasons of use. During the term of this lease, if a water right is administratively changed due to a water right split and renumbering, this lease may be reduced by an equal amount to reflect the water right elements as legally defined under the water right. If a lease contract cannot be reduced sufficient to reflect the legal definition of a water right as amended through a water right split and/or water right transfer, the Board may release the water right from the Water Supply Bank.
6. **ASSIGNMENT OF CONTRACT:** This lease is between the Board and the Lessor, who is the recognized owner or designated representative of the recognized owners of water rights described herein. Should ownership of any part of a water right herein described change during the term of this lease, either through a water right split, a water right transfer, sale of property to which the water right is appurtenant, or through any other recognized water right reassignment, the lease benefits and obligations to the conditions of acceptance for any such water rights will be assigned to the new owners.
7. **DUPLICATE ORIGINAL:** This Lease is executed in duplicate. Each of the documents with an original signature of each party shall be an original.

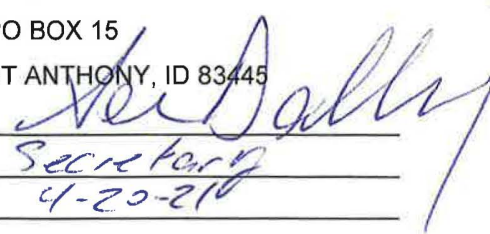


STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

**WATER SUPPLY BANK LEASE CONTRACT No. 1335**

IN WITNESS WHEREOF, the parties have executed this Contract on the date following their respective signatures.

**LESSOR:** EGIN BENCH CANALS INC  
PO BOX 15  
ST ANTHONY, ID 83445

By   
Title Secretary  
Date 4-20-21

**IDAHO WATER RESOURCE BOARD**  
322 East Front Street  
P.O. Box 83720  
Boise, ID 83720-0098

By   
Brian Patton, Acting Administrator  
Idaho Water Resource Board

Date 4/23/21

Lease approved by IDWR 

Date 4/23/21

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

## WATER SUPPLY BANK LEASE CONTRACT No. 1335

### ATTACHMENT A WATER SUPPLY BANK CONDITIONS OF ACCEPTANCE

The water rights or portions thereof leased to the bank are described as follows:

**Source and Location of Point(s) of Diversion for Water Right No(s): 21-12897, 21-12934, 21-12912**

HENRYS FORK      L 8SENE      Sec. 1      Twp 07N      Rge 40E      FREMONT County

**Source and Location of Point(s) of Diversion for Water Right No(s): 21-12922, 21-12921, 21-12908**

HENRYS FORK      L 6SENE      Sec. 1      Twp 07N      Rge 40E      FREMONT County  
HENRYS FORK      L 7NENE      Sec. 33      Twp 08N      Rge 41E      FREMONT County

**Source and Location of Point(s) of Diversion for Water Right No(s): 21-12928, 21-12910**

HENRYS FORK      L 6NESE      Sec. 2      Twp 07N      Rge 40E      FREMONT County

**Source and Location of Point(s) of Diversion for Water Right No(s): 21-12961, 21-12962**

HENRYS FORK      L 4NWSE      Sec. 14      Twp 08N      Rge 41E      FREMONT County

Water Right	Beneficial Use	Season of Use			Diversion Rate (CFS)	Volume (AF)
		From		To		
21-12897	IRRIGATION	04/01	to	10/31	14.7 cfs	1,570 AF
21-12934	IRRIGATION	04/01	to	10/31	14.7 cfs	1,570 AF
21-12912	IRRIGATION	04/01	to	10/31	1.69 cfs	1,570 AF
21-12922	IRRIGATION	04/01	to	10/31	44.1 cfs	3,760 AF
21-12921	IRRIGATION	04/01	to	10/31	7.35 cfs	3,760 AF
21-12908	IRRIGATION	04/01	to	10/31	1.76 cfs	3,760 AF
21-12928	IRRIGATION	04/01	to	10/31	29.4 cfs	1,870AF
21-12910	IRRIGATION	04/01	to	10/31	2.57 cfs	1,870 AF
21-12961	IRRIGATION	04/01	to	07/01	16.2 cfs	949 AF
21-12962	IRRIGATION	07/02	to	10/31	8.81 cfs	949 AF
<b>Totals:</b>					132 cfs	8,140 AF

**PLACES OF USE TO BE IDLED UNDER THIS LEASE:**

**IRRIGATION;** Large POU Not Displayed, See attached Map

Total Acres: 2,326

### ADDITIONAL CONDITIONS OF ACCEPTANCE

1. The water rights referenced above will be rented from the bank at the current rental rate.
2. There is no rental payment to the lessor of the water right if the right or a part thereof is not rented from the bank.



STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

**WATER SUPPLY BANK LEASE CONTRACT No. 1335**

3. While a right is in the bank, the lessor may not use the right without approval of the Department even if the right is not rented from the bank. Any violation of the terms of this lease may result in enforcement procedures pursuant to Idaho Code § 42-351 for illegal diversion and use of water and may include civil penalties pursuant to Idaho Code § 42-1701B.
4. A right accepted into the bank stays in the bank until the Board releases it, or the lease term expires. A right may be released from the bank upon request, provided the Board approves the release. Unless approved by the Department, leased rights may not be immediately available for release.
5. While a water right is in the bank, forfeiture provisions are stayed pursuant to Idaho Code § 42-223(5).
6. Rental of water under this right is subject to the limitations and conditions of approval of the water right.
7. Failure of the right holder to comply with the conditions of acceptance is cause for the Director to rescind acceptance of the lease.
8. Acceptance of a right into the bank does not, in itself, confirm the validity of the right or any elements of the water right, or improve the status of the right including the notion of resumption of use. It does not preclude the opportunity for review of the validity of this water right in any other Department application process.
9. In accordance with Idaho Code § 42-248 and § 42-1409(6), all owners of water rights are required to notify the Department of any changes in mailing address or change in ownership of all or part of a water right. Notice must be provided within 120 days of the change.
10. If a water right leased into the Water Supply Bank is sold or conveyed during the lease term, and if the leased right was rented, the rental proceeds will be disbursed in the following manner regardless of any arrangements between the buyer(s) and seller(s) to the contrary:
  - a. Rental payments will go to the lessor(s) of record at the beginning of the rental season, even if the Department processes a Notice of Change in Water Right Ownership during the rental season.
  - b. New lessor(s) of record will receive payment for any subsequent rental seasons.
11. The water right(s) is leased to the bank subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources.
12. Unleased portions of rights 21-12897, 21-12912 and 21-12934 are limited to irrigation of a combined total of 5,654.6 acres in a single irrigation season.
13. Unleased portions of rights 21-12908, 21-12921 and 21-12922 are limited to irrigation of a combined total of 13,523.7 acres in a single irrigation season.
14. Unleased portions of rights 21-12928 and 21-12910 are limited to irrigation of a combined total of 6,737.8 acres in a single irrigation season.
15. Unleased portions of rights 21-12961 and 21-12962 are limited to irrigation of a combined total of 3,424.9 acres and a combined diversion rate of 203 cfs in a single irrigation season.
16. Unleased portions of rights 21-12897, 21-12912, 21-12934, 21-12908, 21-12921, 21-12922, 21-12910, 21-12928, 21-12961, and 21-12962 are limited to the irrigation of a combined total of 27,776.2 acres.
17. The unleased portion of water right 21-12922 is limited to a maximum diversion rate of 556 cfs from 4/1 – 7/1, and from 7/17 – 7/31, and a maximum diversion rate of 456 cfs from 7/2 – 7/16, and from 8/1 – 10/31

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

**WATER SUPPLY BANK LEASE CONTRACT No. 1335**

18. The unleased portion of water right 21-12928 is limited to a maximum diversion rate of 371 cfs from 4/1 – 7/1, and from 7/17 – 7/31, and a maximum diversion rate of 331 cfs from 7/2 -7/16, and from 8/1 – 10/31
19. The unleased portion of water right 21-12934 is limited to a maximum diversion rate of 185 cfs from 4/1 – 7/1, and from 7/17 – 8/1, and a maximum diversion rate of 85.3 cfs from 7/2 -7/16, and from 8/2 – 10/31
20. Water is delivered through the Egin Canal for water rights 21-12897, 21-12912 and 21-12934.
21. Water is delivered through the St Anthony Union Canal and St. Anthony Union Feeder for water rights 21-12908, 21-12921 and 21-12922.
22. Water is delivered through the Independent Canal for water rights 21-12910 and 21-12928.
23. Water is delivered through the Last Chance Canal for water rights 21-12961 and 21-12962.
24. The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B(2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

## WATER SUPPLY BANK LEASE CONTRACT No. 1364

This Lease Contract ("**Lease**") is between the Idaho Water Resource Board ("**Board**"), and

**LESSOR:** TETON ISLAND FEEDER CANAL CO  
386 N 2400 E  
ST ANTHONY, ID 83445

RECEIVED

APR 21 2021

DEPARTMENT OF  
WATER RESOURCES

### RECITALS

1. The Board is authorized under chapter 17, title 42, Idaho Code to operate a water supply bank and to contract with lessors to act as an intermediary in facilitating the rental of water.
2. The Lessor has filed a completed application to lease water rights described below into the Water Supply Bank on forms supplied by the Idaho Department of Water Resources and received by the Department on January 12, 2021.
3. The Director of the Idaho Department of Water Resources has reviewed the application for compliance with the Water Supply Bank rules and has approved the Lease subject to conditions listed below.

NOW, THEREFORE, in consideration of the mutual covenants and contracts herein contained, and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. **WATER RIGHTS:** The Lessor shall lease and the Board shall accept into the Bank the Applicant's water rights described as follows:

#### Summary of Water Rights or Portions Leased to the Bank

Water Right No.	Priority Date	Source	Diversion Rate (CFS)	Diversion Volume (AF)	Acres (AC)
22-12694	3/1/1883	TETON RIVER, tributary to HENRYS FORK	1.61	Not Stated	1,261.7
22-288	5/15/1883	TETON RIVER, tributary to HENRYS FORK	0.43	Not Stated	1,261.7
22-12695	5/22/1884	TETON RIVER, tributary to HENRYS FORK	10.28	Not Stated	1,261.7
22-589B	6/1/1884	TETON RIVER, tributary to HENRYS FORK	3.38	Not Stated	1,261.7
22-12696	6/1/1885	TETON RIVER, tributary to HENRYS FORK	32.60	Not Stated	1,261.7
22-571	6/1/1888	TETON RIVER, tributary to HENRYS FORK	0.45	Not Stated	1,261.7
22-12697	4/1/1898	TETON RIVER, tributary to HENRYS FORK	31.17	Not Stated	1,261.7
<b>Combined Limit Totals</b>			<b>79.92</b>	<b>Not Stated</b>	<b>1,261.7</b>
<b>Combined Lease Totals</b>			<b>79.92</b>	<b>Not Stated</b>	<b>1,261.7</b>



STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

## WATER SUPPLY BANK LEASE CONTRACT No. 1364

### Summary of Water Rights Elements Rentable From the Bank

Water Right	Diversion Rate (CFS)	Diversion Volume (AF)	Acres (Limited) (AC)	Rate Per Acre (CFS/AC)	Volume Per Acre (AF/AC)
22-12694	1.61	683	1,261.7	0.001	0.54
22-288	0.43	183	1,261.7	0.000	0.14
22-12695	10.3	4,360	1,261.7	0.008	3.46
22-589B	3.38	1,430	1,261.7	0.003	1.14
22-12696	32.6	4,410	1,261.7	0.026	3.50
22-571	0.45	191	1,261.7	0.000	0.15
22-12697	31.2	4,410	1,261.7	0.025	3.50
<b>Combined Limit Totals</b>	<b>79.9</b>	<b>4,420</b>	<b>1,261.7</b>	<b>0.063</b>	<b>3.50</b>

*\* The water right elements rentable feature a rentable diversion volume, calculated as either the maximum volume divertible based on the leased diversion rate over the entire season of use, or, calculated based on the regional field headgate standard of 3.5 afa/ac.*

2. **COMPENSATION:** The Lessor shall accept and the Board shall pay compensation determined by the amount of water rented under the following rental rate during such times as the water is rented from the Bank over the term of this Lease.

**Minimum Payment Acceptable: Current Rental Rate**

3. **TERM OF LEASE:** The term of this lease shall be January 1, 2021 to December 31, 2025. This Lease shall bind the parties and take effect when both parties have signed it.
4. **WATER SUPPLY BANK CONDITIONS OF ACCEPTANCE:** The Lessor shall abide by all terms and conditions contained in the Water Supply Bank Conditions of Acceptance, attached hereto as "Attachment A" and incorporated herein by this reference.
5. **CHANGE OF WATER RIGHT:** This lease specifies water right elements including but not limited to: diversion rates; diversion volumes; number of acres authorized to be irrigated; places of use; points of diversion; beneficial uses; and seasons of use. During the term of this lease, if a water right is administratively changed due to a water right split and renumbering, this lease may be reduced by an equal amount to reflect the water right elements as legally defined under the water right. If a lease contract cannot be reduced sufficient to reflect the legal definition of a water right as amended through a water right split and/or water right transfer, the Board may release the water right from the Water Supply Bank.
6. **ASSIGNMENT OF CONTRACT:** This lease is between the Board and the Lessor, who is the recognized owner or designated representative of the recognized owners of water rights described herein. Should ownership of any part of a water right herein described change during the term of this lease, either through a water right split, a water right transfer, sale of property to which the water right is appurtenant, or through any other recognized water right reassignment, the lease benefits and obligations to the conditions of acceptance for any such water rights will be assigned to the new owners.
7. **DUPLICATE ORIGINAL:** This Lease is executed in duplicate. Each of the documents with an original signature of each party shall be an original.

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

## WATER SUPPLY BANK LEASE CONTRACT No. 1364

IN WITNESS WHEREOF, the parties have executed this Contract on the date following their respective signatures.

**LESSOR:** TETON ISLAND FEEDER CANAL CO  
386 N 2400 E  
ST. ANTHONY, ID 83445

By *Rodney Callum*  
Title *President*  
Date *14 Apr. 2021*

**IDAHO WATER RESOURCE BOARD**  
322 East Front Street  
P.O. Box 83720  
Boise, ID 83720-0098

By *Brian Patton*  
Brian Patton, Acting Administrator  
Idaho Water Resource Board

Date *4/23/21*

Lease approved by IDWR

*FR*

Date *4/23/21*

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

## WATER SUPPLY BANK LEASE CONTRACT No. 1364

### ATTACHMENT A WATER SUPPLY BANK CONDITIONS OF ACCEPTANCE

The water rights or portions thereof leased to the bank are described as follows:

**Source and Location of Point(s) of Diversion for Water Right No(s): 22-288, 22-571, 22-12694, 22-12695, 22-12696, 22-12697, 22-589B**

TETON RIVER                      NWSENW                      Sec. 36                      Twp 07N                      Rge 40E                      FREMONT County

Water Right	Beneficial Use	Season of Use			Diversion Rate (CFS)	Volume (AF)
		From		To		
22-288	IRRIGATION	04/01	to	10/31	0.43 cfs	183 AF
22-571	IRRIGATION	04/01	to	10/31	0.45 cfs	191 AF
22-12694	IRRIGATION	04/01	to	10/31	1.61 cfs	683 AF
22-12695	IRRIGATION	04/01	to	10/31	10.28 cfs	4,360 AF
22-12696	IRRIGATION	04/01	to	10/31	32.60 cfs	4,410 AF
22-12697	IRRIGATION	04/01	to	10/31	31.17 cfs	4,410 AF
22-589B	IRRIGATION	04/01	to	10/31	3.38 cfs	1,430 AF
<b>Totals:</b>					<b>79.92 cfs</b>	<b>4,416 AF</b>

#### PLACES OF USE TO BE IDLED UNDER THIS LEASE: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
06N	39E	1																1.2	1.2
06N	39E	12				0.9							0.1	0.4			4.5	22	27.9
06N	39E	13	5.6		13	1.5	4.7	30	33	36					5.3	0.5			129.6
06N	39E	14				0.7												6	6.7
06N	39E	22				2.4													2.4
06N	39E	23					0.2			0.7									0.9
06N	40E	2					0.9	5.7											6.6
06N	40E	3	0.6				4.8	1	1.4	1.7		0.3					0.8	2.9	13.5
06N	40E	4		0.4		26	16	35	27	11	29	24	11	35	38	40	39	13	344.4
06N	40E	5	20	1.2	0.8	10									4.3		0.1	0.7	37.0
06N	40E	6				3.3							3.2	0.5			16	16	39.0
06N	40E	7	0.1	1		6.9					10					1.7			19.7
06N	40E	8	5.9	14			0.4		2.3				23	0.8	2.8	6	5.5	0.7	61.4
06N	40E	9	9.5	27			39	11	0.8	5									92.3
06N	40E	10	1.5		0.5			0.9			1.9				2.4				7.2
06N	40E	15										0.7	2.2						2.9
06N	40E	16			11			0.1	2.7		0.2	0.4	11	0.2	0.4	22			48.0
06N	40E	17				1.6		6.1	32	7.1	0.3	8.1	1.9	5.5	0.8				63.4
06N	40E	18	2.3	2.2	3	1.9	6.7	0.2		0.4	0.2				5.5	6.9	0.9	1.8	32.0

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

## WATER SUPPLY BANK LEASE CONTRACT No. 1364

06N	40E	19	12	0.7			5.4											18.1	
06N	40E	20	1.8	23	0.9		39	24	15	9.7								113.4	
07N	40E	32												1	2.7		0.1	3.8	
07N	40E	33			0.5					3.6	34	4.1	36	33	0.4	12	28	15	166.6
07N	40E	34				5.1						4.6	7						16.7
07N	40E	35							3			1.7	0.5	1.8					7.0

Total Acres: 1,261.7

### ADDITIONAL CONDITIONS OF ACCEPTANCE

1. The water rights referenced above will be rented from the bank at the current rental rate.
2. There is no rental payment to the lessor of the water right if the right or a part thereof is not rented from the bank.
3. While a right is in the bank, the lessor may not use the right without approval of the Department even if the right is not rented from the bank. Any violation of the terms of this lease may result in enforcement procedures pursuant to Idaho Code § 42-351 for illegal diversion and use of water and may include civil penalties pursuant to Idaho Code § 42-1701B.
4. A right accepted into the bank stays in the bank until the Board releases it, or the lease term expires. A right may be released from the bank upon request, provided the Board approves the release. Unless approved by the Department, leased rights may not be immediately available for release.
5. While a water right is in the bank, forfeiture provisions are stayed pursuant to Idaho Code § 42-223(5).
6. Rental of water under this right is subject to the limitations and conditions of approval of the water right.
7. Failure of the right holder to comply with the conditions of acceptance is cause for the Director to rescind acceptance of the lease.
8. Acceptance of a right into the bank does not, in itself, confirm the validity of the right or any elements of the water right, or improve the status of the right including the notion of resumption of use. It does not preclude the opportunity for review of the validity of this water right in any other Department application process.
9. In accordance with Idaho Code § 42-248 and § 42-1409(6), all owners of water rights are required to notify the Department of any changes in mailing address or change in ownership of all or part of a water right. Notice must be provided within 120 days of the change.
10. If a water right leased into the Water Supply Bank is sold or conveyed during the lease term, and if the leased right was rented, the rental proceeds will be disbursed in the following manner regardless of any arrangements between the buyer(s) and seller(s) to the contrary:
  - a. Rental payments will go to the lessor(s) of record at the beginning of the rental season, even if the Department processes a Notice of Change in Water Right Ownership during the rental season.
  - b. New lessor(s) of record will receive payment for any subsequent rental seasons.
11. The water right(s) is leased to the bank subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources.
12. Water is delivered through Teton Island Feeder Canal.
13. The following rights are all diverted through point of diversion described above: 22-288, 22-571, 22-589B, 22-12694 through 22-12697.

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

**WATER SUPPLY BANK LEASE CONTRACT No. 1364**

14. For the duration of this lease contract, the unleased portions of the water rights listed below are limited to a diversion rate of 519 cfs for the irrigation of a combined total of 8,180 acres in a single irrigation season, and 522 cfs for stockwatering and subirrigation during the non-irrigation season. Combined Right Nos.: 22-288, 22-571, 22-589B, 22-12694, 22-12695, 22-12696 and 22-12697.
15. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 01.

Jefferson Clark Groundwater District Recharge-Recharged by Fremont-Madison Irrigation District				
Water Source	Water Supply Bank Contract 1364	Water Supply Bank Contract 1364	Water Supply Bank Contract 1335	
Measurement Equipment	Rated Culvert +In-Situ Rugged Troll 100 Data logger +Transducer	Rated Section + In-Situ Rugged Troll 100 Data logger +Transducer	IDWR Measurement Station <a href="https://research.idwr.idaho.gov/apps/hydrologic/aquainfo/Home/Data#/">https://research.idwr.idaho.gov/apps/hydrologic/aquainfo/Home/Data#/</a>	
Date	Parkinson Pond(AF)	Cornelsen Pond(AF)	New Recharge Canal(AF)	Daily Total (AF)
26-May	0.0	0.0	34.6	34.6
27-May	0.0	0.0	51.3	51.3
28-May	0.0	0.0	58.4	58.4
29-May	0.0	0.0	33.1	33.1
30-May	0.0	0.0	7.9	7.9
31-May	5.6	0.0	25.5	31.1
1-Jun	11.1	0.0	37.5	48.7
2-Jun	0.0	0.0	41.0	41.0
3-Jun	0.0	0.0	61.0	61.0
4-Jun	0.0	0.0	58.3	58.3
5-Jun	0.0	0.0	54.4	54.4
6-Jun	0.0	0.0	70.1	70.1
7-Jun	0.0	0.0	57.2	57.2
8-Jun	0.0	0.0	47.5	47.5
9-Jun	4.4	0.0	46.1	50.5
10-Jun	6.3	0.0	52.1	58.4
11-Jun	8.6	0.0	77.1	85.7
12-Jun	7.4	0.0	79.2	86.6
13-Jun	7.4	0.0	64.4	71.8
14-Jun	8.6	0.0	56.6	65.2
15-Jun	0.0	0.0	53.8	53.8
16-Jun	0.0	0.0	49.5	49.5
17-Jun	0.0	0.0	24.5	24.5
18-Jun	0.0	0.0	24.2	24.2
19-Jun	0.0	0.0	24.6	24.6
20-Jun	0.0	0.0	36.4	36.4
21-Jun	0.0	0.0	56.4	56.4
22-Jun	10.3	0.0	69.0	79.3
23-Jun	11.9	0.0	72.0	83.8
24-Jun	12.0	0.0	80.5	92.5
25-Jun	9.0	0.0	87.0	96.0
26-Jun	13.8	3.2	111.6	128.6
27-Jun	13.2	3.8	110.1	127.1
28-Jun	4.1	2.5	70.3	76.9
29-Jun	0.0	1.1	47.2	48.3
30-Jun	0.0	0.0	36.7	36.7
1-Jul	0.0	0.0	45.1	45.1
2-Jul	13.8	0.0	57.2	71.0
3-Jul	0.0	0.0	74.8	74.8
4-Jul	0.0	0.0	82.9	82.9
5-Jul	0.0	0.8	108.9	109.7

6-Jul	0.0	2.0	94.2	96.3
7-Jul	5.1	0.0	75.7	80.8
8-Jul	0.0	0.0	78.9	78.9
9-Jul	0.0	0.0	84.8	84.8
10-Jul	0.0	3.7	93.7	97.4
11-Jul	4.5	0.8	91.4	96.7
12-Jul	10.9	0.0	90.7	101.6
13-Jul	1.3	0.0	83.1	84.3
14-Jul	0.7	0.0	66.2	66.9
15-Jul	0.0	0.0	64.8	64.8
16-Jul	0.0	0.0	66.0	66.0
17-Jul	14.4	0.0	84.6	99.0
18-Jul	13.3	2.5	98.3	114.0
19-Jul	12.4	2.9	78.0	93.4
20-Jul	0.0	1.6	77.2	78.8
21-Jul	0.0	0.0	96.4	96.4
22-Jul	0.0	0.0	84.7	84.7
23-Jul	0.0	2.1	0.0	2.1
24-Jul	0.0	2.5	0.0	2.5
25-Jul	0.0	0.0	0.0	0.0
26-Jul	0.0	0.0	0.0	0.0
27-Jul	0.0	0.0	0.0	0.0
28-Jul	0.0	3.4	0.0	3.4
29-Jul	0.0	2.9	0.0	2.9
30-Jul	0.0	3.0	0.0	3.0
31-Jul	0.0	4.4	0.0	4.4
1-Aug	0.0	4.2	0.0	4.2
2-Aug	0.0	4.5	0.0	4.5
3-Aug	0.0	4.4	0.0	4.4
4-Aug	0.0	2.9	0.0	2.9
5-Aug	0.0	0.0	0.0	0.0
6-Aug	0.0	0.0	0.0	0.0
7-Aug	0.0	0.0	0.0	0.0
8-Aug	0.0	0.0	0.0	0.0
9-Aug	0.0	0.0	0.0	0.0
10-Aug	0.0	0.8	0.0	0.8
11-Aug	0.0	0.8	0.0	0.8
12-Aug	0.0	1.1	0.0	1.1
13-Aug	0.0	2.3	0.0	2.3
14-Aug	0.0	2.6	0.0	2.6
15-Aug	0.0	1.5	0.0	1.5
16-Aug	0.0	0.0	0.0	0.0
17-Aug	0.0	0.0	0.0	0.0
18-Aug	0.0	0.0	0.0	0.0
19-Aug	0.0	0.0	0.0	0.0
20-Aug	0.0	0.0	0.0	0.0
21-Aug	0.0	0.0	0.0	0.0
22-Aug	0.0	0.0	0.0	0.0
23-Aug	0.0	0.0	0.0	0.0
24-Aug	0.0	0.0	0.0	0.0

25-Aug	0.0	0.0	0.0	0.0
26-Aug	0.0	0.0	0.0	0.0
27-Aug	0.0	0.0	0.0	0.0
28-Aug	0.0	0.8	0.0	0.8
29-Aug	0.0	0.0	0.0	0.0
30-Aug	0.0	0.0	0.0	0.0
31-Aug	0.0	0.0	0.0	0.0
1-Sep	0.0	0.0	0.0	0.0
2-Sep	0.0	0.0	0.0	0.0
3-Sep	0.0	0.4	0.0	0.4
4-Sep	0.0	2.6	0.0	2.6
5-Sep	0.0	2.7	0.0	2.7
6-Sep	0.0	1.8	0.0	1.8
7-Sep	0.0	4.0	0.0	4.0
8-Sep	0.0	2.2	0.0	2.2
9-Sep	0.0	0.0	0.0	0.0
10-Sep	0.0	0.0	0.0	0.0
11-Sep	0.0	2.1	0.0	2.1
12-Sep	0.0	1.6	0.0	1.6
13-Sep	0.0	0.0	0.0	0.0
14-Sep	0.0	0.0	0.0	0.0
15-Sep	0.0	0.0	0.0	0.0
16-Sep	0.0	0.0	0.0	0.0
17-Sep	0.0	0.0	0.0	0.0
18-Sep	0.0	0.0	0.0	0.0
19-Sep	0.0	0.0	0.0	0.0
20-Sep	0.0	8.3	0.0	8.3
21-Sep	0.0	17.9	0.0	17.9
22-Sep	0.0	12.6	0.0	12.6
23-Sep	0.0	10.5	0.0	10.5
24-Sep	3.9	11.4	0.0	15.4
25-Sep	6.2	8.5	0.0	14.7
26-Sep	8.4	6.7	0.0	15.1
27-Sep	14.1	2.3	0.0	16.4
28-Sep	13.9	0.0	0.0	13.9
29-Sep	13.5	1.3	0.0	14.9
30-Sep	13.0	4.6	0.0	17.5
1-Oct	12.6	3.5	0.0	16.1
2-Oct	12.5	4.0	0.0	16.6
3-Oct	12.1	3.3	0.0	15.4
4-Oct	11.7	2.0	0.0	13.7
5-Oct	11.7	0.0	0.0	11.7
6-Oct	12.3	0.0	0.0	12.3
7-Oct	12.8	0.0	0.0	12.8
8-Oct	13.4	0.0	0.0	13.4
9-Oct	13.5	0.0	0.0	13.5
10-Oct	12.7	0.0	0.0	12.7
11-Oct	11.4	0.0	0.0	11.4
12-Oct	9.7	0.0	0.0	9.7
13-Oct	9.1	0.0	0.0	9.1



14-Oct	8.9	1.0	0.0	9.9
15-Oct	8.6	5.8	0.0	14.4
16-Oct	8.5	6.0	0.0	14.5
17-Oct	8.3	0.7	0.0	8.9
18-Oct	8.9	0.0	0.0	8.9
19-Oct	9.0	0.0	0.0	9.0
20-Oct	8.7	1.6	0.0	10.2
21-Oct	8.5	4.9	0.0	13.4
22-Oct	8.2	2.7	0.0	10.9
23-Oct	8.3	0.0	0.0	8.3
24-Oct	8.2	0.0	0.0	8.2
25-Oct	8.5	0.0	0.0	8.5
26-Oct	8.6	1.0	0.0	9.6
27-Oct	8.7	5.8	0.0	14.5
28-Oct	8.7	9.2	0.0	17.9
29-Oct	10.1	5.5	0.0	15.6
30-Oct	14.8	4.3	0.0	19.1
31-Oct	11.8	4.1	0.0	15.9
Totals	603	236	3745	
Reduction	30	10	0	Total
Total Credit (AF)	573	227	3745	4545

# Magic Valley GWD Recharge Documentation

Report Entries 6.1 - 6.5

JAXON B. HIGGS P.G.  
Office Phone (208)650-6605  
Cell Phone (208)604-1281



355 West 500 South  
Burley, ID 83318  
jaxon@waterwellconsultants.com

March 31, 2021

Brian Ragan  
IDWR State Office

Dear Brian,

This purpose of this letter is to describe the recharge accomplished by Magic Valley Ground Water District (MV) in the 2021 season for the IGWA/SWC Settlement Agreement.

Magic Valley participated in the following leases for 2021:

Entity	Volume (AF)	Note
Minidoka ID	6,000	
IGWA Lower Valley GWDs	950	6,500 total, split w/NSGWD
IGWA Lower Valley GWDs	2,455	4,910 total, split w/AFAGWD, from NSGWD portion of LVGWD leases
Idaho ID	2,000	
Progressive ID	3,000	

Leased water was used for soft conversions and recharge. The table on the following page describes the amount of water used for recharge and where it occurred. The paragraph below describes the same information in narrative form.

MV split the Minidoka Irrigation District lease as follows – 1,170 af at BID for conversions; 400 af at BID for recharge; 3,089 af at AFRD2 for conversions; 1,741 af at AFRD for recharge. All 6,500 af of IGWA Lower Valley GWD leased water in the name of MV was placed at AFRD2 and used as follows – 950 af recharge for MV; 5,550 af recharge for North Snake GWD. North Snake GWD transferred 4,910 acre-ft of water to the Eastern Snake Plain Aquifer Recharge group to be recharged on a 50/50 split for MV and American Falls – Aberdeen GWD. MV's

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portion of that water is 2,455 af. The Idaho ID and Progressive ID water was all (5,000 af) placed at Fremont Madison Irrigation District to be recharged by the Egin Canals.

Recharge Location	Lessor	Volume	Note
Southwest ID	MID	400	1,170 placed at BID, only 400 for recharge
AFRD #2	MID	1,741	4,830 placed at AFRD#2, only 1,741 for recharge
AFRD #2	IGWA (Wyoming)	950	2500 total placed at AFRD#2 and all for recharge, 1550 recharged for NSGWD
Egin Bench Canals	Idaho Irrigation	2,000	all placed at FMID and all for recharge
Egin Bench Canals	Progressive irrigation	3,000	all placed at FMID and all for recharge
SNAKE RIVER VALLEY ID	North Snake GWD (IGWA)	2,455	originally 4910 NSGWD water from IGWA and placed w/ESPAR, then placed at SRVID
	<b>Total:</b>	10,546	

MV realizes that this accounting is confusing but has taken great pains to make sure this recharge was accounted for properly and that the information is presented in a correct manner. Please contact me if you have any questions.

Sincerely,

Jaxon Higgs

	St (KG)	End (KG)	Acre-Ft	Source
Wrigley Inj East	0	28377.9	87.1	SWID Meter
Searle West	0	103816.4	318.6	SWID Meter
<b>Total:</b>	0	132194.3	405.7	
MV Water			400	

\*both flowmeters new in 2021. First year using new system.



**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE APPLICATION  
FOR STORAGE**

\_\_\_\_\_ Minidoka Irrigation District (MID) \_\_\_\_\_ (lessor) agrees to lease  
\_\_\_\_\_ 6000 \_\_\_\_\_ acre-feet of storage to \_\_\_\_\_ Magic Valley Groundwater District \_\_\_\_\_ (lessee)  
for the 2021 irrigation year at a price of \$ 25.00 per acre- foot according to the rules and  
regulations contained in the Water District #1 Rental Pool Procedures.

**Description of Lease:**

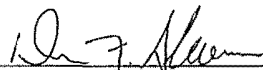
The purpose for which the storage will be put to use: Irrigation (conversions) and recharge

Point-of-Diversion for leased storage: Reservoir District #2, 13086530

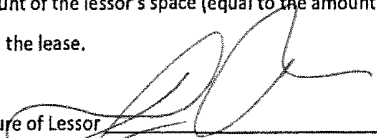
Place-of-use for leased storage: Irrigation (See attached Map) Recharge (Mile post 31)

\*Lessee has until November 30<sup>th</sup> of the year of request to assign a point of diversion. If the water is not assigned  
and used on or before November 30<sup>th</sup>, any unused or unassigned storage will revert back to the lessor.

☒ If the purpose for which this leased storage will be put to use is irrigation, the Lessee, by checking this  
box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said  
land and was legally irrigated prior to the 2019 Irrigation year...or....had approved storage rentals or private leases  
applied to this place-of-use in any year from 2006 through 2018. Failure to meet these conditions contained in  
Rule 3.5 of the Rental Pool Procedures may be grounds for denying the application.

Signature of Lessee  Date 5-11-2021

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be  
reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water  
District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is  
to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation  
season following the lease.

Signature of Lessor  Date 22 Jun 21

\*\*\*\* This lease application is good for one (1) irrigation year only. A new application must be submitted every year  
in which the storage is intended to be leased and used.

\_\_\_\_\_ An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-  
foot administrative fee must be received by Water District #1 prior to the approval of the storage  
lease.

**Jaxon Higgs**

---

**From:** Lance Strout <lance.strout@bwccaford2.com>  
**Sent:** Thursday, October 07, 2021 8:35 AM  
**To:** Jaxon Higgs  
**Subject:** Re: MV Conversion Volume

Good Morning,

I have those numbers you were wanting.

Sept 18th- 245  
Sept 19th- 245  
Sept 20th- 495  
Sept 21st- 495  
Sept 22nd- 495  
Sept 23rd- 495  
Sept 24th- 495  
Sept 25th- 495  
Sept 26th- 495  
Sept 27th- 200

The 27th may have been a bit more. We were closing things down and had trouble with those new gates. Let me know if you have any questions.

Thank you,

Lance

	Date	CFS	AF
September	18	245	486.0
	19	245	486.0
	20	495	981.8
	21	495	981.8
	22	495	981.8
	23	495	981.8
	24	495	981.8
	25	495	981.8
	26	495	981.8
	27	200	396.7

8241.3      2691 for MVGWD entry 6.2 and 5550 for NSGWD entry 7.4  
\$ 65,930.40

numbers as reported by Lance Strout, AFRD#2 watermaster via email on 10/7/21



**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE APPLICATION**  
**FOR STORAGE**

\_\_\_\_\_ **Progressive Irrigation District** \_\_\_\_\_ (lessor) agrees to lease  
**3000** \_\_\_\_\_ acre-feet of storage to \_\_\_\_\_ **Magic Valley Ground Water District** \_\_\_\_\_ (lessee)  
 for the **2021** irrigation year at a price of \$ **75** \_\_\_\_\_ per acre- foot according to the rules and  
 regulations contained in the Water District #1 Rental Pool Procedures.

**Description of Lease:**

The purpose for which the storage will be put to use: \_\_\_\_\_ **Recharge** \_\_\_\_\_

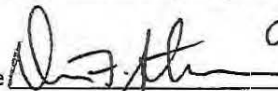
Point-of-Diversion for leased storage: \_\_\_\_\_ **Freemont Madison Irrigation District** \_\_\_\_\_

Place-of-use for leased storage: \_\_\_\_\_ **Egin Lakes recharge** \_\_\_\_\_

\*Lessee has until **November 30<sup>th</sup>** of the year of request to assign a point of diversion. If the water is not assigned and used on or before November 30<sup>th</sup>, any unused or unassigned storage will revert back to the lessor.



If the purpose for which this leased storage will be put to use is **irrigation**, the Lessee, by checking this box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said land and was legally irrigated prior to the 2019 Irrigation year...or....had approved storage rentals or private leases applied to this place-of-use in any year from 2006 through 2018. Failure to meet these conditions contained in Rule 3.5 of the Rental Pool Procedures may be grounds for denying the application.

Signature of Lessee  **Chairman** Date 10.28-2021

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

Signature of Lessor  Date 10-29-21  
**Chairman**

\*\*\*\* This lease application is good for one (1) irrigation year only. A new application must be submitted every year in which the storage is intended to be leased and used.

Water Source Private Leases Submitted Through Water District 01												
Measurement	IDWR Measurement Station <a href="https://research.idwr.idaho.gov/apps/hydrologic/aquainfo/Home/Data#!/">https://research.idwr.idaho.gov/apps/hydrologic/aquainfo/Home/Data#!/</a>	Rated Section (Manual Staff Gauge Reading)	Hydromet	Hydromet	Hydromet	Hydromet	Hydromet	Hydromet	Hydromet	Hydromet	Rated Section (Manual Staff Gauge Reading)	Hydromet
Date	New Recharge Canal (AF)	Old Recharge Canal (AF)	Consolidated (AF)	Fall River (AF)	Crosscut (AF)	Farmers Friend (AF)	Twin Groves (AF)	Salem Union (AF)	Teton Island Feeder (AF)	Rexburg Irr (AF)	Silkey (AF)	Teton Irrigation (AF)
29-Oct-21	213.4	54.5										14.5
30-Oct-21	222.3	54.7										14.5
31-Oct-21	221.0	11.9										14.5
1-Nov-21			114.2	65.5	8.6	13.4	25.5	87.0	90.5	63.1	26.0	14.5
2-Nov-21			115.9	65.5	9.1	14.3	25.5	105.8	90.2	64.9	28.0	14.5
3-Nov-21			115.9	65.0	9.1	15.4	25.5	105.8	91.2	64.6	27.4	14.5
4-Nov-21				66.6	10.8	12.7	24.7		91.0	62.8	27.4	14.5
5-Nov-21				65.9		16.3	24.7		90.7	67.4	27.4	14.5
<b>Sum</b>	<b>656.7</b>	<b>121.2</b>	<b>345.9</b>	<b>328.4</b>	<b>37.6</b>	<b>72.2</b>	<b>125.8</b>	<b>298.6</b>	<b>453.7</b>	<b>322.7</b>	<b>136.1</b>	<b>101.4</b>

\*Water source Progressive ID. Jbh

Total (AF)

3000.0

## WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE APPLICATION FOR STORAGE

Idaho Irrigation District \_\_\_\_\_ (lessor) agrees to lease  
 2000 \_\_\_\_\_ acre-feet of storage to Magic Valley Ground water district \_\_\_\_\_ (lessee)  
 for the 20\_\_\_\_ irrigation year at a price of \$ 75 per acre- foot according to the rules and  
 regulations contained in the Water District #1 Rental Pool Procedures.

### Description of Lease:

The purpose for which the storage will be put to use: Recharge  
 Point-of-Diversion for leased storage: Freemont madison irrigation district  
 Place-of-use for leased storage: Egin Lakes recharge

\*Lessee has until **November 30<sup>th</sup>** of the year of request to assign a point of diversion. If the water is not assigned and used on or before November 30<sup>th</sup>, any unused or unassigned storage will revert back to the lessor.

☐ If the purpose for which this leased storage will be put to use is irrigation, the Lessee, by checking this box, certifies that the place-of-use for this leased storage has a primary irrigation water right appurtenant to said land and was legally irrigated prior to the 2019 Irrigation year...or....had approved storage rentals or private leases applied to this place-of-use in any year from 2006 through 2018. Failure to meet these conditions contained in Rule 3.5 of the Rental Pool Procedures may be grounds for denying the application.

Signature of Lessee \_\_\_\_\_ Date \_\_\_\_\_

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

Signature of Lessor \_\_\_\_\_ Date \_\_\_\_\_

\*\*\*\* *This lease application is good for one (1) irrigation year only. A new application must be submitted every year in which the storage is intended to be leased and used.*

**\_\_\_\_\_ An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease.**

Water Source	Private Leases Submitted through Water District 01		
Measurement Equipment	IDWR Measurement Site <a href="https://research.idwr.idaho.gov/apps/hydrologic/aquainfo/Home/Data#!/">https://research.idwr.idaho.gov/apps/hydrologic/aquainfo/Home/Data#!/</a>	Campbell Data Logger CR-300-210, Cipoletti Weir	
Date	New Recharge Canal (AF)	Tibbits Pond (AF)	Total (AF)
18-Oct	86.2	10.0	96.1
19-Oct	111.5	7.1	118.6
20-Oct	150.5	7.3	157.8
21-Oct	176.3	3.0	179.3
22-Oct	197.5	3.7	201.2
23-Oct	204.8	0.8	205.5
24-Oct	205.6	1.4	207.0
25-Oct	205.5	2.2	207.7
26-Oct	208.5	7.1	215.6
27-Oct	207.7	0.0	207.7
28-Oct	203.5	0.0	203.5
<b>Totals</b>	<b>1957.5</b>	<b>42.5</b>	<b>2000.0</b>

\*Water source Idaho Irrigation District. Jbh

## GROUND WATER RECHARGE AGREEMENT

**Recharge Partner:**      **Fremont-Madison Irrigation District**  
                                  c/o Aaron Dalling  
                                  350 North 6<sup>th</sup> West  
                                  PO BOX 15  
                                  St. Anthony, Idaho 83445  
                                  208-624-3381  
                                  aaron.fmid@myidahomail.com

**District:**                      **Magic Valley Groundwater District**  
                                  PO BOX 430  
                                  Paul, ID 83347

**Years:**                              **2021**

This Ground Water Recharge Agreement ("Agreement") is entered into effective October 18 2021, between the Recharge Partner and the District identified above. Recharge Partner and the District are referred to herein individually as a "party" and collectively as the "parties."

### RECITALS

A.      The District desires to recharge the Eastern Snake Plain Aquifer (ESPA) in order to enhance ground water levels and comply with the terms of the 2015 SWC-IGWA Settlement Agreement.

B.      Recharge Partner owns a surface water canal system and related facilities that may be used to conduct managed ground water recharge of the ESPA, and Recharge Partner desires to conduct recharge for the District pursuant to the terms and conditions of this Agreement.

### AGREEMENT

In consideration of the terms and conditions of this Agreement, and for other good and valuable consideration, the parties agree as follows:

1.      **Term.** The term of this Agreement is calendar year 2021
2.      **Recharge Water.** Recharge Partner agrees to recharge to the ESPA the following amounts of water (the "Recharge Water") on behalf of the District:
  - 2.1      **District Natural Flow.**
  - 2.2      **Recharge Partner Water.** 5,000 acre feet of storage water acquired by the Magic Valley Groundwater District and assigned to the recharge partner, Fremont Madison Irrigation District.
3.      **Recharge Site.** Recharge Partner will deliver the Recharge Water to one or more recharge sites via Recharge Partner's canal system.
4.      **Qualified Recharge.** Recharge Partner will recharge the Recharge Water in accordance with the recharge policy attached hereto as Appendix A.



**5. Recharge Fee.** The District will pay to Recharge Partner the following amounts for water recharged to the ESPA under this Agreement:

**5.1** \$\_\_\_\_\_ for water supplied by the District under natural flow water rights, temporary permits, and storage water assigned to Recharge Partner by the District.

**5.2** \$ 7 per Acre Foot for water supplied by Recharge Partner.

**6 Payment of Recharge Fee.** The District will pay to Recharge Partner the balance of the recharge fee within 30 days after Recharge Partner reports the total amount of water recharged pursuant to section 4 of this Agreement.

**7 Ownership of Recharge Benefits.** The District shall own all benefits or credits generated through recharge conducted under this Agreement.

**8 Dispute Resolution.** Any substantial dispute between the parties shall be resolved in accordance with the following provisions.

**8.1 Good Faith Negotiation.** Upon written notice from one party to the other, authorized representatives of the parties will attempt in good faith to resolve the dispute by good faith negotiation.

**8.2 Mediation.** If the dispute cannot be resolved by good faith negotiation, either party may demand that the dispute be subjected to mediation by a mediator designated by mutual agreement of the parties. The mediation will be held in Fremont County, Idaho, unless the parties mutually agree to a different location. Mediator costs will be split equally between the parties.

**8.3 Litigation.** Litigation is allowed between the parties only (i) if the dispute is not resolved by mediation, (ii) for the purpose of enforcing a settlement agreement entered into between the parties, or (iii) to seek temporary injunctive relief if a party deems such action necessary to avoid irreparable damage. The pursuit or granting of temporary injunctive relief shall not excuse the parties from participating in good faith negotiation and mediation as set forth above. The prevailing party in any litigation is entitled to recover reasonable attorney fees and costs from the non-prevailing party.

**8.4 Governing Law, Jurisdiction, and Venue.** This Agreement will be construed and interpreted in accordance with the laws of the State of Idaho. The parties agree that the courts of Idaho shall have exclusive jurisdiction, and agree that Fremont County is the proper venue.

**8.5 Exclusive Procedures.** The procedures specified in this section 10 are the exclusive procedures for the resolution of disputes between the parties. All applicable statutes of limitation shall be tolled while the negotiation and mediation procedures specified in section 10.1 and 10.2 are pending.

**9 Force Majeure.** Neither the District nor Recharge Partner is liable for failure to perform the party's obligations if such failure is as a result of Acts of God (including fire, flood, earthquake, storm, or other natural disaster), war, invasion, acts of foreign enemies, rebellion, insurrection, military or usurped power or confiscation, or terrorist activities, or the like.

**10 Miscellaneous.**

**10.1 Notices.** All notices given pursuant to this Agreement must be in writing and shall be sent in one of the following manners: (1) by certified mail, return receipt requested, postage prepaid; (2) by recognized overnight courier such as Federal Express; or (3) by email if the receiving party acknowledges receipt of the emailed notice. Notices shall be deemed received on the earlier of actual receipt, three days after mailing for certified mail and regular mail, or the date the receiving party acknowledges receipt of email notice.

**10.2 Merger.** This Agreement supersedes all other written or verbal agreements between the parties concerning the subject matter hereof. Neither the District nor Recharge Partner shall be bound by any understanding, agreement, promise, representation or stipulation, express or implied, not specifically contained herein.

**10.3 Successors.** This Agreement is for the benefit only of the Parties hereto and shall inure to the benefit of and bind their successors and assigns.

**10.4 Counterparts.** This Agreement may be executed in any number of counterparts for all the convenience of the Parties, all of which, when taken together and after execution by all Parties hereto, shall constitute one and the same Agreement.

**10.5 Electronic Signatures.** Digital or scanned signatures transmitted shall be valid and effective to bind the party so signing.

**10.6 Essence of Time.** Time is of the essence in this Agreement.

## COUNTERPART SIGNATURE PAGE

## RECHARGE PARTNER:

Fremont Madison Irrigation DistrictBy: Printed Name: Aaron DallingTitle: Executive Director



COUNTERPART SIGNATURE PAGE

**Magic Valley Groundwater District**

By:  \_\_\_\_\_

Printed Name: Dean Stevenson

Title: Chairman

# North Snake GWD Recharge Documentation

Report Entry 7.1 - 7.3

(Entry 7.4 Documentation under  
MVGWD entries 6.2)

**Jaxon Higgs**

---

**From:** Hardgrove, Bob <Bob.Hardgrove@hdrinc.com>  
**Sent:** Friday, March 11, 2022 9:25 AM  
**To:** Jaxon Higgs  
**Cc:** Adam McCoy; Hardgrove, Bob  
**Subject:** RE: Sandy Ponds Recharge

Jaxon,

Hope 2022 is treating you well thus far. We submitted the report to Tim Luke towards the end of January. We reported a total recharge volume of 5957.2 acre-feet. I believe this volume is intended to be split 50/50 between NSGWD and NSCC.

**5957.2 / 2 = 2979 acre-ft**

Thanks,  
Bob

Bob Hardgrove, P.E.  
D 208.872.9511 M 208.608.3719

[hdrinc.com/follow-us](https://hdrinc.com/follow-us)

---

**From:** Jaxon Higgs <jaxon@waterwellconsultants.com>  
**Sent:** Friday, March 11, 2022 9:07 AM  
**To:** Hardgrove, Bob <bhardgrove@spfwater.com>  
**Cc:** Adam McCoy <adam@waterwellconsultants.com>  
**Subject:** Sandy Ponds Recharge

**CAUTION:** [EXTERNAL] This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Bob,

North Snake GWD is having their annual meeting next week and we would like to report the amount of recharge accomplished at the Sandy Ponds. Have you by chance completed that report yet?

Thank you!

Jaxon Higgs  
WWC, Inc.

Station	Storage Account	Supplier or Recipient	Purchaser	Rental Pool and Leases (AF)			Adjustments (Acre-Feet)					Return to Spaceholder (AF)	Notes
				Common Pool Rental	Private Lease (Supply (-) or Assignment (+))	Fre-Mad (Supply (-) or Assignment (+))	Palisades Water User (Supply (-) or Assignment (+))	Balanced Adjustments	Unbalanced Adjustments	Ground Water Exchange Pumping			
13080500	Burley Irrigation District	Minidoka Irrigation District	Magic Valley GWD		1170								
13080500	Burley Irrigation District	Southwest Irrigation District			3000								IGWA Assignment
13080500	Burley Irrigation District	Water Mitigation Coalition			638								Water Mitigation Coalition Assignment
13080500	Burley Irrigation District	Surface Water Coalition			3750								SWC Assignment
13080500	Burley Irrigation District	Burley Irrigation District	Magic Valley GWD		-669								Private Lease
13080500	Burley Irrigation District	Burley Irrigation District	Magic Valley GWD		669								Private Lease
13085350	Southwest Irrigation District	PWUI					2527.9						
13085350	Southwest Irrigation District		Ryan Cranney	100									
13085350	Southwest Irrigation District	IGWA			7908.7								IGWA Assignment
13085350	Southwest Irrigation District	Burley Irrigation District			-3000								IGWA Assignment
13085350	Southwest Irrigation District	Twin Falls Canal			-2500								IGWA Assignment
13085350	Southwest Irrigation District	North Snake GWD			2000								IGWA Assignment
13085350	Southwest Irrigation District	Milner Irrigation District			-2066.2								IGWA Assignment
13085350	Southwest Irrigation District	Twin Falls Canal			-1655								IGWA Assignment
13085350	Southwest Irrigation District	Falls Irrigation District	Southwest Irrigation District		8000								Private Lease
13085350	Southwest Irrigation District	Minidoka Irrigation District	Southwest Irrigation District		5000								Private Lease
13085400	Hobson	PWUI					275.7						
13085500	A & B Irrigation District	Water Mitigation Coalition			1088								Water Mitigation Coalition Assignment
13085500	A & B Irrigation District	Surface Water Coalition			6400								SWC Assignment
13086000	Milner Irrigation	Artesian						1098.4					Assignment
13086000	Milner Irrigation		Scott Breeding	100									Common Pool
13086000	Milner Irrigation	PWUI					1103.1						
13086000	Milner Irrigation	Surface Water Coalition			1000								SWC Assignment
13086000	Milner Irrigation	Southwest Irrigation District			2066.2								IGWA Assignment
13086000	Milner Irrigation	Water Mitigation Coalition			170								Water Mitigation Coalition Assignment
13086000	Milner Irrigation	Milner Irrigation	Southwest Irrigation District		-4000								Private Lease
13086000	Milner Irrigation	Milner Irrigation	Southwest Irrigation District		4000								Private Lease
13086530	AFRD #2	Minidoka Irrigation District	North Snake GWD		5000								
13086530	AFRD #2	Mitigation Inc	Yellowstone Earth Science		1000								
13086530	AFRD #2	Minidoka Credit						1000					Same amount every year
13086530	AFRD #2	AFRD #2	Knife River Corp		-5								Private Lease
13086530	AFRD #2	AFRD #2	Knife River Corp		5								Private Lease
13086530	AFRD #2	Minidoka Irrigation District	Magic Valley GWD		4830								Private Lease
13086530	AFRD #2	Surface Water Coalition			4900								SWC Assignment
13086530	AFRD #2	Magic Valley GWD			6500								IGWA Assignment
13086530	AFRD #2	Twin Falls Canal			1000								IGWA Assignment
13086530	AFRD #2	Water Mitigation Coalition			1833								Water Mitigation Coalition Assignment
13087000	Northside Canal		Arthur R. Henry	100									
13087000	Northside Canal	Water Mitigation Coalition			1500								Water Mitigation Coalition Assignment
13087000	Northside Canal	Water Mitigation Coalition			2065								Water Mitigation Coalition Assignment
13087000	Northside Canal	Minidoka Irrigation District	North Snake GWD		10000								
13087000	Northside Canal	Minidoka Credit						-7750					Same amount every year
13087000	Northside Canal	Milner Reservoir						7719.2					Milner Storage deliver (Water Right 1-10509)
13087000	Northside Canal	North Snake GWD			8008								IGWA Assignment
13087000	Northside Canal	Surface Water Coalition			9537								SWC Assignment
13087500	Twin Falls Canal	Minidoka Credit						-6750					Same amount every year
13087500	Twin Falls Canal	Artesian						1617.1					Assignment
13087500	Twin Falls Canal	Surface Water Coalition			15750								SWC Assignment
13087500	Twin Falls Canal	Southwest Irrigation District			2500								IGWA Assignment
13087500	Twin Falls Canal	AFRD #2			-1000								IGWA Assignment
13087500	Twin Falls Canal	Water Mitigation Coalition			1678								Water Mitigation Coalition Assignment
13087500	Twin Falls Canal	Water Mitigation Coalition			1028								Water Mitigation Coalition Assignment
13087500	Twin Falls Canal	Southwest Irrigation District			1655								IGWA Assignment
13087500	Twin Falls Canal	Surface Water Coalition			8663								SWC Assignment
13087500	Twin Falls Canal	City of Pocatello						1526.5					Mitigation for Pocatello GW Pumping
13087500	Twin Falls Canal	City of Pocatello	Multiple Cities		3969.3								Private Lease
99999100	City of Pocatello	Twin Falls Canal						-1526.5					Mitigation for Pocatello GW Pumping
99999100	City of Pocatello	Twin Falls Canal	Multiple Cities		-3969.3								Private Lease
99999100	City of Pocatello	Idaho Irrigation District	City of Idaho Falls		-1550								Private Lease
99999250	Wyoming	IGWA	IGWA		-10000								Private Lease
99999300	Palisades Water Users		Palisades Water Users	10000									Impact Rental

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE ASSIGNMENT SHEET**Private Lease Purchasing Entity: IGWA (Tab 16 Rental Pool Spreadsheet)Purchased Balance (AF): 62,500

	Assignment to	Assignment from	AF Amount
1 <sup>st</sup> Order	Surface Water Coalition	IGWA	23,290
	North Snake GWD	IGWA	16,500
	Magic Valley GWD	IGWA	6,500
	Southwest Irrigation District	IGWA	7,908.7
	American Falls-Aberdeen GWD	IGWA	7,500
		IGWA	801.3
2 <sup>nd</sup> Order	Eastern Snake Plain Aquifer Recharge	American Falls-Aberdeen GWD	5,000
	AFRD#2	Magic Valley GWD 5550 for NSGWD	6,500
	Burley Irrigation District	Southwest Irrigation District	3,000
	Twin Falls Canal Company	Southwest Irrigation District	2,500
	AFRD#2	Surface Water Coalition	4,900
	Milner Irrigation District	Surface Water Coalition	1,000
	Twin Falls Canal Company	Surface Water Coalition	15,750
	Northside Canal Company	North Snake GWD 2116 losses, remainder delivered for conversions	8,008
	Minidoka Irrigation District	North Snake GWD	1,582
	Southwest Irrigation District	North Snake GWD	2,000
	Eastern Snake Plain Aquifer Recharge	North Snake GWD 2455 for MVGWD and 2455 for AFAGWD	4,910
3 <sup>rd</sup> Order	AFRD#2	Twin Falls Canal Company	1,000
	Jensen Grove	Eastern Snake Plain Aquifer Recharge	2,006.3
	SNAKE RIVER VALLEY Irrigation District	Eastern Snake Plain Aquifer Recharge	4,910
	Mattson- Craig Canal	Eastern Snake Plain Aquifer Recharge	968.4
	Milner Irrigation District	Southwest Irrigation District	2,000

[illegible]

2021 Groundwater Users running water through AFRD2 System water delivery only

	alloted by a/f	April	May	June	July	August	September	October	Total inches	Total CFS	x1.98	AF	Loss Ratio	Total AF Used	Cost
5% Loss Ratio															
Deanna Chambers/ G	450.0	-			1,540.00	2,140.00	2,460.00		6140.00	122.80	x1.98	243.14	12.16	255.30	2,042.41
Jim Richie	350.0	120.00	1,760.00	2,940.00	540.00	2,140.00	1,350.00		8850.00	177.00	x1.98	350.46	17.52	367.98	2,943.86
rider - Fitzpatrick															
9% Loss Ratio															
Jim Richie	2200.0	-	-	10,433.00	10,472.00	9,408.00	5,934.00		36247.00	724.94	x1.98	1,435.38	129.18	1,564.57	12,516.52
Tim Waters	1750.0	-	-	10,796.00	8,327.00	9,334.00	5,584.00		34041.00	680.82	x1.98	1,348.02	121.32	1,469.35	11,754.77
rider - Bullers															
15% Loss Ratio															
Rick Astle	250.0	-	-	1,495.00	2,657.00	1,565.00	1,575.00		7292.00	145.84	x1.98	288.76	43.31	332.08	2,656.62
Buddy Dunn-Big Sky	1500.0	793.00	3,570.00	6,738.00	5,065.00	4,106.00	3,269.00		23541.00	470.82	x1.98	932.22	139.83	1,072.06	8,576.46
Gene Shaw	500.00	1,000.00	-	2,750.00	2,334.00	1,207.00	471.00		7762.00	155.24	x1.98	307.38	46.11	353.48	2,827.85
Don Taber	1000.0	-	-	3,983.00	5,934.00	3,877.00	2,647.00		16441.00	328.82	x1.98	651.06	97.66	748.72	5,989.79
rider - Cook															
33% Loss Ratio															
Frank Astorquia	1000.0	-	-	2,156.00	983.64	694.30			3833.94	76.68	x1.98	151.82	50.10	201.93	1,615.41
rider - Nasura															
33% Loss Ratio															
Joseph Hults	101	-	-						0.00	0.00	x1.98	-	-	-	-
rider - Schmidt															
Total Loss: 657.19														\$ 50,923.69 Total Cost	

9101.0 total af requested

6365.5 total af used

April	May	June	July	August	September	October	Total Cost
\$ 693.14	\$ 1,886.07	\$ 14,669.42	\$ 13,423.34	\$ 108,818.34	\$ 14,669.42	\$ 13,423.34	\$ 167,583.07

**DEPARTMENT OF WATER RESOURCES**

322 E Front Street, Suite 648 • PO Box 83720 • Boise ID 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700

Website: [idwr.idaho.gov](http://idwr.idaho.gov) • Email: [idwrinfo@idwr.idaho.gov](mailto:idwrinfo@idwr.idaho.gov)BRAD LITTLE  
GovernorGARY SPACKMAN  
Director

June 30, 2022

**To: The Parties<sup>1</sup>**  
**From: Idaho Department of Water Resources**  
**Re: Verification of Signatory Cities' 2021 Recharge Data**

This document is submitted by the Idaho Department of Water Resources ("IDWR") to the Parties to satisfy section III.B of the 2018 Agreement named "Settlement Agreement Between the Surface Water Coalition, Participating Members of Idaho Ground Water Appropriators Inc., and Signatory Cities." Section III.B of the Agreement states:

*"The Parties will request that IDWR analyze the data contained in the Signatory Cities' annual report to confirm the accuracy of the data. IDWR's analysis shall be provided to the Parties no later than July 1 following the Signatory Cities' April 1 submittal of the annual report."*

On March 21, 2022, the Signatory Cities submitted their 2021 Annual Report ("Report") to the Parties and IDWR. IDWR has reviewed the Report and determined the recharge and mitigation activities conducted by the Signatory Cities has met the criteria set forth in section II.A.2 of the Agreement and achieved a total recharge/mitigation volume of 7,247.4 acre-feet as shown in table 1 below.

**Table 1: 2021 Signatory City Recharge Activity Details**

City	Source of Recharge Water	Recharge Location	Recharge Date	Is location authorized? Does location meet Agreement criteria?	2021 Recharge Amount (acre-feet)
Participating Cities	City of Pocatello's Palisades Reservoir Storage	NA: Direct delivery to Twin Falls Canal Company	-	Yes. See First Addendum to Agreement.	5,495.8
Idaho Falls	Source 1. Lease from City of Pocatello (1350 acre-feet)	Sand Creek Site	5/10 - 9/4	Yes. ESPAM2.1 modeled 5-year retention of 17.8% (row 77, columns 160 and 161)	1,392.0
	Source 3. Lease from Common Pool (42 AF)	Near Gem lake	?	Yes. ESPAM2.1 modeled 5-year retention of 21% (row 74, columns 156)	
Rexburg	Rexburg Teton River surface water rights 22-203 and 22-204C	Walters Pond	4/27 - 9/8	Yes. ESPAM2.1 modeled 5-year retention of 44.3% (row 77, column 183)	359.6

**Total Recharge Volume (acre-feet) 7,247.4**

<sup>2</sup> McVay, Michael, P.E., P.G., 2015, *Incorporating Recharge Limitations into the Prioritization of Aquifer Recharge Sites Based on Hydrologic Benefits Using ESPAM2.1*, Idaho Dept. of Water Resources Technical Publication

<sup>1</sup> Parties: Signatory Cities, Surface Water Coalition, Idaho Ground Water Appropriators, Inc.



It is worth noting here the Parties agreed the Cities total recharge and mitigation volume for 2021 shall be 7,650 acre feet. This was agreed to in the *First Amendment to Settlement Agreement* signed by the Parties in August/September 2021.

Section II.A of the Agreement details the requirement to recharge a minimum of 1,000 AF per year and to maintain a five year rolling average recharge volume of 7,650 AF. The assessment of compliance pertaining to the five-year rolling average occurs in 2024 as per Section II.C of the Agreement. The five year rolling average is shown in table 2 below.

**Table 2: Signatory City Annual Recharge and Five Year Average**

	2019	2020	2021	2022	2023	Five Year Average
<b>Total City Recharge Amount</b>	8,169.4	7,813.8	7,247.4			7,743.5

Respectfully,



Brian W. Ragan, PG  
Water Compliance Bureau

**SWC DELIVERY CALL SETTLEMENT AGREEMENT BETWEEN THE SWC AND THE IGWA:  
VERIFICATION OF DISTRICT DATA**

**TO:** Steering Committee  
**FROM:** Idaho Department of Water Resources  
**DATE:** July 3, 2017  
**RE:** Verification of IGWA's 5-Year Baseline and 2016 Diversion Data

---

This document is submitted by the Idaho Department of Water Resources ("Department") to the Steering Committee, comprised of members of the Surface Water Coalition ("SWC") and the Idaho Ground Water Appropriators ("IGWA"), to generally satisfy Covenant 2.b.iii of the Second Addendum to the Settlement Agreement ("Agreement") dated December 14, 2016 which states:

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

The Department reviewed data submitted to the Steering Committee by IGWA on April 1, 2017 in a document with attached data tables and electronic Excel spreadsheets entitled "Settlement Agreement Implementation Report" ("Report"). IGWA data reported for each ground water district included (1) the five-year average baseline usage from 2010 through 2014, (2) the 2016 annual diversion volume, and (3) the resultant difference between the baseline and 2016 usage. These values are reported respectively in column 2 of Tables 1, 2 and 3 in this memo. IGWA's Report included the baseline average and 2016 water use for each ground water district member well or record reported in the Department's Water Management Information System ("WMIS") database. IGWA adjusted the five-year average and 2016 usage for some WMIS records for various reasons.

Department staff independently queried the five-year baseline and 2016 usage amounts from the WMIS database for each WMIS record reported by IGWA. Data resulting from these queries are reported by ground water district and shown in column 3 of Tables 1 and 2. The 2016 volume reduction from the five-year baseline average is shown in column 3 of Table 3.

The Department notes that WMIS records currently do not exist for most or all of the wells in the Fremont Madison Irrigation District ("FMID") and Water District 31 ("WD31"). Most of the FMID wells are measured and reported by Water District 01 ("WD01"). Department staff therefore pulled WD01 FMID data from the WD01 Water Rights Accounting database available on the Department's website. WD31 volume data, which are included in the reported volumes for Jefferson-Clark Ground Water District, are obtained from WD31 annual watermaster records.

The Department also attempted to verify IGWA's reported private lease-rental recharge amounts for the fall of 2015 and all of 2016. Confirmation of actual recharge volumes is difficult due to the complexity of tracking surface water deliveries, transactions and return flow amounts to the Snake River. The Department's review is limited to confirming the existence and delivery volumes of private lease-rental contracts within WD01.

The following tables summarize the five-year average baseline, 2016 usage, resultant reductions, and recharge volumes as determined by IGWA and the Department. The verification results are presented in an objective manner with no judgement as which data are correct or incorrect. Notes are provided under each

table explaining additional details specific to that particular table or dataset. Possible explanations are offered regarding differences between the IGWA and Department datasets.

The Department did not review or include data for A&B Irrigation District, Southwest Irrigation District and Falls Irrigation District. The Department could consider reporting data for these districts to the Steering Committee upon request.

#### Analysis of Districts' Five-Year Baseline Volumes

<b>Table 1: Five-year Baseline Comparison</b>			
2010 through 2014			
1	2	3	4
Ground Water District	IGWA Reported: Adjusted 5-Yr Baseline (AF)	IDWR Database: 5-Yr Baseline (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
Aberdeen - American Falls GWD	279,291	269,872	-3.4
Bingham GWD	278,988	270,593	-3.0
Bonneville - Jefferson GWD	150,838	145,091	-3.8
Carey Valley GWD	5,671	2,528	-55.4
Jefferson - Clark GWD	438,979	439,622	0.1
Fremont-Madison ID/Madison ID /WD100	43,491	22,492	-48.3
Magic Valley GWD	262,205	263,829	0.6
North Snake GWD	183,914	186,634	1.5
<b>Total</b>	<b>1,643,377</b>	<b>1,600,661</b>	<b>-2.6</b>

#### Notes:

- Carey Valley GWD – IGWA used single annual volumes from either 2014 or 2015 as the baseline for each diversion.
- Fremont-Madison et. al. – The Department included FMID's zero pumpage for the years 2010, 2011, 2012, 2014 in their five-year baseline average calculation. IGWA used the single annual diversion volume from these wells in 2013 as the baseline.
- IGWA's original published adjusted five-year baseline volume for the North Snake GWD was 205,219 AF, which included an annual average conversion volume of 21,305 AF. For its analysis, the Department subtracted 21,305 AF from IGWA's adjusted five-year baseline volume to perform a direct comparison of diversion volumes queried from WMIS.
- Jefferson-Clark GWD includes WD31 water use volumes.

Analysis of Districts' 2016 Annual Diversion Volume

Table 2: 2016 Usage Comparisons			
1	2	3	4
Ground Water District	IGWA Reported: 2016 Usage (AF)	IDWR Database: 2016 Usage (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
Aberdeen - American Falls GWD	257,455	254,508	-1.1
Bingham GWD	265,643	263,702	-0.7
Bonneville - Jefferson GWD	148,298	143,895	-3.0
Carey Valley GWD	772	602	-22.0
Jefferson - Clark GWD	416,405	416,950	0.1
Fremont-Madison ID/Madison ID /WD100	16,729	17,051	1.9
Magic Valley GWD	238,094	232,053	-2.5
North Snake GWD	173,992	167,766	-3.6
<b>Total:</b>	<b>1,517,388</b>	<b>1,496,527</b>	<b>-1.4</b>

Notes:

- By the date of this report the Department was unable to verify the 2016 total usage volume for WD31 and therefore used the IGWA published volume of 83,623 AF.
- FMID's exchange wells showed zero usage in 2016.

### Analysis of Districts' 2016 Diversion Reductions

Table 3: Reduction Comparison			
1	2	3	4
Ground Water District	IGWA Reported: Reductions (AF)	IDWR Database: Reductions (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
Aberdeen - American Falls GWD	21,836	15,364	-29.6
Bingham GWD	13,345	6,891	-48.4
Bonneville - Jefferson GWD	2,540	1,196	-52.9
Carey Valley GWD	4,899	1,926	-60.7
Jefferson - Clark GWD	22,574	22,672	0.4
Fremont-Madison ID/Madison ID /WD100	26,762	5,441	-79.7
Magic Valley GWD	24,111	31,776	31.8
North Snake GWD	9,922	18,868	90.2
<b>Total:</b>	<b>125,989</b>	<b>104,134</b>	<b>-17.3</b>

#### Notes:

- The data on this table was generated by subtracting the 2016 usage from the baseline average for each specific district.
- IGWA originally reported a reduction volume of 31,228 AF for the North Snake GWD. For its analysis, the Department subtracted the 21,305 AF annual average conversion volume from North Snake GWD's original five-year baseline volume to directly compare reported diversion volumes queried from WMIS.

## Analysis of Districts' 2015 / 2016 Recharge Volumes

Table 4: Recharge Contract Confirmation						
IGWA Reported Data					IDWR Contract Confirmation	
District	Volume (AF)	Dates	Location	Source	Contract Confirmed	Contract Amount (AF)
American Falls - Aberdeen GWD	11,238	March 1 - Oct 26	Hilton Spill	ASCC Rental	Confirmed	11,238
American Falls - Aberdeen GWD	4,885	March 1 - Oct 26	Hilton Spill	ASCC User Shares	Confirmed	4,370
<b>Sub-Total:</b>	<b>16,123</b>				<b>Sub-Total:</b>	<b>15,608</b>
Bingham GWD	7,202	Fall 2015	ASCC/SRVID/FMID/NSID	WD 01 Common pool/New Sweden	Confirmed	7,202
Bingham GWD	8,558	March - Oct 2016	Hilton Spill	Parson's, Peoples, Riverside, Watson, Wearyrick Canals	Confirmed	9,048
Bingham GWD	1,500	April-Oct 2016	People's Site	Parson's, Peoples, Riverside, Watson, Wearyrick Canals	Confirmed	1,500
Bingham GWD	6,000	April-Oct 2016	Jensen Grove	Parson's, Peoples, Riverside, Watson, Wearyrick Canals	Confirmed	6,000
Bingham GWD	2,000	Spring 2016	St Anthony Union Canal	Parson's, Peoples, Riverside, Watson, Wearyrick Canals	Confirmed	2,000
<b>Sub-Total:</b>	<b>25,260</b>				<b>Sub-Total:</b>	<b>25,750</b>
Bonneville - Jefferson GWD	1,783	Spring 2016	New Sweden ID	New Sweden ID	Confirmed	1,783
Bonneville - Jefferson GWD	1,739	Spring 2016	Great Feeder	Progressive	Confirmed	1,739
Bonneville - Jefferson GWD	1,739	Spring 2016	Great Feeder	Mitigation Inc	Confirmed	1,739
Bonneville - Jefferson GWD	1,739	Spring 2016	Snake River Valley	Snake River Valley	Confirmed	1,739
Bonneville - Jefferson GWD	200	Spring 2016	New Sweden CC	Woodville Canal User Shares	Confirmed	200
Bonneville - Jefferson GWD	2,325	Fall 2015	Aberdeen-Springfield	Rental Pool	Confirmed	2,325
Bonneville - Jefferson GWD	409	Fall 2015	Snake River Valley	Rental Pool	Confirmed	409
Bonneville - Jefferson GWD	353	Fall 2015	Fremont-Madison	Rental Pool	Confirmed	353
Bonneville - Jefferson GWD	325	Fall 2015	New Sweden	New Sweden CC Rental	Confirmed	325
<b>Sub-Total:</b>	<b>10,612</b>				<b>Sub-Total:</b>	<b>10,612</b>
Carey GWD	0					
<b>Sub-Total:</b>	<b>0</b>					
Magic Valley GWD	5,100	May 10 - May 24	Milepost 31	IGWA Rental	Confirmed	5,000
<b>Sub-Total:</b>	<b>5,100</b>				<b>Sub-Total:</b>	<b>5,000</b>
Jefferson-Clark GWD	5,263	Fall 2015	Aberdeen-Springfield		Confirmed	5,263
Jefferson-Clark GWD	926	Fall 2015	Snake River Valley		Confirmed	926
Jefferson-Clark GWD	800	Fall 2015	Fremont Madison		Confirmed	800
Jefferson-Clark GWD	735	Fall 2015	New Sweden		Confirmed	735
Jefferson-Clark GWD	3,343	2016	New Sweden		Confirmed	3,343
Jefferson-Clark GWD	7,000	2016	Fremont Madison		Confirmed	7,000
Jefferson-Clark GWD	4,000	7/2016-10/2016	Dewey		Confirmed	4,000
Jefferson-Clark GWD	6,522	2016	Great Feeder		Confirmed	6,522
Jefferson-Clark GWD	3,261	2016	Snake River Valley		Confirmed	3,261
Jefferson-Clark GWD	343	2016	Birch Creek		Confirmed	343
<b>Sub-Total:</b>	<b>32,193</b>				<b>Sub-Total:</b>	<b>32,193</b>
Fremont-Madison ID	3,000	2016	Egin Lakes	FMID	Confirmed	7,152
<b>Sub-Total:</b>	<b>3,000</b>				<b>Sub-Total:</b>	<b>7,152</b>
<b>Grand-Total</b>	<b>92,288</b>				<b>Grand-Total</b>	<b>96,315</b>

### Notes:

- Recognizing the challenges and difficulties due to the current data gaps in regard to accurately knowing and measuring where, when and how much water was actually recharged, the Department limited its review to confirmation of private lease/rental contracts and associated volume amounts. Lease-rental contract volumes are merely compared to the recharge volumes reported by IGWA.
- Two instances, totaling 615 AF, were identified where the IGWA reported recharge amount was greater than the contract amount.

### Analysis of District's 2016 CREP, Conversions, End-Gun Removals

Although the Report states IGWA has, and will continue to support, conversions and water conservation programs and suggests end-gun removal as a reduction strategy, metric data was not available to be verified and therefore the Department is unable to comment on these efforts. The Department does acknowledge the IGWA's reported average annual conversion volume of 21,305 AF for the North Snake GWD although 2016 data wasn't provided.

### Possible Explanations for Differences in Baseline, 2016 Usage, and resultant Reduction Volumes

- The Department did not adjust volume data queried from WMIS or the WD01 Water Right Accounting database.
- The Department queried WMIS for the volumes associated with the preferred method selected by the Watermaster.
- The Department has not yet confirmed the WD31 2016 usage with the WD31 Watermaster and therefore relied upon the 83,623 AF usage volume reported by IGWA.
- Specific to Bonneville-Jefferson GWD, IGWA included a new site named "Covington" whereas the Department did not include this site as it was not in WMIS to be queried. IGWA provided the following information:
  - Site name "Covington", five-yr baseline volume "145.0 AF", 2016 usage volume "208.9 AF", and the comment "New member. Added to plan 3/9/2017. This well does not have a WMIS number yet. Five year average was provided by user to district manager. This diversion has a mechanical flowmeter."
- The Department accounted for the FMID's five exchange wells "0" pumping years (2010, 2011, 2012, 2014) in the averaging process resulting in a five-year baseline average of 22,492 AF. Treating the "0" pumping years as "null values" in the averaging process increases their five-year baseline average to 45,974. Null values are reported when pumping was known to have occurred but no pumping data is available.
- The NSGWD IGWA baseline value accounts for 21,305 AF of conversions. The Department data does not.

### Examples of baseline and 2016 usage notes presented by IGWA explaining why volume data adjustments were made

- WD120 reporting district, no 2016 calculation completed. Used baseline as 2016 usage.
- Irrigation system and acreage changed. Used 2012-2014 average for baseline.
- Poor data for baseline, no 2016 power data available. Used baseline as 2016 usage.
- Cut 2010 from average because of invalid PCC.
- Removed 2011 from baseline at request of owner an approval of board. An experimental crop was planted those years.
- Multiple demands on electrical meter. Flowmeter installed but historic usage is suspect. Used five year average as 2016 usage.
- Added usage onto average from 200162 for 80 acres that was purchased in 2015.
- New member. Surface and ground water pumped through same system. 20% of usage applied as ground water for baseline.
- Not calculated by WD100 staff. Used 5 year average for 2016 usage.
- No power records supplied and no totalizer start value. Used 5 year average for 2016 usage.
- No end of year meter reading. Used baseline as 2016 usage.

- Broken flow meter. Used five year average for 2016 usage.
- Dead flow meter battery. PCC invalid. Used five year average for 2016 usage.
- Baseline was changed using only 2013 and 2014 years. Owner had wastewater before but lost it and started pumping his well in 2013.



**SWC DELIVERY CALL SETTLEMENT AGREEMENT BETWEEN THE SWC AND THE IGWA:  
VERIFICATION OF DISTRICT DATA**

**TO:** Steering Committee  
**FROM:** Idaho Department of Water Resources  
**DATE:** July 3, 2018  
**RE:** Verification of IGWA's 2017 Diversion and Recharge Data

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This document is submitted by the Idaho Department of Water Resources ("Department") to the Surface Water Coalition ("SWC") and Idaho Ground Water Appropriators ("IGWA") Settlement Agreement Steering Committee to generally satisfy Covenant 2.b.iii of the Second Addendum to the Settlement Agreement ("Agreement") dated December 14, 2016 which states:

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

On April 1, 2018 the Ground Water Districts submitted their Settlement Agreement 2017 Performance Report ("Performance Report") to the Steering Committee and the Department. The format, structure and components of this Performance Report is the same as the 2016 Performance Report. The Department has reviewed the Performance Report which included attached data tables and electronic Excel spreadsheets. Data for each ground water district in the Performance Report included the five-year average baseline usage from 2010 through 2014, the 2017 annual diversion volume, and the resultant difference between the baseline and 2017 annual diversion volume. These values are reported in column 2 of Tables 1, 2 and 3 in this memo. The baseline average and 2017 water use data came from the Department's Water Management Information System ("WMIS") database. IGWA adjusted the five-year average and 2017 annual diversion volume for some WMIS records and provided explanations for the adjustments.

Department staff independently queried the five-year baseline and 2017 diversion volumes from the WMIS database for each WMIS record reported by IGWA to compare against the baseline amounts from the Performance Reports. This was done to capture revisions to historic data in WMIS and account for membership changes within the ground water districts. Data resulting from these queries are reported by ground water district and shown in column 3 of Tables 1 and 2. The 2017 diversion volume reduction from the five-year baseline average is shown in column 3 of Table 3.

WMIS records are being assigned to most or all of the wells in the Fremont Madison Irrigation District ("FMID") and in Water District 31 ("WD31") to make future data queries and reviews more efficient. Some wells in these areas did not have a WMIS record assigned to it and are measured and reported by Water District 01 ("WD01") because they discharge ground water into a canal which is then measured by an open-channel device. Department staff retrieved WD01 FMID data from the WD01 Water Rights Accounting database available on the Department's website. WD31 data, which are included in the reported volumes for Jefferson-Clark Ground Water District, were obtained from WD31 Watermaster Annual Reports.

The Department also verified IGWA's reported private lease-rental recharge amounts for the fall of 2016 and all of 2017. Confirmation of actual recharge volumes is difficult due to the complexity of tracking surface water deliveries, transactions and return flow amounts to the Snake River. The Department's review is limited to confirming the existence and delivery volumes of private lease-rental contracts within WD01, Temporary Water Permits, and Natural Flow Permits and Water Supply Bank Rentals.

The following tables summarize the five-year average baseline, 2017 usage, resultant reductions, and recharge contract volumes as determined by IGWA and the Department. The verification results are presented objectively with no assumption as to which data are correct or incorrect. Notes are provided under each table explaining additional details specific to that particular table or dataset. Possible explanations are offered regarding differences between IGWA and Department datasets.

The Department did not review or include data for A&B Irrigation District or the Southwest Irrigation District. The Department would consider reporting data for these districts to the Steering Committee upon request.

**Table 1: Five-year Baseline Comparison**

2010 through 2014

1	2	3	4
Ground Water District	IGWA Reported: Adjusted 5-Yr Baseline (AF)	IDWR Database: 5-Yr Baseline (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
Aberdeen - American Falls GWD	285,585	275,829	-3.4
Bingham GWD	281,918	280,499	-0.5
Bonneville - Jefferson GWD	155,665	149,607	-3.9
Carey Valley GWD	5,671	2,528	-55.4
Jefferson - Clark GWD	438,814	441,869	0.7
Henry's Fork GWD	45,648	23,139	-49.3
Magic Valley GWD	262,471	262,753	0.1
North Snake GWD	189,002	186,743	-1.2
<b>Total</b>	<b>1,664,774</b>	<b>1,622,967</b>	<b>-2.5</b>

Table 1 Notes:

- Carey Valley GWD – IGWA used single annual volumes from either 2014 or 2015 as the baseline for each diversion.
- Henry's Fork GWD – The Department included Fremont Madison Irrigation District's zero pumping years in the five-year baseline average calculation resulting in a volume of 6,517 acre-feet ("AF"). IGWA used the single annual diversion volume from these wells in 2013 as the baseline resulting in a volume of 29,353 AF.
- IGWA's original published adjusted five-year baseline volume for the North Snake GWD was 210,307 AF, which included an annual average conversion volume of 21,305 AF. For its analysis, the Department subtracted 21,305 AF from IGWA's adjusted five-year baseline volume to perform a direct comparison of diversion volumes queried from WMIS.
- Jefferson-Clark GWD includes WD31 water use volumes.

Table 2: 2017 Usage Comparisons

1	2	3	4
Ground Water District	IGWA Reported: 2017 Usage (AF)	IDWR Database: 2017 Usage (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
Aberdeen - American Falls GWD	240,361	236,569	-1.6
Bingham GWD	231,152	225,405	-2.5
Bonneville - Jefferson GWD	134,134	130,638	-2.6
Carey Valley GWD	1,135	986	-13.1
Jefferson - Clark GWD	370,936	367,898	-0.8
Henry's Fork GWD	14,987	10,748	-28.3
Magic Valley GWD	233,600	224,805	-3.8
North Snake GWD	172,472	166,736	-3.3
<b>Total:</b>	<b>1,398,777</b>	<b>1,363,785</b>	<b>-2.5</b>

## Table 2 Notes:

- Henry's Fork GWD – 2017 diversion volume data had not been entered into WMIS for 11 diversions. In these cases IDWR did not make adjustments whereas IGWA used the 5-year average baseline volume as the 2017 usage volume. The total volume added by this IGWA adjustment is +4,145 AF.

### Table 3: 2017 Reduction Comparison

1	2	3	4
Ground Water District	IGWA Reported: Reductions (AF)	IDWR Database: Reductions (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
Aberdeen - American Falls GWD	45,224	39,260	-13.2
Bingham GWD	50,766	55,094	8.5
Bonneville - Jefferson GWD	21,531	18,969	-11.9
Carey Valley GWD	4,535	1,542	-66.0
Jefferson - Clark GWD	67,878	73,971	9.0
Henry's Fork GWD	30,661	12,391	-59.6
Magic Valley GWD	28,872	37,948	31.4
North Snake GWD	16,530	20,007	21.0
<b>Total:</b>	<b>265,997</b>	<b>259,182</b>	<b>-2.6</b>

Table 3 Notes:

- The data on this table was generated by subtracting the 2017 usage from the baseline average for each specific district.
- IGWA originally reported a reduction volume of 37,836 AF for the North Snake GWD. For its analysis, the Department subtracted the 21,305 AF annual average conversion volume from North Snake GWD's original five-year baseline volume to directly compare reported diversion volumes queried from WMIS. This results in an adjusted NSGWD IGWA reduction of 16,530 AF.

Table 4: 2016 / 2017 Recharge Contract Confirmation

IGWA Reported Data					IDWR Contract Confirmation	
District	Volume (AF)	Location	Source	Type	Contract Confirmed	Contract Amount (AF)
American Falls - Aberdeen GWD	10,000	Aberdeen-Springfield Canal Co	Aberdeen-Springfield Canal Company	Storage Lease	Confirmed	10,000.0
American Falls - Aberdeen GWD	1,000	Blackfoot Canal Company	Aberdeen-Springfield Canal Company	Storage Lease	Confirmed	1,000.0
American Falls - Aberdeen GWD	382	Corbett Slough Canal Company	Aberdeen-Springfield Canal Company	Storage Lease	Confirmed	382.0
American Falls - Aberdeen GWD	4,053	Various	Snake River Storage	Natural Flow	Confirmed	10,000.0
American Falls - Aberdeen GWD	17,872	Aberdeen-Springfield Canal Co	Aberdeen-Springfield Canal Company	Natural Flow Permit 1-10629	Confirmed	17,872.0
American Falls - Aberdeen GWD	17,320	Various	Recharge Development Corporation	Natural flow & Storage	Confirmed	17,320.0
Sub-Total: 50,627					Sub-Total: 56,574.0	
Bingham GWD	16.5	New Sweden Irrigation District	New Sweden Irrigation District	Storage Lease	Confirmed	16.5
Bingham GWD	1,000.0	New Lavaside Canal Co.	New Lavaside Canal Co	Storage Lease	Confirmed	1,000.0
Bingham GWD	1096.00	Aberdeen-Springfield Canal Company	Corbett Slough Canal Company	Storage Lease	Confirmed	1,096.0
Bingham GWD	69.00	Aberdeen-Springfield Canal Company	Parson's Canal Company	Storage Lease	Confirmed	69.0
Bingham GWD	50.00	Aberdeen-Springfield Canal Company	Riverside Canal Company	Storage Lease	Confirmed	50.0
Bingham GWD	167.00	Aberdeen-Springfield Canal Company	Danskin	Storage Lease	Confirmed	167.0
Bingham GWD	1100.00	Aberdeen-Springfield Canal Company	Blackfoot Canal Company	Storage Lease	Confirmed	1,100.0
Bingham GWD	231.00	Aberdeen-Springfield Canal Company	Parson's Canal Company	Storage Lease	Confirmed	231.0
Bingham GWD	7500.00	Aberdeen-Springfield Canal Company	Peoples Canal Company	Storage Lease	Confirmed	7,500.0
Bingham GWD	182.00	Aberdeen-Springfield Canal Company	Watson	Storage Lease	Confirmed	182.0
Bingham GWD	162.00	Aberdeen-Springfield Canal Company	Wearyrick	Storage Lease	Confirmed	162.0
Bingham GWD	1700.00	Aberdeen-Springfield Canal Company	Trego/United	Storage Lease	Confirmed	1,700.0
Bingham GWD	500.0	Blackfoot Irrigation District	Blackfoot Irrigation District	Storage Lease	Confirmed	500.0
Bingham GWD	4,447.0	Harrison Canal Company	Mitigation Inc.	Storage Lease	Confirmed	4,447.0
Bingham GWD	1,396.0	Rudy Canal Company	Mitigation Inc.	Storage Lease	Confirmed	1,396.0
Bingham GWD	14,055	Various	Snake River Storage	Natural Flow	Confirmed	10,000.0
Sub-Total: 33,671					Sub-Total: 29,616.5	
Bonneville - Jefferson GWD	10,000.0	Snake River Valley ID	Snake River Valley ID	Natural Flow Permit #1-10626	Confirmed	10,000.0
Bonneville - Jefferson GWD	5,000.0	New Sweeden Irrigation District	New Sweeden Irrigation District	Storage Lease	Confirmed	5,000.0
Bonneville - Jefferson GWD	4,309.7	Aberdeen-Springfield Canal Company	Aberdeen Springfield Canal Company	Natural Flow Permit# 1-10629	Confirmed	4,309.7
Bonneville - Jefferson GWD	19.8	Aberdeen-Springfield Canal Company	Danskin	Storage Lease	Confirmed	19.8
Bonneville - Jefferson GWD	500.0	Aberdeen-Springfield Canal Company	Watson	Storage Lease	Confirmed	500.0
Bonneville - Jefferson GWD	61.0	Aberdeen-Springfield Canal Company	Wearyrick	Storage Lease	Confirmed	61.0
Bonneville - Jefferson GWD	109.6	Burgess Canal Co.	Trego/United	Storage Lease	Confirmed	109.6
Bonneville - Jefferson GWD	3,596.0	Progressive ID	Progressive ID	Temporary Permit (TP-01-60)	Confirmed	1,270.0
Bonneville - Jefferson GWD	497	Osgood Canal Co.	Osgood Canal Co.	Temporary Permit (TP-01-58)	Confirmed	500.0
Bonneville - Jefferson GWD	6,354	Burgess Canal Co.	Burgess	Temporary Permit (TP-01-62)	Confirmed	5,000.0
Bonneville - Jefferson GWD	890	Butte Market Lake	Butte Market Lake	Temporary Permit (TP-01-61)	Confirmed	10,000.0
Bonneville - Jefferson GWD	5,000	Snake River Valley ID	Snake River Valley	Storage Lease	Confirmed	5,000.0
Bonneville - Jefferson GWD (Mickelsen Farms)	10	New Sweeden Irrigation District	New Sweeden Irrigation District	Storage Lease	Confirmed	10.0
Bonneville - Jefferson GWD (Mickelsen Farms)	10	New Sweeden Irrigation District	New Sweeden Irrigation District	Storage Lease	Confirmed	10.0
Bonneville - Jefferson GWD (Mickelsen Farms)	458	Snake River Valley ID	Woodville Canal Co.	Storage Lease	Confirmed	458.0
Bonneville - Jefferson GWD	5,000	Snake River Valley ID	Butte Market Lake Canal Co.	Storage Lease	Confirmed	5,000.0
Bonneville - Jefferson GWD	5,000	Harrison Canal Co.	Harrison Canal Co.	Storage Lease	Confirmed	5,000.0
Sub-Total: 46,815					Sub-Total: 52,248.1	
Magic Valley GWD	3,000	AFRD2	New Sweden Irrigation District	Storage Lease (IGWA)	Confirmed	3,000.0
Magic Valley GWD	5,000	AFRD2	Snake River Valley	Storage Lease (IGWA)	Confirmed	5,000.0
Sub-Total: 8,000					Sub-Total: 8,000.0	
Jefferson-Clark GWD	4,137.0	Harrison Canal Co.	Harrison Canal Co.	Storage Lease	Confirmed	4,137.0
Jefferson-Clark GWD	2,500.0	Harrison Canal Co.	Harrison Canal Co.	Storage Lease	Confirmed	2,500.0
Jefferson-Clark GWD	6,359.0	Fremont-Madison ID	Enterprise Canal Co.	Storage Lease	Confirmed	7,000.0
Jefferson-Clark GWD	690.40	Aberdeen-Springfield Canal Company	Trego/United	Storage Lease	Confirmed	690.4
Jefferson-Clark GWD	4,151.0	Fremont-Madison ID	Fremont-Madison ID	Temporary Permit (TP-01-54)	Confirmed	27,000.0
Jefferson-Clark GWD	17,252.0	Fremont-Madison ID	Fremont-Madison ID	Temporary Permit (TP-01-54)	Confirmed	27,000.0
Jefferson-Clark GWD	10,305.0	Great Feeder Canal Company	Great Feeder Canal Company	Temporary Permit (TP-01-48)	Confirmed	10,852.0
Jefferson-Clark GWD	1,597.0	Northside CC	Northside CC	Temporary Permit?	no	
Jefferson-Clark GWD	5,101.0	New Sweeden ID	New Sweeden ID	Temporary Permit (TP-01-56)	Confirmed	6,000.0
Jefferson-Clark GWD	153.7	North Rigby Irrigation	North Rigby Irrigation	Temporary Permit (TP-01-63)	Confirmed	1,090.9
Jefferson-Clark GWD	4,309.6	Various	Snake River Storage	Natural Flow	Confirmed	5,000.0
Jefferson-Clark GWD	2,322.4	Birch Creek	Reno Ditch Co. LLC	Permit# 32-13348	Confirmed	1,175.0
Sub-Total: 58,878.1					Sub-Total: 92,445.3	
Henry's Fork GWD (FMID)	3000	Fremont-Madison ID	Fremont-Madison ID	Water Supply Bank Rental	Confirmed	7,152.0
Sub-Total: 3000					Sub-Total: 7,152.0	
North Snake GWD	7,090	Sandy Ponds	Northside CC	See attached documentation	Confirmed	7,290.0
Sub-Total: 7,090					Sub-Total: 7,290.0	
Grand Total 208,081					Grand Total 253,325.9	

## Table 4 Notes:

- Recognizing the challenges and difficulties due to the current data gaps in regard to accurately knowing and measuring where, when and how much water was actually recharged, the Department limited its review to confirmation of private lease/rental contracts and associated volume amounts. Lease-rental contract volumes are merely compared to the recharge volumes reported by IGWA.
- There are multiple instances where the reported recharge amount is greater than the contract amount and also where the contract amount is greater than the reported recharge amount. The combined total of these shortages/exceedances is +45,245 AF indicating there were contracts in place for more recharge than was reported.

### Comments on the Differences in Baseline, 2017 Usage, and resultant Reduction Volumes

- The Department did not adjust volume data queried from WMIS or the WD01 Water Right Accounting database.
- The Department queried WMIS for the volumes associated with the preferred method selected by the Watermaster.
- The Department accounted for the FMID's five exchange wells "0" pumping years (2010, 2011, 2012, 2014) in the averaging process resulting in a five-year baseline average of 22,492 AF. Treating the "0" pumping years as "null values" in the averaging process increases their five-year baseline average to 45,974. Null values are reported when pumping was known to have occurred but no pumping data is available.
- The NSGWD IGWA baseline value accounts for 21,305 AF of conversions. The Department data does not.

### IGWA comments on adjustments to WMIS data (info copied from IGWA spreadsheet)

- *Used 2012-2014 average, PCC prior to 2012 not valid.*
- *Removed 2011 from baseline at request of owner and approval of board. An experimental crop was planted those years.*
- *Used district average ac-ft/acre to estimate baseline.*
- *WD120 has not calculated 2017 volume. Assume baseline as 2017 usage.*
- *No measurement reported; used 2016 pumping*
- *Assume 5 year average baseline as 2017 usage.*
- *New member. No measurements have been made on this well. Baseline created using water right acres and district average acre-feet applied. Usage for 2016 reported as baseline until data can be collected.*
- *5 year average was changed or altered by the Department after baseline was established for unknown reasons.*
- *Previously waived. Assume 5 year baseline average as 2017 usage.*
- *No calculation by water district staff. Assume baseline as 2017 usage.*
- *No data from City of Rupert in WMIS. Assume baseline as 2017 usage.*



DEPARTMENT OF WATER RESOURCES

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BRAD LITTLE  
Governor

GARY SPACKMAN  
Director

July 1, 2019

**To: SWC-IGWA Steering Committee**  
**From: Idaho Department of Water Resources**  
**Re: Verification of IGWA's 2018 Diversion and Recharge Data**

This document is submitted by the Idaho Department of Water Resources ("Department") to the Surface Water Coalition ("SWC") and Idaho Ground Water Appropriators ("IGWA") Settlement Agreement Steering Committee to generally satisfy Covenant 2.b.iii of the Second Addendum to the Settlement Agreement ("Agreement") dated December 14, 2016 which states:

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

Around April 1, 2018 IGWA submitted their Settlement Agreement 2018 Performance Report ("Performance Report") to the Steering Committee and the Department. The Department has reviewed the Performance Report including electronic Excel spreadsheets and data tables. Data for each ground water district in the Performance Report included the five-year average baseline usage from 2010 through 2014, the 2018 annual diversion volume, and the resultant difference between the baseline and 2018 annual diversion volume. These values are reported in column 2 of Tables 1, 2 and 3 in this memo. The baseline average and 2018 water use data came from the Department's Water Management Information System ("WMIS") database. IGWA adjusted the five-year average and 2018 annual diversion volume for some WMIS records and explained the adjustments in their Excel spreadsheet.

Department staff independently queried the five-year baseline and 2018 diversion volumes from the WMIS database for each WMIS record reported by IGWA to compare against the baseline amounts from the Performance Report. This was done to capture revisions to historic data in WMIS and account for membership changes within the ground water districts. Data resulting from these queries are reported by ground water district and shown in column 3 of Tables 1 and 2. The 2018 diversion volume reduction from the five-year baseline average is shown in column 3 of Table 3.

WMIS records are being assigned to most or all of the wells in the Henry's Fork Ground Water District ("HFGWD") and in Water District 31 ("WD31") to make future data queries and reviews more efficient. Some wells in the HFGWD or Fremont Madison Irrigation District ("FMID") did not have a WMIS record assigned to them because they are exchange wells measured and reported by Water District 01 ("WD01"). Regarding the HFGWD, Department staff retrieved FMID data and Teton River exchange well data from the WD01 Water Rights Accounting database available on the Department's website. WD31 data, which are included in the reported volumes for Jefferson-Clark Ground Water District, were obtained from 2018 WD31 Watermaster Annual Report.



The Department also attempted to verify IGWA's reported private lease-rental recharge amounts for the 2018 calendar year. Confirmation of actual recharge volumes is difficult due to the complexity of tracking surface water deliveries, transactions and return flow amounts to the Snake River. The Department's review is limited to confirming the existence and delivery volumes of private lease-rental contracts within WD01, Temporary Water Permits, and Natural Flow Permits and Water Supply Bank Rentals.

The following tables summarize the five-year average baseline, 2018 usage, resultant reductions, and recharge contract volumes as determined by IGWA and the Department. The verification results are presented objectively with no assumption as to which dataset are correct or incorrect. Notes are provided under each table explaining additional details specific to that particular table or dataset. Possible explanations are offered regarding differences between IGWA and Department datasets.

The Department did not review or include data for A&B Irrigation District or the Southwest Irrigation District. The Department will consider reporting data for these districts to the Steering Committee upon request.

**Table 1: Five-year Baseline Comparison**

2010 through 2014

1	2	3	4
Ground Water District	IGWA Reported: Adjusted 5-Yr Baseline (AF)	IDWR Database: 5-Yr Baseline (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
Aberdeen - American Falls GWD	292,784	275,891	-5.8
Bingham GWD	281,918	280,900	-0.4
Bonneville - Jefferson GWD	155,718	149,752	-3.8
Carey Valley GWD	5,671	2,528	-55.4
Jefferson - Clark GWD	441,092	442,143	0.2
Henry's Fork GWD	66,337	31,984	-51.8
Magic Valley GWD	257,019	257,271	0.1
North Snake GWD	185,472	181,440	-2.2
<b>Total</b>	<b>1,686,011</b>	<b>1,621,908</b>	<b>-3.8</b>

Table 1 Notes:

- Carey Valley GWD: IGWA used single annual volumes from either 2014 or 2015 as the baseline for each diversion.
- Henry's Fork GWD: The Department included the five (5) Fremont Madison Irrigation District exchange wells with zero (0) pumping from 2010 to 2014 in the average baseline calculation resulting in a volume of 6,517 AF. IGWA used the single annual diversion volume from these wells in 2013 as the baseline resulting in a volume of 29,352 AF. The Department included the thirteen (13) Teton River exchange wells zero (0) pumping from 2010 to 2014 in the average baseline calculation resulting in a volume of 8,845 AF. IGWA used the annual diversion volume from these wells in 2013 and 2014 as the baseline resulting in a volume of 19,874 AF.

- North Snake GWD: IGWA's original published adjusted five-year baseline volume for the NSGWD was 206,777 AF, which included an annual average conversion volume of 21,305 AF. IGWA included this volume to account for this volume of conversions taking place in 2009 which was one year prior to the baseline volumes being calculated. For its analysis, the Department subtracted 21,305 AF from IGWA's adjusted five-year baseline volume to perform a direct comparison of diversion volumes queried from WMIS.
- Jefferson-Clark GWD includes WD31 water use volumes.

**Table 2: 2018 Usage Comparisons**

1	2	3	4
Ground Water District	IGWA Reported: 2018 Usage (AF)	IDWR Database: 2018 Usage (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
Aberdeen - American Falls GWD	282,272	271,837	-3.7
Bingham GWD	249,324	245,260	-1.6
Bonneville - Jefferson GWD	134,853	120,172	-10.9
Carey Valley GWD	1,387	913	-34.2
Jefferson - Clark GWD	371,537	373,090	0.4
Henry's Fork GWD	16,467	15,332	-6.9
Magic Valley GWD	217,824	215,671	-1.0
North Snake GWD	168,162	165,509	-1.6
<b>Total:</b>	<b>1,441,826</b>	<b>1,407,782</b>	<b>-2.4</b>

Table 2 Notes:

- The Department did not revise the annual diversion volume data queried directly from WMIS. IGWA adjusted the annual diversion volume data for select WMIS records and provided explanations for the adjustments in their Excel spreadsheet.
- Aberdeen-American Falls GWD: The 2018 diversion volume for 43 diversions had to be estimated by IGWA as the baseline volume which cumulatively totaled 10,348 AF. The actual 2018 diversion volume was not available in WMIS for several reasons, including meters not being energized during the fall 2018 reading event or meters being broken and unable to be read. The Department used a zero (0) volume for these diversions rather than inserting the baseline volume for 2018 in its evaluation.
- Bonneville-Jefferson GWD: The 2018 diversion volume for 23 diversions had to be estimated by IGWA as the baseline volume which cumulatively totaled 14,413 AF. The actual 2018 diversion volume was not available in WMIS for several reasons, including meters not being energized during the fall 2018 reading event or meters being broken and unable to be read. The Department used a zero (0) volume for these diversions rather than inserting the baseline volume for 2018 in its evaluation.

Table 3: 2018 Reduction Comparison

1	2	3	4
Ground Water District	IGWA Reported: Reductions (AF)	IDWR Database: Reductions (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
Aberdeen - American Falls GWD	10,512	4,054	-61.4
Bingham GWD	32,594	35,640	9.3
Bonneville - Jefferson GWD	20,865	29,580	41.8
Carey Valley GWD	4,284	1,615	-62.3
Jefferson - Clark GWD	69,555	69,053	-0.7
Henry's Fork GWD	49,870	16,652	-66.6
Magic Valley GWD	39,195	41,600	6.1
North Snake GWD	17,309	15,931	-8.0
<b>Total:</b>	<b>244,184</b>	<b>214,126</b>	<b>-12.3</b>

## Table 3 Notes:

- Data in this table are generated by subtracting the 2018 usage from the baseline average for each district.
- IGWA originally reported a reduction volume of 38,614 AF for the North Snake GWD. For its analysis, the Department subtracted the 21,305 AF annual average conversion volume from North Snake GWD's original five-year baseline volume to directly compare reported diversion volumes queried from WMIS. This results in an adjusted NSGWD IGWA reduction of 17,309 AF.

Table 4: 2018 Recharge Contract Confirmation

IGWA Reported Data					IDWR Contract Confirmation	
District	Volume (AF)	Location Recharged	Source	Type	Contract Confirmed	Contract Amount (AF)
AB-AM Falls GWD	17,871	Aberdeen Springfield: Hilton Spill	Natural Flow and Storage	Natural Flow Permit 1-10629	Confirmed	17,871
AB-AM Falls GWD	17,320	Recharge Dev. Corp.	various	Recharge Dev. Corp.	Confirmed	11,714
AB-AM Falls GWD	7,242	Harrison Canal	-	Storage Lease	Confirmed	7,242
AB-AM Falls GWD	13,834	Various	Natural Flow and Storage	-	No	-
Sub-Total:					Sub-Total:	36,827
Bingham GWD	20,500	-	-	-	No	-
Sub-Total:					Sub-Total:	-
Bonn - Jeff GWD	5,000	Snake River Valley ID	Storage Rental	Storage Lease	Confirmed	5,000
Bonn - Jeff GWD	1,500	Snake River Storage	-	-	No	-
Bonn - Jeff GWD	5,000	Burgess Canal	-	Storage Lease	Confirmed	5,000
Sub-Total:					Sub-Total:	10,000
MV GWD	6,100	AFRD #2	IGWA Storage Rental	Storage Lease	Confirmed	5,000
Sub-Total:					Sub-Total:	5,000
JC GWD	15,004.2	FMID	-	Temporary Water Permit TP-21-47	Confirmed	25,000
JC GWD	1,217.7	Montevue	-	-	No	-
JC GWD	879	Dewey Canal	-	Recharge Dev. Corp.	Confirmed	838
Sub-Total:					Sub-Total:	25,838
HF GWD / Mad. GWD	7,151	Egin lakes	Water Supply Bank Rental	Water Supply Bank Rental	Confirmed	7,151
Sub-Total:					Sub-Total:	7,151
NS GWD	3,821.7	Sandy Ponds	Waste Water	Waste Water	Confirmed	3,822
Sub-Total:					Sub-Total:	3,822
Grand Total					Grand Total	88,638

## Table 4 Notes:

- The timeframe within which recharge activities are counted is the calendar year 2018. As a result, recharge conducted by Recharge Development Corporation was limited to that performed during the 2018 calendar year (RDC's recharge year does not end on December 31<sup>st</sup>).
- ABAF WD01 Natural Flow Permit 1-10629 has several conditions such as (1) only to be used when 2,700 AF is flowing past Minidoka Dam, and (2) diversion shall not exceed 10,000 AF annual average basis without first obtaining approval from the Idaho Water Resource Board.
- Recognizing the challenges and difficulties due to the current data gaps in regard to accurately knowing and measuring where, when and how much water was actually recharged, the Department limited its review to confirmation of private lease/rental contracts and associated volume amounts. Lease-rental contract volumes are merely compared to the recharge volumes reported by IGWA.

General Comments on the Differences in Baseline, 2018 Usage, and resultant Reduction Volumes

- The Department did not adjust volume data queried from WMIS or the WD01 Water Right Accounting database.
- The Department queried WMIS for the volumes associated with the preferred method selected by the Watermaster.
- The NSGWD IGWA baseline value accounts for 21,305 AF of conversions. The Department data does not.

- As in previous years, IGWA's submission included revisions to baseline and usage data for select wells as described in their Performance Report spreadsheets.

Respectfully,

A handwritten signature in cursive script that reads "Brian W. Ragan".

Brian W. Ragan, PG  
Water Compliance Bureau



DEPARTMENT OF WATER RESOURCES

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BRAD LITTLE  
Governor

GARY SPACKMAN  
Director

July 1, 2019

**To: SWC-IGWA Steering Committee**  
**From: Idaho Department of Water Resources**  
**Re: Verification of IGWA's 2018 Diversion and Recharge Data**

This document is submitted by the Idaho Department of Water Resources ("Department") to the Surface Water Coalition ("SWC") and Idaho Ground Water Appropriators ("IGWA") Settlement Agreement Steering Committee to generally satisfy Covenant 2.b.iii of the Second Addendum to the Settlement Agreement ("Agreement") dated December 14, 2016 which states:

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

Around April 1, 2018 IGWA submitted their Settlement Agreement 2018 Performance Report ("Performance Report") to the Steering Committee and the Department. The Department has reviewed the Performance Report including electronic Excel spreadsheets and data tables. Data for each ground water district in the Performance Report included the five-year average baseline usage from 2010 through 2014, the 2018 annual diversion volume, and the resultant difference between the baseline and 2018 annual diversion volume. These values are reported in column 2 of Tables 1, 2 and 3 in this memo. The baseline average and 2018 water use data came from the Department's Water Management Information System ("WMIS") database. IGWA adjusted the five-year average and 2018 annual diversion volume for some WMIS records and explained the adjustments in their Excel spreadsheet.

Department staff independently queried the five-year baseline and 2018 diversion volumes from the WMIS database for each WMIS record reported by IGWA to compare against the baseline amounts from the Performance Report. This was done to capture revisions to historic data in WMIS and account for membership changes within the ground water districts. Data resulting from these queries are reported by ground water district and shown in column 3 of Tables 1 and 2. The 2018 diversion volume reduction from the five-year baseline average is shown in column 3 of Table 3.

WMIS records are being assigned to most or all of the wells in the Henry's Fork Ground Water District ("HFGWD") and in Water District 31 ("WD31") to make future data queries and reviews more efficient. Some wells in the HFGWD or Fremont Madison Irrigation District ("FMID") did not have a WMIS record assigned to them because they are exchange wells measured and reported by Water District 01 ("WD01"). Regarding the HFGWD, Department staff retrieved FMID data and Teton River exchange well data from the WD01 Water Rights Accounting database available on the Department's website. WD31 data, which are included in the reported volumes for Jefferson-Clark Ground Water District, were obtained from 2018 WD31 Watermaster Annual Report.

The Department also attempted to verify IGWA's reported private lease-rental recharge amounts for the 2018 calendar year. Confirmation of actual recharge volumes is difficult due to the complexity of tracking surface water deliveries, transactions and return flow amounts to the Snake River. The Department's review is limited to confirming the existence and delivery volumes of private lease-rental contracts within WD01, Temporary Water Permits, and Natural Flow Permits and Water Supply Bank Rentals.

The following tables summarize the five-year average baseline, 2018 usage, resultant reductions, and recharge contract volumes as determined by IGWA and the Department. The verification results are presented objectively with no assumption as to which dataset are correct or incorrect. Notes are provided under each table explaining additional details specific to that particular table or dataset. Possible explanations are offered regarding differences between IGWA and Department datasets.

The Department did not review or include data for A&B Irrigation District or the Southwest Irrigation District. The Department will consider reporting data for these districts to the Steering Committee upon request.

**Table 1: Five-year Baseline Comparison**

2010 through 2014

1	2	3	4
Ground Water District	IGWA Reported: Adjusted 5-Yr Baseline (AF)	IDWR Database: 5-Yr Baseline (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
Aberdeen - American Falls GWD	292,784	275,891	-5.8
Bingham GWD	281,918	280,900	-0.4
Bonneville - Jefferson GWD	155,718	149,752	-3.8
Carey Valley GWD	5,671	2,528	-55.4
Jefferson - Clark GWD	441,092	442,143	0.2
Henry's Fork GWD	66,337	31,984	-51.8
Magic Valley GWD	257,019	257,271	0.1
North Snake GWD	185,472	181,440	-2.2
<b>Total</b>	<b>1,686,011</b>	<b>1,621,908</b>	<b>-3.8</b>

Table 1 Notes:

- Carey Valley GWD: IGWA used single annual volumes from either 2014 or 2015 as the baseline for each diversion.
- Henry's Fork GWD: The Department included the five (5) Fremont Madison Irrigation District exchange wells with zero (0) pumping from 2010 to 2014 in the average baseline calculation resulting in a volume of 6,517 AF. IGWA used the single annual diversion volume from these wells in 2013 as the baseline resulting in a volume of 29,352 AF. The Department included the thirteen (13) Teton River exchange wells zero (0) pumping from 2010 to 2014 in the average baseline calculation resulting in a volume of 8,845 AF. IGWA used the annual diversion volume from these wells in 2013 and 2014 as the baseline resulting in a volume of 19,874 AF.

- North Snake GWD: IGWA's original published adjusted five-year baseline volume for the NSGWD was 206,777 AF, which included an annual average conversion volume of 21,305 AF. IGWA included this volume to account for this volume of conversions taking place in 2009 which was one year prior to the baseline volumes being calculated. For its analysis, the Department subtracted 21,305 AF from IGWA's adjusted five-year baseline volume to perform a direct comparison of diversion volumes queried from WMIS.
- Jefferson-Clark GWD includes WD31 water use volumes.

**Table 2: 2018 Usage Comparisons**

1	2	3	4
Ground Water District	IGWA Reported: 2018 Usage (AF)	IDWR Database: 2018 Usage (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
Aberdeen - American Falls GWD	282,272	271,837	-3.7
Bingham GWD	249,324	245,260	-1.6
Bonneville - Jefferson GWD	134,853	120,172	-10.9
Carey Valley GWD	1,387	913	-34.2
Jefferson - Clark GWD	371,537	373,090	0.4
Henry's Fork GWD	16,467	15,332	-6.9
Magic Valley GWD	217,824	215,671	-1.0
North Snake GWD	168,162	165,509	-1.6
<b>Total:</b>	<b>1,441,826</b>	<b>1,407,782</b>	<b>-2.4</b>

Table 2 Notes:

- The Department did not revise the annual diversion volume data queried directly from WMIS. IGWA adjusted the annual diversion volume data for select WMIS records and provided explanations for the adjustments in their Excel spreadsheet.
- Aberdeen-American Falls GWD: The 2018 diversion volume for 43 diversions had to be estimated by IGWA as the baseline volume which cumulatively totaled 10,348 AF. The actual 2018 diversion volume was not available in WMIS for several reasons, including meters not being energized during the fall 2018 reading event or meters being broken and unable to be read. The Department used a zero (0) volume for these diversions rather than inserting the baseline volume for 2018 in its evaluation.
- Bonneville-Jefferson GWD: The 2018 diversion volume for 23 diversions had to be estimated by IGWA as the baseline volume which cumulatively totaled 14,413 AF. The actual 2018 diversion volume was not available in WMIS for several reasons, including meters not being energized during the fall 2018 reading event or meters being broken and unable to be read. The Department used a zero (0) volume for these diversions rather than inserting the baseline volume for 2018 in its evaluation.



Table 3: 2018 Reduction Comparison

1	2	3	4
Ground Water District	IGWA Reported: Reductions (AF)	IDWR Database: Reductions (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
Aberdeen - American Falls GWD	10,512	4,054	-61.4
Bingham GWD	32,594	35,640	9.3
Bonneville - Jefferson GWD	20,865	29,580	41.8
Carey Valley GWD	4,284	1,615	-62.3
Jefferson - Clark GWD	69,555	69,053	-0.7
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North Snake GWD	17,309	15,931	-8.0
<b>Total:</b>	<b>244,184</b>	<b>214,126</b>	<b>-12.3</b>

## Table 3 Notes:

- Data in this table are generated by subtracting the 2018 usage from the baseline average for each district.
- IGWA originally reported a reduction volume of 38,614 AF for the North Snake GWD. For its analysis, the Department subtracted the 21,305 AF annual average conversion volume from North Snake GWD's original five-year baseline volume to directly compare reported diversion volumes queried from WMIS. This results in an adjusted NSGWD IGWA reduction of 17,309 AF.

Table 4: 2018 Recharge Contract Confirmation

IGWA Reported Data					IDWR Contract Confirmation	
District	Volume (AF)	Location Recharged	Source	Type	Contract Confirmed	Contract Amount (AF)
AB-AM Falls GWD	17,871	Aberdeen Springfield: Hilton Spill	Natural Flow and Storage	Natural Flow Permit 1-10629	Confirmed	17,871
AB-AM Falls GWD	17,320	Recharge Dev. Corp.	various	Recharge Dev. Corp.	Confirmed	11,714
AB-AM Falls GWD	7,242	Harrison Canal	-	Storage Lease	Confirmed	7,242
AB-AM Falls GWD	13,834	Various	Natural Flow and Storage	-	No	-
<b>Sub-Total:</b>	<b>56,267</b>				<b>Sub-Total:</b>	<b>36,827</b>
Bingham GWD	20,500	-	-	-	No	-
<b>Sub-Total:</b>	<b>20,500</b>				<b>Sub-Total:</b>	<b>-</b>
Bonn - Jeff GWD	5,000	Snake River Valley ID	Storage Rental	Storage Lease	Confirmed	5,000
Bonn - Jeff GWD	1,500	Snake River Storage	-	-	No	-
Bonn - Jeff GWD	5,000	Burgess Canal	-	Storage Lease	Confirmed	5,000
<b>Sub-Total:</b>	<b>11,500</b>				<b>Sub-Total:</b>	<b>10,000</b>
MV GWD	6,100	AFRD #2	IGWA Storage Rental	Storage Lease	Confirmed	5,000
<b>Sub-Total:</b>	<b>6,100</b>				<b>Sub-Total:</b>	<b>5,000</b>
JC GWD	15,004.2	FMID	-	Temporary Water Permit TP-21-47	Confirmed	25,000
JC GWD	1,217.7	Montevue	-	-	No	-
JC GWD	879	Dewey Canal	-	Recharge Dev. Corp.	Confirmed	838
<b>Sub-Total:</b>	<b>17,101</b>				<b>Sub-Total:</b>	<b>25,838</b>
HF GWD / Mad. GWD	7,151	Egin lakes	Water Supply Bank Rental	Water Supply Bank Rental	Confirmed	7,151
<b>Sub-Total:</b>	<b>7,151</b>				<b>Sub-Total:</b>	<b>7,151</b>
NS GWD	3,821.7	Sandy Ponds	Waste Water	Waste Water	Confirmed	3,822
<b>Sub-Total:</b>	<b>3,822</b>				<b>Sub-Total:</b>	<b>3,822</b>
<b>Grand Total</b>	<b>122,441</b>				<b>Grand Total</b>	<b>88,638</b>

## Table 4 Notes:

- The timeframe within which recharge activities are counted is the calendar year 2018. As a result, recharge conducted by Recharge Development Corporation was limited to that performed during the 2018 calendar year (RDC's recharge year does not end on December 31<sup>st</sup>).
- ABAF WD01 Natural Flow Permit 1-10629 has several conditions such as (1) only to be used when 2,700 AF is flowing past Minidoka Dam, and (2) diversion shall not exceed 10,000 AF annual average basis without first obtaining approval from the Idaho Water Resource Board.
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General Comments on the Differences in Baseline, 2018 Usage, and resultant Reduction Volumes

- The Department did not adjust volume data queried from WMIS or the WD01 Water Right Accounting database.
- The Department queried WMIS for the volumes associated with the preferred method selected by the Watermaster.
- The NSGWD IGWA baseline value accounts for 21,305 AF of conversions. The Department data does not.

- As in previous years, IGWA's submission included revisions to baseline and usage data for select wells as described in their Performance Report spreadsheets.

Respectfully,

A handwritten signature in cursive script that reads "Brian W. Ragan".

Brian W. Ragan, PG  
Water Compliance Bureau



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BRAD LITTLE  
Governor

GARY SPACKMAN  
Director

June 29, 2020

**To: SWC-IGWA Steering Committee**  
**From: Idaho Department of Water Resources**  
**Re: Verification of IGWA's 2019 Diversion and Recharge Data**

This document is submitted by the Idaho Department of Water Resources ("Department") to the Surface Water Coalition ("SWC") and Idaho Ground Water Appropriators ("IGWA") Settlement Agreement Steering Committee to satisfy Covenant 2.b.iii of the Second Addendum to the Settlement Agreement ("Agreement") dated December 14, 2016 which states:

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

On April 1, 2020 IGWA submitted their Settlement Agreement 2019 Performance Report ("Performance Report") to the Steering Committee and the Department. The Department has reviewed the Performance Report including electronic Excel spreadsheets, data tables and supplemental scanned documents. Data for each ground water district in the Performance Report included the five-year average baseline usage from 2010 through 2014, the 2019 annual diversion volume, and the resultant difference between the baseline and 2019 annual diversion volume. These values are reported in column 2 of Tables 1, 2 and 3 in this memo. The five-year average baseline and 2019 diversion volume data came from the Department's Water Management Information System ("WMIS") database. IGWA adjusted the baseline average and 2019 diversion volume for some WMIS records and explained the adjustments in their Excel spreadsheet.

Department staff independently queried the five-year average baseline and 2019 diversion volumes from the WMIS database for each WMIS record reported by IGWA to compare against the baseline amounts contained in the Performance Report. This was done to capture revisions to historic data in WMIS and account for membership changes within the ground water districts. Data resulting from these queries are reported by ground water district and shown in column 3 of Tables 1 and 2. The 2019 volume reduction from the five-year baseline average is shown in column 3 of Table 3.

Some wells in Henry's Fork Ground Water District ("HFGWD") and Fremont Madison Irrigation District ("FMID") do not have a WMIS record assigned to them because they are exchange wells measured and reported by Water District 01 ("WD01"). Regarding HFGWD, IGWA and Department staff retrieved FMID data and Teton River exchange well data from the WD01 Water Rights Accounting database available on the Department's website. WD31 data, which are included in the reported volumes for Jefferson-Clark Ground Water District, were obtained from the 2019 WD31 Watermaster Annual Report.

The Department also attempted to verify IGWA's reported private lease-rental recharge amounts for the 2019 calendar year. Confirmation of actual recharge volumes is difficult due to the complexity of

tracking surface water deliveries, transactions and return flow amounts to the Snake River. Therefore, the Department's review is limited to confirming the existence and delivery volumes of private lease-rental contracts within WD01, Temporary Water Permits, Natural Flow Permits and Water Supply Bank Rentals.

The following tables summarize the five-year average baseline, 2019 diversion volume, resultant reductions, and recharge contract volumes as determined by IGWA and the Department. The verification results are presented objectively with no assumption as to which dataset is correct or incorrect. Notes are provided under each table explaining additional details specific to that particular table or dataset. Possible explanations are offered regarding differences between IGWA and Department datasets.

The Department did not review or include data for A&B Irrigation District or the Southwest Irrigation District. The Department will consider reporting data for these districts to the Steering Committee upon request.

**Table 1: Five-Year Baseline Comparison**

2010 through 2014

1	2	3	4
Ground Water District	IGWA Reported 5-Yr Baseline (AF)	IDWR Database 5-Yr Baseline (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
Aberdeen - American Falls GWD	293,639	283,081	-3.6
Bingham GWD	282,316	281,235	-0.4
Bonneville - Jefferson GWD	155,713	153,647	-1.3
Carey Valley GWD	5,671	2,528	-55.4
Jefferson - Clark GWD	441,135	441,101	0.0
Henry's Fork GWD	65,819	31,979	-51.4
Magic Valley GWD	257,491	257,767	0.1
North Snake GWD	186,575	182,243	-2.3
<b>Total</b>	<b>1,688,359</b>	<b>1,633,581</b>	<b>-3.2</b>

Table 1 Notes:

- Carey Valley GWD: IGWA used single annual volumes from either 2014 or 2015 as the baseline for each diversion.
- Henry's Fork GWD: The Department included the five (5) Fremont Madison Irrigation District exchange wells with zero (0) pumping from 2010 to 2014 in the average baseline calculation resulting in a volume of 6,517 AF. IGWA used the single annual diversion volume from these wells in 2013 as the baseline resulting in a volume of 29,352 AF. The Department included the thirteen (13) Teton River exchange wells zero (0) pumping from 2010 to 2014 in the average baseline calculation resulting in a volume of 8,845 AF. IGWA used the annual diversion volume from these wells in 2013 and 2014 as the baseline resulting in a volume of 19,876 AF. The difference between IGWA's and IDWR's baseline calculations is 33,866 AF.

- North Snake GWD: IGWA's original published adjusted five-year baseline volume for the NSGWD was 207,880 AF, which included an annual average conversion volume of 21,305 AF. IGWA included this volume to account for this volume of conversions taking place in 2009 which was one year prior to the baseline volumes being calculated. For its analysis, the Department subtracted 21,305 AF from IGWA's adjusted five-year baseline volume to perform a direct comparison of diversion volumes queried from WMIS.
- Jefferson-Clark GWD includes WD31 water use volumes.

**Table 2: 2019 Diversion Volume Comparison**

1	2	3	4
Ground Water District	IGWA Reported Usage (AF)	IDWR Database Usage (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
Aberdeen - American Falls GWD	258,397	243,793	-5.7
Bingham GWD	238,072	237,688	-0.2
Bonneville - Jefferson GWD	136,683	130,417	-4.6
Carey Valley GWD	883	652	-26.2
Jefferson - Clark GWD	388,213	390,660	0.6
Henry's Fork GWD	15,458	14,983	-3.1
Magic Valley GWD	196,490	196,377	-0.1
North Snake GWD	156,351	150,222	-3.9
<b>Total:</b>	<b>1,390,547</b>	<b>1,364,792</b>	<b>-1.9</b>

Table 2 Notes:

- The Department did not revise the annual diversion volume data queried directly from WMIS. IGWA adjusted the annual diversion volume data for select WMIS records and provided explanations for the adjustments in their Excel spreadsheet.
- Aberdeen-American Falls GWD: The usage volume for 50 diversions had to be estimated by IGWA as the baseline volume because actual usage volume was not available in WMIS due to access, power or measuring device issues. The Department used zero (0) volume for these diversions rather than inserting the baseline volume for 2019 in its evaluation. This resulted in a difference of 13,229 AF between IGWA and IDWR data.
- Bonneville-Jefferson GWD: The usage volume for 17 diversions had to be estimated by IGWA as the baseline volume because actual usage volume was not available in WMIS due to access, power or meter issues. The Department used zero (0) volume for these diversions rather than inserting the baseline volume for 2019 in its evaluation. This resulted in a difference of 7,320 AF between IGWA and IDWR data.

Table 3: 2019 Reduction Comparison

1	2	3	4
Ground Water District	IGWA Reported Reductions (AF)	IDWR Database Reductions (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
Aberdeen - American Falls GWD	35,243	39,288	11.5
Bingham GWD	44,244	43,547	-1.6
Bonneville - Jefferson GWD	19,030	23,230	22.1
Carey Valley GWD	4,787	1,876	-60.8
Jefferson - Clark GWD	52,922	50,441	-4.7
Henry's Fork GWD	50,361	16,996	-66.3
Magic Valley GWD	61,001	61,390	0.6
North Snake GWD	30,225	32,021	5.9
<b>Total:</b>	<b>297,813</b>	<b>268,789</b>	<b>-9.7</b>

## Table 3 Notes:

- Data in this table are generated by subtracting the 2019 diversion volume from the 5-year average baseline for each district.
- IGWA originally reported a reduction volume of 51,530 AF for the North Snake GWD. For its analysis, the Department subtracted the 21,305 AF annual average conversion volume from North Snake GWD's original five-year baseline volume to directly compare reported diversion volumes queried from WMIS. This results in an adjusted NSGWD IGWA reduction of 30,225 AF.

Table 4: 2019 Recharge Contract Confirmation

IGWA Reported Data					IDWR Contract Confirmation	
District	Volume (AF)	Location Recharged	Source Type	Type	Contract Confirmed	Contract Amount (AF)
AB-AF GWD	26,572	Aberdeen Springfield Hilton Spill	District Natural Flow	Natural Flow Permit 1-10629	Confirmed	26,572
AB-AF GWD	2,500	Recharge Development Corporation	various		No	--
AB-AF GWD	13,974	Snake River Storage	Natural Flow and Storage		No	--
<b>Sub-Total:</b>	<b>43,046</b>				<b>Sub-Total:</b>	<b>26,572</b>
Bingham GWD	602	Various	Storage Lease		No	--
Bingham GWD	3,117	Various	Storage Lease		No	--
Bingham GWD	2,100	Various	Storage Lease		No	--
Bingham GWD	927	Various	Storage Lease		No	--
Bingham GWD	241	Corbett Slough Canal	Storage Lease	Temp Water Permit TP-01-93	Confirmed	8,400
Bingham GWD	640	Various	Storage Lease		No	--
Bingham GWD	113	Watson Canal	Storage Lease	Temp Water Permit TP-01-91	Confirmed	4,200
Bingham GWD	173	Wearyrick Ditch	Storage Lease	Temp Water Permit TP-01-94	Confirmed	3,440
Bingham GWD	185	Riverside Canal	Storage Lease	Temp Water Permit TP-01-90	Confirmed	6,600
Bingham GWD	12,500	Various	Lease and Natural Flow		No	--
Bingham GWD	1,474	Various	Lease and Natural Flow		No	--
<b>Sub-Total:</b>	<b>22,072</b>				<b>Sub-Total:</b>	<b>22,640</b>
Bonn - Jeff GWD	5,000	Snake River Valley ID	Storage Rental	Storage Lease	Confirmed	5,000
Bonn - Jeff GWD	5,000	Snake River Valley ID	Natural Flow		No	--
Bonn - Jeff GWD	1,676.9	Snake River Storage	Natural Flow/Storage Rental		Confirmed	1,677
Bonn - Jeff GWD	1,000	Harrison Canal	Storage Rental		Confirmed	1,000
Bonn - Jeff GWD	10	New Sweden ID	Storage Rental		Confirmed	11
Bonn - Jeff GWD	458	Snake River Valley ID	Storage Rental		Confirmed	458
Bonn - Jeff GWD	458	Snake River Valley ID	Natural Flow		Confirmed	458
Bonn - Jeff GWD	500	Snake River Valley ID	Storage		Confirmed	500
<b>Sub-Total:</b>	<b>14,102.9</b>				<b>Sub-Total:</b>	<b>9,104</b>
MV GWD	6,500	AFRD #2 MP31	IGWA Storage Rental	Storage Lease	Confirmed	6,500
<b>Sub-Total:</b>	<b>6,500</b>				<b>Sub-Total:</b>	<b>6,500</b>
JC GWD	4,544.0	Fremont Madison Irrigation District			No	--
JC GWD	1,451.0	Montevue			No	--
JC GWD	838	Dewey Canal			No	--
<b>Sub-Total:</b>	<b>6,833</b>				<b>Sub-Total:</b>	<b>0</b>
HF GWD /Mad. GWD	3,000	Various FMID Sites	Water Supply Bank Rental	Water Supply Bank Rental	Confirmed	3,000
<b>Sub-Total:</b>	<b>3,000</b>				<b>Sub-Total:</b>	<b>3,000</b>
NS GWD	4,890.2	Sandy Ponds	Waste Water	Waste Water	Confirmed	4,127
<b>Sub-Total:</b>	<b>4,890</b>				<b>Sub-Total:</b>	<b>4,127</b>
<b>Grand Total</b>	<b>100,443</b>				<b>Grand Total</b>	<b>71,943</b>

## Table 4 Notes:

- The timeframe within which recharge activities are counted is the calendar year 2019.
- Recognizing the challenges and difficulties due to the current data gaps in regard to accurately knowing and measuring where, when and how much water was actually recharged, the Department limited its review to confirmation of private lease/rental contracts, temporary water permits, natural flow permits, water supply bank rentals and the contract volume amounts.

General Comments on the Differences in Baseline, 2019 Usage, and resultant Reduction Volumes

- The Department did not adjust volume data queried from WMIS or the WD01 Water Right Accounting database.
- The Department queried WMIS for the volumes associated with the preferred method selected by the Watermaster.
- The NSGWD IGWA baseline value accounts for 21,305 AF of conversions. The Department data does not.



- As in previous years, IGWA's submission included revisions to both the baseline and usage data for select wells as described in their Performance Report spreadsheets.

Respectfully,

A handwritten signature in cursive script that reads "Brian W. Ragan".

Brian W. Ragan, PG  
Water Compliance Bureau



DEPARTMENT OF WATER RESOURCES

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BRAD LITTLE  
Governor

GARY SPACKMAN  
Director

July 1, 2021

**To: SWC-IGWA Steering Committee**  
**From: Idaho Department of Water Resources**  
**Re: Verification of IGWA's 2020 Diversion and Recharge Data**

This document is submitted by the Idaho Department of Water Resources ("Department") to the Surface Water Coalition ("SWC") and Idaho Ground Water Appropriators ("IGWA") Settlement Agreement Steering Committee to satisfy Covenant 2.b.iii of the Second Addendum to the Settlement Agreement ("Agreement") dated December 14, 2016 which states:

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

On March 31, 2021 IGWA submitted their 2020 Settlement Agreement Performance Report ("Performance Report") to the Steering Committee. The Department has reviewed the Performance Report including electronic Excel spreadsheets, data tables and supplemental scanned documents. Data for each ground water district in the Performance Report included the five-year average baseline usage from 2010 through 2014, the total 2020 diversion volume, and the resultant difference between the five-year average baseline and 2020 diversion volume. These values are reported in column 2 of Tables 1, 2 and 3 in this memo. The five-year average baseline and 2020 diversion volume data came from the Department's Water Management Information System ("WMIS") database. IGWA adjusted the five-year average baseline and 2020 diversion volume for some WMIS records and explained the adjustments in their Excel spreadsheet.

Department staff independently queried the five-year average baseline and 2020 diversion volumes from the WMIS database for each WMIS record reported by IGWA to compare against the five-year average baseline and 2020 diversion volume amounts contained in the Performance Report. This was done to capture revisions to historic data in WMIS and account for membership changes within the ground water districts. Data resulting from these queries are reported by ground water district and shown in column 3 of Tables 1 and 2. The 2020 diversion volume reduction from the five-year baseline average is shown in column 3 of Table 3.

Some wells in Henry's Fork Ground Water District ("HFGWD") and Fremont Madison Irrigation District ("FMID") do not have a WMIS record assigned to them because they are exchange wells measured and reported by Water District 01 ("WD01"). Regarding HFGWD, IGWA and Department staff retrieved FMID data and Teton River exchange well data from the WD01 Water Rights Accounting database available on the Department's website. WD31 data, which are included in the reported volumes for Jefferson-Clark Ground Water District, were obtained from the 2020 WD31 Watermaster Annual Report.

The Department also attempted to verify IGWA's reported private lease-rental recharge amounts for the 2020 calendar year. Confirmation of actual recharge volumes is difficult due to the complexity of tracking surface water deliveries, transactions and return flow amounts to the Snake River. Therefore, the Department's review is limited to confirming the existence and delivery volumes of private lease-rental contracts within WD01, Temporary Water Permits, Natural Flow Permits and Water Supply Bank Rentals.

The following tables summarize the five-year average baseline, 2020 diversion volume, resultant reductions, and recharge contract volumes as determined by IGWA and the Department. The verification results are presented objectively with no assumption as to which dataset is correct or incorrect. Notes are provided under each table explaining additional details specific to that particular table or dataset. Possible explanations are offered regarding differences between IGWA and Department datasets.

The Department did not review or include data for A&B Irrigation District or the Southwest Irrigation District. The Department will consider reporting data for these districts to the Steering Committee upon request.

### **Changes of Note from Previous Verification Reports**

1. See Appendix A for a detailed description of the five-year baseline average data used by the Department in this report for Carey Valley GWD and select wells in HFGWD. In previous Department and IGWA Performance Reports, each entity chose a different method to treat years with zero pumping in the averaging calculation. The Department historically included years with zero pumping in the averaging calculation and IGWA had not. This difference has been known about and presented each year to the Steering Committee starting in 2016. The Department's proposal to not include years with zero pumping to calculate the five-year average baseline for select wells in its 2020 verification analysis was not met with objections during the Steering Committee meeting held in 2020.
2. The data submitted by IGWA for HFGWD and Madison Ground Water District ("MadGWD") contained line items for wells which were not required to measure during the 2010 to 2014 baseline years and, as a result, have no data. IGWA presented a method of establishing a five-year baseline average for these wells by comparing the 2019 and 2020 usage for 30 wells in HFGWD which did have data from the baseline years. Based on this analysis IGWA determined the 2019/2020 usage was 92% of the baseline for the 30 wells. IGWA concluded the usage patterns between HFGWD and MadGWD were similar and therefore applied this ratio to the remaining wells to establish a baseline.
3. See Item 2 above. The Department applied the same 92% ratio to those wells in HFGWD and MadGWD with no diversion volume data in order to populate a five-year baseline average. In tables 1, 2 and 3 of this report the Department chose to present the data for these wells as separate line items to allow distinct discussion on this data, if needed. In column 1 of these three tables the row named "Total" does not contain the data for the HFGWD and MadGWD wells described in this item, and the row named "Total(including all data)" does contain the data for the wells described in this item. IDWR's use of this data and method in this report does not constitute a validation or determination that this data and method is appropriate.

**Table 1: Five-Year Baseline Comparison**

2010 through 2014

1	2	3	4
Ground Water District	IGWA Reported 5-Yr Baseline (AF)	IDWR Database 5-Yr Baseline (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
American Falls -Aberdeen GWD	286,677	283,760	-1.0
Bingham GWD	277,173	277,359	0.1
Bonneville - Jefferson GWD	156,140	153,647	-1.6
Carey Valley GWD	5,671	5,484	-3.3
Henry's Fork GWD	70,499	63,324	-10.2
Jefferson - Clark GWD	441,711	441,692	0.0
Magic Valley GWD	256,097	256,470	0.1
North Snake GWD	186,384	182,236	-2.2
<b>Total</b>	<b>1,680,352</b>	<b>1,663,972</b>	<b>-1.0</b>
HFGWD (estimated data)	12,324	13,110	6.4
Madison GWD (estimated data)	83,889	85,431	1.8
<b>Total (including all data)</b>	<b>1,776,565</b>	<b>1,762,513</b>	<b>-0.8</b>

**Table 1 Notes:**

- North Snake GWD: IGWA's original published adjusted five-year baseline volume for NSGWD was 207,689 AF, which included an annual average conversion volume of 21,305 AF. IGWA included this to account for the volume of conversions taking place in 2009 which was one year prior to the baseline volumes being calculated. For its analysis, the Department subtracted 21,305 AF from IGWA's adjusted five-year baseline volume to perform a direct comparison of diversion volumes queried from WMIS.
- Jefferson-Clark GWD includes WD31 water use volumes.
- Henry's Fork GWD: Department five-year average baseline not including years with zero pumping equals 63,324 AF and is the sum of 5 FMID wells (29,352.5 AF), 13 Teton River exchange wells (19,876 AF) and standard baseline for remaining wells (14,095 AF). IGWA's baseline for the 13 Teton River exchange wells (27,051 AF) is 7,175 AF larger than the Department's (19,876 AF) which accounts for the entire difference in this line item above.

Table 2: 2020 Diversion Volume Comparison

1	2	3	4
Ground Water District	IGWA Reported Usage (AF)	IDWR Database Usage (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
American Falls -Aberdeen GWD	273,547	272,810	-0.3
Bingham GWD	264,343	263,609	-0.3
Bonneville - Jefferson GWD	150,588	138,025	-8.3
Carey Valley GWD	3,363	2,591	-23.0
Henry's Fork GWD	13,172	13,442	2.1
Jefferson - Clark GWD	400,468	399,959	-0.1
Magic Valley GWD	228,005	227,973	0.0
North Snake GWD	176,809	174,226	-1.5
<b>Total:</b>	<b>1,510,295</b>	<b>1,492,635</b>	<b>-1.2</b>
HFGWD (measured data)	11469.9	11469.9	0.0
Madison GWD (measured data)	77,178	78,579	1.8
<b>Total (including all data)</b>	<b>1,598,942</b>	<b>1,582,684</b>	<b>-1.0</b>

Table 2 Notes:

- The Department did not revise the annual diversion volume data queried directly from WMIS. IGWA adjusted the annual diversion volume data for select WMIS records and provided explanations for the adjustments in their Excel spreadsheet.
- Bonneville-Jefferson GWD: The usage volume for 24 diversions had to be estimated by IGWA as the baseline volume because actual usage volume was not available in WMIS due to access, power or meter issues. The Department used zero (0) volume for these diversions rather than inserting the baseline volume for 2020 in its evaluation. This resulted in a difference of 12,724 AF between IGWA and Department data.
- Carey Valley GWD: The usage volume for 4 diversions had to be estimated by IGWA as the baseline volume because actual usage volume was not available in WMIS due to access, power or meter issues. The Department used zero (0) volume for these diversions rather than inserting the baseline volume for 2020 in its evaluation. This resulted in a difference of 772 AF between IGWA and Department data.

Table 3: 2020 Reduction Comparison

1	2	3	4
Ground Water District	IGWA Reported Reductions (AF)	IDWR Database Reductions (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
American Falls -Aberdeen GWD	13,130	10,950	-16.6
Bingham GWD	12,830	13,750	7.2
Bonneville - Jefferson GWD	5,551	15,622	181.4
Carey Valley GWD	2,308	2,893	25.3
Henry's Fork GWD	57,328	49,882	-13.0
Jefferson - Clark GWD	41,244	41,733	1.2
Magic Valley GWD	28,092	28,497	1.4
North Snake GWD	9,575	8,010	-16.3
<b>Total:</b>	<b>170,058</b>	<b>171,337</b>	<b>0.8</b>
HFGWD: 47 New Wells	854	1,640	92.1
Madison GWD	6,711	6,852	2.1
<b>Total (including all data)</b>	<b>177,623</b>	<b>179,829</b>	<b>1.2</b>

## Table 3 Notes:

- Data in this table are generated by subtracting the 2020 diversion volume from the 5-year average baseline for each district.
- IGWA originally reported a reduction volume of 30,880 AF for the North Snake GWD. For its analysis, the Department subtracted the 21,305 AF annual average conversion volume from North Snake GWD's original five-year baseline volume to directly compare reported diversion volumes queried from WMIS. This results in an adjusted NSGWD IGWA reduction of 9,575 AF.

Table 4: 2020 Recharge Contract Confirmation

IGWA Reported Data					IDWR Contract Confirmation	
District	Volume (AF)	Location Recharged	Water Source	Water Right or Permit Number/ Storage Holder	Contract Confirmed	Amount (AF)
American Falls-Aberdeen	18,754	Multiple Locations	Snake River	Shareholder Recharge	Tentative	18,754
American Falls-Aberdeen	15,000	Multiple Locations	Snake River	Various Leases & Permits	Tentative	15,000
American Falls-Aberdeen	3,451	Multiple Locations	Snake River	Various Leases & Permits	Tentative	3,451
Sub-Total: 37,205					Sub-Total:	37,205
Bingham	9,947	Multiple Locations	Snake River	Shareholder Recharge	Tentative	9,947
Bingham	12,500	Multiple Locations	Snake River	Various Leases & Permits	Tentative	12,500
Bingham	3,451	Multiple Locations	Snake River	Various Leases & Permits	Tentative	3,451
Sub-Total: 25,898					Sub-Total:	25,898
Bonneville - Jefferson	5,000	Snake River Valley Seepage & Frandson Pit	Snake River	Snake River Valley Lease	Confirmed	4,984
Bonneville - Jefferson	482	Snake River Valley Seepage & Frandson Pit	Snake River	Woodville Canal Shareholder Rental	Confirmed	498
Sub-Total: 5,482.0					Sub-Total:	5,482
Hen. Fork and Madison	3000	Egin Lakes	Henry's Fork/Snake River	Water Supply Bank Lease 378	Confirmed	3,000
Sub-Total: 3,000					Sub-Total:	3,000
Jefferson Clark	711	Monteview Recharge Site	Birch Creek	32-13348 / Reno Ditch Co.	Confirmed	711
Jefferson Clark	502	Monteview Recharge Site	Birch Creek	32-13348 / Reno Ditch Co.	Confirmed	498
Jefferson Clark	25,000	Egin Lakes	Henry Fork, Teton River, Fall River	21-13144 TP-21-59 WSB 348 for 596.42 af Egin Bench WSB for 4,100.58 af	Confirmed	25,000
Sub-Total: 26,213					Sub-Total:	26,209
Magic Valley	6,634	MP 31	Snake River	New Sweden & Snake River Valley Leases	Confirmed	6,634
Sub-Total: 6,634					Sub-Total:	6,634
North Snake	4,839	Sandy Ponds	Snake River (NSCC Waste Water)	36-17011	Confirmed	4,839
Sub-Total: 4,839					Sub-Total:	4,839
Grand Total 109,272					Grand Total	109,267

## Table 4 Notes:

- The timeframe within which recharge activities are counted is the calendar year 2020.
- The “tentative” confirmation for American Falls-Aberdeen and Bingham GWD’s is due to the uncertainty in the date ranges and administrative authorization for recharge conducted under natural flow rights versus storage rights.
- Recognizing the challenges and difficulties due to the current data gaps in regard to accurately knowing and measuring where, when and how much water was actually recharged, the Department limited its review to confirmation of private lease/rental contracts, temporary water permits, natural flow permits, water supply bank rentals and the contract volume amounts.

General Comments on the Differences in Baseline, 2020 Usage, and Reduction Volumes

- The Department did not adjust volume data queried from WMIS, the WD01 Water Right Accounting database.
- The Department queried WMIS for the volumes associated with the preferred method selected by the Watermaster.
- The IGWA reported NSGWD baseline value accounts for 21,305 AF of conversions. The Department data does not, however this amount was subtracted for the analysis in this report as noted.

Respectfully,

A handwritten signature in dark ink, reading "Brian W. Ragan". The signature is written in a cursive, flowing style.

Brian W. Ragan, PG  
Water Compliance Bureau



## Appendix A

### **Five Year Baseline Volume Calculation**

The purpose of the change in data used is to ensure differences between Department and IGWA results are due to accuracy and not to the use of a different initial set of data.

In this report, the Department did not include years with zero pumping when calculating the five-year average baseline volume for the Ground Water Districts and well groups listed below. In previous verification reports the Department used all data from 2010 through 2014 and included years with zero pumping when calculating the five-year average baseline volume for those Districts and wells below. In previous annual Progress Reports IGWA did not include years with zero pumping in their averaging process, and when this was the case IGWA presented their reasoning. Because the five-year baseline is an average, including or excluding years with zero values has a measurable effect on the results.

The difference in how the Department and IGWA dealt with years with zero pumping was identified in 2016. At each Steering Committee meeting starting in 2016 the Parties have been made aware of this difference and the effect it has on the results. At the 2020 Steering Committee the Department formally proposed to not include years with zero pumping for the wells below in its 2020 analysis and no objections raised by either Party. Unless there are objections raised this year, the Department will continue to exclude years with zero pumping in future verification reports for the Ground Water Districts and well groups listed below.

The Department used the following five-year baseline average data:

- Carey Valley GWD
  - single annual volumes from 2014 or 2015 (due to supplemental nature of water rights and completeness of data)
- Henry's Fork GWD
  - 5 FMID wells
    - Only used data from 2013 (zero pumping on 2010, 2011, 2012 and 2014)
  - 13 Teton River exchange
    - Only used data from 2013 and 2014 (zero pumping in 2010, 2011 and less than typical pumping in 2012 due to conversion efforts)



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BRAD LITTLE  
Governor

GARY SPACKMAN  
Director

June 30, 2022

**To: SWC-IGWA Steering Committee**  
**From: Idaho Department of Water Resources**  
**Re: Verification of IGWA's 2021 Diversion and Recharge Data**

This document is submitted by the Idaho Department of Water Resources ("Department") to the Surface Water Coalition ("SWC") and Idaho Ground Water Appropriators ("IGWA") Settlement Agreement Steering Committee to satisfy Covenant 2.b.iii of the Second Addendum to the Settlement Agreement ("Agreement") dated December 14, 2016 which states:

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

On April 1, 2022, IGWA submitted their 2021 Settlement Agreement Performance Report ("Performance Report") to the Steering Committee. The Department has reviewed the Performance Report including electronic Excel spreadsheets, data tables and supplemental scanned documents. Data for each ground water district in the Performance Report included the five-year average baseline usage from 2010 through 2014, the total 2021 diversion volume, and the resultant difference between the five-year average baseline and 2021 diversion volume. These values are reported in column 2 of Tables 1, 2 and 3 in this memo. The five-year average baseline and 2021 diversion volume data came from the Department's Water Management Information System ("WMIS") database. IGWA adjusted the five-year average baseline and 2021 diversion volume for some WMIS records and explained the adjustments in their Excel spreadsheet.

Department staff independently queried the five-year average baseline and 2021 diversion volumes from the WMIS database for each WMIS record reported by IGWA to compare against the five-year average baseline and 2021 diversion volume amounts contained in the Performance Report. This was done to capture revisions to historic data in WMIS and account for membership changes within the ground water districts. Data resulting from these queries are reported by ground water district and shown in column 3 of Tables 1 and 2. The 2021 diversion volume reduction from the five-year baseline average is shown in column 3 of Table 3.

Some wells in Henry's Fork Ground Water District ("HFGWD") and Fremont Madison Irrigation District ("FMID") do not have a WMIS record assigned to them because they are exchange wells measured and reported by Water District 01 ("WD01"). Regarding HFGWD, IGWA and Department staff retrieved FMID data and Teton River exchange well data from the WD01 Water Rights Accounting database available on the Department's website. WD31 data, which are included in the reported volumes for Jefferson-Clark Ground Water District, were obtained from the 2021 WD31 Watermaster Annual Report.

The Department also attempted to verify IGWA's reported private lease-rental recharge amounts for the 2021 calendar year. Confirmation of actual recharge volumes is difficult due to the complexity of tracking surface water deliveries, transactions and return flow amounts to the Snake River. Therefore, the Department's review is limited to confirming the existence and delivery volumes of private lease-rental contracts within WD01, Temporary Water Permits, Natural Flow Permits and Water Supply Bank Rentals.

The following tables summarize the five-year average baseline, 2021 diversion volume, resultant reductions, and recharge contract volumes as determined by IGWA and the Department. The verification results are presented objectively with no assumption as to which dataset is correct or incorrect. Notes are provided under each table explaining additional details specific to that particular table or dataset. Possible explanations are offered regarding differences between IGWA and Department datasets.

The Department did not review or include data for A&B Irrigation District or the Southwest Irrigation District. The Department will consider reporting data for these districts to the Steering Committee upon request.

**Table 1: Five-Year Baseline Comparison**

2010 through 2014

1	2	3	4
Ground Water District	IGWA Reported 5-Yr Baseline (AF)	IDWR Database 5-Yr Baseline (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
American Falls -Aberdeen GWD	286,448	283,673	-1.0
Bingham GWD	277,011	277,359	0.1
Bonneville - Jefferson GWD	156,287	153,794	-1.6
Carey Valley GWD	5,671	5,484	-3.3
Henry's Fork GWD	73,539	75,477	2.6
Jefferson - Clark GWD	441,987	441,931	0.0
Madison GWD (estimated data)	81,423	82,361	1.2
Magic Valley GWD	256,270	256,643	0.1
North Snake GWD	208,970	203,545	-2.6
<b>Total</b>	<b>1,787,606</b>	<b>1,780,267</b>	<b>-0.4</b>

Table 1 Notes:

- Jefferson-Clark GWD includes WD31 water use volumes.
- Madison GWD: Baseline data determined by IGWA via the method described on the "Madison GWD" tab of the IGWA submittal Excel spreadsheet. In summary, the average usage for each diversion from 2019 and 2020 was estimated to be 92% of the baseline volume. The average use in 2019/2020 for each well was increased by a factor of 1.0869565 to get to a 100% baseline volume. IGWA estimated the 92% value by comparing usage in the adjoining Henry's Fork GWD area. IDWR calculated the Madison GWD baseline for each well using the same method as IGWA.

Table 2: 2021 Usage Volume Comparison

1	2	3	4
Ground Water District	IGWA Reported Usage (AF)	IDWR Database Usage (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
American Falls -Aberdeen GWD	291,929	290,691	-0.4
Bingham GWD	302,020	298,859	-1.0
Bonneville - Jefferson GWD	158,212	158,281	0.0
Carey Valley GWD	4,336	4,101	-5.4
Henry's Fork GWD	65,323	64,213	-1.7
Jefferson - Clark GWD	405,131	406,518	0.3
Madison GWD	77,449	76,305	-1.5
Magic Valley GWD	231,474	231,933	0.2
North Snake GWD	194,778	182,780	-6.2
<b>Total:</b>	<b>1,730,652</b>	<b>1,713,681</b>	<b>-1.0</b>

## Table 2 Notes:

- The Department did not revise the annual diversion volume data queried directly from WMIS. IGWA adjusted the annual diversion volume data for select WMIS records and provided explanations for the adjustments in their Excel spreadsheet.
- Carey Valley GWD: The usage volume for 2 diversions had to be estimated by IGWA as the baseline volume because actual usage volume was not available in WMIS due to access, power or meter issues. The Department used zero (0) volume for these diversions rather than inserting the baseline volume for 2021 in its evaluation. This resulted in a difference of 235 AF between IGWA and Department data.
- North Snake GWD: The usage volume for 40 diversions had to be estimated by IGWA as the baseline volume, or via PCC, because actual usage volume was not available in WMIS due to access, power or meter issues. The Department used zero (0) volume for these diversions rather than inserting the baseline or PCC volume for 2021 in its evaluation. This resulted in a difference of 11,998 AF between IGWA and Department data.

### Table 3: 2021 Reduction Comparison

1	2	3	4
Ground Water District	IGWA Reported Reduction (AF)	IDWR Database Reduction (AF)	IDWR % Difference Compared to IGWA (negative = IDWR < IGWA)
American Falls -Aberdeen GWD	-5,481	-7,018	28.0
Bingham GWD	-25,009	-21,500	-14.0
Bonneville - Jefferson GWD	-1,925	-4,487	133.1
Carey Valley GWD	1,335	1,383	3.6
Henry's Fork GWD	8,216	11,264	37.1
Jefferson - Clark GWD	36,856	35,413	-3.9
Madison GWD	3,973	6,056	52.4
Magic Valley GWD	24,795	24,710	-0.3
North Snake GWD	14,192	20,765	46.3
<b>Total:</b>	<b>56,952</b>	<b>66,586</b>	<b>16.9</b>

Table 3 Notes:

- Data in this table are generated by subtracting the 2021 diversion volume from the 5-year average baseline for each district.
- Differences between IGWA and IDWR annual reduction volumes are highly influenced by differences in annual usage volumes from table 2.

Table 4: 2021 Recharge Contract Confirmation

District	IGWA Volume (AF)	IDWR Volume (AF)
American Falls-Aberdeen	20,050	18,535
Bingham	9,973	9,973
Bonneville - Jefferson	5,080	5,080
Hen. Fork & Madison	3,000	3,000
Jefferson Clark	5,881	5,881
Magic Valley	10,546	10,546
North Snake	11,301	11,302
Grand Total	65,831	64,317

## Table 4 Notes:

- The difference of 1,515 af for American Falls-Aberdeen is specific to recharge activities at the Mattson-Craig Canal, Teton Bass Pond and Snake River Valley ID Steffler and Fransen Pits.
- The timeframe within which recharge activities are counted is the calendar year 2021.
- Recognizing the challenges and difficulties due to the current data gaps in regard to accurately knowing and measuring where, when and how much water was actually recharged, the Department limited its review to confirmation of private lease/rental contracts, temporary water permits, natural flow permits, water supply bank rentals and the contract volume amounts.

Respectfully,



Brian W. Ragan, PG  
Water Compliance Bureau

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

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

Docket No. CM-MP-2016-001

**FINAL ORDER APPROVING  
STIPULATED MITIGATION  
PLAN**

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

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

**FINDINGS OF FACT**

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

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

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

4. The SWC “stipulates that the mitigation provided by participating IGWA members under the [Mitigation Plan] is, provided the [Mitigation Plan is] implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member.” *Request for Order* at 3. The SWC and IGWA agree that “[n]o ground water user participating in the [Mitigation Plan] will be subject to a delivery call by the SWC members as long as the provisions of the [Mitigation Plan] are being implemented.” *Mitigation Plan* at Exhibit B, p. 5.

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

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

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

## CONCLUSIONS OF LAW

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



The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

2. Idaho Code § 42-1805(8) authorizes the Director to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.”

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

4. Pursuant to Chapter 52, Title 67, Idaho Code, and Sections 42-603 & 42-1805(8), Idaho Code, the Department promulgated the Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”), effective October 7, 1994. IDAPA 37.03.11.000-001.

5. The CM Rules “prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply.” IDAPA 37.03.11.001.

6. CM Rule 42.02 states: “The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.” IDAPA 37.03.11.042.02.

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

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

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

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


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

### ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Mitigation Plan submitted by the SWC and IGWA is APPROVED with the following conditions:

- a. All ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan.
- b. The ground water level goal and benchmarks referenced in the Mitigation Plan are applicable only to the parties to the Mitigation Plan.
- c. Approval of the Mitigation Plan does not create a ground water management area pursuant to Idaho Code § 42-233b.

DATED this 2<sup>nd</sup> day of May 2016.

  
 Gary Spackman  
 Director

# **CERTIFICATE OF SERVICE**

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

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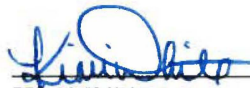


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Kimi White

## EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

### PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

### REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

### APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

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

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

Docket No. CM-MP-2016-001

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

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

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

**FINDINGS OF FACT**

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

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



3. The SWC “stipulates that the mitigation provided by participating IGWA members under the [Mitigation Plan] is, provided the [Mitigation Plan is] implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member.” *Request for Order* at 3. The SWC and IGWA agree that “[n]o ground water user participating in the [Mitigation Plan] will be subject to a delivery call by the SWC members as long as the provisions of the [Mitigation Plan] are being implemented.” *Mitigation Plan* at Exhibit B, p. 5.

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

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

- a. All ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan.
- b. The ground water level goal and benchmarks referenced in the Mitigation Plan are applicable only to the parties to the Mitigation Plan.
- c. Approval of the Mitigation Plan does not create a ground water management area pursuant to Idaho Code § 42-233b.

*Final Order* at 4.

6. On February 7, 2017, the SWC and IGWA submitted to the Department the *Surface Water Coalition’s and IGWA’s Stipulated Amended Mitigation Plan and Request for Order* (“Second Request for Order”).



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

8. The Second Addendum amends the Mitigation Plan by providing “further details concerning implementation of the [Mitigation Plan] addressing Sections 3.a (Consumptive Use Volume Reduction); 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a. (Adaptive Water Management).” *Second Request for Order* at 2. The SWC and IGWA request the Director issue an order approving the Second Addendum as an amendment to the Mitigation Plan. *Id.*

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

### CONCLUSIONS OF LAW

1. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, states:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

2. Idaho Code § 42-1805(8) authorizes the Director to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.”

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

4. Pursuant to Chapter 52, Title 67, Idaho Code, and Sections 42-603 & 42-1805(8), Idaho Code, the Department promulgated the Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”), effective October 7, 1994. IDAPA 37.03.11.000-001.

5. The CM Rules “prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply.” IDAPA 37.03.11.001.

6. CM Rule 42.02 states: “The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.” IDAPA 37.03.11.042.02.

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

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

9. The Mitigation Plan was entered into between the SWC and IGWA in accordance with CM Rule 43.03(o). Again, the SWC “stipulates that the mitigation provided by participating IGWA members under the [Mitigation Plan] is, provided the [Mitigation Plan is] implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member.” *Request for Order* at 3. The SWC and IGWA agree that “[n]o ground water user participating in the [Mitigation Plan] will be subject to a delivery call by the SWC members as long as the provisions of the [Mitigation Plan] are being implemented.” *Mitigation Plan* at Exhibit B, p. 5.

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

11. The Second Addendum “provides further details concerning implementation of the [Mitigation Plan] addressing Sections 3.a (Consumptive Use Volume Reduction); 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a. (Adaptive Water Management).” *Second Request for Order* at 2.

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

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

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

### ORDER

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

- a. While the Department will exert its best efforts to support the activities of IGWA and the SWC, approval of the Second Addendum does not obligate the Department to undertake any particular action.
- b. Approval of the Second Addendum does not limit the Director's enforcement discretion or otherwise commit the Director to a particular enforcement approach.

DATED this 9<sup>th</sup> day of May 2017.

  
GARY SPACKMAN  
Director

# **CERTIFICATE OF SERVICE**

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

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

## EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

### PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

### REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

### APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.





#2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, and TWIN FALLS CANAL COMPANY, (hereinafter “Surface Water Coalition,” “Coalition,” or “SWC”), by and through their attorneys of record, Barker Rosholt & Simpson, LLP and Fletcher Law Office, and hereby file this *Joint Motion for Approval of Interim Mitigation Agreement* pursuant to the provisions of Conjunctive Management Rule 43 and other applicable law.

### **BACKGROUND**

The Surface Water Coalition has an outstanding water delivery call to protect senior surface water rights to the Snake River. The Applicants’ members hold various ground water rights junior in priority to the Coalition’s water rights. On June 15, 2010 the Applicants filed an *Amended Mitigation Plan* regarding the SWC’s delivery call. IDWR published notice of the plan and the Coalition protested the plan on July 9, 2010. Since that time the Coalition and the Applicants have been working in good faith to resolve the protests and an acceptable interim mitigation agreement. Recently, the parties executed an *Interim Mitigation Agreement* for purposes of the SWC delivery call for the years 2013-2015. See Ex. A.

### **JOINT MOTION FOR APPROVAL / STAY OF CONTESTED CASE**

The Coalition and the Applicants jointly move the Director to approve the *Interim Mitigation Agreement* for a term of three years (2013-2015) as set forth in the agreement. The agreement provides for certain aquifer mitigation actions to be undertaken by the Applicants on an annual basis, including groundwater recharge, conversions, and voluntary curtailment. In exchange, the Coalition agrees that the Applicants’ members’ junior priority ground water rights shall not be subject to curtailment in response to the SWC’s water delivery call or any order issued by IDWR during the term of the agreement.

The Parties have also identified reach gains, spring flows, and ground water level goals for purposes of the parties' continued water supplies. In exchange for the agreement, the Parties have also agreed to stay the pending contested case on the Applicants' mitigation plan and work toward a long-term permanent mitigation plan.

In the event no permanent mitigation plan or agreement is reached between the Parties, both the Applicants and SWC reserve all rights and retain their respective positions with respect to the protested mitigation plan. The Parties will keep IDWR informed as to future progress and whether a permanent plan or agreement has been reached prior to the expiration of the interim agreement's term (end December 31, 2015). No hearing is requested on this motion, however, the Parties will appear and provide any further information to the Director if needed. The Parties respectfully request the Director to expedite consideration and approval of this motion.

#### **REQUESTS FOR RELIEF**

1. The Parties request the Director to approve the *Interim Mitigation Agreement*.
2. The Parties request the Director to stay the contested case on the Applicants' amended mitigation plan until December 31, 2015, or until otherwise notified in writing by the Parties.
3. The Parties request the Director recognize that members' junior priority ground water rights within the Applicants' boundaries are not subject to curtailment or any further mitigation requirements in response to the SWC delivery call during the term of the *Interim Mitigation Agreement*.
4. The Parties request the Director to expedite approval of this joint motion.

DATED this 25 day of October, 2013.

**BARKER ROSHOLT & SIMPSON LLP**

  
\_\_\_\_\_  
Travis L. Thompson  
Paul L. Arrington

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

**FLETCHER LAW OFFICE**

  
\_\_\_\_\_  
W. Kent Fletcher

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

**PARSONS, SMITH, STONE LOVELAND & SHIRLEY LLP**

  
\_\_\_\_\_  
William A. Parsons

*Attorneys for Southwest Irrigation District and  
Goose Creek Irrigation District*

### CERTIFICATE OF SERVICE

I hereby certify that on this 25 day of October, 2013, I served a true and correct copy of the foregoing **JOINT MOTION FOR APPROVAL OF INTERIM MITIGATION AGREEMENT** by email and by depositing same in the United States mail, postage prepaid, addressed to the following:

Director Gary Spackman  
Idaho Department of Water Resources  
322 E. Front St.  
P.O. Box 83720-0098  
[gary.spackman@idwr.idaho.gov](mailto:gary.spackman@idwr.idaho.gov)  
[deborah.gibson@idwr.idaho.gov](mailto:deborah.gibson@idwr.idaho.gov)

William Parsons  
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Burley, Idaho 83318  
[wparsons@pmt.org](mailto:wparsons@pmt.org)

  
Travis L. Thompson

# Exhibit A

## INTERIM MITIGATION AGREEMENT

THIS AGREEMENT is entered into by and between SOUTHWEST IRRIGATION DISTRICT and GOOSE CREEK IRRIGATION DISTRICT (hereinafter collectively referred to as "SWID"), Idaho irrigation districts, and A&B IRRIGATION DISTRICT ("A&B"), an Idaho irrigation district, AMERICAN FALLS RESERVOIR DISTRICT #2 ("AFRD #2"), an Idaho reservoir district, BURLEY IRRIGATION DISTRICT ("BID"), an Idaho irrigation district, MILNER IRRIGATION DISTRICT ("Milner"), an Idaho irrigation district, MINIDOKA IRRIGATION DISTRICT ("MID"), an Idaho irrigation district, NORTH SIDE CANAL COMPANY ("NSCC"), an Idaho non-profit corporation, and TWIN FALLS CANAL COMPANY ("TFCC"), an Idaho non-profit corporation (hereinafter collectively referred to as "Surface Water Coalition", "Coalition", or "SWC") (together both sets of parties hereinafter referred to as "Parties").

### RECITALS

WHEREAS, the Surface Water Coalition has an outstanding delivery call against hydraulically connected junior ground water rights on the Eastern Snake Plain Aquifer ("ESPA"); and

WHEREAS, the Coalition's delivery call remains subject to pending administrative and judicial cases; and

WHEREAS, SWID filed a mitigation plan with the Idaho Department of Water Resources ("IDWR") on May 28, 2010 in reference to the Surface Water Coalition's water delivery call; and

WHEREAS, IDWR published notice of the plan and processed it under Rule 43 of the *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11 *et seq.*) and the SWC filed a protest to SWID's plan on July 9, 2010; and

WHEREAS, the Parties have held several meetings and have exchanged information in an effort to resolve SWC's protest to SWID's mitigation plan without a formal hearing; and

WHEREAS, SWC acknowledges SWID's past mitigation actions and history of taking a pro-active approach to reducing groundwater demand in Basin 45, including through local recharge projects, voluntary curtailment, and conversions of lands irrigated with groundwater to a surface water supply; and

WHEREAS, SWC is supportive of SWID's primary "aquifer" based mitigation actions that seek to reduce consumptive groundwater use from the ESPA and enhance groundwater recharge to the ESPA; and

WHEREAS, the Parties seek to implement a three-year pilot project through this interim agreement as a first step toward a long-term permanent mitigation agreement and to finally resolve SWC's protest and obtain IDWR's approval of SWID's mitigation plan for the SWC water delivery call; and

WHEREAS, the Parties wish to delineate their agreement in writing as follows.

### COVENANTS

NOW THEREFORE, in consideration of the recitals, the mutual covenants, representations and warranties contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **SWID Aquifer Mitigation Actions.** SWID agrees to undertake the following aquifer mitigation actions during the years 2013-2015. The Parties acknowledge that actual water recharged or delivered for conversions may vary based upon water availability, delivery constraints, and climatic conditions. Assuming: 1) similar water conditions to an average of 2008-2012; 2) SWID acquires similar surface water supplies to an average of 2008-2012; and 3) SWID does not experience any unforeseen circumstances or delivery constraints; SWID agrees to undertake all necessary steps to accomplish the mitigation actions in the following amounts:

a. **Recharge:** Subject to water availability, SWID will attempt to accomplish not less than the following amounts of recharge through its various projects:

i.	Cottonwood	=	800 acre-feet
ii.	Dry Creek	=	800 acre-feet
iii.	Murtaugh	=	450 acre-feet
iv.	West Cassia Pipeline	=	<u>2,500 acre-feet</u>
	Total		4,550 acre-feet

b. **Conversions:** SWID will provide surface water to convert, in total or in part, approximately 30,000 ground water irrigated acres within SWID's boundary. Subject to water availability and delivery capability, SWID will attempt to accomplish not less than the following amounts of surface water conversion (identified by delivery system):

i.	Burley Irrigation District	=	23,100 acre-feet
ii.	Milner Irrigation District	=	12,630 acre-feet
iii.	Twin Falls Canal Company	=	6,500 acre-feet
iv.	West Cassia Pipeline	=	<u>12,120 acre-feet</u>
	Total		54,350 acre-feet

c. **Voluntary Curtailment:** In addition to the foregoing, SWID will voluntarily curtail all groundwater use on an additional 2,378 acres within SWID's boundary (to be identified and reported by SWID on an annual basis by May 1<sup>st</sup>).

2. **Storage Water Mitigation.** SWID further agrees to provide, on an annual basis, Five Thousand (5,000) acre-feet to the SWC as direct water mitigation to mitigate for junior ground water rights held by SWID members within its project boundaries. SWID agrees to acquire and provide the water to SWC by July 1<sup>st</sup>, or within ten (10) days after Water District 01's "date of allocation" for purposes of storage fill in the Upper Snake River reservoir system above Milner Dam, whichever date is later. SWC shall advise SWID and the Water District 01 Watermaster as to how the storage water will be assigned. The Parties agree to cooperate and coordinate with the Water District 01 Watermaster in order to satisfy this term.

3. **Alternative Mitigation.** The Parties may agree to accept alternative mitigation in any year as a substitute for the mitigation prescribed in Paragraph 2 above (i.e. contributions of water, funds, or services to a designated recharge project, conversion, etc.). If acceptable, the Parties shall confirm any alternative mitigation in writing by June 1<sup>st</sup>. In the event the Parties agree to alternative mitigation in the form of funds toward an aquifer project, SWID shall pay Sixty-Five Thousand and No/Dollars (\$65,000) to be deposited into a trust account held for the benefit of SWC to be used for a designated aquifer project.

4. **No Curtailment.** In exchange for the mitigation identified in Paragraphs 1-3 above, SWC agrees that junior priority ground water rights held by SWID members (located within the project boundaries of the Southwest Irrigation District and Goose Creek Irrigation District) shall not be subject to curtailment in response to SWC's delivery call or any curtailment order issued by IDWR or any district court for the SWC delivery call during the term of this Agreement.

5. **Mitigation Plan Agreement.** To the extent deemed necessary by IDWR or any district court, this Agreement shall constitute an agreement on an acceptable mitigation plan identified in Rule 43.03.o of the *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11 *et seq.*).

6. **Water Measurement Devices.** By August 1, 2013, SWID agrees to install, or cause to be installed, water measurement devices (flow meters, data loggers, etc.) on all groundwater wells within the Southwest and Goose Creek Irrigation District boundaries in order to accurately measure and record all ground water diversions. SWID shall report its annual water use to the Water District 140 Watermaster and will make any data, including total volume pumped and instantaneous diversion records, available to SWC. The Parties agree this obligation under this provision will survive the term of this Agreement.

7. **Reach Gains / Spring Flow / American Falls Groundwater Level Goals.** The Coalition agrees to monitor and evaluate reach gains, certain spring flows, and certain ground water levels in the Snake River in the Near Blackfoot – Milner Reach. The Coalition seeks to sustain ground water levels, reach gains, and spring flows in the American Falls reach for purposes of maintain a sufficient water supply for the irrigation of its members' projects. The Parties seek to achieve and maintain the following hydrologic goals in each category over the course of this Interim Agreement and into the future:



**a. American Falls Reach Gains**

<u>Month</u>	<u>Short-Term Goal (Average 1980-2000)</u>
May	176,073 af
June	171,550 af
July	161,219 af
August	178,274 af
September	192,570 af

**b. Spring Flow**

<u>Spring Creek</u>	<u>Short-Term Goal (Average 1980-2000)</u>
	359 cfs

**c. Ground Water Levels**

<u>Well ID</u>	<u>Short-Term Goal (Average 1980-2000)</u>
08S27E-B1DDA1	4,173 ft (elevation)
08S26E-33BCB1	4,213
05S31E-19DDC1	4,381
05S33E-35CDC1	4,399

Following each irrigation season and no later than February 1<sup>st</sup> of the following year, the Parties agree to meet and review the past season's data in the above categories. As part of a long-term mitigation agreement, the Parties will seek to identify an acceptable level of reach gains, spring flows, and groundwater levels to maintain the water supplies of SWC.

**8. SWID Groundwater Level Goals.** SWID agrees to monitor and evaluate certain ground water levels in the SWID project areas (including the boundaries of the Southwest and Goose Creek Irrigation Districts). The Parties seek to achieve and maintain the following static groundwater levels over the course of this Interim Agreement and into the future:

<u>Well ID (POD)</u>	<u>Name</u>	<u>Short-Term Goal (Target Depth)</u>
11S24E28 SWSWSW	Searle Abandoned	400 ft
12S23E6 SWSE	Chris Drakos	490 ft
11S22E4 NWSW	Mike Beck	485 ft
11S21E33 NWNWNW	Pickett Desert	430 ft
11S20E21 NWNWNE	Darrell Funk	100 ft
11S19E18 NENW	Skunk Well	265 ft

Following each irrigation season and no later than February 1<sup>st</sup> of the following year, the Parties agree to meet and review the past year's data. As part of a long-term mitigation agreement, the Parties will seek to identify acceptable groundwater levels throughout Water District No. 140 to maintain the water supplies of SWID.

**9. Term / Stay of Contested Case.** The term of this agreement is from January 1, 2013 to December 31, 2015. The Parties further agree to seek interim approval of SWID's mitigation plan as modified by this Agreement and stipulate to entry of an order staying the contested case on SWID's mitigation plan during the term of this Agreement.

10. **Long-Term Mitigation Agreement.** The Parties agree to continue to meet and attempt to reach a long-term permanent mitigation agreement regarding SWID's mitigation plan for the SWC water delivery call.

11. **Implementation of Agreement.** The Parties agree to take any and all actions necessary to ensure this Agreement is implemented to the satisfaction of the Parties, including filing necessary documents with the Director for approval for the term (years 2013-2015), and compliance with any requirements of the Water District 01 and 140 Watermasters. The Parties further agree to jointly support or defend the implementation of the Agreement including ensuring that IDWR does not improperly credit other junior ground water users, not covered by this agreement, for any mitigation obligations that they incur pursuant to the SWC Delivery Call.

12. **Representations.** The Parties have the full legal right, power and authority to enter into and perform this Agreement.

13. **Attorneys' Fees.** In any suit, action or appeal therefrom, to enforce this Agreement or any term or provision hereof, or to interpret this Agreement, the prevailing Party shall be entitled to recover all its costs reasonably incurred therein (and on appeal), including reasonable attorneys' fees.

14. **Duty of Good Faith.** Each of the Parties to this Agreement agrees to perform and execute this Agreement in accordance with the highest standards of good faith, honesty in fact, and fair dealing. Accordingly, the Parties agree to cooperate fully and execute any and all supplemental documents and take any and all additional actions which may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

15. **Entire Agreement.** This is the entire agreement of the Parties with respect to matters covered hereby and supersedes all prior agreements between them, written or oral. This Agreement may be modified only in writing, signed by the Parties.

16. **Counterparts.** This Agreement may be executed in any number of counterparts for the convenience of the Parties, all of which, when taken together and after execution by all Parties hereto, shall constitute one and the same Agreement.

17. **Idaho Law.** This agreement shall be governed by the laws of the State of Idaho.

18. **Severability.** The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision hereof.

19. **Captions to Paragraphs.** The captions to the paragraphs of this Agreement are for convenience only and shall not be deemed to enlarge, diminish, explain or in any manner affect the meaning of such paragraphs.

20. **Binding Contract.** This Agreement shall be binding upon and inure to the benefit of the heirs, personal representative, administrators, successors, and assigns of the Parties

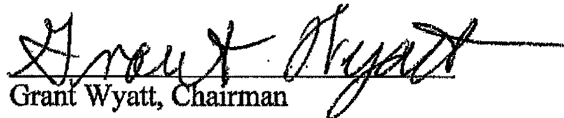
hereto.

21. **Effective Date.** The Effective Date of this Agreement shall be January 1, 2013.

IN WITNESS WHEREOF, the undersigned have duly executed this Agreement.

DATED this 24 day of Sept. 13.

SOUTHWEST IRRIGATION DISTRICT

  
Grant Wyatt, Chairman

ATTEST:

\_\_\_\_\_, Secretary

INTERIM MITIGATION AGREEMENT

6

DATED this 27<sup>th</sup> day of Sept, 2013.

GOOSE CREEK IRRIGATION DISTRICT

Noland Critchfield  
Noland Critchfield, Chairman

ATTEST:

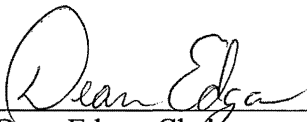
\_\_\_\_\_  
\_\_\_\_\_, Secretary

INTERIM MITIGATION AGREEMENT

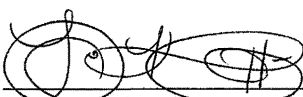
7

DATED this 10<sup>th</sup> day of September, 2013.

BURLEY IRRIGATION DISTRICT

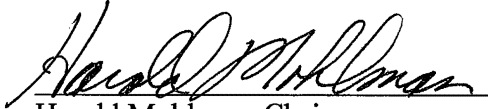
  
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Dean Edgar, Chairman

ATTEST:

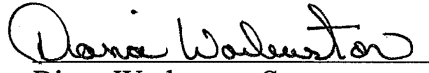
  
\_\_\_\_\_  
Lana Hanks, Secretary

DATED this 10 day of Sept, 2013.

A&B IRRIGATION DISTRICT

  
Harold Mohlman, Chairman

ATTEST:

  
Diana Warburton, Secretary

INTERIM MITIGATION AGREEMENT

9

DATED this 15<sup>th</sup> day of October, 2013.

AMERICAN FALLS RESEVOIR DISTRICT #2

Ellis Gooch  
Ellis Gooch, Chairman

ATTEST:

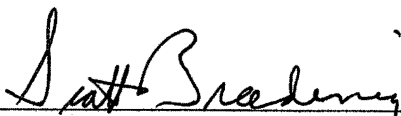
John Arkoosh  
John Arkoosh, Secretary  
*acting for*

INTERIM MITIGATION AGREEMENT

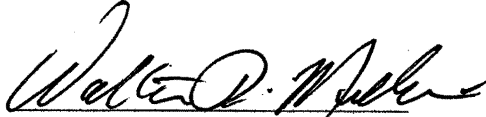
10

DATED this 11 day of September, 2013.

MILNER IRRIGATION DISTRICT

  
\_\_\_\_\_  
Scott Breeding, Chairman

ATTEST:

  
\_\_\_\_\_  
Walt Mullins, Secretary

INTERIM MITIGATION AGREEMENT

11



DATED this 10<sup>th</sup> day of September, 2013.

MINIDOKA IRRIGATION DISTRICT

Mike Wilkins  
Mike Wilkins, Chairman

ATTEST:

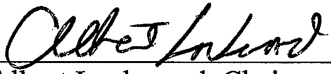
Ruth Bailes  
Ruth Bailes, Secretary

INTERIM MITIGATION AGREEMENT

12

DATED this 20<sup>th</sup> day of September, 2013.

NORTH SIDE CANAL COMPANY

  
\_\_\_\_\_  
Albert Lockwood, Chairman

ATTEST:

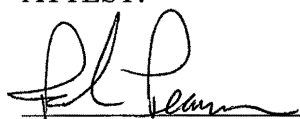
  
\_\_\_\_\_  
Alan Hansten, Secretary

DATED this 10 day of Sept, 13.

TWIN FALLS CANAL COMPANY

  
\_\_\_\_\_  
Roger Blass, Chairman

ATTEST:

  
\_\_\_\_\_  
Rick Pearson, Secretary

INTERIM MITIGATION AGREEMENT

14

John K. Simpson, ISB #4242  
 Travis L. Thompson, ISB #6168  
 Jonas A. Reagan, ISB #<sup>1</sup>  
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 Irrigation District, Twin Falls Canal Company,  
 North Side Canal Company and Milner  
 Irrigation District*

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 Irrigation District*

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 STONE & SHIRLEY LLP**  
 137 West 13<sup>th</sup> St.  
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 Burley, Idaho 83318  
 Telephone: (208) 878-8382  
 Facsimile: (208) 878-0146

*Attorneys for Southwest Irrigation  
 District and Goose Creek Irrigation  
 District*

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

IN THE MATTER OF SOUTHWEST AND	)	
GOOSE CREEK IRRIGATION DISTRICTS	)	Docket No.: CM-MP-2010-01
MITIGATION PLAN FOR THE SURFACE	)	
WATER COALITION DELIVERY CALL	)	<b>JOINT MOTION FOR APPROVAL</b>
	)	<b>OF MITIGATION AGREEMENT</b>
	)	
	)	

COME NOW, the Applicants SOUTHWEST IRRIGATION DISTRICT and GOOSE  
 CREEK IRRIGATION DISTRICT (hereinafter collectively referred to as "Applicants") by  
 through their attorneys of record Parsons, Smith, Stone, Loveland and Shirley LLP, and the

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<sup>1</sup> Mr. Reagan is currently practicing under a legal intern limited license (I.B.C.R. 226). Mr. Reagan also recently passed the bar exam and is the process of being admitted to the Idaho State Bar.

Protestants, 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, (hereinafter “Surface Water Coalition,” “Coalition,” or “SWC”), by and through their attorneys of record, Barker Rosholt & Simpson, LLP and Fletcher Law Office, and hereby file this *Joint Motion for Approval of Mitigation Agreement* pursuant to the provisions of Conjunctive Management Rule 43 and other applicable law.

### **BACKGROUND**

The Surface Water Coalition has an outstanding water delivery call to protect senior surface water rights to the Snake River. The Applicants’ members hold various ground water rights junior in priority to the Coalition’s water rights. On June 15, 2010 the Applicants filed an *Amended Mitigation Plan* regarding the Coalition’s delivery call. IDWR published notice of the plan and the Coalition protested the plan on July 9, 2010. Since that time the Coalition and the Applicants have been working in good faith to resolve the protests and reach an acceptable mitigation agreement. The parties initially executed an *Interim Mitigation Agreement* for the years 2013-2015. The Director approved that agreement by final order. *See Final Order Approving Interim Mitigation Plan* (Nov. 25, 2013). The interim agreement was then extended for the years 2016 and 2017. The Director approved both extensions. *See Final Order Approving Mitigation Plan for 2016* (March 29, 2016); *Final Order Approving SWID’s Mitigation Plan for 2017* (Feb. 8, 2017).

Since approval of the 2017 extension the Parties have negotiated and ultimately agreed upon terms for a permanent mitigation plan. *See Ex. A*. The agreement provides safe harbor for the Applicants’ members’ junior priority ground water rights that may otherwise cause material

injury to the Coalition's senior priority surface water rights. The agreement further identifies specific mitigation actions to be undertaken by the Applicants. Finally, the agreement establishes a groundwater level index and goals through a list of wells for continued measurement and monitoring within Water District 45.

### **JOINT MOTION FOR APPROVAL**

The Coalition and the Applicants jointly move the Director to finally approve the *Mitigation Agreement*. The agreement provides for certain aquifer mitigation actions to be undertaken by the Applicants on an annual basis, including groundwater recharge, conversions, and voluntary curtailment. In exchange, the Coalition agrees that the Applicants' members' junior priority ground water rights shall not be subject to curtailment in response to the SWC's water delivery call or any order issued by IDWR during the term of the agreement.

No hearing is requested on this motion, however, the Parties will appear and provide any further information to the Director if needed. The Parties respectfully request the Director to expedite consideration and approval of this motion.

### **REQUESTS FOR RELIEF**

1. The Parties request the Director to approve the *Mitigation Agreement*.
2. The Parties request the Director to lift the stay of the contested case on the Applicants' amended mitigation plan and enter a final order concluding the contested case.
3. The Parties request the Director recognize that the Applicants' members' junior priority ground water rights are not subject to curtailment or any further mitigation requirements in response to the SWC delivery call during the term of the *Mitigation Agreement*.

4. The Parties request the Director to expedite approval of this joint motion.

DATED this 4<sup>th</sup> day of January, 2018.

**BARKER ROSHOLT & SIMPSON LLP**

  
\_\_\_\_\_  
Travis L. Thompson

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

**FLETCHER LAW OFFICE**

  
\_\_\_\_\_  
W. Kent Fletcher

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

**PARSONS, SMITH, STONE LOVELAND & SHIRLEY LLP**

  
\_\_\_\_\_  
William A. Parsons


*Attorneys for Southwest Irrigation District and  
Goose Creek Irrigation District*

### CERTIFICATE OF SERVICE

I hereby certify that on this 4<sup>th</sup> day of January, 2018, I served a true and correct copy of the foregoing **JOINT MOTION FOR APPROVAL OF MITIGATION AGREEMENT** by email and by depositing same in the United States mail, postage prepaid, addressed to the following:

Director Gary Spackman  
Idaho Department of Water Resources  
322 E. Front St.  
P.O. Box 83720-0098  
[gary.spackman@idwr.idaho.gov](mailto:gary.spackman@idwr.idaho.gov)  
[deborah.gibson@idwr.idaho.gov](mailto:deborah.gibson@idwr.idaho.gov)

William Parsons  
Parsons Smith Stone Loveland & Shirley LLP  
P.O. Box 910  
137 W. 13<sup>th</sup> St.  
Burley, Idaho 83318  
[wparsons@pmt.org](mailto:wparsons@pmt.org)

  
Travis L. Thompson



# Exhibit A

## MITIGATION AGREEMENT

THIS AGREEMENT is entered into by and between SOUTHWEST IRRIGATION DISTRICT and GOOSE CREEK IRRIGATION DISTRICT (hereinafter collectively referred to as "SWID"), Idaho irrigation districts, and A&B IRRIGATION DISTRICT ("A&B"), an Idaho irrigation district, AMERICAN FALLS RESERVOIR DISTRICT #2 ("AFRD #2"), an Idaho reservoir district, BURLEY IRRIGATION DISTRICT ("BID"), an Idaho irrigation district, MILNER IRRIGATION DISTRICT ("Milner"), an Idaho irrigation district, MINIDOKA IRRIGATION DISTRICT ("MID"), an Idaho irrigation district, NORTH SIDE CANAL COMPANY ("NSCC"), an Idaho non-profit corporation, and TWIN FALLS CANAL COMPANY ("TFCC"), an Idaho non-profit corporation (hereinafter collectively referred to as "Surface Water Coalition", "Coalition", or "SWC") (together both sets of parties hereinafter referred to as "Parties").

### RECITALS

WHEREAS, the Surface Water Coalition has an outstanding delivery call against hydraulically connected junior ground water rights on the Eastern Snake Plain Aquifer ("ESPA") (IDWR Docket No. CM-DC-2010-001); and

WHEREAS, SWID filed a mitigation plan with the Idaho Department of Water Resources ("IDWR") on May 28, 2010 in reference to the Surface Water Coalition's water delivery call; and

WHEREAS, IDWR published notice of the plan and processed it under Rule 43 of the *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11 *et seq.*) and the SWC filed a protest to SWID's plan on July 9, 2010; and

WHEREAS, the Parties negotiated and eventually entered into an *Interim Mitigation Agreement* for the years 2013-2015; and

WHEREAS, the Director approved the agreement by final order on November 25, 2013; and

WHEREAS, the Parties subsequently extended the agreement for the years 2016 and 2017, which extensions were also approved by the Director; and

WHEREAS, since that time the Parties have been gathering additional groundwater data within SWID's boundary in Twin Falls and Cassia Counties; and

WHEREAS, the Parties seek to enter into a perpetual term agreement and wish to delineate their agreement in writing as follows.

## COVENANTS

NOW THEREFORE, in consideration of the recitals, the mutual covenants, representations and warranties contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **SWID Aquifer Mitigation Actions.** SWID agrees to undertake the following aquifer mitigation actions during the years 2018-2026 to meet the groundwater level benchmarks and the groundwater level goal set forth in Paragraph 6:

a. **Recharge:**

i.	Cottonwood	=	800 acre-feet
ii.	Dry Creek	=	800 acre-feet
iii.	Murtaugh	=	450 acre-feet
iv.	West Cassia Pipeline	=	2,500 acre-feet
v.	New Pipeline	=	<u>2,000 acre-feet</u>

Total			6,550 acre-feet
-------	--	--	-----------------

b. **Conversions:** SWID will provide surface water to convert, in total or in part, approximately 30,000 groundwater irrigated acres within SWID's boundary. The approximate volume delivered for the conversions is identified as follows:

i.	Burley Irrigation District	=	23,100 acre-feet
ii.	Milner Irrigation District	=	12,630 acre-feet
iii.	Twin Falls Canal Company	=	6,500 acre-feet
iv.	West Cassia Pipeline	=	12,120 acre-feet
v.	New Pipeline	=	<u>10,000 acre-feet</u>

Total			64,350 acre-feet
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c. **Voluntary Curtailment:** In addition to the foregoing, SWID will voluntarily curtail all groundwater use on an additional 2,378 acres within SWID's boundary (to be identified and reported by SWID on an annual basis by May 1<sup>st</sup>).

3. **Irrigation Season.** Landowners within SWID further agree to not turn on and irrigate with any groundwater prior to April 1<sup>st</sup> or after October 31<sup>st</sup> within a given irrigation season.

4. **Alternative Mitigation.** As an alternative to providing mitigation water directly to SWC, SWID shall annually pay, on or before May 1<sup>st</sup>, Sixty-Five Thousand and No/Dollars (\$65,000.00) to be deposited into a trust account held for the benefit of SWC to be used for projects or actions to stabilize and/or enhance groundwater levels in the ESPA and benefit reach gains to the Snake River.

5. **Safe Harbor.** In exchange for the mitigation identified in Paragraphs 1-3 above, and provided SWID implements the Agreement as stated, SWC agrees that junior priority ground water rights held by SWID members (located within the project boundaries of the Southwest Irrigation District and Goose Creek Irrigation District and in good standing with each irrigation district) shall not be subject to curtailment in response to SWC's delivery call or any curtailment order issued by IDWR or any district court for the SWC delivery call during the term of this Agreement.

6. **Mitigation Plan Agreement.** To the extent deemed necessary by IDWR or any district court, this Agreement shall constitute an agreement on an acceptable mitigation plan identified in Rule 43.03.o of the *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11 *et seq.*).

7. **Groundwater Level Goals.** The Coalition seeks to sustain ground water levels, reach gains, and spring flows in the American Falls reach for purposes of maintaining a sufficient water supply for the irrigation of its members' projects. The Parties seek to stabilize and ultimately reverse the trend of declining groundwater levels in the SWID boundary and return ground water levels in that area to a level equal to the average of the groundwater levels from 1991-2001. A preliminary list of eighteen (18) wells has been agreed to by the Parties, recognizing that the list may be modified based on additional technical information. The list and groundwater level index for measuring the benchmarks and goal is attached hereto as **Ex. A**. The following benchmarks shall be established:

- a. Stabilization of groundwater levels at the identified wells by April 2020, to the 2015 groundwater levels (spring groundwater level readings);
- b. Increase groundwater levels by April 2023 to a point halfway to the groundwater level goal;
- c. Increase groundwater levels at the identified wells by April 2026 to the groundwater level goal (average of 1991-2001) and sustained thereafter.

When the groundwater level goal is achieved for a five-year rolling average, the actions identified in Paragraph 1 above may be reduced or removed, so long as the ground water level goal is sustained. If any of the benchmarks, or the groundwater level goal, is not achieved, adaptive measures will be identified and implemented pursuant to Paragraph 8 below.

8. **Adaptive Water Management Measures.** If any of the benchmarks or the groundwater level goal is not met, additional recharge, conversions, consumptive use reductions, or other measures as recommended by the Parties shall be implemented by SWID to meet the benchmarks or the groundwater level goal.

9. **Implementation of Agreement.** The Parties agree to take any and all actions necessary to ensure this Agreement is implemented to the satisfaction of the Parties, including filing necessary documents with the Director for approval for the initial review term (years 2018-2026), and compliance with any requirements of the Water District 01 and 140 Watermasters. The Parties further agree to jointly support and defend the implementation of the Agreement

including ensuring that IDWR does not improperly credit other junior ground water users, not covered by this Agreement, for any mitigation obligations that they incur pursuant to the SWC Delivery Call.

10. **Term.** This is a perpetual agreement.

11. **Steering Committee.** The Parties will establish a steering committee to meet at least once annually. The committee will review progress on the actions taken by SWID (set forth in Paragraph 1), the annual groundwater level measurements, and the progress in meeting the benchmarks and goal. The committee will develop an adaptive management plan for responding to changes in groundwater levels in the SWID boundary and reach gain trends in the American Falls reach (Near Blackfoot to Milner) of the Snake River.

12. **Representations.** The Parties have the full legal right, power and authority to enter into and perform this Agreement.

13. **Attorneys' Fees.** In any suit, action or appeal therefrom, to enforce this Agreement or any term or provision hereof, or to interpret this Agreement, the prevailing Party shall be entitled to recover all its costs reasonably incurred therein (and on appeal), including reasonable attorneys' fees.

14. **Duty of Good Faith.** Each of the Parties to this Agreement agrees to perform and execute this Agreement in accordance with the highest standards of good faith, honesty in fact, and fair dealing. Accordingly, the Parties agree to cooperate fully and execute any and all supplemental documents and take any and all additional actions which may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

15. **Entire Agreement.** This is the entire agreement of the Parties with respect to matters covered hereby and supersedes all prior agreements between them, written or oral. This Agreement may be modified only in writing, signed by the Parties.

16. **Counterparts.** This Agreement may be executed in any number of counterparts for the convenience of the Parties, all of which, when taken together and after execution by all Parties hereto, shall constitute one and the same Agreement.

17. **Idaho Law.** This agreement shall be governed by the laws of the State of Idaho.

18. **Severability.** The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision hereof.

19. **Captions to Paragraphs.** The captions to the paragraphs of this Agreement are for convenience only and shall not be deemed to enlarge, diminish, explain or in any manner affect the meaning of such paragraphs.

20. **Binding Contract.** This Agreement shall be binding upon and inure to the benefit of the heirs, personal representative, administrators, successors, and assigns of the Parties

hereto.

21. **Effective Date.** The Effective Date of this Agreement shall be the date when both Parties have approved and executed the Agreement.

IN WITNESS WHEREOF, the undersigned have duly executed this Agreement.

DATED this 28 day of November, 2017.

SOUTHWEST IRRIGATION DISTRICT

Randy Brown  
Randy Brown, Chairman

DATED this 28 day of November 2017.

GOOSE CREEK IRRIGATION DISTRICT

  
Noland Critchfield, Chairman

MITIGATION AGREEMENT

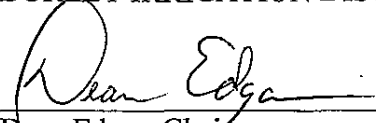
Ex. 39 - Page 012

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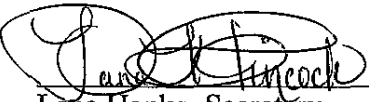
000941

DATED this 12<sup>th</sup> day of December, 2017.

BURLEY IRRIGATION DISTRICT

  
\_\_\_\_\_  
Dean Edgar, Chairman

ATTEST:

  
\_\_\_\_\_  
Lana Hanks, Secretary  
Fincoch

MITIGATION AGREEMENT

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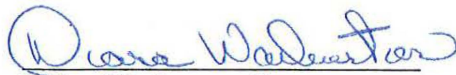


DATED this 11 day of December, 2017.

A&B IRRIGATION DISTRICT

  
Harold Mohlman, Chairman

ATTEST:

  
Diana Warburton, Secretary

MITIGATION AGREEMENT

DATED this 1st day of 12, 2017.

AMERICAN FALLS RESEVOIR DISTRICT #2

Ellis Gooch  
Ellis Gooch, Chairman

ATTEST:

Mark Sabala  
~~John Arkoosh~~, Secretary  
MARK SABALA

MITIGATION AGREEMENT

9

DATED this 13<sup>th</sup> day of DECEMBER 2017.

MILNER IRRIGATION DISTRICT

  
Scott Breeding, Chairman

ATTEST:

  
Walt Mullins, Secretary

MITIGATION AGREEMENT

10

DATED this 12<sup>th</sup> day of December, 2017.

MINIDOKA IRRIGATION DISTRICT

  
Ron Kowitz, Chairman

ATTEST:

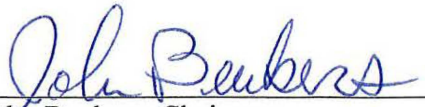
  
Ruth Bailes, Secretary

MITIGATION AGREEMENT

11

DATED this 15 day of December, 2017.

NORTH SIDE CANAL COMPANY

  
John Beukers, Chairman

ATTEST:

  
Alan Hansten, Secretary

MITIGATION AGREEMENT

DATED this 12<sup>th</sup> day of December 2017.

TWIN FALLS CANAL COMPANY

  
Dan Shewmaker, Chairman

ATTEST:

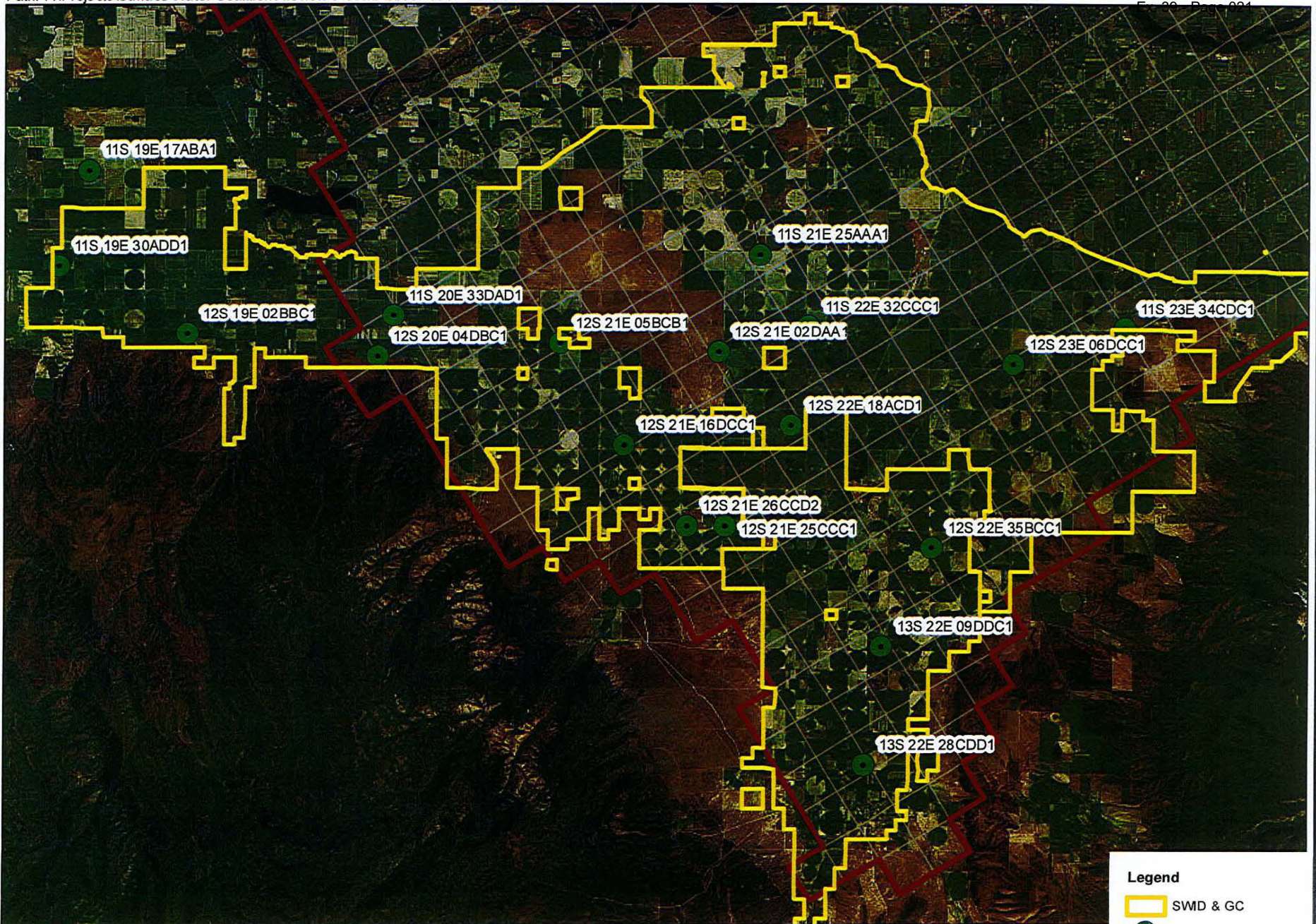
  
Rick Pearson, Secretary

MITIGATION AGREEMENT

13

# Exhibit A





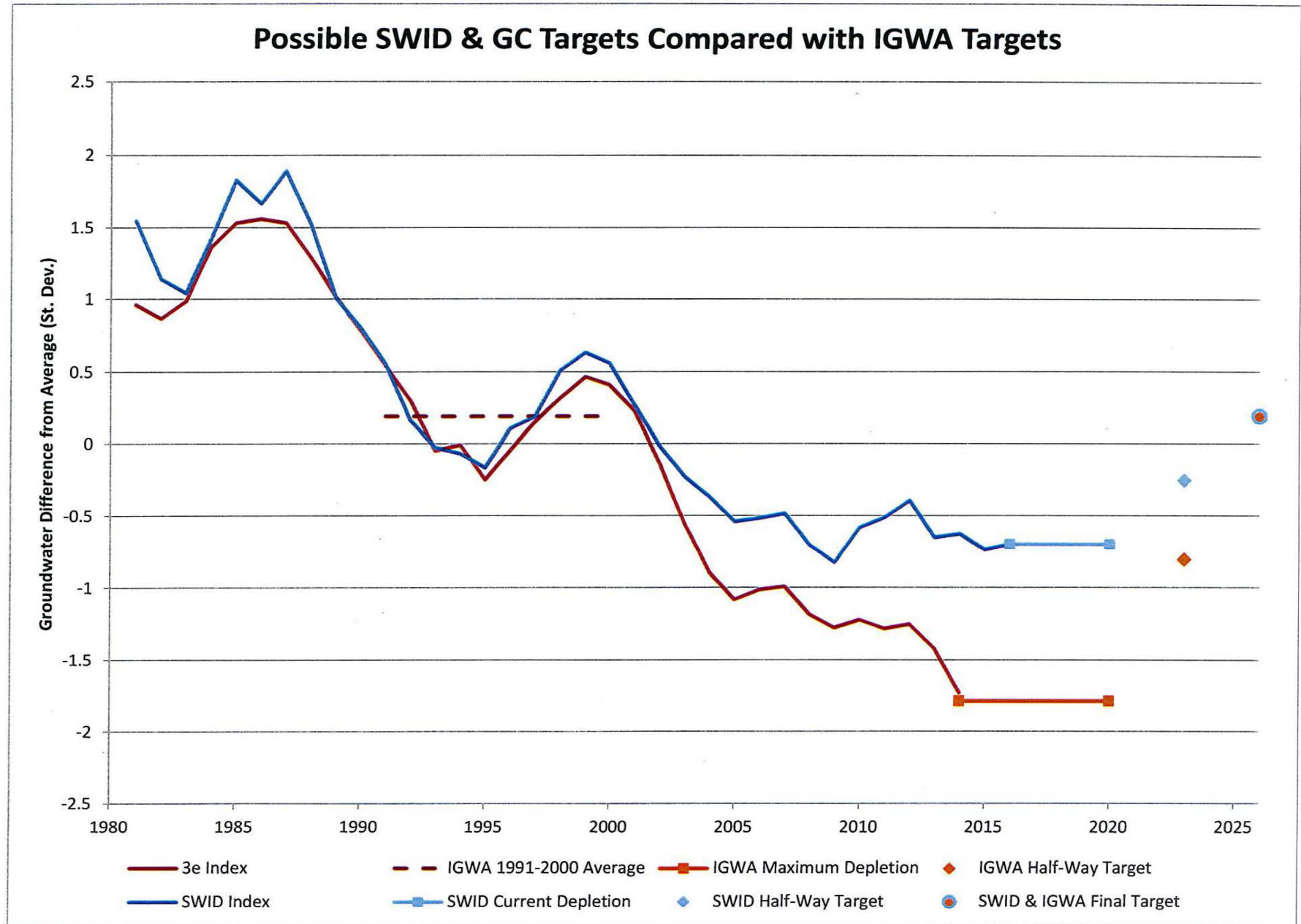
N  
1 inch = 17,000 feet  
BROCKWAY ENGINEERING, PLLC  
GEP - JAN. 12, 2017  
Ex. 39 - Page 021

SWID & GC GROUNDWATER LEVELS  
SURFACE WATER COALITION  
2015 NAIP AERIAL PHOTOGRAPH

**Legend**

- SWID & GC
- Observation Wells
- ESPA BOUNDARY
- ESPA GRID

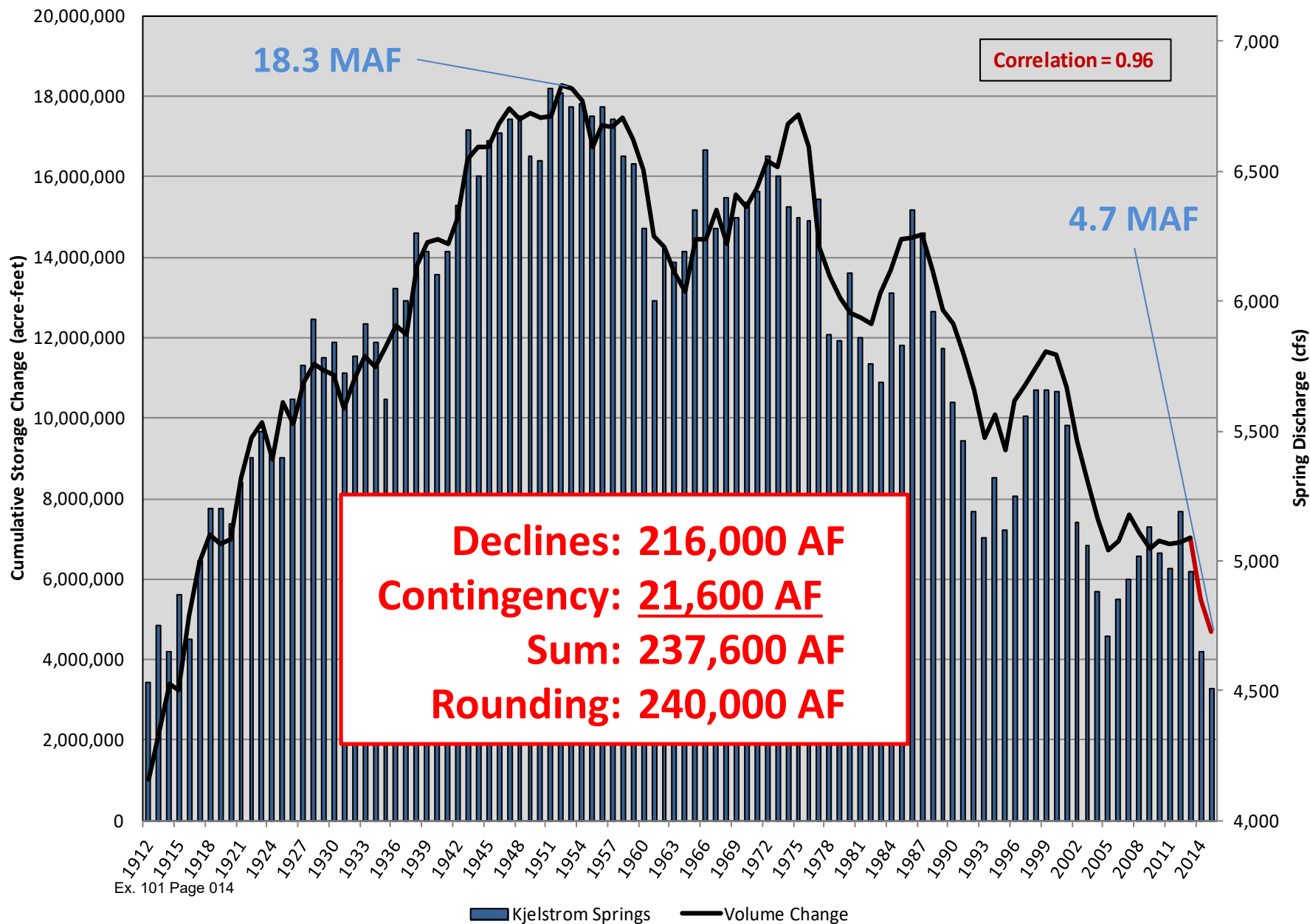






# Cumulative Change in Volume of Water Stored Within ESPA: K-Springs

Ex. 101 Page 014



*CONFIDENTIAL : Attorney-Client Privileged*

**QUESTIONS AND ANSWERS**

**TO: IGWA Members**  
**FROM: Randy Budge, T.J. Budge**  
**DATE: July 2, 2015**  
**RE: SWC – IGWA SETTLEMENT AGREEMENT dated June 30, 2015**

1. How was the 240,000 acre-feet of reduction in groundwater diversions arrived at?

Answer: The total volume of water stored in the ESPA has declined by an average of approximately 220,000 acre-feet annually over the last 60 years. The 240,000 acre-feet is a negotiated reduction.

2. What is the purpose of the 240,000 acre-feet reduction in groundwater diversion plus the 250,000 acre-feet of state-Sponsored recharge?

Answer: Stabilize the declining aquifer, then trend groundwater levels upward until the established goal is reached (discussed below).

3. Why is it necessary to raise groundwater levels?

Answer: Several reasons: (1) to increase the water supplies of senior surface water right holders and avoid future delivery calls; (2) improve reach gains to the Snake River; (3) sustain the Murphy gage minimum flows; and (4) decrease pumping lifts and re-drilling costs.

4. How will the 240,000 acre-foot reduction in groundwater withdrawals be allocated between the districts?

Answer: Each of the twelve (12) ground water and irrigation districts that divert water from the ESPA will be allocated their proportionate share of the total annual ground water reduction based on the number of cfs and/or irrigated acres within each district.

5. If one or more districts choose not to participate in the settlement, will the participating districts have to further reduce diversions in order to reach the cumulative 240,000 acre-foot reduction in groundwater use?

Answer: No, each district will only be responsible for its share of the 240,000 acre-feet. However, if the ground water level goal or benchmarks identified in the settlement agreement are not met further diversion reductions may be necessary to meet the goal.

6. What is the approximate percentage reduction in groundwater diversions needed to achieve an overall 240,000 acre-foot reduction?

Answer: Approximately 10.9% to each district, subject to refinement as the exact amount of groundwater diverted in each district is determined.

7. How will the diversion reduction be applied across the ESPA?

Answer: Each district will be required to reduce diversion by 10.9%. The following table shows the current crop irrigation requirements (CIR) for each district, compared to the CIR with a 10.9 % reduction. These figures may change as the amount of groundwater diverted by each district is refined.

<b>District</b>	<b>Current</b>	<b>10.9% Reduction</b>
A&B Irrig. Dist.	2.6	2.32
Aberdeen-American Falls GWD	2.1	1.87
Bingham GWD	2.3	2.05
Bonneville-Jefferson GWD	1.9	1.69
Carey Valley GWD	2.2	1.96
Fremont-Madison Irrig. Dist.	1.7	1.51
Jefferson-Clark GWD	1.9	1.69
Madison GWD	1.7	1.51
Magic Valley GWD	2.6	2.32
North Snake GWD	2.4	2.14
Raft River GWD	1.8	1.60
Southwest Irrig. Dist.	2.4	2.14

8. Is each district required to dry up 10.9% of its irrigated acreage?

Answer: No. Each district will decide how to accomplish its 10.9% reduction. Options may include diversion caps, fallowing land, end-gun removals, conversions to surface water, changing crop rotation patterns to less consumptive crops, and enrolling land in CREP.

9. What is the ground water level goal?

Answer: An average of the 1991 to 2001 ground water levels at 19 identified wells.

10. What is the benchmark for stabilizing ground water levels?

Answer: By April 2020 stabilize ground water levels at identified wells to 2015 ground water levels.

11. What are the benchmarks for increasing groundwater levels?

Answer: By 2023 increase ground water levels at identified wells to a point half way between 2015 ground water levels and the ground water level goal; and, by April 2026 increase ground water levels at identified wells to the ground water level goal.

12. Will the 240,000 acre-foot reduction of groundwater diversion plus 250,000 acre-feet of state-sponsored recharge be sufficient to stabilize and then return ground water levels to an average of the 1991 to 2001 levels?

Answer: Model runs indicate it will, though precipitation plays a significant role in how long it will take.

13. How long will it take to restore the aquifer to meet the goals?

Answer: Under average precipitation, the aquifer is projected to stabilize in about 5 years and reach the recovery goal in about 10 years. Persistent drought will cause it to take longer, whereas a wet cycle will expedite the recovery.

14. If ground water level goal is achieved, can the reduction in groundwater diversions be reduced or eliminated?

Answer: Yes. Success is measured when a rolling average of 5 years of groundwater levels at identified wells equals or exceeds the established goal. When these levels are achieved and sustained, groundwater diversion reductions may be reduced or eliminated so long as the groundwater level goal is maintained.

15. What happens if the groundwater level goal is not achieved?

Answer: Adaptive measures will be identified and implemented. A steering committee comprised of the parties and the State will identify appropriate adaptive measures.

16. What is the “safe harbor” provided to participating groundwater users in a participating district?

Answer: No participating groundwater user within a district that is party to the settlement will be subject to a delivery call by the SWC.

17. How long is the agreement for?

Answer: It is perpetual.

18. Will groundwater users who have already implemented efficiencies such as participating in end gun removals, CREP and conversions for example, still be required to reduce more?

Answer: Not necessarily. It will depend on the methods implemented by each district to achieve their diversion reduction. Highly efficient water users may already be near or under a diversion cap.

19. Who makes the decision whether to participate in the settlement?

Answer: The board of directors of each district will decide whether their district participates. The districts plan to hold member meetings to provide guidance.

20. When must each district decide whether to participate in the settlement?

Answer: By August 1, 2015.

21. Will a district that does not participate in the settlement by August 1, 2015, be able to change its mind and participate at a later date?

Answer: Unknown at this time. All parties to the agreement would have to decide whether to allow others to participate later and upon what terms.

22. What happens to a participating district that opts out of the settlement or fails to perform?

Answer: The settlement agreement does not provide for an option to opt out. If a district fails to perform, the members water rights will be subject to administration by IDWR. District members will then be required to comply with mitigation and curtailment orders imposed by the Director under the SWC delivery call. Members of districts who do not perform may be subject to curtailment during times when SWC water rights are short.

23. If a district board decides to participate in the settlement, can individual groundwater users opt out?

Answer: No, unless the district board allows them to withdraw from the district.

24. If a district board allows a member to withdraw from the district, will the remaining district members have to make up the senior's share?

Answer: Yes.

25. If a district chooses not to participate in the settlement, may a member choose to participate by reducing their groundwater diversion by 10.9%?

Answer: The settlement agreement does not address this, but the member may be able to petition to join another participating district for mitigation purposes to participate in the SWC settlement and gain safe harbor from curtailment.

26. What happens if a water user fails to keep its diversions under a diversion cap?

Answer: The district would need to enforce the cap or be in breach of the agreement. If the agreement is breached the safe harbor protections would end and all of the district's member's water rights would be subject to administration and curtailment.

27. Can a district obligate senior groundwater rights to participate in the settlement?

Answer: Districts have authority under Idaho Code 42-5224 to enter into the settlement agreement on behalf of their members. A district member could challenge the Board's action. The outcome of such challenge is unknown.

It is important that groundwater users understand that the settlement agreement presents a unique opportunity to solve the declining aquifer problem. The alternative is leaving the problem to the devices of IDWR and judges. The demand reduction plus recharge plan is a holistic approach that aims to keep everyone in business and operating every year, rather than being subject to curtailment during periods of drought.

If the settlement agreement fails, groundwater users will be required to live with curtailment orders issued by the IDWR and judges, which require drying up land. The settlement agreement is the only way for groundwater users to avoid curtailment by reducing diversions instead of drying up land.

Since all groundwater rights could be at risk of curtailment under the SWC delivery call, most groundwater users have multiple water rights with different priority dates, and the settlement provides an opportunity to keep land in production by reduced diversions, IGWA believes it is the most cost-effective and fair approach to solving the problem.

28. How will the priority of water rights between groundwater users be recognized by those districts who participate in the settlement?

Answer: Districts could decide to allocate the reduction unequally so that older rights have a smaller diversion cap and later rights have a larger diversion cap. However, this would likely be more difficult and expensive to administer than other alternatives because of stacked rights. It would also be difficult for individual farmers to implement.

29. How will enforcement of the diversion reductions be accomplished against participating groundwater districts?

Answer: Groundwater diversions have been measured and reported to IDWR for many years. This database will be used to determine whether farmers stay within their diversion cap. In addition, satellite sensors will be used by IDWR to measure ET losses from irrigated fields to confirm a reduction in consumptive use.

30. Who will do the enforcement of the groundwater diversion reductions against the districts and their members?

Answer: Each district is ultimately responsible to ensure its members comply with the diversion cap for the district. IDWR may help districts facilitate enforcement.

31. Can the diversion reductions be accomplished by averaging diversions or a period of years to accommodate crop rotation practices?

Answer: Perhaps, but this technical detail will need to be worked out.



32. Does the Director's new 2015 Methodology Order increase mitigation obligations to the SWC?

Answer: Yes. Changes made to the 2015 Methodology Order, along with declining aquifer levels, cause much larger mitigation obligations than existed previously and also increase the frequency of years in which mitigation obligations will exist.

33. Will groundwater diverters outside of the Rule 50 aquifer boundary, such as in the Big Loss, Big Wood and Portneuf basins, be required to participate in the settlement?

Answer: Not at this time because they are legally outside of the ESPA. This is expected to change in the future so that all ground water users that impact aquifer levels are required to participate in the solutions necessary to protect the aquifer.

34. How will the starting groundwater level be determined and how will stabilization and increase in groundwater levels be determined?

Answer: Technical experts representing the parties have identified 19 wells to establish the current ground water level and to monitor changes in the groundwater level and determine if the benchmarks and goal are being achieved.

35. What happens if the State does not meet its commitment to recharge an average of 250,000 acre-feet annually?

Answer: The State's recharge obligation is separate from the groundwater users under the settlement. The districts obligations to perform continue regardless of whether the State achieves its recharge objective.

36. Can a district still participate in the settlement and have safe harbor if another district does not?

Answer: Yes. Participating districts will enjoy safe harbor while members of non-participating districts will risk curtailment.

37. Will commercial, industrial, municipal, or stock water rights in participating districts also be required to reduce their diversions?

Answer: Yes. However, the means by which they accomplish reductions in their diversions have yet to be determined.

38. Summarize how approving and performing the settlement will solve problems and help eliminate curtailment risks to ground water users?

Answer: The settlement agreement will help solve ongoing risks of curtailment in three key areas: (1) by permanently solving all mitigation obligations to the SWC and providing safe harbor from curtailment; (2) by increasing spring discharges in the Hagerman Valley which will reduce or eliminate over time for mitigation obligations there; and (3) by increasing base river flows in the summer to help avoid need for curtailment to sustain the Murphy gage minimum flows.

Stabilizing then restoring the aquifer will cause chronic pain for a number of years until the groundwater level goal is met. In return, ground water users will receive certainty by removing the risk of curtailment for the future and preserving the right to reduce or eliminate diversion reductions once the ground water level goal is achieved.

It will not be business as usual, but a way to stay in business!

# Surface Water Coalition Agreement

District Reduction Apportionment

# Issues with CIR

- (-) Snapshots
  - Averaged over year/season
- (-) Measurement error
- (-) Few ground stations for calibration
- (-) SW/GW mixed areas
- (-) Does not account for soft conversions
- (-) Does not account for non-irrigation uses
- (-) Physical reduction not based on CIR
- (+) Includes small users not required to measure
- (+) Quick

# WMIS – Water Measurement Information System

- Database
  - Accessible online to general public
  - Editable by field techs, watermasters, and department staff
  - Contains field notes and measurements
  - Linked to water rights
- Used to calculate usage
  - Water rights  $\geq$  5 acres or 0.24 cfs
- 9,927 points of diversion in ESPA & Tributaries
  - **5,706** ground water PODs in ESPA



# Legend

- ESPA - ACGWS
- Surface Water
- Ground Water

Ex. 107 Page 007

Ex. 107 Page 007



# Example:

- WMIS Organization
  - WMIS #
  - Reporting District
- Well in BJ GWD
  - PCC Option
  - Calculated usage back to 1997
  - Measured 12 times since 1997

Ex. 107 Page 008

Idaho Department of Water Resources

WMIS

Water Management Information System

Ex. 107 Page 008

Quick Search:

Search Method:

Reporting District

Reporting District:

Bonneville-Jefferson GW/D

WMIS Number:

200033

Legal Description:

02N 35E 12 NW SW NE

Metal Tag Number:

A0000359

You are logged in as BHI/GGS

Point Of Diversion

PCC

Flow Meter

Time Clock

Alternate

Contacts

Data Summary

Other

Logout

PCC Conditions

You are viewing 200033; A0000359

[Click here to insert a new record.](#)

Year: 2014

Date: 7/18/2014 12:00:00 AM

Total PCC: 938.81

Total Percentage: 100

Edit

Insert New Condition

Delete

# 1

Condition Date: 07/18/2014

Condition PCC: 938.81

Percentage: 100

KW: 442.70

GPM: 2561.0

PSI: 49

Boost On: No

Description: Both measurements had good sections and good signal. Booster off. Likely running one 8 tower pivot, one 9 tower, and 2 corners of solid set hand lines

Meter:

Utility: Utah Power & Light

Main HP: 500.00

Pole Number:

Manufacturer: General Electric

Serial Number: 23748498

Boost HP: 0.00

Multiplier: 640.00

Disk Constant: 1.20

Year: 2013

Date: 8/9/2013 12:00:00 AM

Total PCC: 914.41

Total Percentage: 100

Edit

Insert New Condition

Delete

# 1

Condition Date: 08/09/2013

Condition PCC: 914.41

Percentage: 100

KW: 445.00

GPM: 2643.0

PSI:

Boost On: No

Description: Re-lift off. West line closed and pipe warm. Grain off. 3 pivots with endguns.

Meter:

Utility: Utah Power & Light

Main HP: 500.00

Pole Number: 755687869

Manufacturer: General Electric

Serial Number: 23748498

Boost HP: 0.00

Multiplier: 640.00

Disk Constant: 1.20

Year: 2010

Date: 6/26/2010 12:00:00 AM

Total PCC: 1073.18

Total Percentage: 100

# 1

Condition Date: 06/26/2010

Condition PCC: 1073.18

Percentage: 100

KW: 445.00

GPM: 2252.0

PSI:

Boost On: No

Description: Running 2 pivots and 4 hand lines. booster off. Grain and hay. Booster HP 200.

Meter:

Utility: Utah Power & Light

Main HP: 500.00

Serial Number: 23748498

Boost HP: 0.00

Report Year

Utility KW/H

Total PCC

Acre Feet Volume

Preferred Method

2011

974720.00

06/26/10 1073.18

908.00

PCC

000965

# Issues with Water Measurement

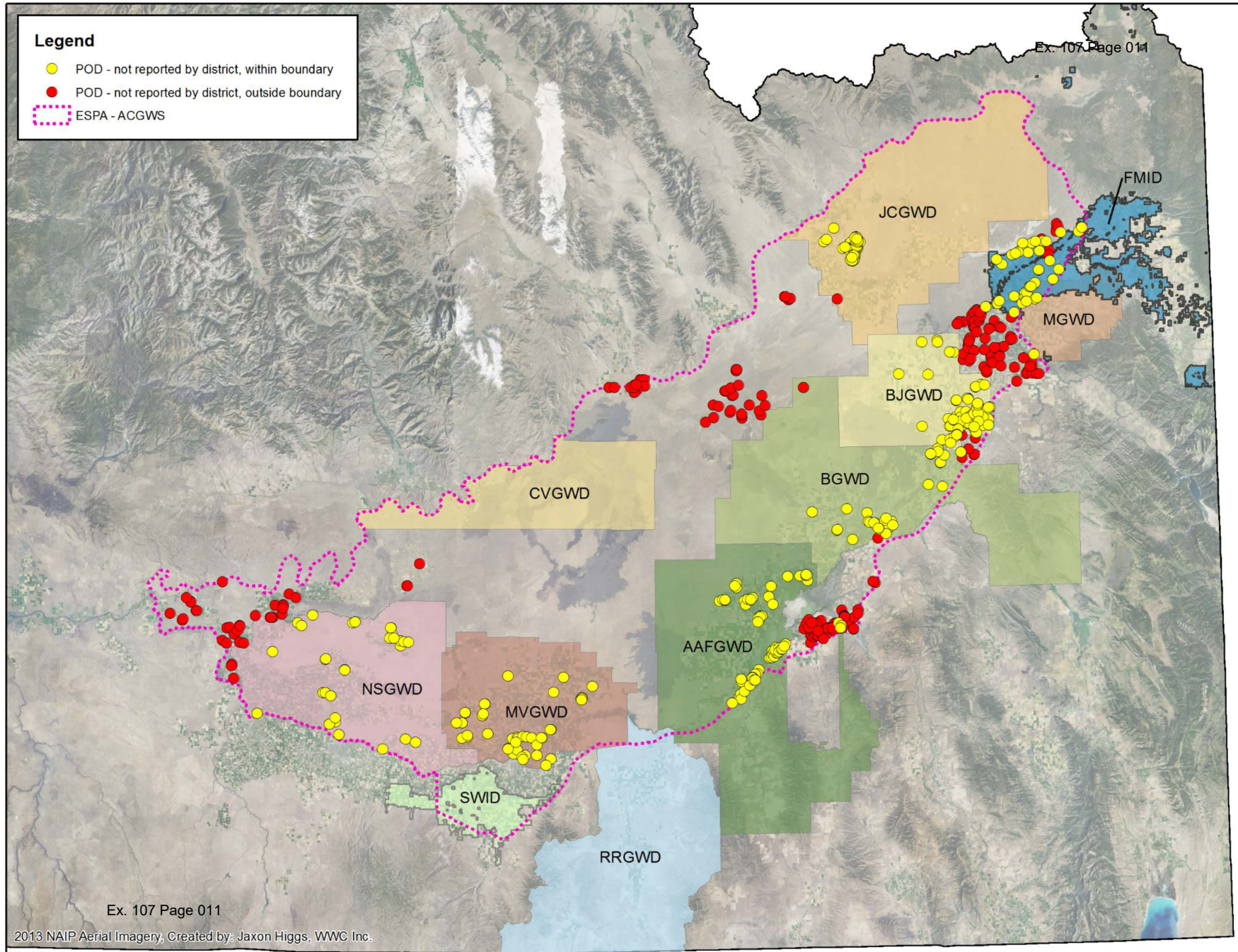
- (-) PCC
  - PCC not valid for some scenarios
  - Data good where PCC is valid
- (-) Missing measurements
  - Mostly small users or wells used infrequently
  - <5 acres not required to measure
- (-) No data in some areas outside ACGWS
- (+) Accounts for supplemental & GW/SW mix
- (+) Accounts for soft conversions
- (+) Accounts for non-irrigation use
- (+) Good records for previous 5+ years
- (+) Reduction will be calculated using measured usage



Preliminary Analysis - Reduction by Usage*												
	Current					Applied					Difference	
	AF/Yr	District % Total	AF Reduction	% Reduction		AF/Yr	District % Total	AF Reduction	% Reduction		AF/Yr	AF Reduction
American Falls	254,777	12.5%	30,111	11.8%		289,023	14.2%	34,158	11.8%		34,246	4047
Bingham	379,429	18.7%	44,843	11.8%		385,001	19.0%	45,502	11.8%		5,572	659
Bonneville	144,925	7.1%	17,128	11.8%		184,557	9.1%	21,812	11.8%		39,632	4684
Carey	2,166	0.1%	256	11.8%		2,166	0.1%	256	11.8%		0	0
Jefferson Clark	311,293	15.3%	36,790	11.8%		373,943	18.4%	44,195	11.8%		62,650	7404
Fremont-Madison**	8,651	0.4%	1,022	11.8%		8,651	0.4%	1,022	11.8%		0	0
Madison	6,530	0.3%	772	11.8%		9,589	0.5%	1,133	11.8%		3,059	362
Magic Valley	253,858	12.5%	30,002	11.8%		257,691	12.7%	30,455	11.8%		3,833	453
A&B	174,399	8.6%	20,611	11.8%		174,399	8.6%	20,611	11.8%		0	0
North Snake	179,846	8.9%	21,255	11.8%		191,460	9.4%	22,628	11.8%		11,614	1373
Raft River	651	0.0%	77	11.8%		651	0.0%	77	11.8%		0	0
Southwest	108,044	5.3%	12,769	11.8%		108,044	5.3%	12,769	11.8%		0	0
In district, not reported by Dist.	160,606	7.9%	18,981	11.8%		-	0.0%	-	0.0%		-160,606	-18981
Out of District	45,529	2.2%	5,381	11.8%		45,529	2.2%	5,381	11.8%		0	0
Total:	<b>2,030,704</b>	100.0%	240,000	11.8%		<b>2,030,704</b>	100.0%	240,000	11.8%		0	0
*ESPA only, includes commercial/stock/multiple use domestic.												
**Assumed all wells within boundary are part of district.												

# Legend

- POD - not reported by district, within boundary
- POD - not reported by district, outside boundary
- ESPAs - ACGWS

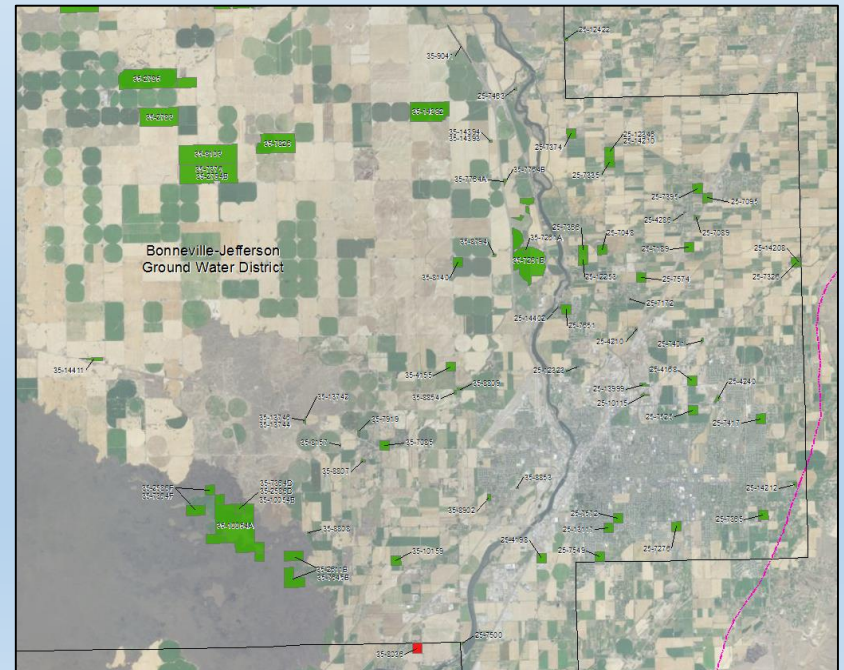
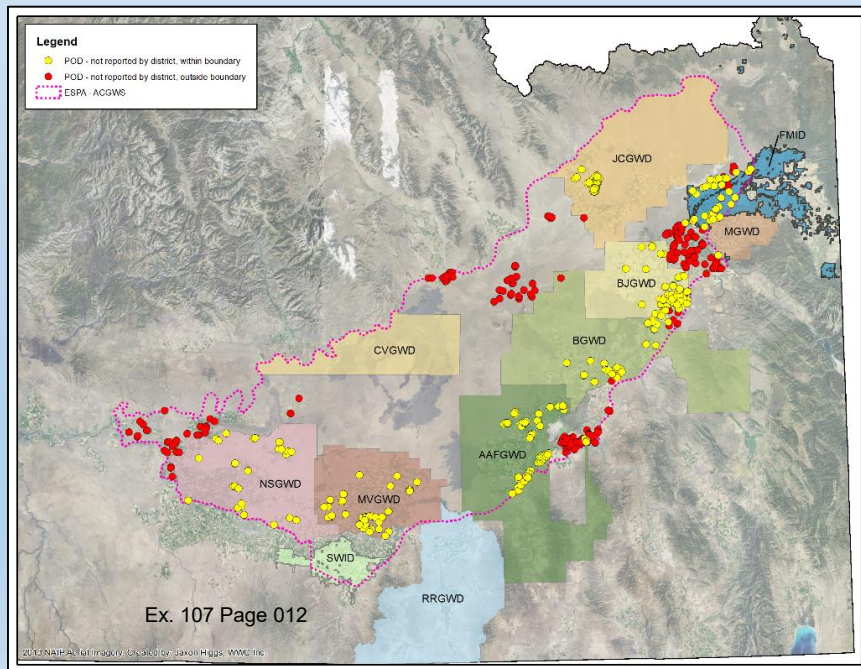


000968



# What's next?

- All water rights accounted for
- All wells associated with water rights accounted for
- Meeting w/IDWR technical staff
- Recommendation
  - Usage where available, CIR where not available



**SWC-IGWA Term Sheet Implementation - Technical Work Shop**  
**September 23, 2015 (10:00 AM – 3:00 PM)**  
**Best Western (800 N. Overland Avenue Burley, ID 83318)**

**Agenda**

- 1. Introduction – Mat Weaver & Randy Budge**
  - a. Review of agenda and objectives
  - b. Discuss process and future workshops
  - c. What information do GWDs need
- 2. Review of Department Water Right Data, Consumptive Use Basics, METRIC, NDVI**
  - a. Department Irrigated Land Use Data and Water Right Records – Linda Davis
  - b. Review of Consumptive Use Basics – Matt Anders
  - c. Method for Computing ET – Bill Kramber
- 3. Review of Diversion Data (i.e. WMIS database records)**
  - a. Review of WMIS Data Base and Records – Cindy Yenter
  - b. Review 2015 WMIS QA Effort – Cindy Yenter
  - c. Review PCC Methods and Data – Corbin Knowles
  - d. Analysis and Comparison of Metric vs. PCC Data – Corbin Knowles
- 4. Discussion of Establishing Baseline, 240,000 AF Proportionment, & Annual Performance Review**
  - a. Consider methods for determining baseline – Mat Weaver
  - b. Consider methods for proportioning 240,000 AF reduction amongst GWDs – Mat Weaver
  - c. Consider methods for annual performance review – Mat Weaver
- 5. Discuss Next Steps**
  - a. Prepare list of what outstanding information is still needed – IGWA/GWD
  - b. Schedule next meeting
  - c. Make work assignments
- 6. As Time Allows - Discussion of alternative practices to reduction in consumptive use**
  - a. Discussion of necessary technical evaluation and metrics associated with recharge as an alternative practice
    - i. Answer the question, “Does my recharge activity have an equivalent effect on the aquifer to a reduction in consumptive use?”
  - b. Does 1 AF of recharge or other demand reduction always equal 1 AF of credit?
    - i. Answer to question, “Does my activity have an equivalent effect on the aquifer to a reduction in consumptive use?”

## Objectives

1. Discuss and reconcile the inconsistent usage of “diversion reduction”, “consumptive reduction”, and “demand reduction” language by the term sheet.
2. Develop a clear understanding of the Department’s ground water diversion data set (i.e. WMIS database).
3. Develop a clear understanding of the challenges associated with relying on a power consumption coefficient (PCC) method of measuring diversions.
4. Develop a Clear understanding of the Department’s consumptive use analysis, the analysis input variables, and the completeness and accuracy of the input variables.
5. Identify any missing data necessary for implementation of the term sheet (e.g. field scale data set of ground water irrigated lands).
6. Determine whether “diversion reduction” or “consumptive reduction” will be the standard used by the GWDs in implementing their collective practices to achieve the term sheet’s benchmarks and goal.
7. Determine the data and methods that will be used to proportionately split the 240,000 acre foot obligation up amongst all of the parties (i.e. GWDs, A&B, SWID, and others).
8. Determine the data and methods that will be used to establish the “baseline condition”.
9. Determine the data and methods that will be used to measure the year-to-year performance of the GWDs in achieving the term sheet’s benchmarks and goal.
10. Discuss sideboards for acceptable recharge and other demand reduction practices and how to equate these practices to a diversion/consumptive use reduction.

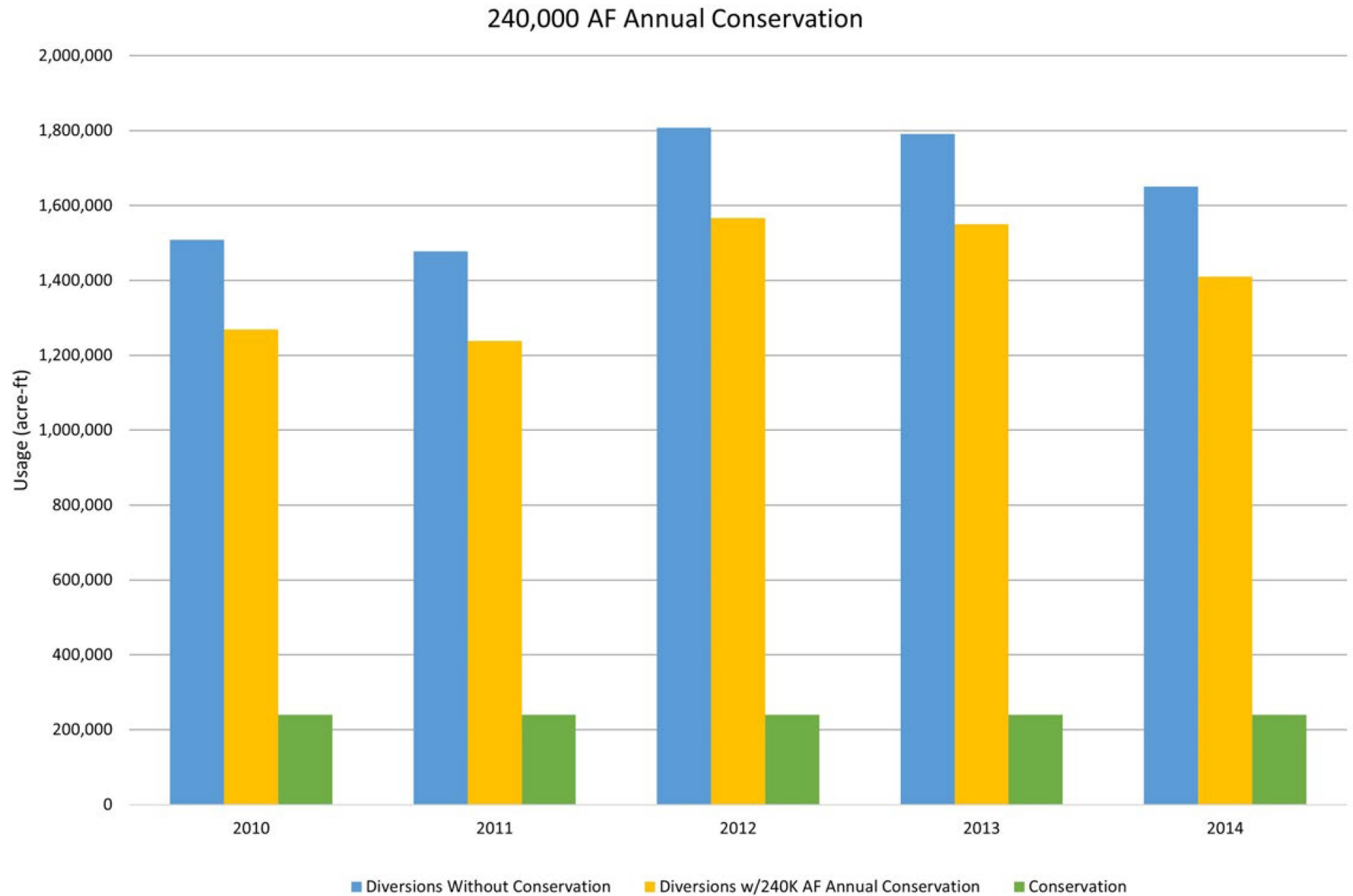
## Final SWC-IGWA Settlement Allocation 2016

11/3/2016

	AF/Yr	District % Total	AF Reduction	% Reduction
Aberdeen - American Falls GWD	271,989	14.0%	33,595	12.4%
Bingham GWD	282,476	14.5%	34,890	12.4%
Bonneville - Jefferson GWD	147,337	7.6%	18,198	12.4%
Carey Valley GWD	5,671	0.3%	700	12.4%
Jefferson - Clark GWD <sup>1</sup>	438,634	22.6%	54,178	12.4%
Fremont-Madison ID <sup>2</sup>	43,491	2.2%	5,372	12.4%
Magic Valley GWD	261,877	13.5%	32,346	12.4%
A&B ID	174,735	9.0%	21,582	12.4%
North Snake GWD <sup>3</sup>	205,501	10.6%	25,382	12.4%
Southwest ID	104,417	5.4%	12,897	12.4%
Falls ID	6,968	0.4%	861	12.4%
Total:	<b>1,943,096</b>	100.0%	<b>240,000</b>	12.4%
Non-Participants	98,051	4.8%	-	-
Total ESPA:	<b>2,041,147</b>			

1. WD31 has 89,884 af that have no WMIS records, but included in Jefferson-Clark GWD total.
2. Includes Madison Irrigation District and WD100. Instead of diversion reduction FMID providing direct delivery of 1,500 af of storage to IGWA and 3,000 af annual recharge.
3. North Snake GWD 5 year average delivery of water to conversions in WD130 is 21,305 af.
4. Total wells for all districts estimated to be 4,750

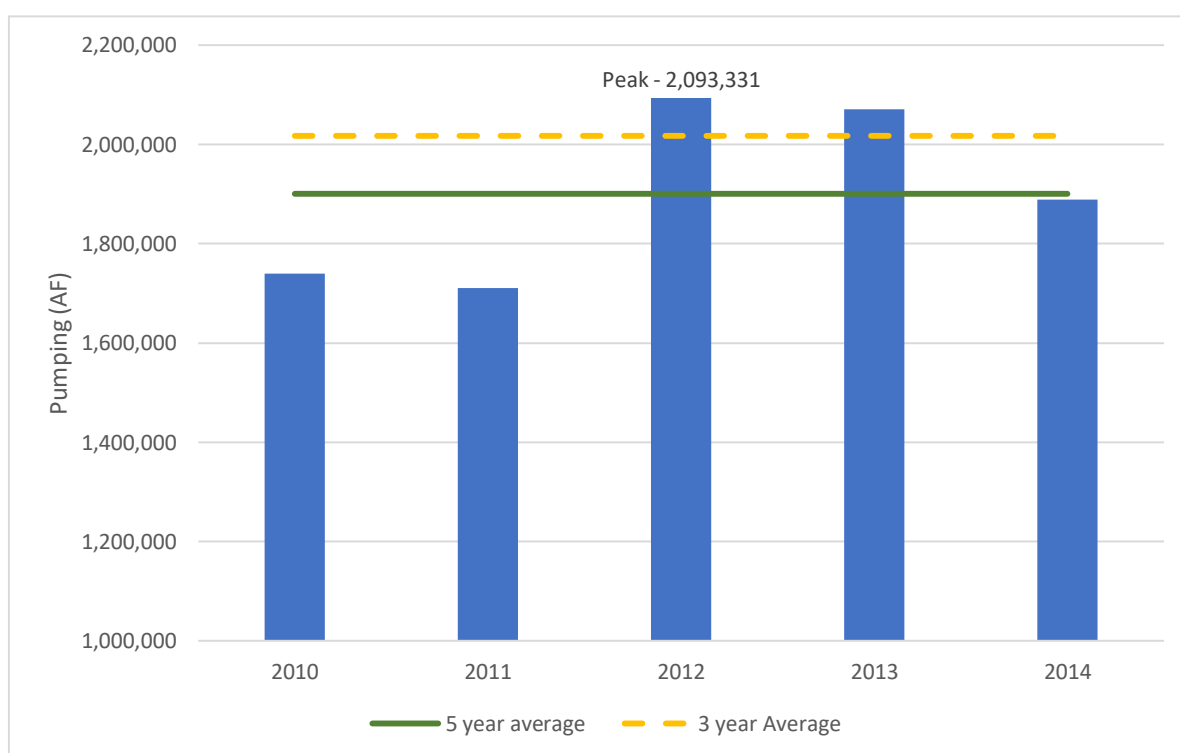




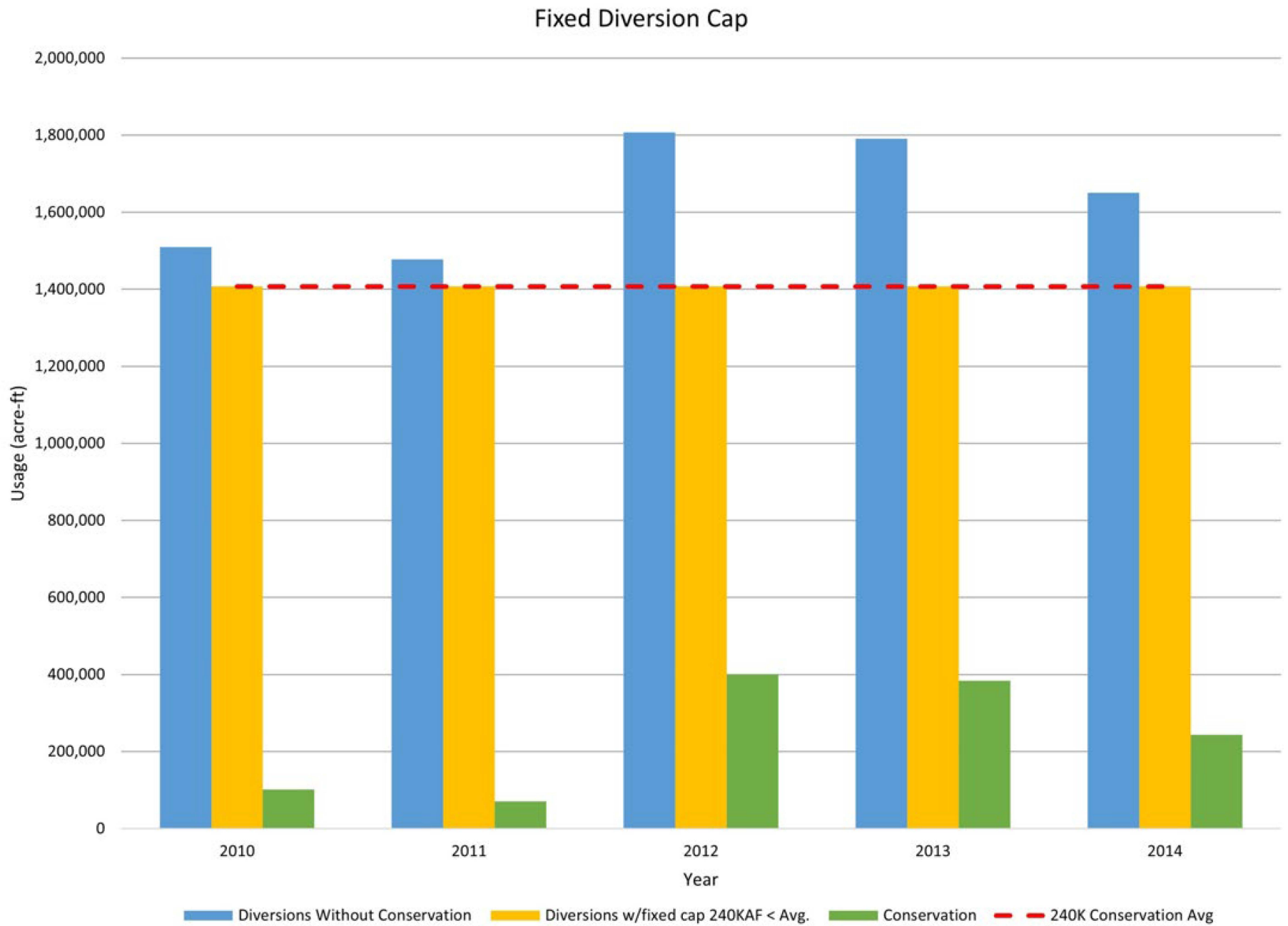
**IGWA Baseline Determination Example:**

Year	Total Pumping (AF)	5 year Average	3 Year Average	Peak Diversions
2010	1,739,793			
2011	1,710,914			
2012	2,093,331	1,900,511		2,093,331
2013	2,070,287		2,017,282	
2014	1,888,227			

\*includes entities currently listed on IGWA annual report







*John A. Rosholt  
Albert P. Barker  
John K. Simpson  
Travis L. Thompson  
Shelley M. Davis  
Paul L. Arrington  
Scott A. Magnuson*



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*Travis L. Thompson*  
tlt@idahowaters.com

April 14, 2017

**VIA EMAIL & U.S. MAIL**

Mr. Randall C. Budge  
Racine Olson Chtd.  
201 E. Center St.  
P.O. Box 1391  
Pocatello, Idaho 83201

**Re: Ground Water Districts 2016 Implementation Report**

Dear Randy,

I am writing on behalf of the Surface Water Coalition ("SWC" or "Coalition"). We recently received the Ground Water Districts 2016 Implementation Report (via your April 3<sup>rd</sup> email) and are in the process of reviewing that information with our consultants. It is our understanding that the Idaho Department of Water Resources will also perform verification of that report. We appreciate the submittal and look forward to working through it pursuant to the terms of the 2015 *Settlement Agreement*.

However, one issue that needs clarification is the continued reference to A&B Irrigation District and other non-parties to the settlement (i.e. Falls, Southwest). The 2016 Performance Summary Table includes A&B and 21,582 acre-feet referenced as "target conservation." Including A&B as part of the Ground Water Districts' 240,000 acre-feet obligation is an error. I pointed this error out at the November 30, 2016 Steering Committee meeting. If there is any continuing confusion, please refer to the *Agreement* ("*A&B Agreement*") executed between A&B and the Ground Water Districts dated October 7, 2015. That *Agreement* expressly provides:

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

Randall C. Budge  
April 14, 2017  
Page - 2

water rights held by participating members of the Ground Water Districts as set forth in Paragraph 6 of the *Settlement Agreement*.

*A&B Agreement* at 1 (emphasis in original).

In addition to the consideration referenced above, A&B agreed to not file a ground water delivery call against the Ground Water Districts. *See id.* Accordingly, as set forth above, A&B does not have an obligation to reduce its diversions under the *SWC Agreement*. However, A&B did agree to implement approximately 3,000 acres of “soft conversions” in its project. A&B satisfied this obligation and delivered 7,812 acre-feet of surface water to approximately 3,391 acres during the 2016 irrigation season. If you need any information or the actual data on this action please advise.

It is the SWC’s position that the *SWC Agreement* does not apply to the Falls and Southwest Irrigation Districts since they are not signatory parties. As such, please correct the 2016 Performance Summary Table and resubmit it to the Coalition and IDWR to ensure an accurate record for the Steering Committee and future reference. Further, we are unsure of what is meant by the column “mitigation balance.” If possible, can you please describe the purpose of this information?

Assuming the numbers in the “total conservation” column are accurate as verified by SWC and IDWR, it appears the Ground Water Districts were just short of meeting the 240,000 acre-feet reduction obligation in 2016. Using those numbers, the nine districts appear to have conserved a total of 239,585 acre-feet in 2016 (shortfall of 415 acre-feet). Despite the shortfall, given the efforts made by the districts, and in the spirit of good faith, the Coalition is not asserting a breach of the *SWC Agreement*. However, the districts need to comply with their obligations and conserve at least 240,000 acre-feet as required by the *SWC Agreement* every year. Moreover, the districts’ obligation, including meeting the agreed to goals and benchmarks, is wholly independent from the Idaho Water Resource Board’s annual recharge program and the parties’ commitment to support that program. *See SWC Agreement* at 3-4, ¶ 3.f.

It is the SWC’s understanding that IDWR is in the process of collecting the sentinel well data this month. We look forward to reviewing this information with the Ground Water Districts and meeting with the Steering Committee to evaluate the 2016 implementation report and progress toward meeting the agreement’s benchmarks and goals. *See Second Addendum* at 3 (¶ 2.c.v). Although the *Second Addendum* contemplates submitting a report to IDWR by May 1<sup>st</sup>, we may need to develop an appropriate schedule once all the information on the wells is collected.

Again, please prepare and submit a revised 2016 Performance Summary Table to avoid future confusion regarding A&B and non-parties to the *Settlement Agreement*. The Coalition appreciates the Ground Water Districts’ commitment to the agreement and looks forward to hearing from you soon.

Randall C. Budge  
April 14, 2017  
Page - 3

If you have any questions please call me at 733-0700.

Sincerely,

**BARKER ROSHOLT & SIMPSON LLP**



Travis L. Thompson

cc: (via email only)  
T.J. Budge  
Bill Parsons  
John Simpson  
Kent Fletcher  
Charles Brockway Jr.  
Dave Shaw  
Director Gary Spackman  
Garrick Baxter  
Mat Weaver  
Clive Strong  
Brian Patton  
Dan Temple, A&B  
Lynn Harmon, AFRD #2  
John Lind, BID  
Walt Mullins, Milner  
Dan Davidson, MID  
Alan Hansten, NSCC  
Brian Olmstead, TFCC



April 20, 2017

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163 Second Ave. West / P.O. Box 63  
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[tlth@idahowaters.com](mailto:tlth@idahowaters.com)

*Sent Via Email & U.S. Mail*

**Re: Ground Water Districts' 2016 Implementation Report**

Dear Travis:

Thanks for your letter of April 14, 2017, bringing to IGWA's attention certain concerns the SWC has with the Ground Water Districts' implementation report for 2016. We can expect issues to arise from time to time as we move forward in implementing the Settlement Agreement and we appreciate the opportunity to work cooperatively with the SWC to resolve them.

First, let me respond to the SWC's concerns regarding the allocation of the 240,000 AF among groundwater users. We agree that A&B, SWID and Falls Irrigation are not bound by the terms of the Settlement Agreement. However, their pumping must be accounted for in order to determine the proportionate share of the total groundwater pumping from the ESPA for which the participating Districts are responsible.

You will recall that the basis upon which the Settlement Agreement was negotiated and reached was the continuing decline in the groundwater levels from all groundwater pumping, not just pumping by IGWA members. The attached bar chart was at the center of the settlement negotiations and formed the basis of that bargain which focused upon stabilizing then recovering the aquifer.

The participating Ground Water Districts agreed to do their part to recover the aquifer. They did not agree to take responsibility for the pumping of A&B, SWID and Falls Irrigation, or others. The precise language of the Settlement Agreement supports this. Paragraph 3.a states that "total groundwater diversions shall be reduced by 240,000 AF annually" and that "each Ground Water District and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual groundwater reduction or equivalent private recharge activity."

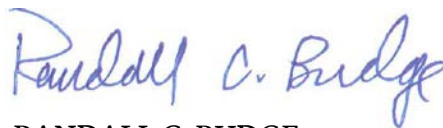
The participating Districts are committed to being responsible for their share of pumping from the ESPA. They expect the SWC to enforce their water rights and hold other groundwater users to the same the same standard by requiring that they also meaningfully participate in recovering the aquifer. We understand the SWC has done this with separate agreements with SWID and A&B. We expect the SWC will do the same with Falls Irrigation, the cities, and others as well. The joint support by SWC and IGWA of the Director's effort to establish a Ground Water Management Area represents a necessary and appropriate additional effort to ensure that all other groundwater pumpers who not parties of the Settlement Agreement, yet part of the cause of the decline, become part of the solution and aquifer recovery effort.

The participating Districts certainly recognized that they are ultimately subject to the groundwater level benchmarks and goal set forth in the Settlement Agreement, and their extraordinary efforts to conserve water in 2016 demonstrate their commitment to achieve them. It is our understanding that IDWR is in the process of collecting the Sentinel Well data which will be reviewed and submitted to the Steering Committee around July 1. We look forward to reviewing this information and suggest the next Steering Committee meeting be scheduled in July to evaluate the Districts' 2016 Implementation Report, the Sentinel Well report, and any related issues.

It is important that we continue a dialogue as needed to resolve questions where we can during the times in between the regular Steering Committee meetings. While questions concerning the details of the Districts 2016 Performance Report are appropriate for discussion, let's not lose sight of the aquifer recovery benchmarks and goals.

If you have any questions, don't hesitate to contact me; or T.J. Budge during the period of April 24 through May 12 while I will be unavailable on vacation.

Sincerely,



RANDALL C. BUDGE

RCB:ts

Enclosures

cc: (via email only)

IGWA

Tim Deeg, President

Lynn Tominaga, Executive Director

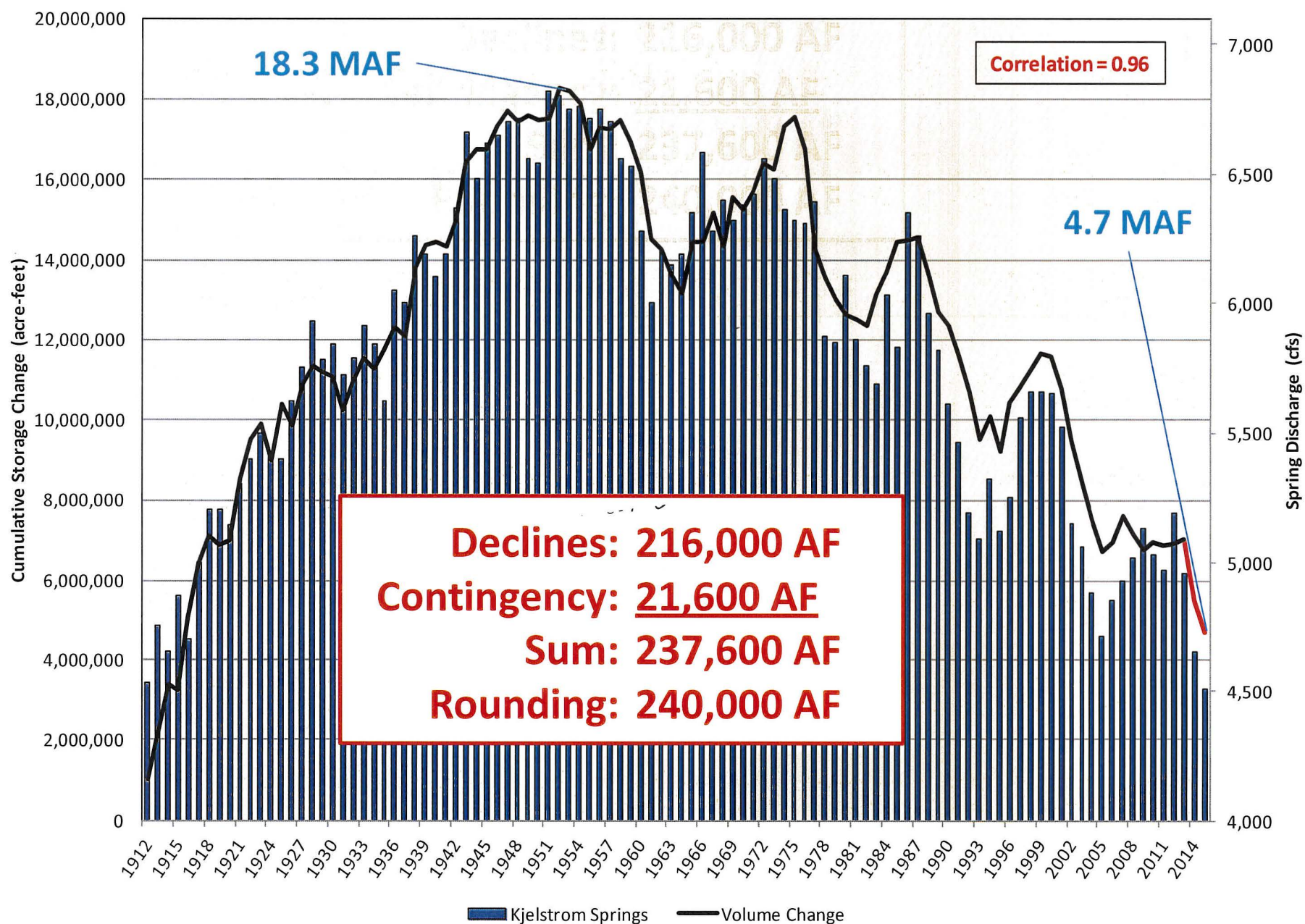
Ground Water District Chairmen

T.J. Budge

Bill Parsons  
John Simpson  
Kent Fletcher  
Charles Brockway Jr.  
Dave Shaw  
Director Gary Spackman  
Garrick Baxter  
Matt Weaver  
Clive Strong  
Brian Patton



# Cumulative Change in Volume of Water Stored Within ESPA: K-Springs





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ATTORNEY GENERAL

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*Attorneys for Respondents*

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

IDAHO GROUND WATER APPROPRIATORS,  
INC.,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER  
RESOURCES, and GARY SPACKMAN in his  
capacity as the Director of the Idaho Department  
of Water Resources.

Respondents.

Case No. CV01-23-07893

**NOTICE OF LODGING THE  
AGENCY TRANSCRIPT AND  
RECORD WITH THE  
AGENCY**

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

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

TO: THE DISTRICT COURT AND THE PARTIES OF RECORD


In accordance with I.R.C.P. 84(j), YOU ARE HEREBY NOTIFIED that the agency record and transcript, having been prepared pursuant to I.R.C.P. 84(f), (g), and (i), are lodged with the Idaho Department of Water Resources for the purpose of settlement.

A copy of the agency transcript and record filed with the Department have been uploaded to the Department's website. The parties may visit <https://idwr.idaho.gov/legal-actions/district-court-actions/igwa-v-idwr-cv01-23-07893/> and follow their browser's document download procedure to obtain a copy of the agency transcript and record after expanding the accordion labeled "Agency Transcript and Record" and clicking on the PDFs titled "Agency Hearing Transcript on Appeal" and "Agency Record on Appeal" and the zipped file titled "Agency Record Excel Documents."

The parties have fourteen (14) days from the date of this notice to file any objections to the transcript and record. The agency's decision on any objection timely filed along with all evidence, exhibits, and written presentations on the objection shall be determined by the agency within fourteen (14) days and included in the record. If no objections are filed within that time, the transcripts and record shall be deemed settled. Subsequently, the agency will lodge the settled transcripts and record with the District Court pursuant to I.R.C.P. 84(k).

DATED this 12th day of June 2023.

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL

  
\_\_\_\_\_  
GARRICK L. BAXTER  
Deputy Attorney General  
*Attorneys for Respondents*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of June 2023, I caused to be served a true and correct copy of the foregoing *Notice of Lodging the Agency Transcript and Record With the Agency*, via iCourt E-File and Serve, upon the following:

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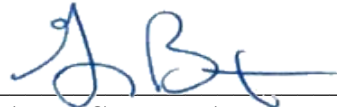
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