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Fourth Judicial District, Ada County
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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.

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

Respondents,

And

CITY OF POCATELLO, CITY OF BLISS, CITY OF BURLEY, CITY OF CAREY, CITY OF DECLO, CITY OF DIETRICH, CITY OF GOODING, CITY OF HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF SHOSHONE, CITY OF WENDELL, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, and BINGHAM GROUNDWATER DISTRICT,

Intervenors.

Case No. CV01-23-7893

SURFACE WATER COALITION'S RESPONSE BRIEF

Judicial Review from the Idaho Department of Water Resources
Gary D. Spackman, Director
Honorable Eric J. Wildman, Presiding

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STATEMENT OF THE CASE

I. Nature of the Case.

This case concerns the Director's interpretation of a prior order that approved IGWA's 2016 stipulated mitigation plan filed pursuant to the Idaho Department of Water Resources' *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11 et seq.) ("CM Rules"). IGWA failed to comply with its mitigation plan in 2021 as it only reduced groundwater diversions and recharged a total of 122,784 acre-feet, well short of the required 240,000 acre-feet. The Director determined that IGWA's breach would have resulted in curtailment absent approval of an additional settlement agreement.

II. Procedural History / Statement of Facts.

In the summer of 2015 IGWA[1] and the Surface Water Coalition[2] entered into a *Settlement Agreement*[3] ("Agreement") to resolve continued litigation over the Coalition's delivery call.[4] In consideration for certain short- and long-term mitigation actions, IGWA received "safe harbor" from priority water right administration under the CM Rules. IGWA agreed to report its performance each year on or before Aprils 1st, and IDWR performed an audit of those actions.

[1] 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 nine entities are hereafter referred to collectively as "IGWA".

[2] Signatory members of the Coalition 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.

[3] A copy of the Agreement can be found at R. 436.

[4] The parties later executed a First Addendum in October 2015. R. 461.

Pursuant to the Agreement 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. . . .

R. 437.

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.

R. 441 (bold in original).

The Agreement was submitted to IDWR as a stipulated mitigation plan pursuant to CM Rule 43 in early 2016.[5] R. 509. 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. R. 894. 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.

R. 896.

The parties then executed a *Second Addendum to Settlement Agreement* ("Second Addendum") that was also approved through a final agency order as well in May 2017. R. 477,

[5] Although the parties submitted a proposed order as an exhibit to the stipulated mitigation plan, the Director did not sign it. R. 516-20. Consequently, the unsigned order has no legal effect for purposes of reviewing IDWR's final agency actions in this case.

901. 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.

R. 906.

IGWA submitted its 2021 performance report to IDWR and the SWC on April 1, 2022. R. 709. As detailed in that report, the signatory 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 IGWA's performance in 2021. R. 19. IGWA filed a response and did not dispute the committee's impasse on the question of its 2021 performance. R. 29.

The Director held a status conference on August 5, 2022, and then took official notice of IGWA's 2021 performance report and supporting spreadsheets. R. 55. The Director issued the *Final Order Regarding Compliance with Approved Mitigation Plan* on September 8, 2022. R. 71. IGWA filed a *Petition for Reconsideration and Request for Hearing* on September 22, 2022. R. 96. The Director issued an order granting the request for hearing on October 13, 2022. R. 105. An administrative hearing was held on February 8, 2023. *See generally*, Hearing Transcript ("Tr."). The Director issued the *Amended Final Order Regarding Compliance with Approved Mitigation Plan* ("Amended Compliance Order") on April 24, 2023. R. 403.

IGWA filed a notice of appeal and petition for judicial review on May 15, 2023. IGWA filed its opening brief ("*IGWA Br.*") on August 15, 2023.

STANDARD OF REVIEW

A reviewing court "defers to the agency's findings of fact unless they are clearly erroneous," and "the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505–06, 284 P.3d 225, 230–31 (2012). "This Court freely reviews questions of law." *Vickers v. Lowe*, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011).

The district court must affirm the agency action unless it finds that the agency's findings, inferences, conclusions, or decisions are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.

I.C. § 67-5279(3); *Clear Springs Foods v. Spackman*, 150 Idaho 790, 796, 252 P.3d 71, 77 (2011).

Even if one of these conditions is met, an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67-5279(4) . The use of "and" in section 67-5279(4) "means that this test is conjunctive." *3G AG LLC v. Idaho Dep't. of Water Res.*, 170 Idaho 251, 265, 509 P.3d 1180, 1194 (2022).

Discretionary decisions of an agency shall be affirmed if the agency (1) perceived the issue in question as discretionary, (2) acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and (3) reached its own decision through an exercise of reason. *Haw v. Idaho State Bd. of Med.*, 143 Idaho 51, 54, 137 P.3d 438, 441 (2006). "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." I.C. § 67-5279(3) .

ARGUMENT

A junior ground water user must comply with a mitigation plan in order to receive the benefits of safe harbor from priority administration. CM Rule 40, 43. If a ground water user does not comply with the approved mitigation actions, the plan does not "mitigate" the senior's injury, and unless a contingency is in place, the Director must administer or curtail the junior right. *See* CM Rule 40.05; R. 85 ("A mitigation plan that depends on a prediction of compliance must include a contingency plan to mitigate if the predictive mitigation is not satisfied").

In this case certain ground water users (collectively referred to herein as "IGWA") did not comply with their mitigation plan in 2021. This fact is undisputed. In response, the Director issued an order of non-compliance. Following an administrative hearing, the Director issued an amended final order confirming the prior finding. IGWA disputes that final agency order despite its admitted non-compliance in 2021. Although junior ground water users pumped freely and with safe harbor in 2021, their non-compliance is not excused by IGWA's present arguments.

Consequently, the Court should deny IGWA's petition for judicial review and affirm the Amended Compliance Order. Further, the Court can find that IGWA's substantial rights have not been prejudiced and deny the appeal for that reason as well.

I. The Director Properly Found that IGWA Did Not Comply with the 2016 Mitigation Plan and Order Approving the Plan.

This case concerns the Director's interpretation of his prior orders approving IGWA's mitigation plan and amendment. The Director issued a final order approving the mitigation plan on May 2, 2016 with certain conditions, including the following:

> a. All ongoing activities required pursuant to the Mitigation Plan <u>are the responsibility of the parties</u> to the Mitigation Plan.

R. 896 (emphasis added).

IGWA contests the Director's finding with respect to the calculation of each district's proportionate share of the 240,000 acre-feet reduction obligation. *See IGWA. Br.* at 12-14. IGWA wrongly argues that non-parties are somehow responsible for a share of that annual conservation action. *See id.* In this regard IGWA views that number as a misnomer.[6] The Director rightly rejected this argument in the Amended Compliance Order:

> In this case, § 6 of the SWC-IGWA Agreement specifically states that 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 form 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.

R. 417 (bold emphasis added).

[6] IGWA has changed its interpretation of what groundwater users are included in the 240,000 acre-feet number over time. At one point IGWA believed it should be shared with A&B Irrigation District, Falls Irrigation District, and Southwest Irrigation District. R. 684. SWC's counsel pointed out that error immediately in the spring of 2016. R. 976-78. Later, IGWA removed Falls Irrigation District from its annual reporting. R. 690, 696, 702, 708. At hearing, IGWA's witness admitted that there are other groundwater users in the ESPA besides A&B and SWID, but that they did not list those users in the annual performance reports, despite their argument that volume was representative of all depletions to the aquifer caused by all pumping. Tr. 161:23-25; 162:1-3 ("[BY MR. HIGGS: A. Yeah, if we're talking pumpers from the ESPA, yes, it doesn't include all pumpers from the USA – or ESPA, excuse me.").

This finding is supported by the wording of the Agreement: "Any ground water user not participating in this Settlement Agreement or otherwise have another approved mitigation plan will be subject to administration." R. 440 (emphasis added). The Agreement and Second Addendum further provide: "This Agreement shall bind and inure to the benefit of the respective successors of the parties" *Id.* (emphasis added); "This Second Addendum shall bind and inure to the benefit of the respective successors of the Parties." R. 480 (emphasis added).

It is also supported by the language of the *Agreement* entered into between A&B Irrigation District, IGWA and the Grund Water Districts dated October 7, 2015: "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…" R. 498 (emphasis added).

IGWA offers no plausible argument to reverse the Director's conclusion. Instead, IGWA believes the Agreement could have contained different language, or that Southwest Irrigation District's non-signature would have necessitated a revision of the 240,000 acre-feet figure. *See IGWA Br.* at 13. Neither argument changes the unambiguous and plain language of the Agreement and the Director's 2016 Order approving the mitigation plan. *See Miller v. Remior*, 86 Idaho 121, 127, 383 P.2d 596, 599 (1963) ("The court should not make the contract for the parties or interpret it to mean something which it in itself does not contain"). Similar to an agency rule, a reviewing court should defer to the agency's interpretation of its prior orders.[7] *See e.g. Ducan v. State Bd. of Accountancy*, 149 Idaho 1, 232 P.3d 322 (2010); *3G AG LLC*, 170 Idaho at 264, 509 P.3d at 1193 ("An agency interpretation may be afforded a particular level of deference based upon our jurisprudence").

[7] IGWA did not appeal the Director's 2016 final order approving the mitigation plan.

Critically, the Agreement and Mitigation Plan do not affect the rights of non-parties.[8] *See Greater Boise Auditorium Dist. v. Frazier*, 159 Idaho 266, 274, 360 P.3d 275, 283 (2015) (non-parties are generally not bound by contracts they did not enter into). By asking the Court to reduce the 240,000 acre-feet obligation due to non-parties' perceived obligations, IGWA asks the Court to read terms into the contract that do not exist. *See IGWA Br.* at 13 ("the Director ruled that the withdrawal of SWID shifted the proportionate share onto the signatory districts").[9] Idaho law prohibits such a rewrite. *See Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 779, 69 P.3d 1035, 1041 (2003) (court cannot revise the contract in order to change or make a better agreement for the parties); *Page v. Pasquali*, 150 Idaho 150, 152, 244 P.3d 1236, 1238 (2010) ("where the contract is clear and unambiguous, and courts cannot revise the contract in order to change or make a better agreement for the parties"); *River Range, LLC v. Citadel Storage, LLC*, 166 Idaho 592, 599, 462 P.3d 120, 127 (2020) ("a party's subjective intent is immaterial to the interpretation of a contract").

Contrary to IGWA's arguments, 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). The Director rightly determined there was only one reasonable interpretation of the Agreement and Mitigation Plan. R. 415 ("The Director rejects IGWA's arguments because they are contrary to the plain and unambiguous language of the Mitigation Plan"). There is no "patent" ambiguity on the face of the Agreement and Mitigation Plan. As explained above, no reasonable person would conclude that the long-term practices applied to

[8] A person is not made a party to a contract merely by being named and described in it. *See Harding Co. v. Sendero Resources, Inc.*, 365 S.W.3d 732 (Tex. App. Texarkana 2012).

[9] SWID did not "withdraw" from the Agreement as IGWA suggests. Instead, SWID never signed the Agreement in the first place. If the other signatory parties did not agree with the unambiguous terms of the Agreement, i.e. the 240,000 acre-feet obligation, then they should have raised that issue prior to signing it.

"non-parties." Any interpretation that the Agreement bound non-parties is patently absurd and unreasonable.[10] Stated another way, nothing on the face of the Agreement suggests that IGWA's annual conservation obligation is anything other than "240,000 af."[11]

IGWA also claims that the Agreement and Mitigation Plan contains a "latent ambiguity" regarding the method to calculate the various districts' conservation obligations. *See IGWA Br.* at 14-16. The Director properly rejected this claim:

> 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. . . . The plain reading of the six documents that make up the Mitigation Plan renders IGWA's latent ambiguity argument untenable.

R. 418.

The language in the Agreement and Mitigation Plan is plain and unambiguous. First, it references a total quantity: "Total ground water diversion shall be reduced by 240,000 ac-ft annually." R. 437. Second, it requires "Each Ground Water District and Irrigation District with members pumping from the ESPA" to be responsible "for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity."[12] *Id.*

The Director's reasoning is supported by Idaho Supreme Court precedent on this issue which requires "that a latent ambiguity in a contract must ultimately be tied to the language of

[10] IGWA's erroneous interpretation is further highlighted by its subsequent agreement with the A&B Irrigation District where it specifically agreed that the "long term practices" in the Agreement "do not apply to A&B and its ground water rights." R. 498.

[11] IGWA's witness confirmed this fact at hearing. Tr. 220:2-5 ("Q. (BY MR. THOMPSON): To your knowledge, did the Surface Water Coalition ever sign off on any conservation number other than 240,000 acre-feet? A. [BY MR. DEEG]. Not that I'm aware of.").

[12] The terms "Ground Water District" and "Irrigation District" plainly refer to the eight ground water districts and one irrigation district that executed the Agreement on IGWA's side. R. 451-59.

the instrument itself." *See Porcello v. Estate of Porcello*, 167 Idaho 412, 424, 470 P.3d 1221, 1233 (2020). In *Sommer v. Misty Valley, LLC*, the Court further explained:

> Based on this holding, there are two points of analysis when determining whether an instrument contains a latent ambiguity: 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 the language *within* the instrument.

170 Idaho 413, 425, 511 P.3d 833, 845 (2021).

There is nothing in either the Agreement or Mitigation Plan that suggests "240,000 acre-feet" is subject to more than one reasonable meaning. How IGWA ultimately decided to divide that obligation up amongst its members that executed the Agreement and submitted the Mitigation Plan does not change the actual language itself. IGWA's subjective intent is immaterial. *See River Range, LLC*, 166 Idaho at 599, 462 P.3d at 127. Again, the method of dividing up what volume each district would conserve did not create any ambiguity in the total number, which is simply 240,000 acre-feet.

Since the terms of the Agreement and Mitigation Plan are unambiguous, the Court should reject IGWA's argument concerning either a patent or latent ambiguity and affirm the Director's Amended Compliance Order.

II. IGWA Established the Baseline to Measure Compliance.

IGWA argues it was wrong for the Director to measure compliance based upon single year diversion totals compared to the baseline. *See IGWA Br.* at 16-20. However, the Director's evaluation was based upon the plain and unambiguous language of the Agreement and Mitigation Plan. R. 415 ("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"). In the order approving IGWA's plan the Director noted:

> 10. As discussed above, the Mitigation Plan requires numerous ongoing activities, including: (a) **annual** ground water reductions and storage water deliveries . . .

R. 896 (emphasis added).

Nothing in the Agreement and Mitigation Plan requires IGWA to perform more or authorizes IGWA to perform less than the stated obligation of 240,000 acre-feet per year.[13] Therefore, the Director properly enforced the plain terms of the Agreement and Mitigation Plan. *See Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 291 P.3d 399 (2012); *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 264, 297 P.3d 222, 227 (2011).

Further, IGWA established the five-year pumping baseline for purposes of evaluating future compliance.[14] While IGWA's members exceeded 240,000 acre-feet of actions in 2017-2020, they failed in 2021.[15] R. 855-892. Moreover, despite IGWA's baseline, nothing in the Agreement or Mitigation Plan states that performance can be based upon a "5-year average." *IGWA Br.* at 20-21. The term "annually" does not mean a five-year average. *See City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 201, 889 P.2d 411, 414 (1995) ("Words of phrases that have established definitions in common use or settled legal meanings are not rendered ambiguous merely because they are not defined in the document where they are used").

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[13] The fact IGWA exceeded the annual conservation goal in certain years when more water was available for groundwater recharge was advisable and proactive given the groundwater level benchmarks and goals that were required under the Agreement and Mitigation Plan to be met in 2020, 2023, and 2026. R. 438 (¶ 3.e). However, the additional conservation in one year did not mean IGWA was free to underperform the next. R. 416 ("Nor has IGWA pointed to any language in the Mitigation Plan authorizing this type of surplus & deficit accounting").

[14] IGWA chose the five-year pumping average from 2010-14 as a baseline to judge its annual conservation obligations from. R. 211 ("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. . ." What IGWA "might" have done different is of no relevance or consequence now. *See IGWA Br.* at 18.

[15] IGWA was just short of the 240,000 acre-feet in 2016, however the Surface Water Coalition did not contest the minor shortfall from the first year of implementation of the Mitigation Plan. R. 977 (noting IGWA's 415 acre-feet shortfall in 2016). SWC pointed out that the Agreement's long-term reduction obligations did not apply to A&B, Southwest, or Falls Irrigation District in that same letter. *See id.*

IGWA's efforts to construe the language to say something that it doesn't is simply unreasonable and should be rejected by this Court. The Director's determination on this issue is correct and should be affirmed.

III. The Agreement's Merger Clause Prohibits Consideration of Parol Evidence.

IGWA's final argument centers around the Director's authority concerning the contractual obligations. *See IGWA Br.* at 21-22. IGWA overlooks the Director's authority to approve the mitigation plan and interpret his order approving the same. Further, IGWA complains the Director erred by not resolving "the obvious ambiguity by evaluating parol evidence." *Id.* at 22. However, Idaho law prohibits the type of evaluation that IGWA seeks. The Director's interpretation should be upheld because the Agreement's "merger clause" prohibits consideration of parol evidence. The Agreement and Mitigation Plan include the following provision:

> 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.

R. 440 (bold in original).

The above merger clause has significant legal effect in Idaho. In *AED, Inc. v. KDC Investments, LLC*, 155 Idaho 159, 307 P.3d 176 (2013), the Idaho Supreme Court held "[i]f 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 written and integrated contract is based upon consideration other than what is contained in the text of the contract." 155 Idaho at 165, 307 P.3d at 182. Further, in *Kimbrough v. Reed*, 130 Idaho 512, 943 P.2d 1232 (1997), the Supreme Court explained:

> We held in *Valley Bank v. Christensen*, 119 Idaho 496, 808 P.2d 415 (1991), that "[i]f the written agreement is complete upon its face and unambiguous, no fraud or mistake being alleged, extrinsic evidence of prior or contemporaneous negotiations or conversations is not admissible to contradict, vary, alter, add to or detract from the terms of the written contact."
>
> * * *
>
> This parol evidence is not admissible to contradict, vary, add to or detract from the terms of the sales agreement.

130 Idaho at 515, 943 P.2d at 1235.

Therefore, the parties' intent to the Agreement must be determined solely from its language, and IGWA cannot rely upon parol evidence to show a different meaning. There is nothing in the plain language of the Agreement or Mitigation Plan that supports IGWA's theory. The Director's Amended Compliance Order can be affirmed accordingly.

IV. The Order Does Not Prejudice Any Substantial Right of IGWA.

Finally, IGWA's appeal can further be denied on the basis that the Director's order does not prejudice any substantial rights. This case concerns the Director's evaluation of IGWA's underperformance under its Mitigation Plan in 2021. That dispute was resolved by a separate agreement. R. 67. IGWA wrongly contends that the Amended Compliance Order "prejudices the water rights of IGWA's members by forcing them to conserve more groundwater than they agreed to when they signed the 2015 Agreement." *IGWA Br.* at 23.

First, the Amended Compliance Order simply applies the terms of the Agreement and Mitigation Plan as written. Nothing in the order forces IGWA to conserve more than 240,000 acre-feet per year. Second, even under IGWA's theory of its obligation, for purposes of this case its members did not conserve a sufficient volume in 2021 anyway. In other words, IGWA's total performance of 126,260 (R. 419) was woefully short whether measured against the plain terms of the Agreement and Mitigation Plan (i.e. 240,000 acre-feet) or IGWA's own perceived number

(i.e. 205,397 acre-feet).[16] R. 33 ("IGWA's collective share of 240,000 acre-feet is 205,307 acre-feet"). Consequently, none of IGWA's substantial rights have been prejudiced and the Court should affirm the Amended Compliance Order accordingly.

CONCLUSION

The Director properly found that IGWA did not comply with the Mitigation Plan and order approving the same in 2021. There is no dispute that IGWA failed to conserve 240,000 acre-feet that year and the Director's Amende Compliance Order should be affirmed. The Coalition respectfully requests the Court to deny IGWA's petition for judicial review accordingly.

DATED this 12th September 2023.

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[16] Tr. 151:18-21 ("Q. [BY MR. FLETHCER]: Okay. And is there anything in the final order or the agreement that references 205,000 acre-feet? A. [BY MR. HIGGS]. Not that I'm aware of.").

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2023, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

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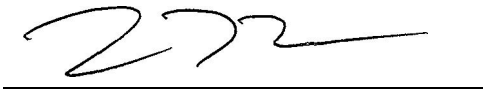

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