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

MEMORANDUM DECISION AND ORDER

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 RESERVOIRS DISTRICT NO. 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

I

BACKGROUND

A. Delivery call and approved mitigation plan.

In 2005, members of the Surface Water Coalition initiated a delivery call seeking curtailment of junior priority ground water rights that divert from the Eastern Snake Plain Aquifer ("ESPA").[1] The call asserts surface and ground waters in the Snake River Basin are hydraulically connected. Further, that the ESPA discharges to the Snake River via tributary springs and that junior ground water pumping on the ESPA has decreased natural flows in the Snake River and its tributaries to the injury of senior water rights held by Coalition members. The delivery call is ongoing in nature. It has required yearly evaluation by the Director of the Idaho Department of Water Resources as to whether junior ground water pumping is causing material injury to the Coalition's senior rights.

Beginning in 2010, the Director began using procedures set forth in his Methodology Order to conduct his yearly evaluation.[2] The Methodology Order contains a series of steps to be undertaken annually through which the Director determines whether the Coalition's water rights are suffering material injury. If so, the Director will order the curtailment of junior rights unless

[1] The term "Surface Water Coalition" refers collectively to the A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

[2] The Methodology Order has since been amended on several occasions since 2010.

he finds junior right holders can mitigate the material injury through an approved mitigation plan.

On June 30, 2015, a Settlement Agreement in response to the call was entered into between members of the Coalition and certain members of the Idaho Ground Water Appropriators, Inc. ("IGWA"). R., 436. All members of the Coalition except for A&B Irrigation District signed the Settlement Agreement.[3] Additionally, Southwest Irrigation District, which is an IGWA member, did not sign the Settlement Agreement. R., 460. The parties entered into an Addendum to the Settlement Agreement in October 2015. R., 461. The objectives of the Settlement Agreement are as follows:

a. Mitigate for material injury to senior surface water rights that rely upon natural flow in the Near Blackfoot to Milner reaches to provide part of the water supply for the senior surface water rights.

b. Provide "safe harbor" from curtailment to members of ground water districts and irrigation districts that divert ground water from the Eastern Snake Plain Aquifer (ESPA) for the term of the Settlement Agreement and other ground water users that agree to the terms of this Settlement Agreement.

c. Minimize economic impact on individual water users and the state economy arising from water supply shortages.

d. Increase reliability and enforcement of water use, measurement, and reporting across the Eastern Snake Plain.

e. Increase compliance with all elements and conditions of all water rights and increase enforcement when there is not compliance.

f. Develop an adaptive groundwater management plan to stabilize and enhance ESPA levels to meet existing water right needs.

R., 436.

In furtherance of these objectives, the Settlement Agreement prescribes near term and long term practices to be undertaken by the parties. One long term practice contemplates a reduction of ground water use by junior ground water pumpers:

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

[3] A&B Irrigation District subsequently entered into a separate agreement with IGWA in October 2015. R., 498. That separate agreement states in part that "A&B agrees to participate in the *Settlement Agreement* as a surface water right holder only." R., 498. Further, that 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.

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.

R., 437. The Settlement Agreement calls for the establishment of a steering committee to assist with the implementation of its terms. R., 439. The steering committee is comprised of a representative of each signatory party and the State. *Id.*

The parties jointly submitted the Settlement Agreement to the Director on March 9, 2016, as a proposed mitigation plan in response to the delivery call.[4] R., 509. Under the parties' stipulation, the Coalition agrees the mitigation provided by participating IGWA members under the Settlement Agreement is "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." R., 511. The parties further agree that participating IGWA members are not subject to curtailment under the ongoing call "provided actions are implemented and performed as set forth in the [Settlement Agreement]." *Id.* The Director entered a Final Order Approving Stipulated Mitigation Plan on May 2, 2016. R., 893. That Order adopts the proposed stipulated mitigation plan with some additional conditions as an approved mitigation plan under CM Rule 43.[5] *Id.* One condition of approval is that "[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan." R., 896.

The parties entered into a Second Addendum to the Settlement Agreement on December 14, 2016. R., 477. The Second Addendum details the parties' agreement regarding the implementation of the terms of the Settlement Agreement. *Id.* With respect to the reduction of ground water use, the Second Addendum provides 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.

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[4] The documents submitted to the Director included (1) the Settlement Agreement dated June 30, 2015; (2) the Addendum to the Settlement Agreement; and (3) the Agreement dated October 7, 2015 entered into between A&B Irrigation District and IGWA.

[5] The term "CM Rule" refers to Idaho's Rules for Conjunctive Management of Surface and Ground Water Resources.

R., 478. The Second Addendum clarifies the steering committee is charged with initially reviewing compliance issues under the approved mitigation plan:

> 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 40.05.
>
> 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.

R., 479.

The parties jointly submitted the Second Addendum to the Director on February 7, 2017, as a proposed amendment to the approved mitigation plan. R., 586. On May 9, 2017, the Director entered a Final Order Approving Amendment to Stipulated Amended Mitigation Plan. R., 901. The Order adopted the Second Addendum with some additional conditions as an amendment to the approved mitigation plan. *Id.*

B. 2021 compliance issue.

On April 29, 2022, the Surface Water Coalition requested a status conference before the Director. R., 1. It asserted IGWA failed to comply with the approved mitigation plan in 2021. R., 2-3. Specifically, it argued IGWA failed to meet the requirement that total ground water diversion be reduced by 240,000 ac-ft annually:

> 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.

> 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.

Id. The Director declined the Coalition's request for a status conference. R., 14. He directed the parties must first take the compliance issue before the steering committee as provided in the approved mitigation plan. *Id.*

The steering committee held meetings on the compliance issue in May and June of 2022. R., 21. At the meetings, IGWA denied the Coalition's allegations of non-compliance. The dispute between the parties hinged on (1) the amount of ground water reduction for which IGWA is responsible under the approved mitigation plan, and (2) whether averaging may be used to measure compliance with IGWA's reduction obligation. R., 67-68. The steering committee was unable to resolve the compliance issue, ultimately reaching an impasse. R., 22. As a result, the Surface Water Coalition brought the issue back to the Director. *Id.* It again requested a status conference be held to address the following issues regarding the 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 April1 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.

Id. The Director granted the request. R., 25. A status conference was held on August 5, 2022, wherein the parties argued their positions. *Id.*

After the status conference, the parties entered into a Settlement Agreement dated September 7, 2022 ("Remedy Settlement Agreement"). R., 67. In the Remedy Settlement Agreement, IGWA withheld admission of non-compliance with the approved mitigation plan. R., 68. However, to avoid potential curtailment in 2022, it agreed to the following remedy to resolve the dispute for purposes of 2021:

> **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.

R., 68. The parties filed the Remedy Settlement Agreement with the Director. R., 67. They agreed the Director "shall incorporate the terms of section 1 above as the remedy selected for the alleged shortfall [in 2021] in lieu of curtailment." R., 68. Furthermore, notwithstanding resolution of the compliance issue for 2021, the parties agreed that the Director "shall issue a final order regarding the interpretive issues" pertaining to the approved mitigation plan that were raised by the Coalition in its request for a status conference. *Id.*

The Director issued a Final Order Regarding Compliance with Approved Mitigation Plan on September 8, 2022. R., 71. He concluded that certain IGWA members failed to comply with the requirements of the approved mitigation plan in 2021. R., 83. He approved the remedy stipulated to by the parties as an appropriate remedy for the non-compliance. R., 91. IGWA subsequently petitioned for reconsideration of the Final Order and requested a hearing. R., 96. The Director granted the request for a hearing. R., 105. An evidentiary hearing was held on February 8, 2023. Tr., 1.

On April 24, 2023, the Director issued his Amended Final Order Regarding Compliance with Approved Mitigation Plan ("Final Order"). He found the mitigation plan unambiguously requires reduction of ground water diversion in the amount of 240,000 acre feet of water each year. R., 415. Correlated with that finding, he determined that averaging that reduction requirement over a period of years is not permitted under the plan. R., 415. He further found the

mitigation plan unambiguously prohibits IGWA from apportioning a percentage of the annual reduction requirement under the mitigation plan to A&B Irrigation District and/or Southwest Irrigation District. R., 416. IGWA subsequently filed a *Petition* seeking judicial review of the Final Order. It asserts the Director's Final Order is contrary to law and requests the Court set it aside and remand for further proceedings. The Court entered an *Order* permitting the Intervenors to participate in this proceeding. The parties submitted briefing on the issues raised on judicial review and a hearing on the *Petition* was held before the Court on October 30, 2023.

II.
STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision 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). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.

ANALYSIS

A. The Director's Final Order is affirmed.

The approved mitigation plan requires that "[t]otal ground water diversion shall be reduced by 240,000 ac-ft annually." R., 437. The compliance dispute centers on two points of contention related to this requirement. The first is whether the 240,000 acre-feet reduction obligation is an annual requirement under the plan, or whether it is based on a five-year rolling average. The second centers on which ground water diverters are responsible for the 240,000 acre-feet reduction obligation. Each will be addressed in turn.

i. The Director's determination that the approved mitigation plan unambiguously requires a reduction in ground water diversions in the amount of 240,000 acre-feet each year is affirmed.

The Director found the approved mitigation plan unambiguously requires a reduction in ground water diversions in the amount of 240,000 acre-feet each year. R., 415-416. The approved mitigation plan is based on a settlement agreement that was jointly presented to the Director as a proposed mitigation plan under CM Rule 43.[6] 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). The interpretation of a contract begins with the language of the contract itself. *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). If the language of the contract is unambiguous, then its meaning and legal effect must be determined from its words. *Id.* A contract is ambiguous if it is reasonably subject to conflicting interpretations. *Id.* Determining whether a contract is ambiguous is a question of law over which this Court exercises free review. *Id.*

Courts must read a contract as the average person would and must not give a strained construction. *Cf., Swanson v. Beco Const. Co., Inc.*, 145 Idaho 59, 175 P.3d 748 (2007). Moreover, a contract is not rendered ambiguous on its face because one of the parties thought that a word used has some meaning that differed from the ordinary meaning of that word:

[6] CM Rule 43 governs the submissions of mitigation plans in the context of a delivery call. IDAPA 37.03.11.043.

> If the language used by the parties is plain, complete, and unambiguous, the intention of the parties must be gathered from that language, and from that language alone, no matter what the actual or secret intentions of the parties may have been. Presumptively, the intent of the parties to a contract is expressed by the natural and ordinary meaning of their language referable to it, and such meaning cannot be perverted or destroyed by the courts through construction, for the parties are presumed to have intended what the terms clearly state. Only when the language of the contract is ambiguous may a court turn to extrinsic evidence of the contracting parties' intent.

Id. at 63-64; 175 P.3d at 752-753 (citing, 17A Am.Jur.2d, Contracts § 348 (2004)).

Section 3.a. of the Settlement Agreement provides that "[t]otal ground water diversion shall be reduced by 240,000 ac-ft annually." R.,437. The Director found the language of this provision to be unambiguous. R., 415. The Court agrees. As the Director set forth in the Final Order, "the adverb 'annually' derives from the adjective 'annual,' which means 'of or measured by a year' or 'happening or appearing once a year, yearly." R., 415 (citing, Webster's New World Dictionary (3d coll. Ed. 1994). The term annually does not mean a five-year average and the average person would not read it as such. Therefore, the Director did not err in determining that Section 3.a of the Settlement Agreement unambiguously requires a reduction in ground water diversions in the amount of 240,000 acre-feet each year.

Notwithstanding the plain language, IGWA asserts Section 3.a. of the Settlement Agreement is latently ambiguous. "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." *Sky Cannon Properties, LLC,* 155 Idaho at 606, 315 P.3d at 794. The Court finds the plain language of Section 3.a. does not lose clarity when applied to the facts as they exist. This is not a case where the definition of the term annually is unclear and two or more possible definitions might exist. *See, Williams v. Idaho Potato Starch Co.*, 73 Idaho 13, 20, 245 P.2d 1045, 1048-1049 (1952) (holding that a latent ambiguity arose when a writing referred to a pump and it was shown that there were two or more pumps to which it might properly apply). The term "annually" is easily defined as, and commonly understood to mean, happening yearly.

Additionally, if the Court were to hold that the term "annually" means a five-year average for purposes of Section 3.a., the Settlement Agreement would lose clarity, not gain it. Such an interpretation would cast doubt and confusion on the meaning of the terms "annually" and "annual" as used throughout the Settlement Agreement. For example, Section 2.a.i of the

Second Addendum requires IGWA to submit certain data to the Steering Committee "prior to April 1 annually." R., 478. Section 3.b. of the Settlement Agreement requires the "annual" delivery of storage water from IGWA to the Upper Snake Reservoir system "delivered to SWC 21 days after the date of allocation." R., 438. Likewise, Section 3.m. of the Settlement Agreement requires the Steering Committee "will meet at least once annually." R., 439.

This is also not a case where the common definition of the term annually would lead to an illogical or absurd result. *See e.g., Mountainview Landowners Cooperative Assoc., Inc. v. Dr. James Cool, D.D.S.*, 139 Idaho 770, 86 P.3d 484 (2004) (Supreme Court found a latent ambiguity where the strict definition of a word would lead to illogical or absurd results). The delivery call is ongoing in nature and, prior to the Settlement Agreement, has required annual evaluation by the Director. In the context of an ongoing call, it is neither illogical nor absurd that Section 3.a. of the Settlement Agreement would require a reduction in ground water diversions in the amount of 240,000 acre-feet each year.

Last, IGWA relies upon certain non-contemporaneous extrinsic evidence to support its position that ambiguity exists. This includes (1) a proposed order that was submitted to the Director when the parties proffered the Settlement Agreement as a proposed mitigation plan in March 2016 (R., 516)[7], and (2) post-Settlement Agreement evidence showing how IGWA determined to calculate the pre-2015 baseline diversion number against which the 240,000 acre-feet reduction obligation was to be measured. IGWA determined to utilize a five-year average of years 2010-2014 to determine the baseline.[8] Averaging those five years establishes the pre-2015 baseline from which the post-2015 240,000 acre-feet reduction is compared. IGWA argues in relevant part as follows:

> [i]f it is reasonable to use a 5-year average to define the baseline against which compliance is measured, it is reasonable to average post-2015 diversions to measure compliance with the annual reduction obligation.
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> . . .
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> It is incompatible for the Director to order that conservation be measured based on single-year diversions while using a 5-year average as the baseline.
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> . . .
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> If averaging is used for the baseline, averaging should be used to measure compliance.

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[7] The Director did not use, sign, or adopt the subject proposed order.

[8] How IGWA calculates the pre-2015 baseline year was not raised as a disputed issue before the Director below and is not at issue on judicial review. *See* R., 22.

IGWA's Opening Br., p.20.

The Court finds that neither evidence of the proposed order nor evidence showing how IGWA determined to calculate the baseline can be used to create an ambiguity. As set forth above, Section 3.a.i. of the Settlement is unambiguous. Therefore, extrinsic evidence cannot be used to modify or contradict that plain language. Additionally, the Settlement Agreement contains a merger clause which provides as follows:

> 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. A written agreement containing a merger clause "is complete on its face." *City of Meridian v. Petra Inc.*, 154 Idaho 425, 435, 299 P.3d 232, 242 (2013). Since the Settlement Agreement is complete on its face the Court need not look to extrinsic evidence. For these reasons, the Court finds IGWA's argument's that Section 3.a.i of the Settlement Agreement is patently ambiguous to be unavailing.

ii. The Director's determination that the 240,000 acre-feet reduction obligation is the responsibility of the signatory IGWA members is affirmed.

The next point of contention centers on which ground water diverters are responsible for the mitigation plan's 240,000 acre-feet reduction obligation. The Director found that the ground water diverters that are the signatory parties to the Settlement Agreement are responsible for the whole of the obligation. R., 416-417. IGWA disagrees, asserting the Director's determination forces the signatory parties to conserve more groundwater than they agreed to. IGWA's argument relies upon relies upon Section 3.a.ii of the Settlement Agreement, which provides as follows:

> 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.

R., 437 (emphasis added).

When the parties drafted the Settlement Agreement, IGWA contends it was contemplated that all ground water and irrigation districts having members that divert from the ESPA would be signatory to the Settlement Agreement. This includes A&B Irrigation District, Southwest Irrigation District, and Falls Irrigation District, as well as the various IGWA members that actually signed the Agreement. IGWA further contends it was contemplated that the 240,000 acre-feet reduction obligation would be shared proportionately by all ground water and irrigation districts having members that divert from the ESPA.

In actuality, A&B Irrigation District, Southwest Irrigation District, and Falls Irrigation District are not signatory parties to the Settlement Agreement. Notwithstanding, it is IGWA's position the Director must still attribute a portion of the Agreement's 240,000 acre-feet reduction requirement to A&B Irrigation District and Southwest Irrigation District consistent with the intent of the Agreement.[9] It argues the ground water diverters that are signatory parties to the Settlement Agreement are only responsible for 205,397 acre-feet of the 240,000 acre-feet obligation. It proceeds to assert that A&B Irrigation District and the Southwest Irrigation District are responsible for the remainder, relying on Section 3.a.ii of the Settlement Agreement quoted above.[10]

The Court finds this issue has already been decided. On May 2, 2016, the Director issued his Final Order Approving Stipulated Mitigation Plan. In that Order, the Director approved the parties' stipulated proposed mitigation plan on the condition that "[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan." R., 896. The annual reduction obligation set forth in Section 3.a. of the Settlement Agreement is an ongoing activity required under the mitigation plan. Therefore, it cannot be

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[9] For reasons that are not clear from the record, IGWA does not contend that a portion of the 240,000 acre feet reduction requirement should be attributed to Falls Irrigation District. That said, at oral argument counsel for IGWA represented that the parties have agreed that Falls Irrigation District should be exempted from this analysis by agreement of the parties.

[10] As part of an ambiguity analysis, IGWA appears to argue the Settlement Agreement lacks terms that would allow the Director to (1) determine compliance with the mitigation plan's 240,000 acre-feet reduction requirement and/or (2) determine how the requirement should be allocated among the signatory ground water users. At oral argument, counsel for IGWA stated that at the time the Settlement Agreement was signed, there was no agreement between the parties as to how to calculate and/or proportion the 240,000 acre-feet reduction requirement amongst the signatory ground water users. That said, none of the parties have argued on judicial review (or before the Director) that the Settlement Agreement lacks any material terms. Therefore, the Court does not reach that issue.

attributed to Southwest Irrigation District which is neither a signatory party to the Settlement Agreement nor a party to the mitigation plan. While A&B Irrigation District is a party to the mitigation plan, the Agreement between it and IGWA dated October 7, 2015, makes clear that its participation in the Settlement Agreement and subsequent mitigation plan is as "a surface water right holder only."[11] R., 498. IGWA explicitly agreed in the Agreement that "Paragraphs 2 – 4 of the *Settlement Agreement* do not apply to A&B and its ground water rights." R., 498. This includes the 240,000 acre-feet reduction requirement set forth in Section 3.a.

The Court notes the parties knew that neither A&B Irrigation District nor Southwest Irrigation District were signatory parties to the Settlement Agreement when they submitted it to the Director as a proposed mitigation plan. The Settlement Agreement was entered into on June 30, 2015. R., 436. The signatories had all signed the Settlement Agreement on or before July 29, 2015.[12] R., 446-460. The signatory parties did not submit the Settlement Agreement to the Director as a proposed mitigation plan until March 9, 2016. R., 509. By that time, the signatory parties had known that A&B Irrigation District and Southwest Irrigation District had not signed the Settlement Agreement for a considerable amount of time. Notwithstanding, the 240,000 acre-feet reduction obligation was not modified downward by the signatory parties to account for that fact. As a result, when the signatory parties submitted the Settlement Agreement to the Director as a proposed mitigation plan, it still contained the 240,000 acre-feet annual reduction requirement in Section 3.a.

When the Director approved the Settlement Agreement as a proposed mitigation plan, he did so on the explicit condition the ongoing activities required pursuant to the Mitigation Plan, including the 240,000 acre-feet reduction requirement, "are the responsibility of the parties to the Mitigation Plan." R., 896. The Director's Final Order dated May 2, 2016, was a final and appealable order.[13] If IGWA disagreed with the Director's conditional approval of the stipulated proposed mitigation plan, it was required to timely exhaust administrative remedies and seek

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[11] Some members of A&B Irrigation District are holders of surface water rights while other members are holders of ground water rights.

[12] The Settlement Agreement had a signature deadline of August 1, 2015. R., 445.

[13] If IGWA had a different intent regarding the application of Section 3.a. of the Settlement Agreement, at this point the Director's conditional approval of the proposed mitigation plan plainly set forth the requirement regarding which parties were responsible for the annual 240,000 acre-feet annual reduction obligation. If IGWA had concerns with the Director's addition of the condition for approving the Mitigation Plan, it did not raise them with the Director. Accordingly, the parties have been subject to the terms of the Mitigation Plan since its approval.

judicial review at that time. I.C. §§ 67-5271, *et. seq.* It did not, and the time for taking such actions has expired. The issue is therefore final and not proper for review in this proceeding and IGWA's attempt to raise the issue for the first time in this proceeding is an improper collateral attack on the Director's May 2, 2016, Final Order. It follows the Director's Final Order must be affirmed.

B. Substantial rights.

IGWA argues its substantial rights were prejudiced by the Final Order by "forcing them to conserve more groundwater than they agreed to when they signed the [Settlement Agreement]." IGWA Opening Br., p.23. As set forth above, IGWA has failed to establish the Final Order was made in violation of Idaho Code § 67-5279(3). Additionally, the only issues before the Court pertain to the dispute over compliance with the approved mitigation plan in 2021. The parties entered into a separate agreement (i.e., the Remedy Settlement Agreement) to resolve that dispute. That Agreement was entered into prior to the Director's issuance of Final Order that is the subject of this proceeding, which Final Order simply implemented the stipulated resolution. Therefore, the Final Order did not implement any remedy in relation to the 2021 compliance dispute that was not agreed to by IGWA in resolution of the dispute. It follows the Final Order did not prejudiced IGWA's substantial rights. At oral argument, the parties indicated that compliance issues with the approved mitigation plan have been raised with respect to 2022 and that additional issues may potentially be raised with respect to 2023. It is the Court's understanding that no determination or final order pertaining to 2022 and 2023 has been made by the Director at this time. As a result, compliance issues related to 2022 and 2023 are not before the Court in this proceeding and cannot be used to establish prejudice to a substantial right for purposes of this case. Therefore, IGWA has not shown its substantial rights were prejudiced. It follows the Final Order must be affirmed.

C. Attorney fees.

IGWA seek an award of attorney fees under Idaho Code § 12-117(1). That code section provides for fees to the prevailing party where the Court finds "that the nonprevailing party acted without a reasonable basis in fact or law." IGWA is not the prevailing party in this proceeding. As a result, its request for attorney fees must be denied.

IV.

ORDER

Therefore, based on the foregoing, IT IS ORDERED that the Final Order is hereby affirmed.

Dated November 16, 2023

ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

Thomas Budge tj@racineolson.com	via Email
Gary Spackman Garrick Baxter gary.spackman@idwr.idaho.gov garrick.baxter@idwr.idaho.gov	via Email
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Dylan Anderson dylan@dylananderson.com	via Email

Date: 11/16/2023

Trent Tripple
Clerk of the Court

By Erin Rowell
Deputy Clerk

DISTRICT COURT 4TH JUDICIAL DISTRICT
OF THE STATE
- OF -
IDAHO
IN AND FOR ADA COUNTY