Dylan Anderson (ISB# 9676)
Dylan Anderson Law PLLC
P.O. Box 35
Rexburg, Idaho 83440

Phone - (208) 684-7701
Email - dylan@dylanandersonlaw.com

Attorney for Bingham Groundwater District. (BGWD)

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., Petitioners, vs. IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, Respondents.	Case No. CV01-23-07893 **BINGHAM GROUNDWATER DISTRICT'S RESPONSE BRIEF IN SUPPORT OF IGWA'S PETITION FOR REHEARING**
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	

Bingham Ground Water District (BGWD) submits this response brief in support of IGWA's Petition for rehearing. On page 4 of IGWA's Brief in Support of Petition for Rehearing, IGWA argued:

The Director's method compares average pre-Settlement Agreement diversions against single-year post-Settlement Agreement diversions. The Director's method may seem to be a small modification, but in practice it has major consequences.

This brief attempts to further illustrate how drastic those major consequences are, and how this decision is not supported by the settlement agreement, nor does it fulfill any purpose of the settlement agreement.

Argument

The question of ambiguity is less about the definition of the term "annually", and more about how to measure an annual reduction. In looking at a 205,000 acre-feet reduction, or a 240,000 acre-feet reduction, the key question is, a reduction from what? Simply saying a reduction in pumping comes woefully short of reality. Because year-to-year pumping can vary drastically, there is no set pumping number for which to definitively say this reduction will come from. Pumping is impacted each year by the temperature, rainfall, type of crops planted, and a variety of other factors. If year-to-year pumping fluctuates depending on a variety of variables, then how should an annual reduction of a set amount be applied?

As a good faith effort to be accurate and follow the terms of the settlement agreement, groundwater pumpers used a 5-year average to develop a baseline, recognizing that this baseline contained values of yearly pumping both below the baseline, and well above the baseline. This baseline only works if you recognize that it represents multiple years of pumping and should be compared to multiple years of pumping. Because an average baseline contains values both above and below the average, if you attempt to compare it to a single year, it has the effect of understating the reduction amount in a wet year and overstating the reduction amount in a dry year. To further illustrate this, consider the following example:

Imagine that a family needed to reduce their budget by $500 a month. Now imagine that they spend on average $3,500 a month. Some months they spend more, and some months they spend less. If they must reduce their budget by $500 a month, then a month with normal spending of $3,000 should see a reduction to $2,500. A month with normal spending of $4,000 should see a reduction to $3,500. If these reductions are consistent, then the average spending would be $3,000 a month. Comparing average monthly spending to an average reduced monthly spending allows the reductions to be consistent over the months, and ultimately lead to an average that reflects a $500 a month reduction. This outcome is simulated in the following graph identified as Chart 1:

Chart 1:

Month	1	2	3	4	5	6	7	8	9	10	Average
Previous expenses	$ 3,000	$ 3,300	$ 3,300	$ 4,000	$ 3,200	$ 4,000	$ 3,100	$ 3,900	$ 3,700	$ 3,500	$ 3,500

Reduction of $500 a month	-$500	-$500	-$500	-$500	-$500	-$500	-$500	-$500	-$500	-$500	
Mitigated Expenses	$2,500	$2,800	$2,800	$3,500	$2,700	$3,500	$2,600	$3,400	$3,200	$3,000	$3,000

These expenses were selected because a $500 a month reduction from $3,500 to $3,000 is similar percentagewise to the required reductions under the settlement agreement. Furthermore, the amount depicted in this graph reflect similar fluctuations in groundwater pumping year to year.

In contrast to regular monthly reductions depicted in the graph above, if the average monthly spending were to become a standard cap for every monthly reduction, regardless of spending needs, as is the case with the director's current interpretation of the 2015 agreement, the monthly reductions would be erratic, inconsistent, and range from almost nothing to severe reductions. In a month with normal spending of $3,000, no reductions would be needed at all. In a month with normal spending of $4,000, a reduction of $1,000 would be required. This outcome is simulated in the following graph identified as Chart 2:

Chart 2:

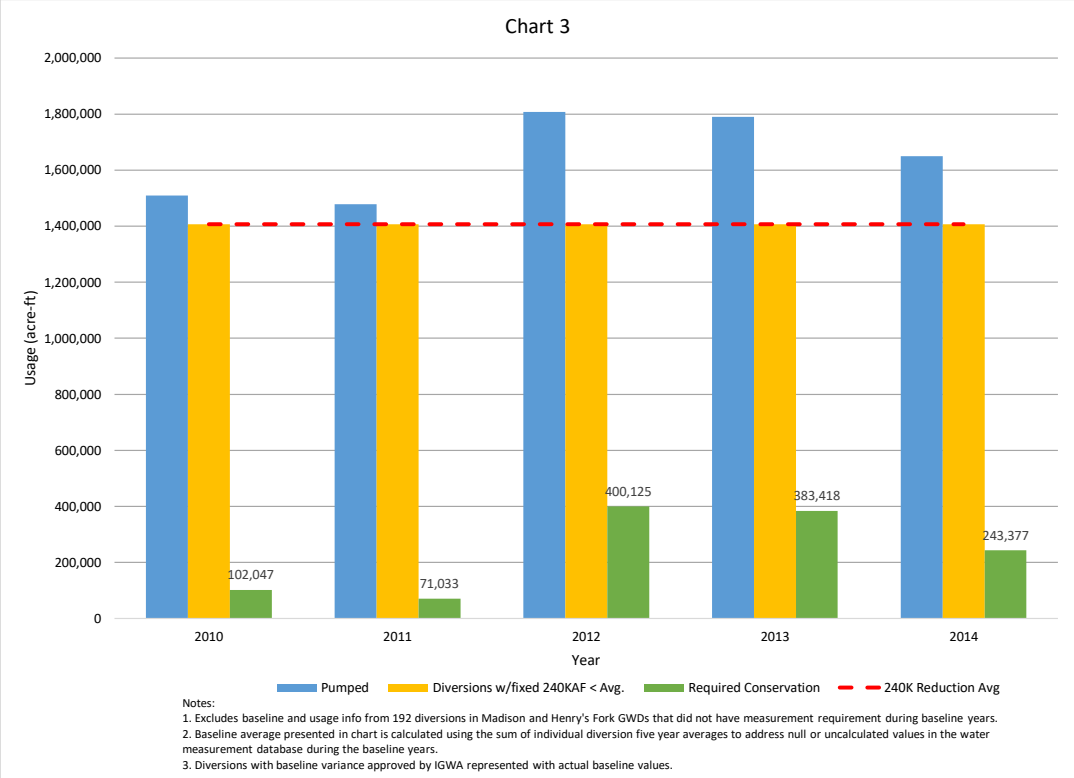
Month	1	2	3	4	5	6	7	8	9	10	Average
Previous expenses	$ 3,000	$ 3,300	$ 3,300	$ 4,000	$ 3,200	$ 4,000	$ 3,100	$ 3,900	$ 3,700	$ 3,500	$ 3,500
Reduction of $500 a month	-$500	-$500	-$500	-$500	-$500	-$500	-$500	-$500	-$500	-$500	
Mitigated Expenses	$3,000	$3,000	$3,000	$3,000	$3,000	$3,000	$3,000	$3,000	$3,000	$3,000	$3,000
Monthly Reduction baseline as a cap.	$0	$300	$300	$1,000	$200	$1,000	$100	$900	$700	$500	$500

As you can see from the graph below, employing an average as a set cap does not lead to regular monthly reductions, but rather leads to sporadic and inconsistent reduction. This same effect will happen to annual reductions under the director's interpretation of the settlement agreement, and arbitrary use of the average baseline as a cap for annual reductions.

Complicating this application even further, imagine that the family has no idea which month is going to be a high-expenditure month, and which one will be a low-expenditure month. In the graph, month 1 was a low expenditure month and month 6 was a high expenditure month, but what if the expenses in month 1 and month 6 were reversed, and the family did not know going into month 1. There are really only two options for the family. Either accept the fact that some months they won't reduce down to $3,000 (or in the case of the

settlement agreement, be in breach) or they would need to plan for a $1,000 reduction every month just in case any given month happened to be a high expenditure month.

Applying this scenario to the Director's interpretation of the settlement agreement reveals a similar situation. Groundwater users who must decide to plant crops early in the year without knowing whether or not the year will be a high pumping year or not, would need to either accept that every several years they will be in breach, or plan for double reduction every year just in case there happens to be a dry year. The following graph, identified as Chart 3, shows the 5 years included in the baseline average, and the pumping reductions required for those years if operating under the director's interpretation.



In looking at this scenario, groundwater users made some important observations about the practical application of the settlement agreement as interpreted by the director. First, groundwater users were to simply accept the fact that they would be in breach every 3-5 years, those years of breach would likely come during dry years where the mitigation requirement due to increased injury calculations under the methodology order would be greater, and the need for safe harbor would be more necessary. In wet years, the risk of breach would be reduced, as would the risk of large curtailments due to increased injury calculations under the methodology order. So, in years when groundwater users don't need safe harbor, they would have it, and in years they need it, they would be in breach.

The second observation groundwater users made is that in order to avoid breach even in a dry year, they must treat every year as though it were a dry year. This would require significant reductions in pumping that would likely only be possible through drying up acres. It is important to note that if you plan for a dry year in March or April when you plant crops, you cannot plant new crops in July if it turns out to be a wet year. The decision is made at the start of the season.

The third important observation groundwater users made regarding the director's interpretation of the settlement agreement is that the yearly reductions necessary to assure that even in a wet year a groundwater user would not be in breach would require an equivalent curtailment date in the late 1970s every year. This yearly self-curtailment to avoid breach was equal to the deepest curtailments ever calculated by the methodology order. This is in addition to other requirements of the settlement agreement, such as 50,000 acre/ft of wet water delivered every year.

Groundwater users pointed this out to the Department, and explained to them that frankly, the Directors interpretation of the settlement agreement made it so difficult that curtailment was easier than following the settlement agreement year after year. Instead of recognizing the adverse impacts of the Director's arbitrary adoption of an average baseline as a "cap" on pumping, the Department (without new data, new law, or a hearing) simply changed the methodology order to increase curtailment ten-fold. That action is before the district court in another case, but groundwater users feel trapped into something they did not agree to, and do not think they can do. The recent changes in the methodology order have only magnified the negative impacts of the Directors interpretation of compliance with the settlement agreement.

CONCLUSION

IGWA has taken the position that the director erred in finding that the settlement agreement is not ambiguous and has asked this court to remand that decision with instruction. The real ambiguity in the agreement is that although it requires an "annual reduction", it does not state a number that reductions should be from, nor does it explain how to calculate such a number. Again, the question is, an annual reduction from what? The course of IGWA's dealing with SWC has given an answer to that, but if that is insufficient, as the court queried during oral arguments, then the settlement agreement is missing vital terms. If reductions from what is not answered in the settlement agreement, and if it is not defined by the course of conduct of IGWA, who has solely produced yearly compliance reports, then the simple answer is that the settlement agreement lacks necessary terms and is unenforceable. Under no scenario is it proper for the Director to arbitrarily select an amount not contained in the settlement agreement from which all reductions should be calculated. Even if that were in the authority of the Director, arbitrarily fixing the calculated average as a limit from which every years pumping must be reduced does not result in "annual reductions" consistent with the settlement agreement, but rather produces volatile swings in reductions from year to year.

Dated December 12, 2023

Dylan Anderson Law, PLLC

___/s/ Dylan Anderson_____
Dylan Anderson,
Attorney for Bingham Groundwater District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December, 2023, I caused to be filed a true and correct copy of the foregoing document via iCourt E-File and Serve, and upon such filing, the following parties were served via electronic mail:

Idaho Dept. of Water Resources
file@idwr.idaho.gov

Kathleen Marion Carr
US Dept. Interior
960 Broadway Ste 400
Boise, ID 83706
kathleenmarion.carr@sol.doi.gov

John K. Simpson
MARTEN LAW LLP
P.O. Box 2139 Boise, ID 83701-2139
jsimpson@martenlaw.com

David W. Gehlert
Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice
999 18th St., South Terrace, Suite 370 Denver, CO 80202
david.gehlert@usdoj.gov

Travis L. Thompson
MARTEN LAW LLP P.O. Box 63
Twin Falls, ID 83303-0063
tthompson@martenlaw.com
jnielsen@martenlaw.com

Matt Howard
US Bureau of Reclamation
1150 N Curtis Road
Boise, ID 83706-1234
mhoward@usbr.gov

W. Kent Fletcher
FLETCHER LAW OFFICE
P.O. Box 248
Burley, ID 83318
wkf@pmt.org

Thomas J. Budge
Elisheva M. Patterson
RACINE OLSON
P.O. Box 1391
Pocatello, ID 83204-1391
tj@racineolson.com
elisheva@racineolson.com

Candice McHugh
Chris Bromley
MCHUGH BROMLEY, PLLC
380 South 4th Street, Suite 103
Boise, ID 83702
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC
P.O. Box 50130
Idaho Falls, ID 83405
rharris@holdenlegal.com

Robert E. Williams
WILLIAMS, MESERVY, & LOTHSPEICH, LLP
P.O. Box 168
Jerome, ID 83338
rewilliams@wmlattys.com

Skyler C. Johns
Nathan M. Olsen
Steven L. Taggart
OLSEN TAGGART PLLC
P.O. Box 3005
Idaho Falls, ID 83403
sjohns@olsentaggart.com
nolsen@olsentaggart.com
staggart@olsentaggart.com

Randall D. Fife
City Attorney
CITY OF IDAHO FALLS
P.O. Box 50220
Idaho Falls, ID 83405
rfife@idahofallsidaho.gov

Corey Skinner
IDWR—Southern Region
1341 Fillmore St., Ste. 200
Twin Falls, ID 83301-3033
corey.skinner@idwr.idaho.gov

Tony Olenichak
IDWR—Eastern Region
900 N. Skyline Drive, Ste. A
Idaho Falls, ID 83402
Tony.Olenichak@idwr.idaho.gov

William A. Parsons
PARSONS SMITH & STONE
P.O. Box 910
Burley, ID 83318
wparsons@pmt.org

Rich Diehl
City of Pocatello
P.O. Box 4169
Pocatello, ID 83205
rdiehl@pocatello.us

Sarah A Klahn
Somach Simmons & Dunn
1155 Canyon Blvd, Ste. 110
Boulder, CO 80302
sklahn@somachlaw.com
dthompson@somachlaw.com

/s/ Dylan Anderson .
Dylan Anderson
Attorney for Bingham Groundwater District