**RAÚL R. LABRADOR**
ATTORNEY GENERAL

**SCOTT L. CAMPBELL**
Chief of Energy and Natural Resources Division

**GARRICK L. BAXTER, ISB No. 6301**
**KAYLEEN R. RICHTER, ISB No. 11258**
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
kayleen.richter@idwr.idaho.gov

*Attorneys for Respondents IDWR*

**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,

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

**Case No. CV01-23-07893**

**IDWR'S RESPONSE IN OPPOSITION TO PETITION FOR REHEARING**

| |
|---|
| CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, and BINGHAM GROUNDWATER DISTRICT |
| 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 |

## INTRODUCTION

On November 16, 2023, the Court issued its *Memorandum Decision and Order* ("*Decision*"). In the *Decision*, the Court affirmed the Director's *Amended Final Order Regarding Compliance with Approved Mitigation Plan* ("*Amended Final Order*"). Specifically, the Court affirmed the Director's determination that the use of the term "annually" in the Approved Mitigation Plan unambiguously requires a reduction in ground water diversions in the amount of 240,000 acre-feet *each year*. *Decision* 10–12. In so holding, the Court rejected IGWA's argument that a five-year average should be used instead. *Id*. at 11–12. The Court also affirmed the Director's determination that the 240,000 acre-feet reduction obligation is the responsibility of the signatory IGWA members. *Id.* at 13–15.

On November 29, 2023, Idaho Ground Water Appropriators, Inc. ("IGWA"), petitioned the Court for rehearing of the *Decision* pursuant to Idaho Rule of Civil Procedure 84(r) and

Idaho Appellate Rule 42. On December 12, 2023, Intervenor Bingham Groundwater District ("BGWD") filed a brief in support of IGWA's petition.[1]

In its brief in support, IGWA requests the Court reconsider IGWA's arguments regarding the "proportionate share term" and the Court's determination that IGWA has not shown its substantial rights were prejudiced. IGWA Rehr'g Pet. Br. 2. While IGWA does not expressly seek rehearing on the Court's rejection of IGWA's averaging arguments, IGWA attempts to revisit the issue by reframing the averaging argument. IGWA Rehr'g Pet. Br. 4. This is a renewed effort by IGWA to avoid the plain language of the Approved Mitigation Plan. The Court should deny IGWA's petition for rehearing for the reasons set forth below.

## ARGUMENT

### A. The Court should deny IGWA's petition for rehearing because the *Decision* sufficiently addresses the issues that were proper for the Court to review.

As an initial matter, IGWA asserts that it "has not challenged the meaning of the words 'annually,'" and that "[n]o such arguments are made in IGWA's Opening Brief. Rather, IGWA has challenged the Director's interpretation of the proportionate share term[.]" IGWA Rehr'g Pet. Br. 2. This argument is untenable, as throughout this proceeding IGWA has challenged the Director's determination that the Settlement Agreement's use of the term "annually" did not allow for averaging.

Since this compliance dispute arose, IGWA's core challenges have been: (1) that its compliance with the 240,000 acre-feet conservation obligation should be measured on a rolling

[1] BGWD's brief purports to support IGWA's argument that "[t]he 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." BGWD Rehr'g Pet. Br. 2 (citing "page 4 of IGWA's Brief in Support of Petition for Rehearing"). BGWD misquotes IGWA's argument, which instead asserts: "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 it makes a huge difference in practice because it forces groundwater irrigators to assume that every summer will experience the most extreme heat and drought when making planting decisions*." IGWA Rehr'g Pet. Br. 4 (emphasis added).

Save for this single misquote, BGWD does not support its argument with citations to legal authority or citations to the record. Accordingly, the Court should decline to address the merits of BGWD's arguments. *See e.g., McCandless v. Pease*, 166 Idaho 865, 878, 465 P.3d 1104, 1117 (2020) ("Therefore, because Appellants' arguments lack citations to any legal authority and coherent argument, we decline to address the merits of these arguments on appeal.")

average and (2) it should be permitted to consider A&B Irrigation District and Southwest Irrigation District's diversions in allocating proportionate shares of 240,000 acre-feet. *See e.g.,* R. 31–33, 46.

To support these two core challenges to the requirements of the Approved Mitigation Plan, IGWA has argued that the language of the conservation obligation in the SWC-IGWA Settlement Agreement is both patently and latently ambiguous. Despite IGWA's contention now that it has never argued that the term "annually" was ambiguous, in IGWA's opposition to summary judgment filed in the underlying administrative proceeding, IGWA argued that measuring "annual" conservation becomes ambiguous when applied to the facts, revealing a latent ambiguity.[2] IGWA made a similar argument in its opening brief.[3]

Whether the conservation obligation requires annual conservation was never the question. It is undisputed that it does. The question was whether compliance with the 240,000 acre-feet reduction obligation is allowed to be measured based on a rolling average. One finds the answer to the question by considering the impact the term "annually" has in the conservation obligation language, which provides that "[t]otal ground water diversion shall be reduced by 240,000 ac-ft annually." R. 437. In the *Decision*, the Court evaluated the plain meaning of "annually," contemplated its use throughout the SWC-IGWA Settlement Agreement and concluded that the

---

[2] IGWA argued:

> 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.
>
> . . . .
>
> 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.

R. 201, 203–04.

[3] IGWA argued:

> In addition to not prescribing the method or metric used to calculate each district's proportionate mitigation obligation, the Settlement Agreement does not prescribe how compliance therewith will be measured, other than to say that it will occur annually. IGWA presented evidence at the hearing to demonstrate that this becomes ambiguous in practice because groundwater diversions fluctuate from year-to-year based on climate and crop mix.

IGWA Opening Br. 16.

conservation obligation is unambiguous both patently and latently. "The term annually does not mean a five-year average and the average person would not read it as such." *Decision* 10. The Court also found that IGWA's non-contemporaneous extrinsic evidence could not be used to create an ambiguity and could not be used to modify or contradict the plain, unambiguous language. *Id.* at 11–12. The Court held that 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." *Id.* at 10.

IGWA argues in its petition for rehearing that the *Decision* does not resolve IGWA's arguments concerning the proportionate share term. IGWA Rehr'g Pet. Br. 2. In support of this contention, IGWA repackages and conflates its earlier arguments regarding averaging with new arguments on proportionate shares and "parol evidence."

To disentangle the arguments, one must first address IGWA's arguments on averaging. IGWA claims that "the Director selected a method for measuring compliance that is not specified in the Settlement Agreement" and that the "Settlement Agreement does not specify a method for measuring compliance." IGWA Rehr'g Pet. Br. 4. IGWA claims that it "developed and implemented one of various possible methods after the Settlement Agreement was signed." *Id.* IGWA states that its "method measures compliance by comparing *average* pre-Settlement Agreement diversions against *average* post-Settlement Agreement diversions." *Id.* IGWA asserts that the Director "borrowed IGWA's method" and "modified the way compliance is measured under IGWA's method." *Id.* IGWA claims that the "Director's method compares *average* pre-Settlement Agreement diversions against *single-year* post-Settlement Agreement diversions." IGWA concludes that the "Director's method is not specified in the Settlement Agreement, was not agreed to nor implemented by IGWA, and is based on parol evidence." *Id.*

By "method for measuring compliance" IGWA appears to refer to whether it can employ a rolling average to demonstrate its member districts have met the 240,000 acre-feet conservation obligation. Contrary to IGWA's assertion, the Director did not "select a method for measuring compliance that is not specified in the Settlement Agreement." IGWA Rehr'g Pet. Br. 4. The

Director evaluated the plain language of the Approved Mitigation Plan and determined that the conservation obligation unambiguously called for measuring compliance *annually*, without averaging. In its petition for rehearing IGWA ignores that the Director and the Court have both concluded that the annual conservation obligation is unambiguous: Section 3.a. of the Settlement Agreement requires a reduction in ground water diversion in the amount of 240,000 acre-feet each year and does not allow for averaging. The Court addressed IGWA's averaging argument directly and found it to be unavailing. *Decision* 12. Despite IGWA's current framing, this is the same argument it made to the Court, which the Court considered and rejected, and there is no basis upon which the Court should reconsider its decision.

IGWA then reshapes its unavailing averaging argument into one regarding the apportionment of proportionate shares of the 240,000 acre-feet obligation. IGWA argues that when the Director redistributed the proportionate shares IGWA allocated to Southwest and A&B the "Director used parol evidence to develop conservation obligations and a compliance method that are not prescribed in the Settlement Agreement, yet he refused to consider IGWA's parol evidence of party intent by ruling that the Agreement is unambiguous." IGWA Rehr'g Pet. Br. 4. IGWA asserts that the Director "cannot refuse to consider parol evidence of party intent by ruling that the Settlement Agreement [is] ambiguous, and then use parol evidence to interpret the proportionate share term the way he would like." *Id.* at 4–5.

IGWA misunderstands the parol evidence rule and the use of extrinsic evidence. The parol evidence rule provides:

> "Where preliminary negotiations are consummated by written agreement, the writing super[s]edes all previous understandings and the intent of the parties must be ascertained from the writing." If 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 contract.

*Valley Bank v. Christensen*, 119 Idaho 496, 498, 808 P.2d 415, 417 (1991) (internal citations omitted). The Director and the Court declined to consider the extrinsic evidence IGWA

submitted in support of its ambiguity arguments because both concluded that Section 3.a.i was unambiguous and extrinsic evidence cannot be used to modify or contradict that plain language.

However, this case is not only about the interpretation of a contract, it is about a mitigation plan approved under the Department's Conjunctive Management Rules and whether the mitigation plan was effectively operating. When the Director evaluated whether the plain language of the Approved Mitigation Plan allowed for averaging to determine compliance and whether IGWA could attribute proportionate shares to non-signatory member districts, the Director was interpreting the Approved Mitigation Plan consistent with Idaho law governing contracts. When the Director evaluated whether the signatory member districts complied with an approved and effectively operating mitigation plan, the Director was not engaging in contract interpretation but was exercising his discretion and acting pursuant to his statutory authority and the Conjunctive Management Rules. Interpreting the Approved Mitigation Plan was a prerequisite to determining whether IGWA was operating under an approved mitigation plan and the two are distinct actions undertaken pursuant to separate authority.

The Director is not a party to the SWC-IGWA Settlement Agreement. The Director does not opine whether the SWC-IGWA Settlement Agreement would be enforceable as a contract on its own, complete in all its terms. The SWC and IGWA, both sophisticated parties, negotiated the agreement and submitted it to the Director as a stipulated mitigation plan. Because the mitigation plan was submitted to the Director as a *stipulated* mitigation plan, "the Director allowed significant latitude to the agreeing parties in accepting the provisions of the Mitigation Plan." R. 419. This significant latitude allowed IGWA to determine its baseline and its members' proportionate shares as the mitigation plan only defined the annual overall 240,000 acre-feet conservation obligation. Were it material for each IGWA member district's proportionate share to be prescribed by the SWC-IGWA Settlement Agreement, the parties would have included

them, rather than omit them and allow IGWA to calculate the proportions independently.[4] Instead, the parties sought flexibility with the plan and the Director agreed to be flexible, subject to the conditions the Director included upon his approval. The parties complied with the Approved Mitigation Plan for several years.

In addition, Section 3.m of the Second Addendum provides:

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

R. 479. (emphasis added). The SWC and IGWA did not agree that a breach occurred. The Steering Committee reported the same to the Director. The Director then evaluated all available information, determined if a breach had occurred, and issued an order specifying actions that must be taken by the breaching party to cure the breach. IGWA's proportionate share calculation was information available to the Director, but its overall calculation that included Southwest and A&B was incorrect and inconsistent with the requirements of the Approved Mitigation Plan. To determine which ground water districts breached the plan, the Director had to correct IGWA's overall calculation to eliminate proportionate shares attributed to Southwest and A&B. As the parties had already reached the Remedy Agreement and submitted it to the Director, the Director then issued an order that explained the breach, identified the breaching parties, and ordered IGWA to implement the Remedy Agreement.

Again, when the Director evaluated all available information to determine whether a breach had occurred, the Director was not engaging in contract interpretation he was exercising the discretion the parties agreed he would be afforded under Section 3.m of the Second Addendum, the Conjunctive Management Rules and pursuant to his authority under Idaho law.

[4] As the Court recognized in the *Decision*, "none of the parties have argued on judicial review (or before the Director) that the Settlement Agreement lacks any material terms." *Decision* 13 n.10. The Court correctly did not reach the issue. In IGWA's brief on rehearing, IGWA requests the Court analyze whether the proportionate share term is a material term of the Settlement Agreement; however, IGWA's argument omits its own analysis of materiality. IGWA Rehr'g Pet. Br. 6. Regardless, it remains that no party argued that the Settlement Agreement lacked material terms to the Director and the Court should not reach the issue.

When the Director corrected IGWA's proportionate share calculations he was not violating the parol evidence rule because he was not interpreting a contract. However, even if the Director was engaging in contract interpretation, the SWC and IGWA agreed in the Second Addendum that the Director would "evaluate all available information," which necessarily allows the Director to look outside the four corners of the Approved Mitigation Plan. It was not error for the Director to do so and the Court should not reconsider this issue.

Moreover, even if this Court finds that the Director erred in proportioning the mitigation obligation among only the signatory ground water districts, IGWA has failed to show how the Director's proportioning prejudices a substantial right as IGWA and the SWC entered into the Remedy Agreement to cure the breach for 2021 and the settlement does not rely on percent distribution. Even if one accepts IGWA's preferred proportionate share division, which includes A&B and Southwest, IGWA still fell short of its conservation obligation in 2021 by 82,613 acre-feet. R. 412. Because the SWC and IGWA agreed to remedy that breach through IGWA providing storage water, the Director's proportionate share allocation does not prejudice IGWA.

**B. The Final Order does not prejudice IGWA's substantial rights, and the Court should not reconsider its decision.**

IGWA argues that the Final Order prejudiced IGWA's substantial rights because "the Remedy Settlement Agreement was entered into under duress after the Director communicated to IGWA through back channels that he was planning to declare a breach and shut off the ground water districts' members water rights in September of 2021, with only a few weeks of irrigation remaining to finish their valuable potato and sugar beet crops." IGWA Rehr'g Pet. Br. 7. None of what IGWA alleges is supported by the record before the Court. The Director is not a party to the Remedy Agreement. *See* R. 67. Whether IGWA has a defense to the Remedy Agreement is not at issue here, has not been presented to the Director, and is immaterial to whether IGWA member districts did not comply with the requirements of the Approved Mitigation Plan in 2021.

IGWA also argues that the Final Order prejudices IGWA's substantial rights because the "Director's interpretation of the Settlement Agreement makes it much more likely that the water

rights of IGWA's members will be curtailed by IDWR." IGWA's argument relies on speculation and presumes future non-compliance of its member districts. As the Court recognized in the *Decision*, "the only issues before the Court pertain to the dispute over compliance with the approved mitigation plan in 2021." *Decision* 15. Future compliance issues are not properly before the Court and cannot be used to establish prejudice to a substantial right in this proceeding. IGWA has not shown that its substantial rights were prejudiced, the Court should not reconsider its decision, and the Final Order should be affirmed.

**CONCLUSION**

For the reasons provided above, the Department requests that the Court deny IGWA's petition for rehearing and affirm the Director's *Amended Final Order*.

DATED this 5th day of February 2024.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

KAYLEEN R. RICHTER
Deputy Attorney General

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5th day of February 2024, I caused to be served a true and correct copy of the foregoing via iCourt E-File and Serve, upon the following:

Thomas J. Budge
Elisheva M. Patterson
RACINE OLSON, PLLP
tj@racineolson.com
elisheva@racineolson.com

Dylan Anderson
DYLAN ANDERSON LAW
dylan@dylanandersonlaw.com

Skyler C. Johns
Nathan M. Olsen
Steven L. Taggart
OLSEN TAGGART PLLC
johns@olsentaggart.com
nolsen@olsentaggart.com
staggart@olsentaggart.com
icourt@olsentaggart.com

Candice M. McHugh
Chris M. Bromley
MCHUGH BROMLEY, PLLC
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

W. Kent Fletcher
FLETCHER LAW OFFICE
wkf@pmt.org

John K. Simpson
Travis L. Thompson
MARTEN LAW LLP
jsimpson@martenlaw.com
tthompson@martenlaw.com

Sarah A. Klahn
Maximilian C. Bricker
sklahn@somachlaw.com
mbricker@somachlaw.com

KAYLEEN R. RICHTER
Deputy Attorney General