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Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)

**DISTRICT COURT OF THE STATE OF IDAHO
FIFTH JUDICIAL DISTRICT
JEROME COUNTY**

IDAHO GROUND WATER
APPROPRIATORS, INC.,

Petitioner,

vs.

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

Respondents.

Case No. CV27-22-00945

**DECLARATION OF THOMAS J. BUDGE
IN SUPPORT OF IGWA'S RESPONSE
TO IDWR'S MOTION TO DISMISS**

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

I, Thomas J. Budge, hereby declare the following:

1. I am one of the attorneys of record representing Idaho Ground Water Appropriators, Inc. (“IGWA”) in the above-captioned matters.
2. The above-captioned matters are contested cases of the Idaho Department of Water Resources (“Department”) governed by the Idaho Administrative Procedures Act, Chapter 52, Title 67, Idaho Code.
3. *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*, IDWR Docket No. CM-DC-2010-001, involves a water right delivery call filed by the Surface Water Coalition.
4. *In the Matter of IGWA’s Settlement Agreement Mitigation Plan*, IDWR Docket No. CM-MP-2016-001, involves a water rights mitigation plan filed by IGWA.
5. The documents attached to this declaration are all part of the agency record in the above-captioned matters. The agency record has not yet been lodged with the court in this action.
6. Attached hereto as **Exhibit A** is an excerpt from the original *Order* issued by the Department on February 14, 2005, in response to the SWC delivery call. Due to its length, only the first, last, and relevant *Order* provisions are included in this exhibit.
7. Attached hereto as **Exhibit B** is the *Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of Idaho Ground Water Appropriators, Inc.*, dated June 30, 2015.
8. Attached hereto as **Exhibit C** is the *Final Order Approving Stipulated Mitigation Plan*, dated May 2, 2016, which approved the June 30, 2015, *Settlement Agreement*, the *Addendum to Settlement Agreement*, and the October 7, 2015, *Agreement* between A&B Irrigation District and IGWA.
9. Attached hereto as **Exhibit D** is the *Second Addendum to the Settlement Agreement*, dated December 14, 2016, which augments the *Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of Idaho Ground Water Appropriators, Inc.*, the *Addendum Agreement* between the same entered into October 19, 2015, and the *Agreement* between A&B Irrigation District and participating members of IGWA dated October 7, 2016.

10. Attached hereto as **Exhibit E** is the *Final Order Approving Amendment to Stipulated Mitigation Plan*, dated May 9, 2017, adopting the parties' December 14, 2016 *Second Addendum to the Settlement Agreement*.

11. Attached hereto as **Exhibit F** is the *Surface Water Coalition's Notice Steering Committee Impasse/Request for Status Conference* ("SWC Request for Status Conference") filed on July 21, 2022.

12. Attached hereto as **Exhibit G** is the *Notice of Status Conference* that the Director of the Department served upon the parties on July 26, 2022, granting SWC's request for a status conference and scheduling same for August 5, 2022.

13. Attached hereto as **Exhibit H** is *IGWA's Response to Surface Water Coalition's Notice of Steering Committee Impasse*, filed on August 3, 2022.

14. Attached hereto as **Exhibit I** is the *Surface Water Coalition's Reply to IGWA's Response*, filed on August 4, 2022.

15. On August 5, 2022, I represented IGWA at the status conference before the Director. At the status conference the Director requested oral arguments and then advised the parties that he would issue a written decision on the issues raised in the SWC Request for Status Conference.

16. Attached hereto as **Exhibit J** is *IGWA's Supplemental Response to Surface Water Coalition's Notice of Steering Committee Impasse*, filed on August 12, 2022.

17. Attached hereto as **Exhibit K** is the *Notice of Intent to Take Official Notice of IGWA's 2021 Settlement Agreement Performance Report and Supporting Spreadsheet* that the Director of the Department served upon parties on August 18, 2022.

18. Attached hereto as **Exhibit L** is *IGWA's Objection to Notice of Intent to Take Official Notice of IGWA's 2021 Settlement Agreement Performance Report and Supporting Spreadsheet; and Request for Hearing*, filed on August 23, 2022.

19. Attached hereto as **Exhibit M** is the *Settlement Agreement* entered into between IGWA and SWC on September 7, 2022 (aka "Remedy Agreement"), which resolved a dispute between IGWA and the SWC over IGWA's compliance in 2021 with the IGWA-SWC Settlement Agreement and IGWA's mitigation plan associated therewith.

20. Attached hereto as **Exhibit N** is the Director's *Final Order Regarding Compliance with Approved Mitigation Plan*, dated September 8, 2022 ("Compliance Order").


21. Attached hereto as **Exhibit O** is IGWA's *Petition for Reconsideration and Request for Hearing*, filed September 22, 2022.

22. Attached hereto as **Exhibit P** is the Director's *Order Granting Request for Hearing; Notice of Prehearing Conference*, dated October 13, 2022.

I declare under the penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 14th day of November, 2022.

RACINE OLSON, PLLP

By: 
Thomas J. Budge
Attorneys for IGWA

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2022, I served the foregoing document on the persons below via email or as otherwise indicated:


Thomas J. Budge

Clerk of the Court JEROME COUNTY DISTRICT COURT 233 West Main Street Jerome, ID 83338	iCourt
Director Gary Spackman IDAHO DEPT. OF WATER RESOURCES Garrick L. Baxter P.O. Box 83720 Boise, Idaho 83720-0098	file@idwr.idaho.gov gary.spackman@idwr.idaho.gov garrick.baxter@idwr.idaho.gov mark.cecchini-beaver@idwr.idaho.gov
John K. Simpson Travis L. Thompson Michael A. Short BARKER ROSHOLT & SIMPSON, LLP P.O. Box 63 Twin Falls, ID 83303-0063	jks@idahowaters.com tlr@idahowaters.com mas@idahowaters.com
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	wkf@pmt.org brd@pmt.org
Kathleen Marion Carr US DEPT. INTERIOR 960 Broadway Ste 400 Boise, ID 83706	kathleenmarion.carr@sol.doi.gov
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. DEPARTMENT OF JUSTICE 999 18 th St., South Terrace, Suite 370 Denver, CO 80202	david.gehlert@usdoj.gov

Matt Howard U.S. BUREAU OF RECLAMATION 1150 N Curtis Road Boise, ID 83706-1234	mhoward@usbr.gov
Sarah A Klahn SOMACH SIMMONS & DUNN 2033 11 th Street, Ste 5 Boulder, Co 80302	sklahn@somachlaw.com dthompson@somachlaw.com
Rich Diehl CITY OF POCATELLO P.O. Box 4169 Pocatello, ID 83205	rdiehl@pocatello.us
Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4 th Street, Suite 103 Boise, ID 83 702	cbromley@mchughbromley.com cmchugh@mchughbromley.com
Robert E. Williams WILLIAMS, MESERVY, & LOTHSPEICH, LLP P.O. Box 168 Jerome, ID 83338	rewilliams@wmlattys.com
Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405	rharris@holdenlegal.com
Randall D. Fife CITY ATTORNEY, CITY OF IDAHO FALLS P.O. Box 50220 Idaho Falls, ID 83405	rfife@idahofallsidaho.gov
William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318	wparsons@pmt.org

EXHIBIT A

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

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

ORDER

This matter is before the Director of the Department of Water Resources (“Director” or “Department”) as a result of a letter (“Letter”) and petition (“Petition”), both filed with the Director on January 14, 2005, from A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the “Surface Water Coalition”). The Letter and Petition seek the administration and curtailment of ground water rights within Water District No. 120, the American Falls Ground Water Management Area, and areas of the Eastern Snake Plain Aquifer not within an organized water district or ground water management area, that are junior in priority to water rights held by or for the benefit of members of the Surface Water Coalition. The Petition also seeks designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area.

On February 3, 2004, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed two petitions to intervene. The first was filed to intervene in the request for administration and curtailment of ground water rights within Water District No. 120, and the second was filed to intervene in the request for administration and curtailment of ground water rights in the American Falls Ground Water Management Area and designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area.

On February 11, 2005, Idaho Power Company filed a letter in which Idaho Power requests that the letter be treated as a motion to intervene should a contested case be initiated in response to the Letter and Petition filed by the Surface Water Coalition. Under Department Rule of Procedure 354, IDAPA 37.01.01.354, action on a petition to intervene can not be taken sooner than seven days after the filing of such petition. Therefore, Idaho Power’s request will be addressed separately from the filings of the Surface Water Coalition and IGWA.

Based upon the Director’s initial consideration of the Letter, Petition, and IGWA’s petitions to intervene, the Director enters the following Findings of Fact, Conclusions of Law, and Order.

ORDER

The Director enters the following Order as an initial response to the Letter, Petition, and Request for Information filed by the Surface Water Coalition, and the petitions to intervene filed by IGWA, for the reasons stated in the foregoing Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED as follows in response to the Letter filed by the Surface Water Coalition requesting water right administration in Water District No. 120 and delivery of senior surface water rights:

1. A contested case is initiated pursuant to Idaho Code § 67-5240 to consider the relief requested.
2. Water rights nos. 01-04045, 01-04052, 01-04055, 01-04056, and 01-04057 listed in the Letter as being held by or for the benefit of members of the Surface Water Coalition are beneficial use rights claimed pursuant to Idaho Code § 42-243 and shall be treated as junior in priority for the purposes of distributing water to any decreed, licensed, or permitted water rights. This portion of the Order is final. Any person aggrieved by this final portion of the Order has the right to request a hearing before the Department pursuant to the provisions of Idaho Code § 42-1701A(3).
3. The Director will make a determination of the extent of likely injury after April 1, 2005, when the USBR and USACE release forecasts for inflow to the Upper Snake River Basin for the period April 1 through July 1, 2005.
4. The Director will consider the water delivery call as a call for administration and curtailment of junior priority ground water rights in Water Districts No. 120 and No. 130 that are alleged to be causing injury to the senior surface water rights of the members of the Surface Water Coalition.

IT IS FURTHER ORDERED as follows in response to the Petition filed by the Surface Water Coalition:

1. The part of the Petition seeking the administration and curtailment of junior priority ground water rights not in a water district created pursuant to chapter 6, title 42, Idaho Code, or in the American Falls Ground Water Management Area shall be held for a period of not more than thirty (30) days from the date of this Order to provide time for the Surface Water Coalition to identify and file with the Department the names, addresses, and description of the water rights of the ground water users who the Surface Water Coalition allege are causing material injury to the rights of the Coalition and to serve each of the identified right holders with a copy of the Petition.
2. The part of the Petition seeking the administration and curtailment of junior priority ground water rights in the American Falls Ground Water Management Area is designated a contested case pursuant to Idaho Code § 67-5240 to consider the relief requested. A fact finding hearing will be scheduled as early in April of 2005 as possible for this proceeding.

3. The part of the Petition seeking the designation of the ESPA as a ground water management area is DENIED. This portion of the Order is final. Any person aggrieved by this final portion of the Order has the right to request a hearing before the Department pursuant to the provisions of Idaho Code § 42-1701A(3).

IT IS FURTHER ORDERED that the Request for Information filed by the Surface Water Coalition is DENIED. However, the Department, if so requested, will assist the Surface Water Coalition in gathering the required information as provided by Idaho Code § 42-221J. For research in excess of one (1) hour, the Department's current charge is \$48 per hour.

IT IS FURTHER ORDERED that the petitions filed by IGWA to intervene in the request for administration and curtailment of ground water rights in Water District No. 120 and to intervene in the request for administration and curtailment of ground water rights in American Falls Ground Water Management Area are GRANTED.

IT IS FURTHER ORDERED that not later than thirty (30) days from the date of this Order, each member of the Surface Water Coalition is to file with the Director the information called for under Conclusion of Law No. 38 of this Order.

IT IS FURTHER ORDERED that pursuant to Department Rule of Procedure 710, IDAPA 37.01.01.710, this is an interlocutory order and is not subject to review by reconsideration or appeal, with the exception of the portions of the Order that (1) determines water rights nos. 01-04045, 01-04052, 01-04055, 01-04056, and 01-04057 to be junior in priority for the purposes of distributing water to any decreed, licensed, or permitted water rights; and (2) denies the portion of the Petition seeking designation of the ESPA as a ground water management area. The Director may review this interlocutory order pursuant to Rule 711, IDAPA 37.01.01.711.

DATED this 14th day of February 2005.



KARL J. DREHER
Director

EXHIBIT B

**SETTLEMENT AGREEMENT ENTERED INTO JUNE 30, 2015 BETWEEN PARTICIPATING
MEMBERS OF THE SURFACE WATER COALITION¹ AND PARTICIPATING MEMBERS OF THE
IDAHO GROUND WATER APPROPRIATORS, INC.²**

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

1. Objectives.

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

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

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

2. Near Term Practices.

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

3. Long Term Practices, Commencing 2016.

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

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

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

c. *Irrigation season reduction.*

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

d. *Mandatory Measurement Requirement.*

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

e. *Ground Water Level Goal and Benchmarks.*

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

f. *Recharge.*

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

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

g. *NRCS Programs.*

Parties will support NRCS funded permanent water conservation programs.

h. *Conversions.*

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

i. *Trust Water Rights.*

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

j. *Transfer Processes.*

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

k. *Moratorium Designations.*

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

l. *IDWR Processes.*

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

m. *Steering Committee.*

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

4. Adaptive Water Management Measures.

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

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

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

5. Safe Harbor.

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

6. Non-participants.

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

7. Term.

This is a perpetual agreement.

8. Binding Effect.

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

9. Entire Agreement.

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

10. Effect of Headings.

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

11. Effective Date.

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

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

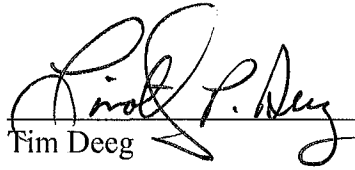
The parties have executed this Agreement on the date following their respective signatures.

RACINE OLSON NYE BUDGE AND BAILEY, CHARTERED

Randall C Budge 7/1/15
Randall C. Budge Date

Attorney for Idaho Ground Water Appropriators, Inc.

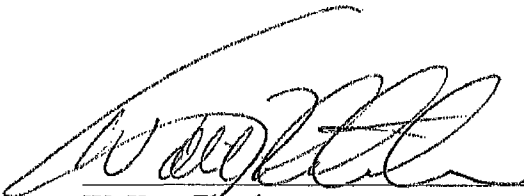
IDAHO GROUND WATER APPROPRIATORS, INC.

 7/1/2015

Tim Deeg Date

President

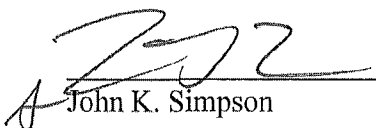
FLETCHER LAW OFFICE

 7-2-15

W. Kent Fletcher Date

On Behalf of the Surface Water Coalition

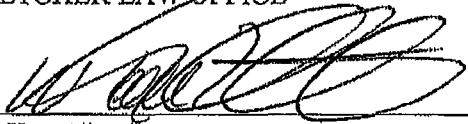
BARKER ROSHOLT AND SIMPSON LLP

 7/7/15
John K. Simpson Date

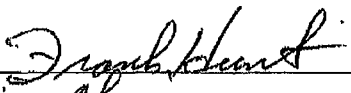
On Behalf of the Surface Water Coalition

**The following signature pages are
for the August 1 Deadline**


FLETCHER LAW OFFICE


W. Kent Fletcher Date 7-7-15

MINIDOKA IRRIGATION DISTRICT

BY: 
Title: Chairman Date 7-7-15

AMERICAN FALLS RESERVOIR DISTRICT NO. 2

BY: 
Title: Chairman Date 7-1-15

BURLEY IRRIGATION DISTRICT

BY: Dean Edgan
Title: President Date: July 14, 2015

Attested by:

Lana K. Pincock
Lana K. Pincock
Secretary / Treasurer

MILNER IRRIGATION DISTRICT

BY: Scott B. Reading
Title: Board Chairman Date: 7/23/2015

NORTH SIDE CANAL COMPANY

BY: John Beubers
Title: Chairman Date: 7/20/15

TWIN FALLS CANAL COMPANY

BY: *Don A. Schumaker*

Title: *Chair. BOD*

Date: *July 22, 2015*

ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT



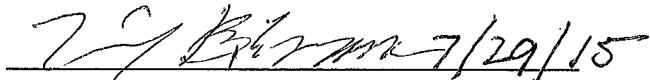
Nick Behrend

7-16-15

Date

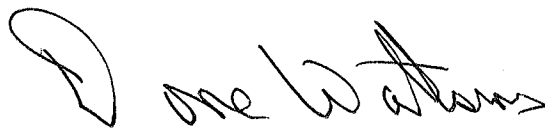
Chairman

BINGHAM GROUND WATER DISTRICT


Craig Evans Date

Chairman

BONNEVILLE-JEFFERSON GROUND WATER DISTRICT



 7/29/15

Dane Watkins

Date

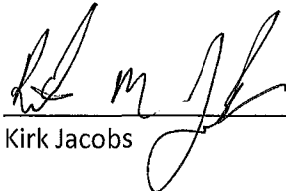
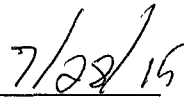
Chairman

CAREY VALLEY GROUND WATER DISTRICT


 
Leta Hansen Date

Chairman

JEFFERSON CLARK GROUND WATER DISTRICT

 
Kirk Jacobs Date
Chairman

MADISON GROUND WATER DISTRICT


 7-23-15

Jason Webster

Date

Chairman

MAGIC VALLEY GROUND WATER DISTRICT

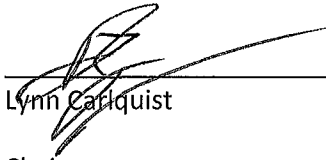
 7/14/2015

Dean Stevenson

Date

Chairman

NORTH SNAKE GROUND WATER DISTRICT




Lynn Carlquist
Chairman

7/22/2015

Date

FREEMONT MADISON IRRIGATION DISTRICT



Dale L. Swenson Date
Jeff Raybould
Manager Chairman

SOUTHWEST IRRIGATION DISTRICT

RANDY BROWN

Date

Chairman

EXHIBIT C

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

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

IN THE MATTER OF IGWA'S SETTLEMENT
AGREEMENT MITIGATION PLAN

Docket No. CM-MP-2016-001

**FINAL ORDER APPROVING
STIPULATED MITIGATION
PLAN**

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

FINDINGS OF FACT

1. On March 9, 2016, the Idaho Ground Water Appropriator's Inc. ("IGWA"), and A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to herein as "Surface Water Coalition" or "SWC"), submitted to the Department the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* ("Request for Order").
2. Attached to the Request for Order as Exhibits B and C respectively are the *Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriator's, Inc.* and the *Addendum to Settlement Agreement* (collectively the "SWC-IGWA Settlement Agreement"). Attached to the Request for Order as Exhibit D is the October 7, 2015, *Agreement* between A&B Irrigation District and the IGWA members who entered into the SWC-IGWA Settlement Agreement (the "A&B-IGWA Agreement"). The SWC and IGWA submitted the SWC-IGWA Settlement Agreement and the A&B-IGWA Agreement (collectively, the "Mitigation Plan") as a stipulated mitigation plan in response to the SWC delivery call. *Request for Order* at 3.

3. The Department published notice of the Mitigation Plan in the Idaho Mountain Express and Mountain Home News on March 16th and 23rd, 2016; and the Times News, Post Register, Idaho State Journal, and Idaho Statesman on March 17th and 24th, 2016.

4. The SWC “stipulates that the mitigation provided by participating IGWA members under the [Mitigation Plan] is, provided the [Mitigation Plan is] implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member.” *Request for Order* at 3. The SWC and IGWA agree that “[n]o ground water user participating in the [Mitigation Plan] will be subject to a delivery call by the SWC members as long as the provisions of the [Mitigation Plan] are being implemented.” *Mitigation Plan* at Exhibit B, p. 5.

5. Through the Mitigation Plan, the SWC and IGWA members agree to: (a) a total ground water diversion reduction of 240,000 acre-feet annually, (b) annual delivery of 50,000 acre-feet “of storage water through private lease(s) of water from the Upper Snake Reservoir system, delivered to the SWC 21 days after the date of allocation,” (c) IGWA using “its best efforts to continue existing conversions in Water Districts 130 and 140,” (d) ground water users not irrigating sooner than April 1 or later than October 31, (e) installation of approved closed conduit flow meters on all remaining unmeasured and power consumption coefficient measured ground water diversions by the beginning of the 2018 irrigation season, (f) establishment of a ground water level goal and benchmarks to “[s]tabilize and ultimately reverse the trend of declining ground water levels,” (g) development of a method “to measure reach gain trends in the Blackfoot to Milner reach,” (h) contributions by the SWC and IGWA to the State sponsored managed recharge program, (i) support by the SWC and IGWA of “NRCS funded permanent water conservation programs,” (j) IGWA undertaking “additional targeted ground water to surface water conversions and/or fallow land projects above American Falls,” and (k) “[i]f any of the benchmarks or ground water level goal is not met, additional recharge, consumptive use reductions, or other measures as recommended by” a steering committee established by the SWC and IGWA. *Mitigation Plan* at Exhibit B, p. 2-5.

6. On April 4, 2016, the City of Pocatello (“Pocatello”) and the City of Idaho Falls (“Idaho Falls”) protested the Mitigation Plan.

7. On April 22, 2016, Pocatello and Idaho Falls filed a *Motion for Order Approving Stipulation to Conditionally Withdraw Protests* (“Motion”). Pocatello and Idaho Falls agreed to withdraw their protests to the Mitigation Plan if the Director includes provisions in an order approving the Mitigation Plan: (a) clarifying that the parties to the Mitigation Plan are responsible for the ongoing activities and ground water level goal and benchmarks identified in the Mitigation Plan, and (b) that approval of the plan does not create a ground water management area pursuant to Idaho Code § 42-233b.

CONCLUSIONS OF LAW

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

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

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

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

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

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

6. CM Rule 42.02 states: “The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.” IDAPA 37.03.11.042.02.

7. CM Rule 43.03 establishes factors the Director may consider “in determining whether a proposed mitigation plan will prevent injury to senior rights.” IDAPA 37.03.11.043.03(a-o).

8. CM Rule 43.03(o) states: “Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.” IDAPA 37.03.11.043.03(o).

9. The SWC and IGWA “have entered into an agreement on [a] . . . mitigation plan” in accordance with CM Rule 43.03(o). The SWC “stipulates that the mitigation provided by participating IGWA members under the [Mitigation Plan] is, provided the [Mitigation Plan] is implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member.” *Request for Order* at 3. The SWC and IGWA agree that “[n]o ground water user participating in the [Mitigation Plan] will be subject to a delivery call by the SWC members as long as the provisions of the [Mitigation Plan] are being implemented.” *Mitigation Plan* at Exhibit B, p. 5.

10. As discussed above, the Mitigation Plan requires numerous ongoing activities, including: (a) annual ground water diversion reductions and storage water deliveries, (b) irrigation season reduction, (c) installation of measurement devices, (d) support of the State sponsored managed recharge program and NRCS funded permanent water conservation programs, (e) efforts to continue existing conversions, (f) additional conversions and/or fallow land projects, and (g) establishment of and oversight by a steering committee and technical work group. *Mitigation Plan* at Exhibit B, p. 2-5. The Mitigation Plan also references a ground water level goal and benchmarks, development of a method “to measure reach gain trends in the Blackfoot to Milner reach,” and additional recharge, consumptive use reductions, or other measures should any of the benchmarks or the ground water level goal not be met. *Id.* at Exhibit B, p. 3-5. The parties to the Mitigation Plan should be responsible for these activities and the ground water level goal and benchmarks should only be applicable to the parties to the Mitigation Plan as specified in the Mitigation Plan.

11. Having reviewed the Mitigation Plan, the CM Rules, and the proceedings herein, the Director will approve the Mitigation Plan.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Mitigation Plan submitted by the SWC and IGWA is APPROVED with the following conditions:

- a. All ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan.
- b. The ground water level goal and benchmarks referenced in the Mitigation Plan are applicable only to the parties to the Mitigation Plan.
- c. Approval of the Mitigation Plan does not create a ground water management area pursuant to Idaho Code § 42-233b.

DATED this 2nd day of May 2016.



Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of May 2016, the above and foregoing was served on the following by the method(s) indicated below:

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Paul L. Arrington
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Kimi White

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

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

(Required by Rule of Procedure 740.02)

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

PETITION FOR RECONSIDERATION

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

REQUEST FOR HEARING

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

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

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

EXHIBIT D

SECOND ADDENDUM TO SETTLEMENT AGREEMENT

This Second Addendum dated December 14th, 2016 ("Second Addendum") augments the *Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of Idaho Ground Water Appropriators, Inc.* ("IGWA"), the *Addendum Agreement* between the same entered into October 19, 2015 ("First Addendum"), and the *Agreement* between A&B Irrigation District and participating members of IGWA dated October 7, 2016. The foregoing agreements are referred to collectively herein as the "Settlement Agreement," and the parties thereto are referred to collectively herein as the "Parties."

RECITALS

- A. WHEREAS, on March 9, 2016 the Surface Water Coalition and IGWA submitted to the Idaho Department of Water Resources ("Department") the *Surface Water Coalition and IGWA's Stipulated Mitigation Plan and Request for Order* ("Request for Order"); and
- B. WHEREAS, the parties included as an attachment to the Request for Order a proposed "Final Order" for the purpose of Department approval of the Settlement Agreement as a mitigation plan under rule 43 of the Rules for Conjunctive Management of Surface and Ground Water Resources ("CMR"); and
- C. WHEREAS, the proposed Final Order contained provisions to address, clarify and resolve certain issues relating to the Settlement Agreement; and
- D. WHEREAS, on May 2, 2016 the Director entered a *Final Order Approving Stipulated Mitigation Plan* ("Director's Final Order") approving the Settlement Agreement as a CMR 43 mitigation plan; and
- E. WHEREAS, the Director's Final Order did not include certain provisions set forth in the Parties' proposed Final Order; and
- F. WHEREAS, the Parties now set forth and incorporate into the Settlement Agreement to the provisions set forth in this Second Addendum.

COVENANTS

NOW THEREFORE, in consideration of the above recitals and the mutual agreements contained herein, the parties to the Settlement Agreement agree as follows:

1. **Incorporation of Recitals.** The Recitals set forth above are an integral part of this Second Addendum and are fully incorporated herein by this reference.

2. **Implementation of Settlement Agreement.** The Parties will work cooperatively in implementing the terms of the Settlement Agreement, to wit: Sections 3.a (Consumptive Use Volume Reduction), 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a (Adaptive Water Management) as follows:

a. Section 3.a (Consumptive Use Volume Reduction):

- i. Prior to April 1 annually the Districts will submit to the Steering Committee their groundwater diversion and recharge data for the prior irrigation season and their proposed actions to be taken for the upcoming irrigation season, together with supporting information compiled by the Districts' consultants.

b. Section 3.e (Ground Water Level Goal and Benchmarks):

- i. The Parties and their consultants will work with the Department to collect, process, archive and submit sentinel well data to the Steering Committee within 30 days of collection.
- ii. The Parties and their consultants will use the *Technique For Calculating Groundwater Level Index and Determining Compliance with Settlement* ("Calculation Technique") to determine if the groundwater level benchmarks and goal are met by June 1 of the year identified. This information shall be provided for use by the Steering Committee. Following experience with the Calculation Technique the technical working group may recommend amendments for approval by the Steering Committee.
- iii. The Parties will request the Department to verify each District's annual diversion volume, and other diversion reduction data (recharge, CREP, conversions, end-gun removals, etc.) to confirm the accuracy of the data. The Department's analysis shall be provided to the Steering Committee no later than July 1 for the previous irrigation season.
- iv. Any District may elect to report to the Department and request enforcement against any individual member of that District that is not in compliance with any mitigation plan or activity implemented by the District. Such members will not be protected under the Settlement Agreement. It is the Parties' intent that the Director will evaluate the breach and, if a breach is found to exist, provide notice of violation and opportunity to cure to the breaching member. If the member fails to cure the breach the Parties will request the Director to issue an order

against the breaching member requiring action to cure the breach or be subject to immediate curtailment as provided under CMR 40.05.

c. Section 3.m (Steering Committee):

- i. The Steering Committee will review the technical information supplied by the Department together with technical reports compiled by the Parties' consultants.
- ii. If, based on the information reported and available, the Surface Water Coalition and IGWA find that the Long Term Practices as set forth in paragraph 3 of the Agreement have been performed but the groundwater level benchmarks or goal set forth in 3.e.ii have not been met, the Steering Committee shall recommend additional actions to be undertaken by the Districts pursuant to 3.m.iii of the Settlement Agreement. If the Surface Water Coalition and IGWA do not agree upon additional actions prior to March 1 of the following year, the Steering Committee will request that the Director issue an order requiring additional actions to be undertaken by the Districts to achieve the benchmarks or goal not met.
- iii. If, based on the information reported and available, the Steering Committee finds any breach of the Long Term Practices as set forth in paragraph 3 of the Agreement, the Steering Committee shall give ninety (90) days written notice of the breach to the breaching party specifying the actions that must be taken to cure such breach. If the breaching party refuses or fails to take such actions to cure the breach, the Steering Committee shall report the breach to the Director with all supporting information, with a copy provided to the breaching party. If the Director determines based on all available information that a breach exists which has not been cured, the Steering Committee will request that the Director issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to immediate curtailment pursuant to CM Rule 40.05.
- iv. If the Surface Water Coalition and IGWA do not agree that a breach has occurred or cannot agree upon actions that must be taken by the breaching party to cure the breach, the Steering Committee will report the same to the Director and request that the Director evaluate all available information, determine if a breach has occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.
- v. The Steering Committee will submit a report to the Parties and the Department prior to May 1 annually reporting on: (a) progress on implementation and achieving the benchmarks and goals of the

Settlement Agreement, (b) performance of the Long Term Practices set forth in paragraph 3 of the Settlement Agreement, (c) the status and resolution of any breaches, and (d) adaptive water management measures recommended and implemented pursuant to paragraph 4 of the Settlement Agreement.

d. **Section 4 (Adaptive Water Management Measures):**


- i. The intent of the Adaptive Management Provision is to provide a forum for the Parties to resolve implementation issues without a party seeking an enforcement order from the Department or a district court. The terms of the Settlement Agreement and the Director's Final Order approving the same as a mitigation plan control and satisfy any mitigation obligations imposed by the Methodology Order on the Parties to the Settlement Agreement.

3. **Binding Effect.** This Second Addendum shall bind and inure to the benefit of the respective successors of the Parties.
4. **Entire Agreement.** This Second Addendum and the Settlement Agreement set forth all understandings between the Parties. There are no other understandings, covenants, promises, agreements, conditions, either oral or written between the Parties other than those contained herein and in the Agreement between A&B and IGWA dated October 7, 2015. The Parties expressly reserve all rights not settled by this Agreement. The parties further reserve all remedies, including the right to judicial action, to enforce the terms of the Settlement Agreement and this Second Addendum.
5. **Effect of Headings.** Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text.

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

SURFACE WATER COALITION:


BARKER ROSHOLT & SIMPSON LLP



John K. Simpson 1/3/17
Date

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

FLETCHER LAW OFFICE



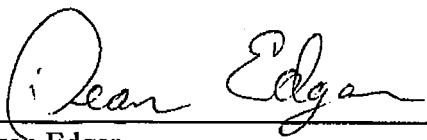
W. Kent Fletcher 1-3-17
Date

Attorney for American Falls Reservoir District #2 and
Minidoka Irrigation District

AMERICAN FALLS RESERVOIR DISTRICT NO. 2

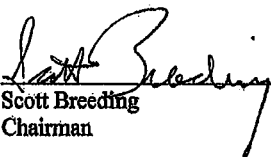
Ellis Gooch 1-3-17
Ellis Gooch Date
President

BURLEY IRRIGATION DISTRICT

 12/13/2014

Dean Edgar Date
Chairman

MILNER IRRIGATION DISTRICT



Scott Breeding
Chairman

12/14/16

Date

MINIDOKA IRRIGATION DISTRICT

Frank Hunt 12-20-16
Frank Hunt Date
Chairman

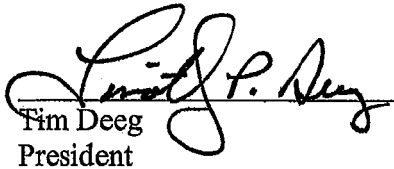
NORTH SIDE CANAL COMPANY

John Beukers 12-16-16
John Beukers Date
Chairman

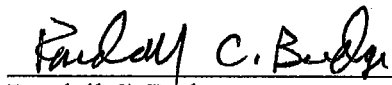
TWIN FALLS CANAL COMPANY

 12-13-16
Dan Shewmaker Date
Chairman

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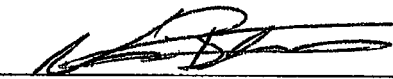
 12/14/16
Tim Deeg Date
President

RACINE OLSEN NYE BUDGE & BAILEY, CHTD.

 12/14/16
Randall C. Budge Date

Attorneys for Idaho Ground Water Appropriators, Inc. et al.


ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT



Nick Behrend
Chairman

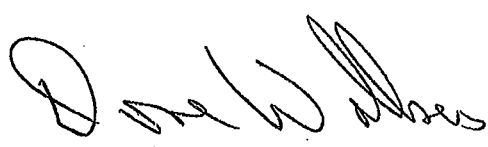
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BINGHAM GROUND WATER DISTRICT

 12-14-14

Craig Evans Date
Chairman

BONNEVILLE-JEFFERSON GROUND WATER DISTRICT

 12/14/16

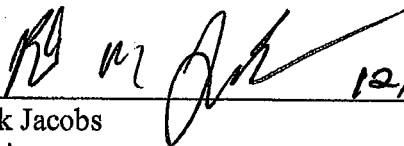
Dane Watkins
Chairman

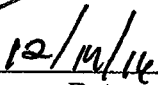
Date

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Leta Hansen Chairman Date

JEFFERSON CLARK GROUND WATER DISTRICT

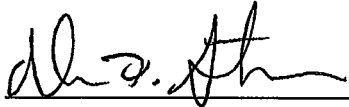

Kirk Jacobs
Chairman


Date

MADISON GROUND WATER DISTRICT

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MAGIC VALLEY GROUND WATER DISTRICT

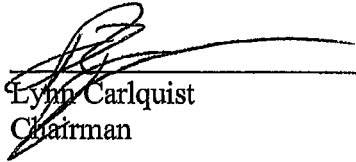


Dean Stevenson
Chairman

12/14/16

Date

NORTH SNAKE GROUND WATER DISTRICT

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Lynn Carlquist
Chairman

12/14/16
Date

FREEMONT MADISON IRRIGATION DISTRICT

Dale L. Swenson 12-14-16
Dale L. Swenson Date
Manager

EXHIBIT E

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

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

IN THE MATTER OF IGWA'S SETTLEMENT
AGREEMENT MITIGATION PLAN

Docket No. CM-MP-2016-001

**FINAL ORDER APPROVING
AMENDMENT TO STIPULATED
MITIGATION PLAN**

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

FINDINGS OF FACT

1. On March 9, 2016, the Idaho Ground Water Appropriator's Inc. ("IGWA"), and A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to herein as "Surface Water Coalition" or "SWC"), submitted to the Department the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* ("Request for Order").

2. Attached to the Request for Order as Exhibits B and C respectively are the *Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriator's, Inc.*, and the *Addendum to Settlement Agreement* (collectively the "SWC-IGWA Settlement Agreement"). Attached to the Request for Order as Exhibit D is the October 7, 2015, *Agreement* between A&B Irrigation District and the IGWA members who entered into the SWC-IGWA Settlement Agreement (the "A&B-IGWA Agreement"). The SWC and IGWA submitted the SWC-IGWA Settlement Agreement and the A&B-IGWA Agreement (collectively, the "Mitigation Plan") as a stipulated mitigation plan in response to the SWC delivery call. *Request for Order* at 3.

3. The SWC “stipulates that the mitigation provided by participating IGWA members under the [Mitigation Plan] is, provided the [Mitigation Plan is] implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member.” *Request for Order* at 3. The SWC and IGWA agree that “[n]o ground water user participating in the [Mitigation Plan] will be subject to a delivery call by the SWC members as long as the provisions of the [Mitigation Plan] are being implemented.” *Mitigation Plan* at Exhibit B, p. 5.

4. Through the Mitigation Plan, the SWC and IGWA members agree to: (1) a total ground water diversion reduction of 240,000 acre-feet annually, (2) annual delivery of 50,000 acre-feet “of storage water through private lease(s) of water from the Upper Snake Reservoir system, delivered to the SWC 21 days after the date of allocation,” (3) IGWA using “its best efforts to continue existing conversions in Water Districts 130 and 140,” (4) ground water users not irrigating sooner than April 1 or later than October 31, (5) installation of approved closed conduit flow meters on all remaining unmeasured and power consumption coefficient measured ground water diversions by the beginning of the 2018 irrigation season, (6) establishment of a certain ground water level goal and benchmarks to “[s]tabilize and ultimately reverse the trend of declining ground water levels,” (7) development of a method “to measure reach gain trends in the Blackfoot to Milner reach,” (8) contributions by the SWC and IGWA to the State sponsored managed recharge program, (9) support by the SWC and IGWA of “NRCS funded permanent water conservation programs,” (10) IGWA undertaking “additional targeted ground water to surface water conversions and/or fallow land projects above American Falls,” and (11) “[i]f any of the benchmarks or ground water level goal is not met, additional recharge, consumptive use reductions, or other measures as recommended by” a steering committee established by the SWC and IGWA. *Mitigation Plan* at Exhibit B, p. 2-5.

5. On May 2, 2016, the Department issued the *Final Order Approving Stipulated Mitigation Plan* (“Final Order”). The Final Order approved the Mitigation Plan upon the following conditions:

a. All ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan.

b. The ground water level goal and benchmarks referenced in the Mitigation Plan are applicable only to the parties to the Mitigation Plan.

c. Approval of the Mitigation Plan does not create a ground water management area pursuant to Idaho Code § 42-233b.

Final Order at 4.

6. On February 7, 2017, the SWC and IGWA submitted to the Department the *Surface Water Coalition’s and IGWA’s Stipulated Amended Mitigation Plan and Request for Order* (“Second Request for Order”).

7. Attached to the Second Request for Order as Exhibit A is the *Second Addendum to Settlement Agreement* entered into on December 14, 2016, between the SWC and IGWA (“Second Addendum”).

8. The Second Addendum amends the Mitigation Plan by providing “further details concerning implementation of the [Mitigation Plan] addressing Sections 3.a (Consumptive Use Volume Reduction); 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a. (Adaptive Water Management).” *Second Request for Order* at 2. The SWC and IGWA request the Director issue an order approving the Second Addendum as an amendment to the Mitigation Plan. *Id.*

9. The Department published notice of the Second Request for Order and Second Addendum in the Idaho Mountain Express and Mountain Home News on February 22 and March 1, 2017; the Times News, Idaho Statesman, Post Register, and Idaho State Journal on February 23 and March 2, 2017; and the Standard Journal on February 24 and March 3, 2017. No protests were filed.

CONCLUSIONS OF LAW

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

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

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

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

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

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

6. CM Rule 42.02 states: “The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.” IDAPA 37.03.11.042.02.

7. CM Rule 43.03 establishes factors the Director may consider “in determining whether a proposed mitigation plan will prevent injury to senior rights.” IDAPA 37.03.11.043.03(a-o).

8. CM Rule 43.03(o) states: “Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.” IDAPA 37.03.11.043.03(o).

9. The Mitigation Plan was entered into between the SWC and IGWA in accordance with CM Rule 43.03(o). Again, the SWC “stipulates that the mitigation provided by participating IGWA members under the [Mitigation Plan] is, provided the [Mitigation Plan] is implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member.” *Request for Order* at 3. The SWC and IGWA agree that “[n]o ground water user participating in the [Mitigation Plan] will be subject to a delivery call by the SWC members as long as the provisions of the [Mitigation Plan] are being implemented.” *Mitigation Plan* at Exhibit B, p. 5.

10. As discussed above, the Mitigation Plan requires numerous ongoing activities, such as annual ground water diversion reductions and storage water deliveries, irrigation season reduction, installation of measurement devices, support of the State sponsored managed recharge program and NRCS funded permanent water conservation programs, efforts to continue existing conversions, additional conversions and/or fallow land projects, and establishment and operation of a steering committee and technical work group. *Mitigation Plan* at Exhibit B, p. 2-5. The Mitigation Plan also includes reference to a certain ground water level goal and benchmarks, development of a method “to measure reach gain trends in the Blackfoot to Milner reach,” and additional recharge, consumptive use reductions, or other measures should any of the benchmarks or the ground water level goal not be met. *Id.* at Exhibit B, p. 3-5. The parties to the Mitigation Plan should be responsible for these activities and the ground water level goal and benchmarks are only applicable to the parties to the Mitigation Plan as specified in the Mitigation Plan.

11. The Second Addendum “provides further details concerning implementation of the [Mitigation Plan] addressing Sections 3.a (Consumptive Use Volume Reduction); 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a. (Adaptive Water Management).” *Second Request for Order* at 2.

12. The Second Addendum references the Department and requests the Department undertake specific actions in support of the Mitigation Plan and Second Addendum. The Department will exert its best efforts to support the activities of IGWA and the SWC. However, the Department is not a signatory to the Mitigation Plan or Second Addendum, and approval of the Second Addendum should not be construed to obligate the Department to undertake any

particular action. Furthermore, approval of the Second Addendum does not limit the Director's enforcement discretion or otherwise commit the Director to a particular enforcement approach.

13. Having reviewed the Second Request for Order, Second Addendum, Mitigation Plan, CM Rules, and the proceedings herein, the Director will approve the Second Addendum as an amendment to the Mitigation Plan.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Second Addendum is APPROVED as an amendment to the Mitigation Plan with the following conditions:

- a. While the Department will exert its best efforts to support the activities of IGWA and the SWC, approval of the Second Addendum does not obligate the Department to undertake any particular action.
- b. Approval of the Second Addendum does not limit the Director's enforcement discretion or otherwise commit the Director to a particular enforcement approach.

DATED this 9th day of May 2017.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of May 2017, the above and foregoing was served on the following by the method(s) indicated below:

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Kimi White

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

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

(Required by Rule of Procedure 740.02)

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

PETITION FOR RECONSIDERATION

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

REQUEST FOR HEARING

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

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

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

EXHIBIT F

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

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

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

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

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

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

I. Ground Water Districts’ Compliance with Approved Mitigation Plan

The Director approved the stipulated mitigation plan submitted by SWC and IGWA on May 2, 2016. *See Final Order Approving Stipulated Mitigation Plan*. Pursuant to the plan the signatory¹ ground water districts and their members agreed to “a total ground water diversion reduction of 240,000 acre-feet annually.” *See Order* at 2. On Friday April 1, 2022, counsel for IGWA submitted the districts’ 2021 performance report. As detailed in that report, the signatory ground water districts only performed 56,953 acre-feet in diversion reductions and 65,831 acre-feet in recharge for a total of 122,784 acre-feet. IDWR recently submitted its verification report on June 30, 2022. *See Brian Ragan June 30, 2022 Memo*. IDWR’s numbers differed from IGWA’s in that IDWR assumed (0) diversion for various wells within Carey Valley and North Snake Ground Water Districts. *See id.* at 3, *Table 2 Notes*. Further, IDWR’s reduction calculations were significantly different than IGWA’s resulting in IDWR using a diversion reduction value of 66,586 acre-feet compared to IGWA’s number of 56,952 acre-feet. The Coalition requests further review of this issue given the large disparity. IDWR also used a smaller recharge value which was 1,514 acre-feet less than IGWA’s. *See Memo* at 5, *Table 4*.

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

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

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

II. Steering Committee Impasse

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

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

Response at 2.

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

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

REQUEST FOR STATUS CONFERENCE

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

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

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

DATED this 21st day of July, 2022.

BARKER ROSHOLT & SIMPSON LLP



John K. Simpson
Travis L. Thompson

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

FLETCHER LAW OFFICE



for

W. Kent Fletcher

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

CERTIFICATE OF SERVICE

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

<p>Director Gary Spackman Garrick Baxter Sarah Tschohl State of Idaho Dept of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail</p> <p>gary.spackman@idwr.idaho.gov garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov</p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only</p> <p>mhoward@usbr.gov emcgarry@usbr.gov</p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only</p> <p>tony.olenichak@idwr.idaho.gov</p>
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EXHIBIT G

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

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

Docket No. CM-DC-2010-001

Docket No. CM-MP-2016-001

NOTICE OF STATUS CONFERENCE

BACKGROUND

On July 21, 2022, the Surface Water Coalition (“SWC”) filed with the Idaho Department of Water Resources (“Department”) the *Surface Water Coalition’s Notice of Steering Committee Impasse/Request for Status Conference* (“Request”) in the above-captioned matters.¹ In the Request, the SWC alleges that the ground water districts are not complying with the stipulated mitigation plan approved by the Director on May 2, 2016.² *Request* at 2. The SWC states that the allegations of noncompliance have been reviewed by the steering committee, as required by the approved mitigation plan, and that the SWC and the Idaho Ground Water Appropriators, Inc. (“IGWA”) have reached an impasse on whether there has been a breach. *Id.* at 3-4. The SWC requests the Director set a status conference to discuss the allegations of noncompliance. *Id.* at 4. The SWC also requests a status conference to discuss discrepancies between the numbers in IGWA’s 2021 performance report and IDWR’s verification report. *Id.*

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

NOTICE OF STATUS CONFERENCE

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

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

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

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

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

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

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

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

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

Dated this 26th day of July 2022.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

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

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<p>Tony Olenichak IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 Tony.Olenichak@idwr.idaho.gov</p>	<input checked="" type="checkbox"/> Email
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<p>COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 wparsons@pmt.org</p>	<input checked="" type="checkbox"/> Email



 Megan Jenkins
 Administrative Assistant II

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Attorneys for Idaho Ground Water Appropriators, Inc.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF IGWA’S SETTLEMENT
AGREEMENT MITIGATION PLAN

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

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

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

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

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

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

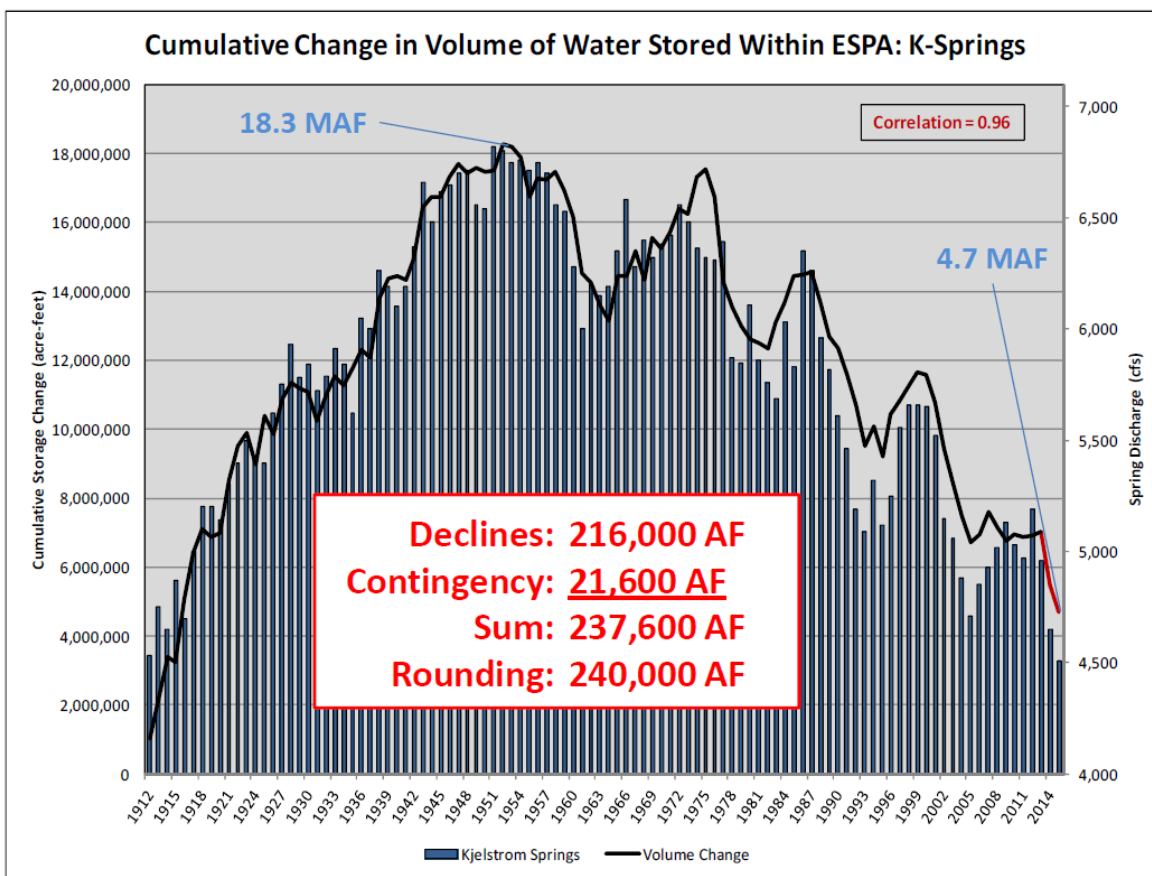
supplement this response based on information presented at the August 5 status conference.

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

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

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

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



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

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

Section 3.a.ii of the Agreement confirms that the districts represented by IGWA are responsible only for their “proportionate share” of the aquifer recovery goal: “Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their *proportionate share* of the total annual ground water reduction or in conducting an equivalent private recharge activity.” (Emphasis added.) Because IGWA districts do not account for all pumping from the ESPA, they are responsible for mitigating for only their proportionate share. The parties contemplated that A&B Irrigation District, Southwest Irrigation District, cities, and other non-IGWA members would be required to provide additional mitigation, above and beyond the mitigation provided by IGWA, to aid in recovering the ESPA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

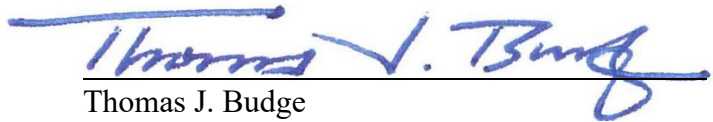
² A five-year average is also used to measure compliance under the Cities Settlement Agreement and to measure compliance with ground water management plans in the Oakley Valley.

CONCLUSION

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

DATED this 3rd day of August, 2022.

RACINE OLSON, PLLP

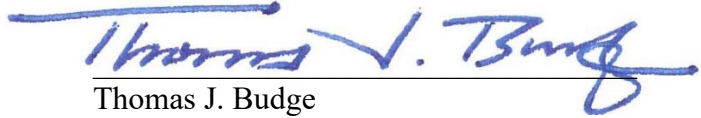


Thomas J. Budge

*Attorneys for Idaho Ground Water
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CERTIFICATE OF SERVICE

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


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 Irrigation District, Milner Irrigation District,
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 Canal Company*

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

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

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

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

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

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

REPLY

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

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

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

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

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

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

Settlement Agreement at 2, ¶ 3.a.

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

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

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

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

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

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

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

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

Black's Law Dictionary, p. 58 (6th Ed. 1991) (emphasis added).

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

CONCLUSION

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

DATED this 4th day of August, 2022.

BARKER ROSHOLT & SIMPSON LLP



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

FLETCHER LAW OFFICE

 for

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

CERTIFICATE OF SERVICE

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

<p>Director Gary Spackman Garrick Baxter Sarah Tschohl State of Idaho Dept of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail file@idwr.idaho.gov gary.spackman@idwr.idaho.gov garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov</p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only mhoward@usbr.gov emcgarry@usbr.gov</p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only tony.olenichak@idwr.idaho.gov</p>
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Travis L. Thompson

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Attorneys for Idaho Ground Water Appropriators, Inc.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

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

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

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

IN THE MATTER OF IGWA’S SETTLEMENT
AGREEMENT MITIGATION PLAN

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

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

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

the conference.

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

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

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

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

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

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

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

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

Director intended to take action on the SWC Notice.

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

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

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

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

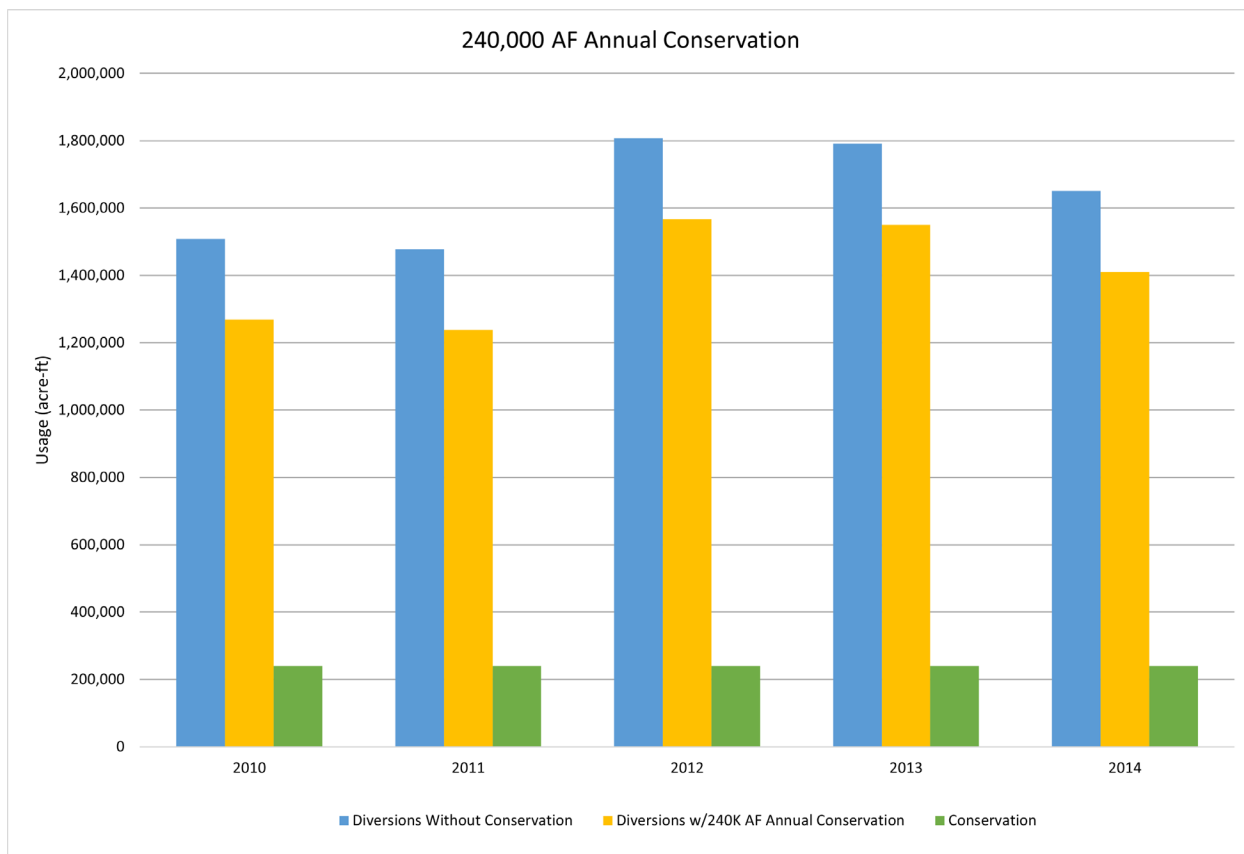
There is no dispute that section 3.a.i of the Agreement contemplates 240,000 acre-feet of groundwater conservation "annually." The question is how to measure annual conservation. IGWA and the SWC have presented two different methods by which compliance with section 3.a could be measured. IGWA contends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

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

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

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

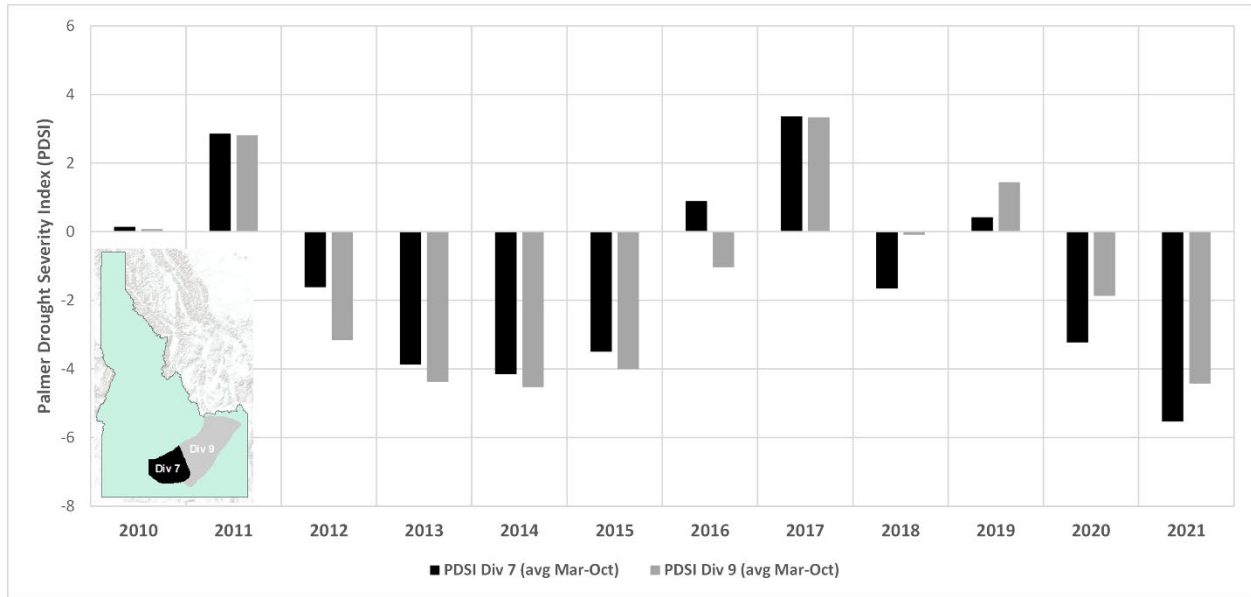
² Diversion volumes exclude usage from 192 wells in Madison Ground Water District and Henry's Fork Ground Water District that were not under measurement orders during the 2010-2014 time period. To account for null values within the WMIS database, an averaging factor was applied. Adjustments were made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



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

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

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

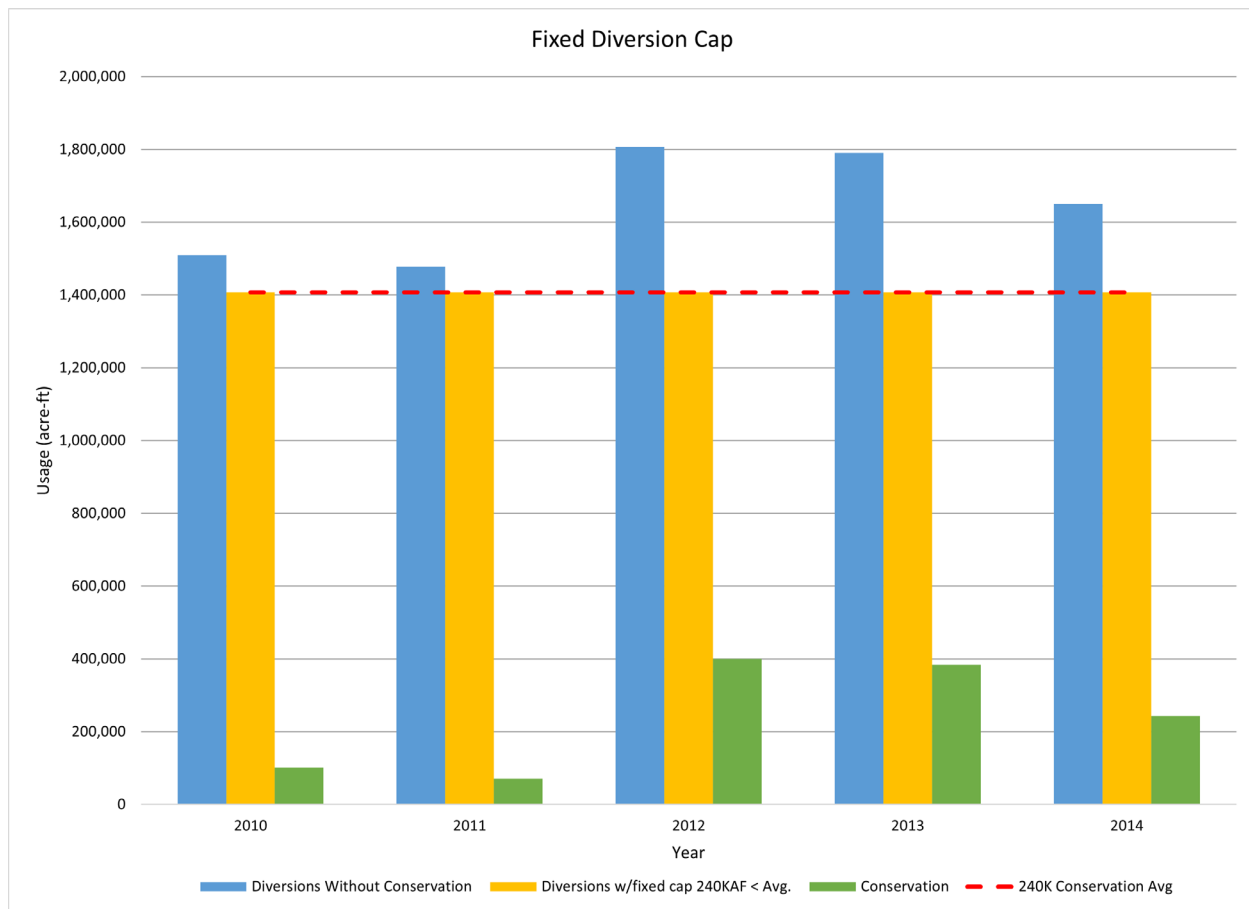


When the Settlement Agreement was signed in 2015, neither IGWA nor the SWC could foresee what climatic conditions would occur in future years. And it is impossible to measure groundwater conservation prospectively by comparing diversions both with and without taking conservation actions, because farmers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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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


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

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

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

DATED this 12th day of August, 2022.

RACINE OLSON, PLLP



Thomas J. Budge

*Attorneys for Idaho Ground Water
Appropriators, Inc.*

CERTIFICATE OF SERVICE

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


Thomas J. Budge

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EXHIBIT K

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

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

IN THE MATTER OF IGWA’S SETTLEMENT
AGREEMENT MITIGATION PLAN

Docket No. CM-MP-2016-001

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

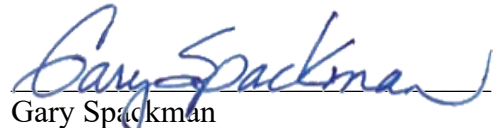
On August 5, 2022, the Director of the Idaho Department of Water Resources (“Department”) held a status conference in response to a request by the Surface Water Coalition (“SWC”). During the conference, counsel for the SWC and the Idaho Ground Water Appropriators, Inc. (“IGWA”) presented argument as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

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

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

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

Dated this 18th day of August 2022.


Gary Spackman
Director

CERTIFICATE OF SERVICE

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

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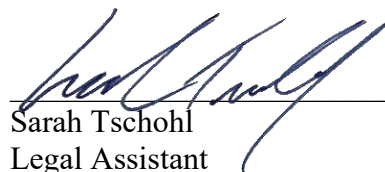

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STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

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

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

Docket No. CM-MP-2016-001

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

Idaho Ground Water Appropriators, Inc. (“IGWA”)¹ hereby objects to the *Notice of Intent to Take Official Notice of IGWA’s 2021 Settlement Agreement Performance Report and Supporting Spreadsheet* (“Notice”) issued August 18, 2022, in the above-captioned matter. As explained below, the Director cannot lawfully take official notice of IGWA’s 2021 performance report² without granting a hearing and allowing IGWA to present evidence concerning the report and any action the Director may take in reliance thereon. For the Director to selectively take official notice of certain facts, while precluding the parties from presenting their own evidence to counter or rebut such facts, would violate the constitutional right to due process, the Idaho Administrative Procedures Act, and the rules of procedure of the Department, as explained below.

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

² References to “IGWA’s 2021 performance report” include the supporting spreadsheet.

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

Introduction

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

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

Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Request for Hearing.

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

DATED August 23, 2022.

RACINE OLSON, PLLP

By: 
Thomas J. Budge
Attorneys for IGWA

CERTIFICATE OF SERVICE

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


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EXHIBIT M

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into effective September 7, 2022, between participating members of Idaho Ground Water Appropriators, Inc.¹ (“IGWA”) and participating members of the Surface Water Coalition² (“SWC”). Such participating members may be referred to herein individually as a “party” and collectively as the “parties.”

Recitals

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

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

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

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

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

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

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

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

Agreement

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

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

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

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

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

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

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

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

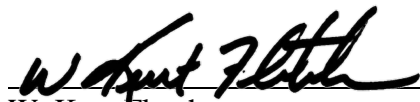
BARKER ROSHOLT & SIMPSON LLP

/s/ John Simpson 9/7/22

John Simpson
*Attorneys for A&B Irrigation District,
Burley Irrigation District, Milner Irrigation
District, NSCC and TFCC*

FLETCHER LAW OFFICE

September 7, 2022



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

RACINE OLSON, PLLP

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

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

EXHIBIT N

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

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

IN THE MATTER OF IGWA’S SETTLEMENT
AGREEMENT MITIGATION PLAN

Docket No. CM-MP-2016-001

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

Second Final Order at 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICABLE LAW

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

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

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

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

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

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

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

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

IDAPA 37.03.11.040.01.

CM Rule 42.02 states:

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

IDAPA 37.03.11.042.02.

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

FINDINGS OF FACT

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

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

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

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

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

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

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

TABLE 1

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

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

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

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

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

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

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

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

ANALYSIS AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

FINAL ORDER REGARDING COMPLIANCE WITH APPROVED MITIGATION PLAN—
Page 10

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TABLE 2

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

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

TABLE 3

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

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

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

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

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

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

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

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

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

Rangen June 1, 2015 Decision at 9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

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

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

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

DATED this 8th day of September 2022.

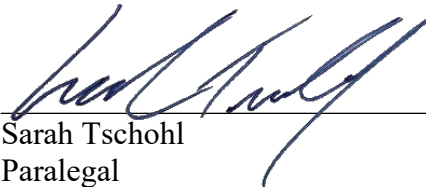

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

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

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Sarah Tschohl
Paralegal

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

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

(Required by Rule of Procedure 740.02)

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

PETITION FOR RECONSIDERATION

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

REQUEST FOR HEARING

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

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

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

EXHIBIT O

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Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF IGWA’S SETTLEMENT
AGREEMENT MITIGATION PLAN

Docket No. CM-MP-2016-001

Petition for Reconsideration and Request for Hearing

Idaho Ground Water Appropriators, Inc. (“IGWA”) submits this petition for reconsideration pursuant to Idaho Code § 67-5246(4) and rule 740.02.b of the Department’s rules of procedure in response to the *Final Order Regarding Compliance with Approved Mitigation Plan* (“Final Order”) issued September 8, 2022. This petition requests that the Director withdraw those parts of the Final Order that adjudicate IGWA’s contractual obligations under the IGWA-SWC Settlement Agreement¹ (the “Settlement Agreement”).

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

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

PETITION FOR RECONSIDERATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REQUEST FOR HEARING

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

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

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

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

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

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

CONCLUSION

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

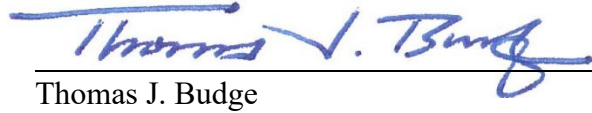
DATED September 22, 2022.

RACINE OLSON, PLLP

By: 
Thomas J. Budge
Attorneys for IGWA

CERTIFICATE OF SERVICE

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


Thomas J. Budge

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EXHIBIT P

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

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

Docket No. CM-MP-2016-001

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

IN THE MATTER OF IGWA'S SETTLEMENT
AGREEMENT MITIGATION PLAN

BACKGROUND

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

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

APPLICABLE LAW

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

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

ANALYSIS AND CONCLUSIONS OF LAW

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

NOTICE OF PREHEARING CONFERENCE

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

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

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

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

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

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

ORDER

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

Dated this 13th day of October 2022.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

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

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Megan Jenkins
Administrative Assistant II