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DISTRICT COURT OF THE STATE OF IDAHO

FOURTH JUDICIAL DISTRICT

ADA 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.

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

Case No. CV01-23-07893

IGWA'S REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING

Idaho Ground Water Appropriators, Inc. (IGWA), submits this reply brief pursuant to the *Notice of Hearing on Petition for Rehearing* entered January 22, 2024, in this action. This brief replies to *IDWR's Response in Opposition to Petition for Rehearing* and *Surface Water Coalition's Response to IGWA's Petition for Rehearing* filed February 5, 2022.

Reply Argument

IGWA filed a petition for judicial review in this case to challenge the Director's ruling that six ground water districts breached the IGWA-SWC Settlement Agreement in 2022 by failing to conserve the amount of groundwater required of them. The Director ruled that each district must conserve the following volumes, as set forth in Table 2 of the Final Order:

Ground Water District	Conservation Obligation (acre-feet)
American Falls-Aberdeen	39,395
Bingham	40,914
Bonneville-Jefferson	21,341
Carey	821
Jefferson-Clark	63,533
Henry's Fork	6,299
Madison	
Magic Valley	37,931
North Snake	29,765
Total	**240,000**

(Excerpt from Table 2, R. 412.) The Settlement Agreement does not specify the above conservation volumes. The Director calculated them on his own, using parol evidence. This is not the only reasonable way of calculating each district's proportionate share of 240,000 acre-feet, it is not the method used by the ground water districts from 2016-2021, and the districts have never agreed to the conservation obligations set forth above.

The Director also ruled that compliance with the above conservation obligations must be measured by comparing cumulative groundwater diversions among ground water district patrons in a given year against average diversions by district patrons from 2010-2014.[1] The Settlement Agreement does not prescribe this method of measuring compliance. The Director derived this method by using parol evidence. This is not the only reasonable way of measuring compliance

[1] This method is reflected in Table 2 of the *Amended Final Order Regarding Compliance with Approved Mitigation Plan* issued April 24, 2023. (R. 412.) The method consists of (1) calculating the Diversion Reduction volumes by subtracting 2022 Usage from Baseline volumes; (2) calculating Total Conservation volumes by adding Diversion Reduction and Accomplished Recharge/Direct Delivery volumes; then (3) subtracting IDWR Target Conservation volumes from Total Conservation volumes.

with each district's conservation obligation, it is not the method used by the ground water districts from 2016-2021, and the districts have never agreed to this method.

IGWA has argued that the Director erred by declaring the Settlement Agreement to be unambiguous, then using parol evidence to define conservation volumes and a compliance method that are not prescribed in the terms of the Settlement Agreement, while at the same time refusing to consider parol evidence of the parties' intent concerning the same. (*IGWA's Opening Br*., p. 21.) *IGWA's Opening Brief* in this case states: "Since the Settlement Agreement does not prescribe how the baseline will be defined, or how conservation will be measured as compared to the baseline, and since there are multiple methods that could be used, with averaging being one reasonable method, the Director erred as a matter of law by failing to find the 2015 Agreement latently ambiguous." *Id*.

This Court's *Memorandum Decision and Order* issued November 16, 2023 ("Decision") upholds the Director's determination that the Settlement Agreement is unambiguous, yet it does not explain where the Settlement Agreement prescribes the conservation volumes cited above, or where it prescribes the method adopted by the Director for measuring compliance. IGWA's petition for rehearing asks the Court to reconsider its Decision and either (a) find that the Settlement Agreement is ambiguous on these points, or (b) clarify the Court's basis for finding no ambiguity in the terms of the Settlement Agreement on these points. (*IGWA's Br. in Supp. of Pet. for Rehearing*, p. 5.)

Perhaps the best evidence that the Settlement Agreement does not prescribe the conservation volumes cited above, nor the method by which compliance is measured, is that neither the Idaho Department of Water Resources ("IDWR") nor the Surface Water Coalition ("SWC") point to a provision of the Settlement Agreement that prescribes these terms. Their tacit admission that Settlement Agreement does not prescribe these terms should compel the Court to grant IGWA's petition for rehearing, find the Settlement Agreement ambiguous on these points, and remand the matter to the Director to determine the intent of the parties based on parol evidence.

Since the Settlement Agreement does not explicitly prescribe the conservation obligations cited above, the method by which compliance is measured, nor the baseline volumes utilized in the compliance method, IDWR and the SWC attempt to avoid the issues, focusing instead on arguments that do not answer the question before this Court.

The SWC first argues that "IGWA's primary complaint is that the Director should not have allocated the 240,000 acre-feet in the same manner as the Districts chose to utilize," and that "[t]he Director's decision to evaluate the Districts' compliance with the same allocation method that IGWA used was reasonable." (*SWC Resp. to IGWA's Pet. for Rehearing*, p. 3, 5.) While the Director borrowed data from IGWA's method, he most certainly did not utilize IGWA's method. IGWA would not have petitioned for judicial review if he had. This case exists only because the Director imposed larger conservation obligations and adopted a different compliance method which makes it much more difficult for ground water districts to comply with the Settlement Agreement, and much more likely that their patrons will be curtailed.

The SWC next asserts that "IGWA ultimately misses the point that the Districts failed to conserve what was required under the Settlement Agreement and the 2016 Mitigation Plan Order." *Id*. Actually, "what was required" is precisely the point. The Director assigned conservation obligations to each ground water district that are not prescribed in the Settlement Agreement, and he adopted a compliance method that is not prescribed in the Settlement Agreement. He used parol evidence to do both, while refusing to consider parol evidence of the intention of the parties on these points. IGWA requests that the matter be remanded so the Director can determine "what was required" based on "the intention of the parties." *Ida-Therm, LLC v. Bedrock Geothermal*, LLC, 154 Idaho 6, 9 (2012).

The SWC also argues that "it is undisputed that the Districts only conserved roughly 50% of what was required in 2021," and that "IGWA's complaint about what was done doesn't change the result." (*SWC Resp. to IGWA's Pet. for Rehrg*., p. 4, 5.) Actually, IGWA vehemently disputes the SWC's claim of non-compliance in 2021. The Director's finding that IGWA conserved 122,784 acre-feet is based on conservation figures and a compliance method that are not prescribed in the Settlement Agreement. Under the method actually utilized by the ground water districts from 2016-2021, all districts complied in 2021. (R. 33.) From 2017-2021, the ground water districts conserved 347,220 acre-feet on average—an excess of 141,823 acre-feet per year. *Id*.

After the Settlement Agreement was signed, IGWA elected to utilize average diversions over a five-year period (2010-2014) as the baseline against which post-settlement groundwater conservation would be measured by. This average was selected as the baseline in part because IGWA understood that averaging could also be used for measuring compliance. When the

Director modified IGWA's compliance method by eliminating the use of averaging, it became much more difficult for ground water districts to comply with the Settlement Agreement, and much more likely that curtailment will occur.

Had the Director considered parol evidence of the parties' intent, the record would show that the SWC in fact consented to IGWA's use of averaging for the purpose of compliance. Furthermore, undisputed evidence shows that under the compliance method IGWA employed from 2016-2021, every ground water district met its conservation obligation in 2021.

Rather than acknowledge the fact that the Settlement Agreement does not prescribe specific conservation volumes for each district, or the method by which compliance is measured, IDWR stubbornly insists that the term "annually" somehow justifies the Director's selective use of parol evidence to develop his own methods. (*IDWR's Resp. In Opp. To Pet. For Rehearing*., p. 5.) Yet, it cannot be avoided that the term "annually" simply does not define the volume of groundwater that each district must conserve, nor does it require that post-settlement diversions be measured against a five-year average of pre-settlement diversions.

At the hearing, IGWA demonstrated that there are multiple reasonable ways of measuring compliance with groundwater conservation obligations. (*IGWA's Opening Br.,* p. 6-8, 16-20.) The method adopted by the Director is not the only plausible or enforceable method. *Id*.

IDWR also argues that the individual conservation obligations of the ground water districts are not a "material term" of the Settlement Agreement. (*IDWR's Resp. In Opp. To Pet. For Rehearing.*, p. 7.) A contract term is "material" if it "go[es] to the heart of the very essence of the contract." *Griffith v. Clear Lakes Trout Co*., 143 Idaho 604, 609 (2007). To be enforceable, an agreement "must generally be sufficiently definite to permit the determination of breach and remedies." 17A Am.Jur. 2d Contracts § 180.

The individual conservation obligations of the districts, and the method by which compliance is measured, are material terms of the Settlement Agreement because it is impossible to evaluate a enforce section 3.a of the Settlement Agreement without them. Indeed, the Director cannot find any district to be in breach without first deciding how much groundwater it must conserve, and how to measure conservation. Thus, these terms are, by definition, material.

As material terms, the Director's interpretation must be based on the plain language of the Settlement Agreement. The Director cannot lawfully consider parol evidence unless he finds the Settlement Agreement to be ambiguous. And, if the Settlement Agreement is ambiguous,

parol evidence becomes relevant for the specific purpose of "discovering the intention of the parties." *Ida-Therm*, 154 Idaho at 9. Idaho law does not allow the Director to consider parol evidence to develop his own theories and methodologies as to how compliance should be measured; he must consider it for the specific purpose of discovering the intention of the parties.

Importantly, the parol evidence rule "is a rule of substantive law, not a rule of evidence." *Porcello v. Est. of Porcello*, 167 Idaho 412, 422, 470 P.3d 1221, 1231 (2020). "[P]arol evidence is excluded because the law requires the terms of the agreement to be found in the writing itself." *Id.* at 422, 470 P.3d at 1231. Accordingly, the Director does not have discretion to ignore the parol evidence rule or impose obligations in violation of the rule.

Here, the Director declared the Settlement Agreement unambiguous, but then used parol evidence to define conservation volumes and a compliance method that are not prescribed in the Settlement Agreement, while at the same time refusing to consider parol evidence of the intention of the parties. This is a violation of Idaho law.

Conclusion

Based on the foregoing, IGWA respectfully requests that this Court either (a) find the proportionate share term ambiguous and remand the case to the Director to evaluate the intent of the parties based on the evidence in the record, or (b) clarify the court's basis for finding the term to be unambiguous. In addition, IGWA requests that the court find that the substantial rights of IGWA and its members have been prejudiced, for the reasons stated in *IGWA's Opening Brief* and in *IGWA's Brief in Support of Petition for Rehearing*.

RESPECTFULLY SUBMITTED this 12th day of February, 2024.

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By: _____
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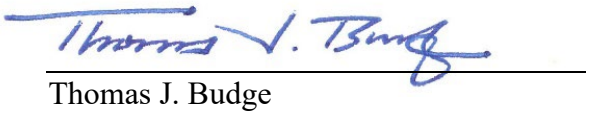
CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2024, I filed the foregoing document via iCourt and served it upon the persons below via iCourt:



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