Thomas J. Budge (ISB# 7465)
Elisheva M. Patterson (ISB# 11746)
RACINE OLSON, PLLP
201 E. Center St. / P.O. Box 1391
Pocatello, Idaho 83204
Phone: (208) 232-6101
tj@racineolson.com
elisheva@racineolson.com

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

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR ADA COUNTY**

IDAHO GROUND WATER APPROPRIATORS, INC.,

Petitioner/Appellant,

vs.

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

Respondents/Respondents.

vs.

A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT NO. 2, MINIDOKA IRRIGATION DISTRICT, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, BINGHAM GROUND WATER DISTRICT, CITY OF POCATELLO, CITY OF BLISS, CITY OF BURLEY, CITY OF CAREY, CITY OF DECLO, CITY OF DIETRICH, CITY OF GOODING, CITY OF HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF SHOSHONE, and the CITY OF WENDELL,

Intervenors/Respondents.

Case No. CV01-23-07893

**IGWA'S NOTICE OF APPEAL**

Filing Fee: $129.00

| |
|---|
| 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 |

TO: THE ABOVE NAMED RESPONDENTS: IDAHO DEPARTMENT OF WATER RESOURCES, AND MATHEW WEAVER IN HIS CAPACITY AS THE DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES;

AND INTERVENORS: A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT NO. 2, MINIDOKA IRRIGATION DISTRICT, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, BINGHAM GROUND WATER DISTRICT, CITY OF POCATELLO, CITY OF BLISS, CITY OF BURLEY, CITY OF CAREY, CITY OF DECLO, CITY OF DIETRICH, CITY OF GOODING, CITY OF HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF SHOSHONE, AND CITY OF WENDELL;

AND THEIR ATTORNEYS: GARRICK L. BAXTER, DEPUTY ATTORNEY GENERAL, IDAHO DEPARTMENT OF WATER RESOURCES, P.O. BOX 83720, BOISE, IDAHO 83720-0098; DYLAN ANDERSON, DYLAN ANDERSON LAW, P.O. BOX 35, REXBURG, IDAHO 83440; SKYLER C. JOHNS, NATHAN M. OLSEN, STEVEN L. TAGGART, OLSEN TAGGART PLLC, 1449 E 17TH ST, STE A, P.O. BOX 3005, IDAHO FALLS, ID 83403; JOHN K. SIMPSON, TRAVIS L. THOMPSON, MARTEN LAW, P.O. BOX 63, TWIN FALLS, ID 83303; W. KENT FLETCHER, FLETCHER LAW OFFICE, P.O. BOX 248, BURLEY, ID 83318; SARAH A. KLAHN, MAXIMILIAN BRICKER, SOMACH SIMMONS & DUNN, 2033 11$^{TH}$ STREET, STE 5, BOULDER, CO 80302; CANDICE MCHUGH, CHRIS BROMLEY, MCHUGH BROMLEY, PLLC, 380 SOUTH 4$^{TH}$ STREET, SUITE 103, BOISE, ID 83702; RICH DIEHL, CITY OF POCATELLO, P.O. BOX 4169, POCATELLO, ID 83205;

AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN:

1. The above-named appellant, Idaho Ground Water Appropriators, Inc. ("IGWA"), appeals to the Idaho Supreme Court from the *Memorandum Decision and Order* entered November 16, 2023, the *Judgment* entered on the same date, and the *Order Denying Petition for Rehearing* entered March 5, 2024, in Ada County Case No. CV01-23-07893, Honorable Eric J. Wildman presiding. Copies of said judgment and orders are attached hereto as Appendix A.

2. The judgment and orders cited above were issued in response to a petition for judicial review of the *Amended Final Order Regarding Compliance with Approved Mitigation Plan* ("Amended Compliance Order") issued by Gary Spackman, former director of the Idaho Department of Water Resources ("IDWR" or "Department"), on April 24, 2023, *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 No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company* and *In the Matter of IGWA's Settlement Agreement Mitigation Plan*, IDWR Docket No. CM-MP-2016-002, a copy of which is attached hereto as Appendix B.

3. IGWA has a right to appeal to the Idaho Supreme Court, and the judgment and orders described in paragraph 1 are appealable, pursuant to I.R.C.P. 84(t)(2) and I.A.R. 11(a)(2).

4. The following is a preliminary statement of issues IGWA intends to assert on appeal:

4.1 Whether the Director erred as a matter of law by concluding that the Settlement Agreement unambiguously prescribes how the signatory districts' proportionate groundwater conservation obligations are to be calculated.

4.2 Whether the Director erred as a matter of law by concluding that the Settlement Agreement unambiguously prescribes how annual groundwater conservation will be measured.

4.3 Whether finding of fact number 43 in the Amended Compliance Order ("Neither Mr. Higgs nor Mr. Deeg testified that the Order Approving Mitigation Plan or Order were ambiguous or otherwise unclear concerning the apportionment of the 240,000 ac-ft reduction obligation") is supported by substantial evidence in the record as a whole.

4.4 Whether the Director's conclusion of law that "IGWA offered neither evidence nor argument that the Mitigation Plan—when read as a whole in its entirety—was

ambiguous concerning IGWA's obligation to conserve 240,000 ac-ft" is supported by substantial evidence in the record as a whole, or is arbitrary, capricious, or an abuse of discretion.

4.5 Whether the Director's reapportionment of contractual obligations pursuant to finding of fact number 19 of the Amended Compliance Order is supported by substantial evidence in the record as a whole, exceeds the statutory authority of the Director, or is arbitrary, capricious, or an abuse of discretion.

4.6 Whether the Department is liable for attorney fees under Idaho Code § 12-117 for finding no evidence of patent or latent ambiguity, without a reasonable basis in fact or law.

4.7 Whether the District Court erred by refusing to consider IGWA's argument that the Settlement Agreement is ambiguous by reasoning that it deals with formation and not ambiguity.

4.8 Whether the District Court erred by ruling that IGWA did not challenge the method by which groundwater conservation is measured.

5. No order has been entered sealing all or any portion of the record.

6. A transcript was prepared in connection with the petition for judicial review from which this appeal is taken, and is part of the agency record and district court record.

7. The appellant, IGWA, requests the following documents to be included in the clerk's record in addition to those automatically included under I.A.R. 28:

7.1 The agency record on appeal.

7.2 The agency transcript on appeal.

7.3 Settlement Agreement Performance Report dated April 1, 2023.

7.4 First Addendum to 2022 Settlement Agreement Performance Report dated February 22, 2024.

8. IGWA does not request any documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court, other than those that are already part of the agency record.

9. I certify:

9.1 This notice of appeal has not been served on any reporter because a transcript is already part of the agency record.

9.2 A reporter's transcript is not requested.

9.3 The estimated fee for appropriation of the clerk's record has been paid.

9.4 The appellate filing fee has been paid.

9.5 Service has been made upon all parties required to be served pursuant to Rule 20, including the Attorney General of Idaho pursuant to Section 67-1401(1), Idaho Code.

Dated this 5th day of April, 2024.

RACINE OLSON, PLLP

By: 

Thomas J. Budge
*Attorneys for IGWA*

# APPENDIX A

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

- **Memorandum Decision and Order**
- **Judgment**
- **Order Denying Petition for Rehearing**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

IDAHO GROUND WATER APPROPRIATORS, INC,

Petitioner,

vs.

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

Respondents,

and

CITY OF POCATELLO, CITY OF BLISS, CITY OF BURLEY, CITY OF CAREY, CITY OF DECLO, CITY OF DIETRICH, CITY OF GOODING, CITY OF HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF SHOSHONE, CITY OF WENDELL, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, and BINGHAM GROUNDWATER DISTRICT

Intervenors.

Case No. CV01-23-7893

**MEMORANDUM DECISION AND ORDER**

IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIRS DISTRICT NO. 2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY.

IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN

# I

# BACKGROUND

## A. Delivery call and approved mitigation plan.

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

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

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

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

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

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

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

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

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

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

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

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

R., 436.

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

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

[3] A&B Irrigation District subsequently entered into a separate agreement with IGWA in October 2015. R., 498. That separate agreement states in part that "A&B agrees to participate in the *Settlement Agreement* as a surface water right holder only." R., 498. Further, that the "obligations of the Ground Water Districts set forth in Paragraphs 2 – 4 of the *Settlement Agreement* do not apply to A&B and its ground water rights." R., 498.

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

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

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

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

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

---

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

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

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

> If, based on the information reported and available, the Steering Committee finds any breach of the Long Term Practices as set forth in paragraph 3 of the Agreement, the Steering Committee shall give ninety (90) days written notice of the breach to the breaching party specifying the actions that must be taken to cure such breach. If the breaching party refuses or fails to take such actions to cure the breach, the Steering Committee shall report the breach to the Director with all supporting information, with a copy provided to the breaching party. If the Director determines based on all available information that a breach exists which has not been cured, the Steering Committee will request that the Director issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to immediate curtailment pursuant to CM 40.05.
>
> If the Surface Water Coalition and IGWA do not agree that a breach has occurred or cannot agree upon actions that must be taken by the breaching party to cure the breach, the Steering Committee will report the same to the Director and request that the Director evaluate all available information, determine if a breach has occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.

R., 479.

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

**B. 2021 compliance issue.**

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

> On Friday April 1, 2022, counsel for IGWA submitted the districts' 2021 performance report. As detailed in that report, the signatory ground water districts only performed 56,953 acre-feet in diversion reductions and 65,831 acre-feet in recharge for a total of 122,784 acre-feet.

> The nine signatory ground water districts' 2021 actions were approximately 117,216 acre-feet short of what is required by the stipulated mitigation plan and the Director's order approving the same. Consequently, IGWA and its junior priority ground water right members are not operating in accordance with the approved plan and are failing to mitigate the material injury to the Coalition members.

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

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

1. IGWA's annual diversion reduction requirement (annual or average?)
2. What that requirement is (240,000 af or something less)
3. Whether IGWA complied in 2021 based upon its technical information and IDWR's review of the same (as identified in April1 and June 30 reports)
4. Disparity in those reports (what was the actual number for both diversion reduction and recharge that occurred in 2021)
5. Director's planned action in response to IGWA's non-compliance with mitigation plan.

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

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

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

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

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

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

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

## II.
## STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

## III.

## ANALYSIS

### A. The Director's Final Order is affirmed.

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

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

The Director found the approved mitigation plan unambiguously requires a reduction in ground water diversions in the amount of 240,000 acre-feet each year. R., 415-416. The approved mitigation plan is based on a settlement agreement that was jointly presented to the Director as a proposed mitigation plan under CM Rule 43.[6] The interpretation of a settlement agreement is "governed by the same rules and principles as are applicable to contracts generally." *Budget Truck Sales, LLC v. Tilley*, 163 Idaho 841, 846, 419 P.3d 1139, 1144 (2018). The interpretation of a contract begins with the language of the contract itself. *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). If the language of the contract is unambiguous, then its meaning and legal effect must be determined from its words. *Id.* A contract is ambiguous if it is reasonably subject to conflicting interpretations. *Id.* Determining whether a contract is ambiguous is a question of law over which this Court exercises free review. *Id.*

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

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

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

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

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

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

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

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

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

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

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

---

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

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

*IGWA's Opening Br.*, p.20.

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

> 9. **Entire Agreement.**
> This Agreement sets forth all understandings between the parties with respect to the SWC delivery call. There are no understandings, covenants, promises, agreements, conditions, either oral or written between the parties other than those contained herein. The parties expressly reserve all rights not settled by this Agreement.

R., 440. A written agreement containing a merger clause "is complete on its face." *City of Meridian v. Petra Inc.*, 154 Idaho 425, 435, 299 P.3d 232, 242 (2013). Since the Settlement Agreement is complete on its face the Court need not look to extrinsic evidence. For these reasons, the Court finds IGWA's argument's that Section 3.a.i of the Settlement Agreement is patently ambiguous to be unavailing.

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

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

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

R., 437 (emphasis added).

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

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

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

---

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

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

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

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

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

---

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

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

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

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

**B. Substantial rights.**

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

**C. Attorney fees.**

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

## IV.

## ORDER

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

Dated November 16, 2023

ERIC J. WILDMAN
District Judge

## CERTIFICATE OF SERVICE

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

| | |
|---|---|
| Thomas Budge<br>tj@racineolson.com | via Email |
| Gary Spackman<br>Garrick Baxter<br>gary.spackman@idwr.idaho.gov<br>garrick.baxter@idwr.idaho.gov | via Email |
| John Simpson<br>Travis Thompson<br>Michael Short<br>jks@idahowaters.com<br>tlt@idahowaters.com<br>mas@idahowaters.com | via Email |
| W. Kent Fletcher<br>wkf@pmt.org | via Email |
| Sarah Klahn<br>sklahn@somachlaw.com | via Email |
| Rich Diehl<br>rdiehl@pocatello.us | via Email |
| Candice McHugh<br>Chris Bromley<br>cmchugh@mchughbromley.com<br>cbromley@mchughbromley.com | via Email |
| Skyler Johns<br>Steven Taggart<br>sjohns@olsentagart.com<br>staggart@olsentagart.com | via Email |
| Dylan Anderson<br>dylan@dylananderson.com | via Email |

Date: 11/16/2023

Trent Tripple
Clerk of the Court

By Erin Rowell
Deputy Clerk

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

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

| | |
|---|---|
| IDAHO GROUND WATER APPROPRIATORS, INC,<br><br>Petitioner,<br><br>vs.<br><br>THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Director of the Idaho Department of Water Resources,<br><br>Respondents,<br><br>and<br><br>CITY OF POCATELLO, CITY OF BLISS, CITY OF BURLEY, CITY OF CAREY, CITY OF DECLO, CITY OF DIETRICH, CITY OF GOODING, CITY OF HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF SHOSHONE, CITY OF WENDELL, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, and BINGHAM GROUNDWATER DISTRICT<br><br>Intervenors. | Case No. CV01-23-7893<br><br>**JUDGMENT** |

| | |
|---|---|
| IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIRS DISTRICT NO. 2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY. | ) |
| IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN | ) |

JUDGMENT IS ENTERED AS FOLLOWS:

The Respondents' Amended Final Order Regarding Compliance with Approved Mitigation Plan dated April 24, 2023, is hereby affirmed.

Dated November 16, 2023

ERIC J. WILDMAN
District Judge

## CERTIFICATE OF SERVICE

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

| | |
|---|---|
| Thomas Budge<br>tj@racineolson.com | via Email |
| Gary Spackman<br>Garrick Baxter<br>gary.spackman@idwr.idaho.gov<br>garrick.baxter@idwr.idaho.gov | via Email |
| John Simpson<br>Travis Thompson<br>Michael Short<br>jks@idahowaters.com<br>tlt@idahowaters.com<br>mas@idahowaters.com | via Email |
| W. Kent Fletcher<br>wkf@pmt.org | via Email |
| Sarah Klahn<br>sklahn@somachlaw.com | via Email |
| Rich Diehl<br>rdiehl@pocatello.us | via Email |
| Candice McHugh<br>Chris Bromley<br>cmchugh@mchughbromley.com<br>cbromley@mchughbromley.com | via Email |
| Skyler Johns<br>Steven Taggart<br>sjohns@olsentagart.com<br>staggart@olsentagart.com | via Email |
| Dylan Anderson<br>dylan@dylananderson.com | via Email |

Date: 11/16/2023

Trent Tripple
Clerk of the Court

By Erin Rowell
Deputy Clerk

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

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

| | |
|---|---|
| IDAHO GROUND WATER APPROPRIATORS, INC,<br><br>Petitioner,<br><br>vs.<br><br>THE IDAHO DEPARTMENT OF WATER RESOURCES and MATHEW WEAVER in his official capacity as Director of the Idaho Department of Water Resources,<br><br>Respondents,<br><br>and<br><br>CITY OF POCATELLO, CITY OF BLISS, CITY OF BURLEY, CITY OF CAREY, CITY OF DECLO, CITY OF DIETRICH, CITY OF GOODING, CITY OF HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF SHOSHONE, CITY OF WENDELL, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, and BINGHAM GROUNDWATER DISTRICT<br><br>Intervenors. | Case No. CV01-23-7893<br><br>**ORDER DENYING PETITION FOR REHEARING** |

IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIRS DISTRICT NO. 2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY.

IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN

## I
## BACKGROUND

This matter concerns a Petition seeking judicial review of the Director's Amended Final Order Regarding Compliance with Approved Mitigation Plan dated April 24, 2023 ("Final Order"). On November 16, 2023, the Court entered a Memorandum Decision and Order, along with a Judgment, affirming the Final Order. The background set forth in the Memorandum Decision is incorporated herein by reference. On November 29, 2023, the Idaho Gound Water Appropriators, Inc. ("IGWA") filed a Petition for Rehearing. The parties briefed the issues raised and a hearing on the Petition for Rehearing was held on February 15, 2024.

## II.
## ANALYSIS

In the Final Order, the Director held the mitigation plan unambiguously requires participating IGWA members to reduce ground water diversions in the amount of 240,000 acre-feet of water each year. R., 415. He further found the mitigation plan unambiguously prohibits participating IGWA members from apportioning a percentage of the annual reduction requirement to A&B Irrigation District and/or Southwest Irrigation District. R., 416. The Court affirmed the Director's holdings in these respects in the Memorandum Decision. In its Petition for Rehearing, IGWA reasserts challenges to the Director's enforcement of the approved

mitigation plan. In particular, it challenges the Director's proportioning of the 240,000 acre-feet reduction obligation among the participating IGWA members.

**A. The Director's proportioning of the 240,000 acre-feet reduction obligation is affirmed.**

With respect to the 240,000 acre-feet reduction obligation, Section 3.a.ii of the Settlement Agreement provides that "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 . . . ." R., 437. Prior to April 1 of each year, the Settlement Agreement requires participating IGWA members to submit their ground water diversions for the prior irrigation season to the steering committee. R., 478. On April 1, 2022, participating IGWA members submitted their performance report for the 2021 irrigation season. R., 709. They also prepared and submitted a document entitled "2021 Performance Summary Table," which included information on their ground water diversions. R., 845. It set forth the proportionate shares of the reduction obligation as follows:

| | |
|---|---|
| American Falls-Aberdeen | 33,715 acre-feet |
| Bingham | 35,015 acre-feet |
| Bonneville-Jefferson | 18,264 acre-feet |
| Carey | 703 acre-feet |
| Jefferson-Clark | 54,373 acre-feet |
| Henry's Fork | 5,391 acre-feet |
| Magic Valley | 32,462 acre-feet |
| North Snake | 25,474 acre-feet |
| A&B | 21,660 acre-feet |
| Southwest ID | 12,943 acre feet |
| TOTAL: | 240,000 acre-feet |

R., 845.

IGWA's numbers attributed 34,603 acre-feet of the 240,000 acre-feet reduction obligation to A&B Irrigation District and Southwest Irrigation District. This attribution was contrary to the plain language of the mitigation plan. The Director expressly approved the mitigation plan on the condition that "[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan." R., 896. The 240,000 acre-feet reduction obligation set forth in Section 3.a. of the Settlement Agreement is an ongoing activity

required under the mitigation plan. Therefore, it cannot be attributed to Southwest Irrigation District which is neither a signatory party to the Settlement Agreement nor a party to the mitigation plan. It also cannot be attributed to A&B Irrigation District, as IGWA expressly agreed that "Paragraphs 2 – 4 of the *Settlement Agreement* do not apply to A&B and its ground water rights." R., 498. This includes the 240,000 acre-feet reduction requirement set forth in Section 3.

Recognizing that IGWA's inclusion of A&B Irrigation District and Southwest Irrigation District in the proportionate share numbers was contrary to the mitigation plan, the Director reapportioned IGWA's numbers to comply with the mitigation plan. The Director did so in a purely mathematical fashion utilizing the information submitted by IGWA. The Director removed A&B Irrigation District and Southwest Irrigation District from the proportionate share numbers. R., 412. The Director then took the 34,603 acre-feet improperly attributed to those two entities and redistributed it to the participating IGWA members. R.412. In doing so, the Director utilizing the same percentages that IGWA utilized in determining each members' share. R., 412. The Director found each participating IGWA members' proportionate share of the reduction obligation in 2021 to be as follows:

| | |
|---|---|
| American Falls-Aberdeen | 39,395 acre-feet |
| Bingham | 40,914 acre-feet |
| Bonneville-Jefferson | 21,341 acre-feet |
| Carey | 821 acre-feet |
| Jefferson-Clark | 63,533 acre-feet |
| Henry's Fork | 6,299 acre-feet |
| Magic Valley | 37,931 acre-feet |
| North Snake | 29,765 acre-feet |
| A&B | 0 acre-feet |
| Southwest ID | 0 acre feet |
| TOTAL: | 240,000 acre-feet |

R., 412. Based on the diversion numbers supplied by IGWA for 2021, the Director found that the following six participating IGWA members failed to satisfy their proportionate share of the 240,000 acre-feet reduction obligation in 2021: American Falls-Aberdeen, Bingham, Bonneville-Jefferson, Jefferson-Clark, Magic Valley, and North Snake. R., 412; 419. In total, participating

IGWA members were 117,216 acre-feet short of the 240,000 acre-feet reduction obligation in 2021.[1]

The Director did not act contrary to law in reapportioning IGWA's numbers to comply with the mitigation plan. The Director is statutorily vested with a clear legal duty to distribute water. I.C. § 42-602. The details of how the Director chooses to distribute water are largely left to his discretion. *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994). The Legislature has authorized the Director "to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water, and other natural water resources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof." I.C. § 42-603. The Director has done so in the CM Rules, which were approved by the Legislature and became effective on October 7, 1994.[2] Under the CM Rules, the Director has broad discretionary authority to administer water. *See e.g., In Matter of Distribution of Water to Various Water Rights Held by or For Ben. of A&B Irr. Dist.,* 155 Idaho 640, 652, 315 P.3d 828, 840 (2013) (recognizing the Director has discretionary authority under the CM Rules to develop and implement a pre-season management plan for allocation of water resources that employs a baseline methodology). The administration of water under the CM Rules includes the discretion to approve, implement, and enforce mitigation plans in lieu of curtailment. IDAPA 37.03.11.043; IDAPA 37.03.11.042.02; *In Matter of Distribution of Water to Various Water Rights Held by or For Ben. of A&B Irr. Dist.*, 155 at 654, 315 P.3d at 842 (when material injury is found to exist in a delivery call, the Director can "either regulate and curtail the diversions causing injury or approve a mitigation plan that permits out-of-priority diversion").

The Director's reapportionment of IGWA's numbers was consistent with both his discretionary authority to approve, implement, and enforce a mitigation plan under the CM Rules and with the plain language of the Settlement Agreement. The proportionate share numbers submitted by IGWA were contrary to the plain language of the approved mitigation plan for the reasons set forth herein. The Director's reapportionment simply accounted for this and, in a

---

[1] It should be noted that even when IGWA improperly attributed 34,603 acre-feet of the reduction obligation to A&B Irrigation District and Southwest Irrigation District, IGWA was still 82,613 acre-feet short of the 240,000 acre-feet reduction obligation in 2021. R., 845; 412. To arrive at the 117,216 acre-feet deficiency, the Director utilized a baseline of 1,787,604 acre-feet as the starting point. This is the baseline IGWA provided in its 2021 Performance Summary Table. R., 845

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

mathematical fashion using IGWA's own percentages, redistributed the improperly attributed 34,603 acre-feet to the participating IGWA members. In fact, the terms of the Settlement Agreement contemplate that the Director has the authority to determine whether a disputed breach has occurred:

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

R., 479. The Director evaluated the information in this case, determined that IGWA's numbers were inconsistent with the mitigation plan, and redistributed the improperly attributed 34,603 acre-feet according to the percentage information submitted by IGWA. The Director did not alter the terms of the Settlement Agreement nor abuse his discretion in this respect.[3]

As the Director acted consistent with his authority under the CM Rules and with the terms of the Settlement Agreement, the Final Order must be affirmed. It follows that IGWA's petition for reconsideration on this issue is denied.

**B. Substantial rights.**

In the Memorandum Decision, the Court utilized Idaho Code § 67-5279(4) as one basis on which to affirm the Director's Final Order, finding that IGWA failed to establish prejudice to its substantial rights. The Court held in part as follows:

> [T]he only issues before the Court pertain to the dispute over compliance with the approved mitigation plan in 2021. The parties entered into a separate agreement (i.e., the Remedy Settlement Agreement) to resolve that dispute. That Agreement was entered into prior to the Director's issuance of Final Order that is the subject of this proceeding, which Final Order simply implemented the stipulated resolution. Therefore, the Final Order did not implement any remedy in relation to the 2021 compliance dispute that was not agreed to by IGWA in resolution of the dispute. It follows the Final Order did not prejudiced IGWA's substantial rights.

[3] IGWA asserts the Settlement Agreement fails to specify a formula to determine each participating IGWA members' proportionate share of the reduction obligation. It also asserts the Settlement Agreement fails to define a baseline against which the 240,000 acre-feet reduction obligation will be measured. Counsel for IGWA represented at the hearing that parties did not reach any agreement on either of these terms at the time of contracting. IGWA couches its argument in this respect in terms of ambiguity, but it appears to the Court the argument is one of contract formation. That said, none of the parties have argued on judicial review that no enforceable contract came into being in this matter, or that the approved mitigation plan is legally unenforceable. Nor were such argument presented to the Director below. Therefore, the Court does not reach that issue.

*Memorandum Decision and Order*, p.15.

IGWA requests the Court reconsider its ruling on rehearing. It asserts "the Remedy Settlement Agreement was entered into under duress after the Director communicated to IGWA through back channels that he was planning to declare a breach and shut off the ground water districts' members water rights . . . ." *IGWA Brief in Support of Petition for Rehearing*, p.7. IGWA's assertion is conclusory and lacks any supporting citation to the evidentiary record. As a result, IGWA's petition on this issue must be denied. *See e.g.*, *Woods v. Sanders*, 150 Idaho 53, 59, 244 P.3d 197, 203 (2010) ("Conclusory allegations and assertions of fact contained in the brief without citation to the record below are not sufficient to support an argument on appeal").

**III.**

**ORDER**

Therefore, based on the foregoing, IT IS ORDERED the Petition for Rehearing is hereby denied.

Dated 3/5/2024

ERIC J. WILDMAN
District Judge

**CERTIFICATE OF SERVICE**

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

| | |
|---|---|
| Thomas Budge<br>tj@racineolson.com | via Email |
| Gary Spackman<br>Garrick Baxter<br>gary.spackman@idwr.idaho.gov<br>garrick.baxter@idwr.idaho.gov | via Email |
| John Simpson<br>Travis Thompson<br>Michael Short<br>jsimpson@martenlaw.com<br>tthompson@martenlaw.com | via Email |
| W. Kent Fletcher<br>wkf@pmt.org | via Email |
| Sarah Klahn<br>sklahn@somachlaw.com | via Email |
| Rich Diehl<br>rdiehl@pocatello.us | via Email |
| Candice McHugh<br>Chris Bromley<br>cmchugh@mchughbromley.com<br>cbromley@mchughbromley.com | via Email |
| Skyler Johns<br>Steven Taggart<br>sjohns@olsentagart.com<br>staggart@olsentagart.com | via Email |
| Dylan Anderson<br>dylan@dylananderson.com | via Email |

Date: 3/5/2024

Trent Tripple
Clerk of the Court

By Erik Rowell
Deputy Clerk

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

# APPENDIX B

**IDWR Docket No. CM-MP-2016-001**

- **Amended Final Order Regarding Compliance with Approved Mitigation Plan**

**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 | Docket No. CM-MP-2016-001<br><br>**AMENDED FINAL ORDER REGARDING COMPLIANCE WITH APPROVED MITIGATION PLAN** |
| IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN | |

This order resolves a dispute over the requirements of an approved mitigation plan in the above-captioned matter. This order amends and replaces the *Final Order Regarding Compliance with Approved Mitigation Plan* issued on September 8, 2022. In this order, the Director concludes that the Idaho Ground Water Appropriators, Inc.'s approved mitigation plan unambiguously requires it to reduce its ground water diversions by 240,000 acre-feet ("ac-ft") each year—meaning that averaging is prohibited. The Director also concludes that the Idaho Ground Water Appropriators, Inc.'s mitigation plan unambiguously prohibits it from apportioning A&B Irrigation District or Southwest Irrigation District a percentage of its annual reduction obligation.[1]

## BACKGROUND

### A. The SWC-IGWA Agreement, Subsequent Amendments, and the Approved Mitigation Plan.

In 2015, the Surface Water Coalition ("SWC")[2] and certain members of the Idaho Ground Water Appropriators, Inc. ("IGWA")[3] entered into the *Settlement Agreement Entered*

[1] The parties also refer to the annual reduction obligation as a "conservation obligation" because the parties have agreed to count certain recharge activities towards IGWA's diversion reduction obligation. In this order, reduction obligation is synonymous with conservation obligation.

[2] 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.

[3] For purposes of this 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.

*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").

In October of 2015, the SWC and IGWA entered into an *Addendum to Settlement Agreement* ("First Addendum"). Also, in October of 2015, the A&B Irrigation District ("A&B") and IGWA entered into a separate agreement ("A&B-IGWA Agreement").

On March 9, 2016, the SWC and IGWA submitted the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* ("Request for Order") to the Director of the Idaho Department of Water Resources ("Department"). Attached to the Request for Order as Exhibits B, C, and D were the SWC-IGWA Agreement, the First Addendum, and the A&B-IGWA Agreement. These documents were submitted as a stipulated mitigation plan in response to the SWC's delivery call (Docket No. CM-DC-2010-001). *Request for Order* at 3.

In 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 also 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* ("Order Approving Mitigation Plan"), which approved the parties' mitigation plan subject to conditions including the following: "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." *Order Approving Mitigation Plan* at 4.

On December 14, 2016, the SWC and IGWA entered into the *Second Addendum to Settlement Agreement* ("Second Addendum"). The *Second Addendum* amended the *SWC-IGWA Agreement* by providing additional details concerning the implementation of certain sections, most notably 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). *Compare SWC-IGWA Agreement* §§ 3–4, *with Second Addendum* § 2. The *Second Addendum* also articulated the process by which the Steering Committee would address alleged breaches and further advised that if the parties couldn't agree whether a breach had occurred, the Director was tasked with resolving the dispute and fashioning a remedy. *Second Addendum* § 2.c.iii-iv.

On February 7, 2017, the SWC and IGWA submitted the *Surface Water Coalition's and IGWA's Stipulated Amended Mitigation Plan and Request for Order* ("Second Request for

Order"). The SWC and IGWA requested that the Director issue an order approving the Second Addendum as an amendment to the mitigation plan. *Second Request for Order* ¶ 6.

On May 9, 2017, the Director issued the *Final Order Approving Amendment to Stipulated Mitigation Plan* ("Order Approving Amendment to Mitigation Plan"), 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.

*Order Approving Amendment to Mitigation Plan* at 5.

During the 2021 irrigation season, IGWA's obligations were set forth in six documents, collectively referred to herein as the "Mitigation Plan," which were admitted by stipulation at the hearing held February 8, 2023:

(1) the SWC-IGWA Agreement (Exhibit 1);

(2) the A&B-IGWA Agreement (Exhibit 4);

(3) the First Addendum (Exhibit 2);

(4) the Order Approving Mitigation Plan (Exhibit 36);

(5) the Second Addendum (Exhibit 3); and

(6) the Order Approving Amendment to Mitigation Plan (Exhibit 37).[4]

**B. IGWA's 2021 breach of the Mitigation Plan.**

On April 1, 2022, IGWA's counsel sent *IGWA's 2021 Performance Report* to representatives of the SWC and the Department.

On May 18, June 27, and July 13, 2022, the joint SWC/IGWA steering committee referenced in the SWC-IGWA Agreement, and the Second Addendum met to review technical information, including *IGWA's 2021 Performance Report.*

[4] Rule 43.02 of the Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11) ("CM Rules") states that upon receiving a proposed mitigation plan the Director will "consider the plan under the procedural provisions of Section 42-222, Idaho Code . . . ." Idaho Code § 42-222 states that the Director shall "examine all the evidence and available information and shall approve the change in whole, or in part, or *upon conditions*, provided no other water rights are injured thereby. . . ." (emphasis added). Accordingly, the Director can approve a mitigation plan "upon conditions." The Director imposed conditions of approval in his Order Approving Mitigation Plan and Order Approving Amendment to Mitigation Plan and those conditions became part of the Mitigation Plan.

On July 21, 2022, the SWC filed *Surface Water Coalition's Notice of Steering Committee Impasse / Request for Status Conference* ("Notice"). In the Notice, the SWC alleged IGWA's members failed to reduce total ground water diversions by 240,000 ac-ft in 2021 as mandated under the Mitigation Plan. *Notice* at 2–3. The SWC further advised that the allegations of noncompliance were reviewed by the steering committee as required by the Mitigation Plan, that the SWC and IGWA disagreed on whether there was a breach, and that the Steering Committee was at an impasse. *Id*. at 3–4.

On July 26, 2022, the Director granted 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"). In the Response, IGWA argued there was no breach in 2021 because each IGWA member met its proportionate share of the 240,000 ac-ft. reduction obligation. *Response* at 4–5. This conclusion, however, was based on IGWA's contention that the annual reduction obligation was measured on a five-year rolling average and that A&B and Southwest Irrigation District ("Southwest") were each responsible for a portion of the 240,000 ac-ft. reduction. *Id*.

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

On August 5, 2022, the Director held a status conference and advised the parties that, in the event of a breach, section 2.c.iv of the *Second Addendum* required him to "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 raised two new procedural arguments. First, IGWA argued 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 argued that, if the Director finds a breach of the Mitigation Plan, he must provide the breaching party with 90 days' notice and an opportunity to cure. *Id*. at 8–9.

## C. Stipulated Remedy.

On September 7, 2022, the SWC and IGWA executed another settlement agreement ("Remedy Agreement"). The Remedy Agreement addressed the breach alleged in the SWC's notice and sought to ensure that "the Director d[id] not curtail certain IGWA members during the 2022 irrigation season." *Remedy Agreement* ¶ E. To accomplish this, the parties stipulated:

> **2021 Remedy.** As a compromise to resolve the parties' dispute over IGWA's compliance with the [SWC-IGWA] 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 [SWC-IGWA] 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 [SWC-IGWA] Agreement for 2021 only.

*Id.* § 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 reduction 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*. Additionally, both parties waived their right to appeal the stipulated remedy. *Id*.

On September 8, 2022, the Director issued a *Final Order Regarding Compliance with Approved Mitigation Plan* ("Compliance Order"), wherein the Director concluded that certain IGWA members breached the Mitigation Plan during the 2021 irrigation season and approved the parties' Remedy Agreement as an appropriate contingency in lieu of curtailment for the breach. *Compliance Order* at 13–16.

## D. Post Compliance Order Filings.

On September 22, 2022, IGWA timely filed a *Petition for Reconsideration and Request for Hearing* requesting that the Director amend the Compliance Order to "withdraw those parts . . . that adjudicate IGWA's contractual obligations under the [SWC-IGWA] Agreement . . ." or

in the alternative, set the matter for a merits hearing. *IGWA's Pet. for Reconsideration and Hearing* at 7.[5]

On October 13, 2022, the Director issued an order granting IGWA's request for a hearing. *Order Grant'g Req. for Hr'g; Notice of Prehr'g Conf.* at 1–2. The Director concluded IGWA's petition for reconsideration was moot since the Director was granting IGWA's request for a hearing. *Id*. at 2. The Director also set a prehearing conference for November 10, 2022. *Id*.

The prehearing conference was held as scheduled on November 10, 2022. On December 7, 2022, the Director issued an order scheduling a three-day hearing for February 8–10, 2023. *Order Authorizing Disc.; Notice of Hr'g* at 1–2.

On November 30, 2022, the Director issued the *Final Order Establishing 2022 Reasonable Carryover (Methodology Step 9)* ("2022 Step 9 Order") in the SWC delivery call matter (Docket No. CM-DC-2010-001). The 2022 Step 9 Order gave ground water users 14 days to establish their ability to mitigate for their proportionate share of the reasonable carryover shortfall. *2022 Step 9 Order* at 6. On December 14, 2022, the Director issued the *Final Order Curtailing Ground Water Rights Junior to May 31, 1989* ("2022 Curtailment Order"). The 2022 Curtailment Order curtailed ground water users junior to May 31, 1989, who failed to establish their ability to mitigate for their share of the reasonable carryover shortfall. *2022 Curtailment Order* at 3. This curtailment order remains in place today.

On December 21, 2022, the SWC filed a *Motion for Summary Judgment* and a *Memorandum in Support of Motion for Summary Judgment* ("SWC Memorandum"). The SWC argued an evidentiary hearing was unnecessary and further argued the Director should grant summary judgment because no material facts were in dispute. *SWC Memorandum* at 5. The SWC framed the issue solely as a contract interpretation inquiry. *Id.* at 10.

On January 4, 2023, IGWA filed its *Response in Opposition to SWC's Motion for Summary Judgment* ("Response to SWC Motion"). IGWA argued a hearing was required because the *SWC-IGWA Agreement* was ambiguous and that it was entitled to a hearing pursuant to Idaho Code § 42-1701(A)(3). *Response to SWC Motion* at 11.

Also on January 4, 2023, the Bonneville-Jefferson Ground Water District ("BJGWD") filed a *Petition to Intervene* ("BJGWD's Petition") and a *Response in Opposition to SWC's Motion for Summary Judgment* ("BJGWD's Response to SWC Motion"). BJGWD requested intervention "to preserve and not waive certain legal arguments and defenses not raised in IGWA's Response Brief." *BJGWD's Petition* at 1–2. More specifically, BJGWD sought intervention to raise a variety of breach of contract defenses, including unjust enrichment, legal impracticality, unclean hands, and lack of damages. *BJGWD's Response to SWC Motion* at 3–8.

[5] In addition to requesting a hearing with the Department, on October 24, 2022, IGWA also filed a *Petition for Judicial Review* on October 24, 2022. *See IGWA v. Idaho Dep't of Water Res*., No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho). The district court dismissed IGWA's petition for lack of jurisdiction on December 8, 2022.

On January 9, 2023, the SWC filed its *Opposition to Bonneville-Jefferson Ground Water District's Motion to Intervene / Motion to Strike Response.*

On January 11, 2023, the SWC filed its *Reply in Support of Summary Judgment Motion*.

On January 17, 2023, BJGWD filed its *Reply and Objection to SWC's Opposition to Bonneville-Jefferson Ground Water District's Motion to Intervene / Motion to Strike*.

On January 25, 2023, IGWA's counsel of record filed a *Notice of Conditional Withdrawal of Representation of Bonneville-Jefferson Ground Water District*.

On January 27, 2023, the Director issued an *Order Denying SWC's Motion for Summary Judgement & Conditionally Granting BJGWD's Petition to Intervene*.

**E. Hearing on February 8, 2023.**

The hearing IGWA requested began on February 8, 2023. The hearing was scheduled for three days but took only one. Thirty-nine common exhibits were admitted by stipulation (Exhibits 1–39).[6] IGWA introduced seven additional exhibits, marked as Exhibits 101, 107, 109, 114, 118, 119, and 120. The SWC introduced two exhibits, marked as Exhibits 200 and 201. IGWA called two witnesses, Jaxon Higgs and Timothy Deeg. Mr. Higgs is a professional geologist, has a master's degree in hydrology, and is a consultant for IGWA. Mr. Deeg was the Chairman of IGWA's Board for over twenty years. Mr. Deeg is also the Director of the Aberdeen-American Falls Groundwater District.

Neither the SWC nor BJGWD called any witnesses. At the conclusion of the hearing, BJGWD moved to adopt IGWA's arguments. All parties waived post-hearing briefing.

## FINDINGS OF FACT

1. The SWC-IGWA Agreement mandates that "[t]otal ground water diversions shall be reduced by 240,000 ac-ft annually." *SWC-IGWA Agreement* § 3.a.i.

2. All members of the SWC except for A&B Irrigation District executed the SWC-IGWA Agreement. *A&B-IGWA Agreement* at 1.

3. The A&B-IGWA Agreement states in pertinent part that "A&B agrees to participate in the [SWC-IGWA] Agreement as a surface water right holder only. The obligations of Ground Water Districts set forth in Paragraphs 2-4 of the [IGWA-SWC] Settlement Agreement do not apply to A&B and its ground water rights." *A&B-IGWA Agreement* ¶ 2.

4. Southwest Irrigation District ("Southwest") did not sign the SWC-IGWA Agreement or any of the subsequent addendums. *SWC-IGWA Agreement* at 25.

[6] Among these were IGWA's 2021 Performance Report (Exhibit 20) and summation of IGWA's 2021 Report (Exhibit 27).

5. The Order Approving Mitigation Plan approved the SWC-IGWA Agreement as a mitigation plan subject to 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*.

*Order Approving Mitigation Plan* at 4 (emphasis added).

6. No party sought judicial review of the Order Approving Mitigation Plan.

7. The Second Addendum articulates the process by which the Steering Committee is to address alleged breaches, and further states that, if the parties cannot agree whether a breach had occurred, the Director is tasked with resolving the dispute and fashioning a remedy. *Second Addendum* § 2.c.iii-iv.

8. Section 2.a.i. of the Second Addendum required IGWA to annually submit to the Steering Committee its diversion and recharge data from the previous irrigation season. IGWA submitted the data each year from 2016 through 2021. *Compare id.* § 2.a.i., *with* IGWA's Performance Reports [2016-2021], Exs. 15–20.

9. The Order Approving Amendment to Mitigation Plan approved 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.

*Order Approving Amendment to Mitigation Plan* at 5.

10. The *Second Final Order* further states that "[t]he 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*." *Id*. at 4 (emphasis added).

11. No party sought judicial review of the Second Final Order.

12. On April 1, 2022, IGWA's sent its 2021 Performance Report to the SWC and the Department. IGWA's 2021 Performance Reports, Ex. 20.

13. A spreadsheet included in the 2021 Performance Report summarizes IGWA's, A&B's, and Southwest's mitigation efforts during 2020. 2020 Performance Summary Table, Ex. 26. IGWA's summary spreadsheet is reproduced as Table 1 below. Important to the Director's consideration here, IGWA apportioned A&B and Southwest a share of the 240,000 ac-ft reduction obligation.

**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. | | | | | | | |

14. Table 2 illustrates IGWA's *2020 Performance Summary Table* with yellow highlighted columns added by the Director. The "Re-proportioning" column in Table 2 redistributes the 34,603 ac-ft IGWA assigned to A&B and Southwest. The yellow highlighted "Target Conservation" column evidences the reduction obligations of each IGWA member after the 34,603 ac-ft were reproportioned to IGWA members who were parties to the Mitigation Plan.

**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 | -117,216 |
| | | | | | | | | | | | |
| 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. | | | | | | | | | | | |

15. The spreadsheets summarizing IGWA's performance from 2016 to 2021 do not include diversion reduction data for A&B or Southwest. [2017-2022] Settlement Agreement Performance Report Spreadsheet, Exs. 22–27.

16. Despite the lack of diversion reduction data in its 2022 Performance Report, IGWA nevertheless assigned A&B a reduction target of 21,660 ac-ft and Southwest a reduction target of 12,943 ac-ft—a reduction of 14.4% or 34,603 ac-ft. 2022 Settlement Agreement Performance Report Spreadsheet, Ex. 27; *see also supra* Tables 1 & 2.

17. When A&B and Southwest are collectively apportioned 34,603 ac-ft of IGWA's conversation obligation, IGWA were 82,613 ac-ft short of its reduction obligation in 2021. 2022 Settlement Agreement Performance Report Spreadsheet, Ex. 27; *see also supra* Tables 1 & 2.

18. When A&B and Southwest are not apportioned 34,603 ac-ft, IGWA were 117,216 ac-ft short of its reduction obligation in 2021. *See supra* Table 2.

19. Based on the analysis in Table 2, American Falls-Aberdeen, Bingham, BJGWD, Jefferson-Clark, Magic Valley, and North Snake failed to satisfy their respective reduction requirements in 2021.

20. Seeking to avoid curtailment, IGWA and the SWC signed and submitted the Remedy Agreement, which requires IGWA to "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." *Remedy Agreement* at 2.

21. The parties affirmatively waived their rights to appeal the stipulated remedy. *Remedy Agreement* ¶3, at 2–3.

22. On February 8, 2023, a hearing was held during which IGWA called two witnesses: Jaxon Higgs, a professional geologist with a master's degree in hydrology and a IGWA consultant; and Timothy Deeg, who served as chairman of IGWA's Board for 22 years and is currently IGWA's Treasurer.

23. Mr. Higgs testified that in addition to IGWA, he also served as a consultant for Southwest.

24. Referencing the SWC-IGWA Agreement, Mr. Higgs admitted that while Southwest was listed as an IGWA member in a footnote, he was aware Southwest had never signed the SWC-IGWA Agreement. *See SWC-IGWA Agreement* at 22.

25. Mr. Higgs testified that Southwest did not sign the SWC-IGWA Agreement because it already had an interim agreement with the SWC and was waiting to finalize a long-term agreement with the SWC once the IGWA-SWC Agreement was finalized.

26. Mr. Higgs testified that Southwest has been performing under the separate agreement it entered with the SWC.

27. Mr. Deeg testified that he was involved in negotiating the SWC-IGWA Agreement but admitted that, with hindsight, the SWC-IGWA Agreement could have been written with greater specificity.

28. Mr. Higgs testified that he was not involved in negotiating the SWC-IGWA Agreement but did assist IGWA in implementing the SWC-IGWA Agreement.

29. Mr. Higgs testified that he began working with IGWA in the summer of 2015, and at that time, IGWA had not yet determined how the SWC-IGWA Agreement's reduction obligation would be apportioned.

30. Referencing IGWA's Exhibit 107, Mr. Higgs testified that he presented information to IGWA's Board in July of 2015 concerning how to apportion the reduction requirements among the various districts, and that during that presentation, he apportioned A&B and Southwest a percentage of the 240,000 ac-ft. *See* Ex. 107 at 10.

31. Mr. Higgs also testified that, in September of 2015, the Department presented information to various ground water districts, and at that time, IGWA had not yet determined how to apportion the 240,000 ac-ft reduction. *See* Ex. 109 ¶7, at 2.

32. Mr. Higgs testified that he chose to apportion A&B and Southwest a share of the 240,000 ac-ft. because they are ground water pumpers in the ESPA, and he assumed A&B and Southwest were required to contribute to the 240,000 ac-ft reduction obligation.

33. Mr. Higgs conceded, however, that there were other ESPA ground water users, for which he did not apportion a share of the 240,000 ac-ft reduction requirement.

34. Mr. Deeg also testified that it was his opinion the 240,000 would be apportioned among all ESPA groundwater users, not just IGWA members, and that the possibility some ground water users might not be included in the 240,000 ac-ft obligation was a real "sore spot" among some ground water districts.

35. Mr. Higgs also admitted that the SWC-IGWA Agreement did not specifically articulate how the 240,000 ac-ft obligation would be apportioned.

36. Mr. Higgs further conceded that, while he was not tasked with interpreting the SWC-IGWA Agreement, the SWC-IGWA Agreement did not specifically state that IGWA would only be responsible for 205,000 ac-ft of reductions.

37. Mr. Higgs also admitted that the SWC-IGWA Agreement did not specifically authorize averaging.

38. Mr. Deeg likewise testified that the SWC-IGWA Agreement did not specify how the 240,000 ac-ft reduction obligation would be apportioned.

39. Mr. Deeg also testified that while his ground water district (Aberdeen-American Falls) allowed individual users to average their respective reduction requirements over a four-year period, the District itself did not average its yearly reduction obligation.

40. Mr. Higgs also conceded that, to his knowledge, the SWC had never agreed with IGWA's contention that A&B and Southwest were responsible for a portion of the 240,000 ac-ft reduction obligation.

41. Mr. Higgs admitted knowing that the SWC had repeatedly objected to IGWA's attempts to assign A&B and Southwest a portion of the 240,000 ac-ft reduction requirement. *See* April 14, 2017 Letter from SWC's Counsel to IGWA's counsel, Ex. 200; April 20, 2017 Letter from IGWA's Counsel to SWC's Counsel, Ex. 201.

42. Mr. Higgs also conceded he did not adjust his calculations concerning IGWA's reduction obligations after the Director issued the Order Approving Mitigation Plan; indeed, Mr. Higgs conceded he never read the Director's Order approving the Mitigation Plan.

43. Neither Mr. Higgs nor Mr. Deeg testified that the Order Approving Mitigation Plan or the Order Approving Amendment to Mitigation Plan were ambiguous or otherwise unclear concerning the apportionment of the 240,000 ac-ft reduction obligation.

## ANALYSIS AND CONCLUSIONS OF LAW

### A. The Mitigation Plan unambiguously requires IGWA to conserve 240,000 ac-ft each year—meaning averaging is prohibited.

The interpretation of a settlement agreement is "governed by the same rules and principles as are applicable to contracts generally." *Budget Truck Sales, LLC v. Tilley*, 163 Idaho 841, 846, 419 P.3d 1139, 1144 (2018) (internal quotation omitted). The interpretation of a contract starts with the language of the contract itself and requires viewing the contract as a whole and in its entirety. *Clear Lakes Trout Co. v. Clear Springs Foods, In*c., 141 Idaho 117, 120, 106 P.3d 443, 446 (2005). "The meaning of an unambiguous contract should be determined from the plain meaning of the words." *Id*. "Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact." *Porcello v. Est. of Porcello*, 167 Idaho 412, 421, 470 P.3d 1221, 1230 (2020) (internal citations and quotations omitted). "Only when the language is ambiguous, is the intention of the parties determined from surrounding facts and circumstances." *Clear Lakes Trout Co.,* 141 Idaho at 120.

Here, the *SWC-IGWA Agreement* states that the "[t]otal ground water diversion shall be reduced by 240,000 ac-ft *annually*." *SWC-IGWA Agreement* § 3.a.i. (Emphasis added). IGWA contends the term "annually" is ambiguous because it "does not prescribe how annual groundwater conservation will be measured[.]" *IGWA's Resp. in Opp. to SWC's Mot. for Summ. J.* at 7. IGWA further contends that the 240,000 ac-ft conversation requirement is based on a multi-year rolling average. *Id.* at 7–10. Were IGWA's argument to prevail, IGWA's failure to conserve 240,000 ac-ft in one year would not necessarily constitute a breach of § 3.a.i. as the reduction obligation deficit could be recouped by reducing more than 240,000 ac-ft in other years. The Director rejects IGWA's arguments because they are contrary to the plain and unambiguous language of the Mitigation Plan.

First, the term "annually" is unambiguous. 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); *see also* Black's Law Dictionary 58 (6th ed. 1991) (The term annually means "[i]n 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."). Accordingly, the phrase "shall be reduced by 240,000 ac-ft annually" unambiguously requires IGWA to reduce ground water diversions by 240,000 ac-ft each and every year. *Clear Lakes*, 141 Idaho at 120, 106 P.3d at 446.

This understanding is reinforced by how the word "annually" is used in other provisions of the Mitigation Plan. For example, § 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 complied with this requirement each and every year. *See* IGWA's 2016-2021 Performance Reports & Summaries, Exs. 15–20, 22–27.

To support its averaging argument, IGWA points to § 3.e.iv of the SWC-IGWA Agreement which 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). The problem with IGWA's argument is that § 3.e.iv. simply states that a five-year rolling average will be used to determine whether IGWA has achieved the *ground water level goal* in § 3.e. Section 3.e.iv does not state or imply that IGWA's 240,000 ac-ft *annual reduction obligation* found in § 3.a can be averaged over multiple years. To the contrary, the fact that § 3.e.iv references a five-year rolling average actually cuts against IGWA's argument, as it demonstrates the parties knew how to draft a rolling-average provision had they intended § 3.a.i. to include one.

IGWA also argues its 240,000 ac-ft reduction should be averaged because IGWA used averaging to set its so-called "baseline." *IGWA's Resp. in Opp. to SWC's Mot. for Summ. J.* at 7. Yet IGWA concedes its averaging process was not described or mandated in the SWC-IGWA Agreement. *Id.* at 9. The fact that IGWA chose to employ averaging when establishing a baseline so that it could apportion the 240,000 ac ft obligation among its members did not amend the SWC-IGWA Agreement's unambiguous requirement that IGWA conserve 240,000 ac ft *annually*.

IGWA also contends it should be allowed to employ averaging because it conserves more than 240,000 ac-ft during cool wet years, meaning it should be allowed to conserve less in hot and dry years. *Id.* at 8–9. The fact that IGWA may conserve more than 240,000 ac-ft in cool wet years does not change its unambiguous obligation to conserve 240,000 ac-ft *annually*. Nor has IGWA pointed to any language in the Mitigation Plan authorizing this type of surplus & deficit accounting.

In sum, averaging is not permitted because the SWC-IGWA Agreement unambiguously requires IGWA to conserve 240,000 ac-ft each and every year.

**B. The Mitigation Plan unambiguously prohibits IGWA from apportioning A&B and Southwest a percentage of its annual reduction obligation.**

IGWA next asserts that the 240,000 ac-ft. reduction requirement under § 3.a.i. is not IGWA's responsibility alone, but rather a shared responsibility amongst all groundwater users in the ESPA, including A&B and Southwest. *IGWA's Resp. in Opp. to SWC's Mot. for Summ. J.* at 4–6. Were IGWA's argument to prevail, IGWA members who signed the Mitigation Plan would only be required to annually conserve 205,397 ac-ft—not 240,000 ac-ft— a reduction of 14.4% or 34,603 ac-ft. IGWA's 2021 Performance Summary, Ex. 27.

To buttress this position, IGWA points to § 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's Resp. in Opp. to SWC's Mot. for Summ. J.* at 4–5. IGWA argues that because A&B and Southwest pump groundwater in the ESPA, they must share in the 240,000 ac-ft reduction obligation. *Id*.

IGWA's focus on § 3.ii of the SWC-IGWA Agreement is misguided. In construing a written instrument, the court must start with the language of the contract itself and requires

viewing the contract as a whole and in its entirety. *Clear Lakes Trout Co.*, 141 Idaho at 120. The court must "give meaning to all the provisions of the writing to the extent possible." *Magic Valley Radiology Assocs., P.A. v. Pro. Bus. Servs., Inc*., 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991). In this case, § 6 of the SWC-IGWA Agreement specifically states it does not cover non-participants: "Any ground water user not participating in this Settlement Agreement or otherwise hav[ing] another approved mitigation plan will be subject to administration." *SWC-IGWA Agreement* § 6. Southwest never signed the SWC-IGWA Agreement, and A&B participated in the Mitigation Plan only as a member of the SWC: "A&B agrees to participate in the [SWC-IGWA] Settlement Agreement as a surface water right holder only. The obligations of Ground Water Districts set forth in Paragraphs 2-4 of the [IGWA-SWC] Settlement Agreement do not apply to A&B and its ground water rights." *A&B-IGWA Agreement* ¶ 2.

Additionally, § 2.d.i. of the Second Addendum states that "[t]he terms of the Settlement and the Director's Final Order approving the same as a mitigation plan" will control and satisfy any mitigation obligations. Both the Director's Order Approving Mitigation Plan and Order Approving Amendment to Mitigation Plan are unequivocal that "[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibilities of the parties to the Mitigation Plan," and that "[t]he ground water level goal and benchmarks referenced in the Mitigation Plan are applicable only to the parties to the Mitigation Plan." *Order Approving Mitigation Plan* at 4; *Order Approving Amendment to Mitigation Plan* at 2.

In sum, the Mitigation Plan—when read as a whole and in its entirety —unambiguously excludes any ground water user that is not a party to the agreement from any obligation related to the annual 240,000 ac ft reduction target. The Mitigation Plan requires IGWA members alone to conserve 240,000 ac-ft each and every year. *Clear Lakes Trout Co*., 141 Idaho at 120.

**C. IGWA's latent ambiguity argument also fails.**

IGWA argues in the alternative that the SWC-IGWA Agreement is latently ambiguous concerning whether IGWA alone is responsible for reducing 240,000 ac-ft. *IGWA's Resp. in Opp. to SWC's Mot. for Summ. J.* at 6–10. More specifically, IGWA contends a latent ambiguity exists concerning the 240,000 ac-ft reduction obligation under § 3.ii because the SWC-IGWA Agreement failed to explain how each district's proportionate share of the 240,000 ac-ft reduction requirement would be calculated. *Id.* at 7.

"A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist." *Porcello v. Est. of Porcello*, 470 P.3d 1221, 167 Idaho 412, 424 (2020) (internal citation and quotations omitted). To determine whether a latent ambiguity exists, the written instrument must be examined along with "other writings incorporated into the instrument" to determine whether an ambiguity exists and the reasonableness of the alternative meanings suggested by the parties. *Sommer, LLC*, 511 P.3d at 845. A latent ambiguity must be tethered to language in the written instrument. *Porcello*, 167 Idaho at 424. Parole evidence may be considered to "determine whether *language within the instrument* is reasonably susceptible of more than one meaning." *Sommer*, 511 P.3d at 845 (emphasis in original).

The flaw in IGWA's argument is that not every phrase in a contract must be defined, nor is a contract rendered ambiguous by an undefined term. *Mut. Of Enumclaw v. Wilcox*, 123 Idaho 4, 8, 843 P.2d 154, 158 (1992). The SWC-IGWA Agreement is not ambiguous merely because it failed to articulate how IGWA must apportion the 240,000 ac-ft among its members. The absence of apportionment instructions does not substantiate IGWA's claim that it "reasonably accounted for diversions from A&B and Southwest in determining each of the signatory districts' proportionate groundwater conservation obligations." *IGWA's Resp. In Opp. to Summ. J.* at 7.

Section 6 of the SWC-IGWA Agreement expressly states that "[a]ny ground water user not participating in this Settlement Agreement or otherwise hav[ing] another approved mitigation plan will be subject to administration." *SWC-IGWA Agreement* § 6. IGWA's Agreement with A&B was likewise explicit that "A&B agrees to participate in the [SWC-IGWA] Settlement Agreement as a surface water right holder only. The obligations of Ground Water Districts set forth in Paragraphs 2-4 of the [IGWA-SWC] Settlement Agreement *do not apply to A&B* and its ground water rights." *A&B-IGWA Agreement* ¶ 2 (emphasis added). Additionally, the Director's orders approving the first and second mitigation plans clearly stated that "[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibilities of the parties to the Mitigation Plan." *Order Approving Mitigation Plan* at 4; *Order Approving Amendment to Mitigation Plan* at 2.

IGWA offered neither evidence nor argument that the Mitigation Plan—when read as a whole and in its entirety—was ambiguous concerning IGWA's obligation to conserve 240,000 ac-ft. IGWA's own witnesses undermined IGWA's latent ambiguity argument. For example, Mr. Higgs testified that IGWA was aware that A&B and Southwest each agreed to separate settlements with the SWC. Mr. Higgs also testified that he did not adjust his calculations in 2016 after the Director issued his Order Approving Mitigation Plan, which was explicit that "[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibilities of the parties to the Mitigation Plan." *Order Approving Mitigation Plan* at 4; *see also* Higgs Test..

The plain reading of the six documents that make up the Mitigation Plan renders IGWA's latent ambiguity argument untenable.

**D. 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 ac-ft. every year. *SWC-IGWA Agreement* § 3.a.

Based on Table 2 as shown in Finding of Fact 14 above, Madison Ground Water District, Fremont Madison Irrigation District, and Carey Ground Water District satisfied their proportionate 2021 mitigation obligations in 2021 and would not be subject to curtailment. *See SWC-IGWA Agreement* § 3.a.ii (Each member "shall be responsible for reducing their proportionate share … ."). Based on the analysis in Table 2, Table 3 below 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** |

## E. 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 a curtailment order.

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 reduce total diversions or recharge the equivalent of 240,000 ac-ft 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 uses 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. Nevertheless, 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 ac-ft reduction obligation, but the plan 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.

The parties affirmatively waived their rights to appeal the stipulated remedy. *Remedy Agreement* ¶3, 2–3. Neither party challenged the remedy at hearing.

**F. IGWA's procedural and evidentiary objections lack merit.**

The primary issues discussed at hearing were the issues of averaging and whether A&B and Southwest were to be included in the reduction calculation. However, prior to the hearing, IGWA raised a handful of procedural and evidentiary objections in connection with this matter. The Director stands by the analysis in the Compliance Order and adopts, by reference, the discussion in Section 5 of the Compliance Order. *See IGWA v. Idaho Dep't of Water Res*., No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho).

## ORDER

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

1. 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 SWC-IGWA 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.

2. Except as necessary to implement paragraph 2 above, nothing in this order alters or amends the parties' Mitigation Plan or any condition in the Director's Order Approving Mitigation Plan or Order Approving Amendment to Mitigation Plan.

3. Failure to comply with the Mitigation Plan may result in curtailment.

DATED this 24th day of April 2023.

GARY SPACKMAN
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of April 2023, the above and foregoing was served by the method indicated below and addressed to the following:

| | |
|---|---|
| John K. Simpson<br>MARTEN LAW LLP<br>P.O. Box 2139<br>Boise, ID 83701-2139<br>jsimpson@martenlaw.com | ☒ U.S. Mail, postage prepaid<br>☒ Email |
| Travis L. Thompson<br>MARTEN LAW LLP<br>P.O. Box 63<br>Twin Falls, ID 83303-0063<br>tthompson@martenlaw.com<br>jnielsen@martenlaw.com | ☒ U.S. Mail, postage prepaid<br>☒ Email |
| W. Kent Fletcher<br>FLETCHER LAW OFFICE<br>P.O. Box 248<br>Burley, ID 83318<br>wkf@pmt.org | ☒ U.S. Mail, postage prepaid<br>☒ Email |
| Thomas J. Budge<br>Elisheva M. Patterson<br>RACINE OLSON<br>P.O. Box 1391<br>Pocatello, ID 83204-1391<br>tj@racineolson.com<br>elisheva@racineolson.com | ☒ U.S. Mail, postage prepaid<br>☒ Email |
| Kathleen Marion Carr<br>US Dept. Interior<br>960 Broadway Ste 400<br>Boise, ID 83706<br>kathleenmarion.carr@sol.doi.gov | ☒ U.S. Mail, postage prepaid<br>☒ Email |
| David W. Gehlert<br>Natural Resources Section<br>Environment and Natural Resources Division<br>U.S. Department of Justice<br>999 18th St., South Terrace, Suite 370<br>Denver, CO 80202<br>david.gehlert@usdoj.gov | ☒ U.S. Mail, postage prepaid<br>☒ Email |
| Matt Howard<br>US Bureau of Reclamation<br>1150 N Curtis Road<br>Boise, ID 83706-1234<br>mhoward@usbr.gov | ☒ U.S. Mail, postage prepaid<br>☒ Email |

| | |
|---|---|
| Sarah A Klahn<br>Somach Simmons & Dunn<br>1155 Canyon Blvd, Ste. 110<br>Boulder, CO 80302<br>sklahn@somachlaw.com<br>dthompson@somachlaw.com | ☒ U.S. Mail, postage prepaid<br>☒ Email |
| Rich Diehl<br>City of Pocatello<br>P.O. Box 4169<br>Pocatello, ID 83205<br>rdiehl@pocatello.us | ☒ U.S. Mail, postage prepaid<br>☒ Email |
| Candice McHugh<br>Chris Bromley<br>MCHUGH BROMLEY, PLLC<br>380 South 4th Street, Suite 103<br>Boise, ID 83702<br>cbromley@mchughbromley.com<br>cmchugh@mchughbromley.com | ☒ U.S. Mail, postage prepaid<br>☒ Email |
| Robert E. Williams<br>WILLIAMS, MESERVY, & LOTHSPEICH, LLP<br>P.O. Box 168<br>Jerome, ID 83338<br>rewilliams@wmlattys.com | ☒ U.S. Mail, postage prepaid<br>☒ Email |
| Robert L. Harris<br>HOLDEN, KIDWELL, HAHN & CRAPO, PLLC<br>P.O. Box 50130<br>Idaho Falls, ID 83405<br>rharris@holdenlegal.com | ☒ U.S. Mail, postage prepaid<br>☒ Email |
| Randall D. Fife<br>City Attorney, City of Idaho Falls<br>P.O. Box 50220<br>Idaho Falls, ID 83405<br>rfife@idahofallsidaho.gov | ☒ U.S. Mail, postage prepaid<br>☒ Email |
| Skyler C. Johns<br>Nathan M. Olsen<br>Steven L. Taggart<br>OLSEN TAGGART PLLC<br>P.O. Box 3005<br>Idaho Falls, ID 83403<br>sjohns@olsentaggart.com<br>nolsen@olsentaggart.com<br>staggart@olsentaggart.com | ☒ U.S. Mail, postage prepaid<br>☒ Email |
| Tony Olenichak<br>IDWR—Eastern Region<br>900 N. Skyline Drive, Ste. A<br>Idaho Falls, ID 83402<br>Tony.Olenichak@idwr.idaho.gov | ☒ Email |

| | |
|---|---|
| Corey Skinner<br>IDWR—Southern Region<br>1341 Fillmore St., Ste. 200<br>Twin Falls, ID 83301-3033<br>corey.skinner@idwr.idaho.gov | ☒ Email |
| COURTESY COPY TO:<br>William A. Parsons<br>PARSONS SMITH & STONE<br>P.O. Box 910<br>Burley, ID 83318<br>wparsons@pmt.org | ☒ Email |

Sarah Tschohl
Paralegal

# EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

(4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) The petition for reconsideration is disposed of; or
(b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, 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.

## APPEAL OF FINAL ORDER TO DISTRICT COURT

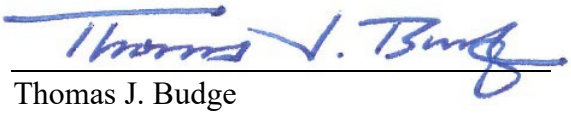
Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county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

## CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2024, I caused the foregoing document to be served upon the Office of the Idaho Attorney General by United States mail with postage prepaid at P.O. Box 83720, Boise, Idaho 83720-0010, and served upon the persons identified below electronically via iCourt:



Thomas J. Budge

Clerk of the Court
ADA COUNTY DISTRICT COURT

Mathew Weaver, Director
Garrick L. Baxter, Deputy Attorney General
IDAHO DEPARTMENT OF WATER RESOURCES

Dylan Anderson
DYLAN ANDERSON LAW

Skyler Johns
Nathan Olsen
Steven Taggart
OLSEN TAGGART PLLC

John Simpson
Travis Thompson
Michael Short
MARTEN LAW

Kent Fletcher
FLETCHER LAW OFFICE

Sarah Klahn
Maximilian Bricker
SOMACH SIMMONS & DUNN

Candice McHugh
Chris Bromley
MCHUGH BROMLEY, PLLC

Rich Diehl
CITY OF POCATELLO