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Fourth Judicial District, Ada County
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO GROUND WATER APPROPRIATORS, INC.,

Petitioner,

vs.

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

Respondents,

And

CITY OF POCATELLO, CITY OF BLISS, CITY OF BURLEY, CITY OF CAREY, CITY OF DELCO, 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 GROUND WATER DISTRICT

Intervenors.

Case No. CV01-23-7893

IDAHO GROUND WATER APPROPRIATORS, INC.'S REPLY BRIEF

JUDICIAL REVIEW FROM THE IDAHO DEPARTMENT OF WATER RESOURCES

Gary D. Spackman, Director
Honorable Eric J. Wildman, Presiding

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INTRODUCTION

Idaho Ground Water Appropriators, Inc. ("IGWA") respectfully submits this brief in reply to *Respondent IDWR's Brief* ("IDWR Response") and *Surface Water Coalition's Response Brief* ("SWC Response") filed September 12, 2023, in this matter.

ARGUMENT

1. IDWR wrongly attempts to separate the IGWA-SWC Settlement Agreement from Director's order approving it as a mitigation plan.

IDWR's opening argument it states:

> IGWA in its opening brief ignores both the scope of the hearing and the Director's statutory authority and obligations under the CM Rules, and instead insists on attempting to drag the Director and the Court into re-interpreting a contract it negotiated with the SWC. IGWA's brief seeks to reframe the issues in an apparent attempt to confuse the Court as to the facts the Director's decisions in the *Amended Final Order*.

(IDWR Resp., p. 11.) This statement prefaces subsequent arguments where IDWR attempts to distinguish between the Director's interpretation of the *Settlement Agreement Entered into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of Idaho Ground Water Appropriators, Inc.* ("2015 Agreement") and the Director's interpretation of the orders approving the 2015 Agreement as a mitigation plan under Conjunctive Management Rule 43.

It is a perplexing argument. The 2015 Agreement was filed as a stipulated mitigation plan under Conjunctive Management Rule 43.03.o, which allows the Director to approve a mitigation plan entered into by agreement between the senior and junior water user "even though such plan may not otherwise be fully in compliance with these provisions." IDAPA 37.03.11.043.03.o. IGWA and the SWC jointly filed the 2015 Agreement, the Addendum to Settlement Agreement ("First Addendum"), and the IGWA-A&B Agreement with IDWR "as a stipulated mitigation plan in reference to the Surface Water Coalition delivery call." (R. 511).

The Director's order approving the stipulated mitigation plan defines the 2015 Agreement, the First Addendum, and the IGWA-A&B Agreement collectively as the "Mitigation Plan." The order summarily identifies key terms of these documents but does not restate the terms wholly; rather, the 2015 Agreement, First Addendum, and IGWA-A&B Agreement are

incorporated into the Director's order by reference. (R. 893-896.) The Director approved the Mitigation Plan with three conditions requested by the cities of Pocatello and Idaho Falls to clarify that they are not required to reduce their groundwater diversions under the order approving the Mitigation Plan. (R. 896, 894 ¶ 7.)

After IGWA and the SWC submitted the Second Addendum for approval, IDWR issued a *Final Order Approving Amendments to Stipulated Mitigation Plan* ("Order Approving Amended Plan") which approved the Second Addendum and added two conditions to clarify that the Department's approval of the Mitigation Plan does not obligate the Department to take any particular enforcement action. (R. 905.) Again, the Order Approving Amended Plan incorporated the Second Addendum by reference; it did not restate its terms in the order.

Thus, the 2015 Agreement and its addenda are part and parcel with the Director's orders approving them as the Mitigation Plan. IDWR acknowledges this, pointing out in its Opening Brief that the term "Mitigation Plan" consists of six documents: "(1) the SWC-IGWA Settlement Agreement; (2) the A&B-IGWA Agreement; (3) the First Addendum; (4) the *Order Approving Mitigation Plan*; (5) the Second Addendum; and (6) the *Order Approving Amendment to Mitigation Plan*." (IDWR Resp., p. 5). The Director's *Amended Final Order Regarding Compliance with Approved Mitigation Plan* ("Amended Compliance Order") likewise identifies these six documents as constituting the Mitigation Plan. (R. 405.)

Since the 2015 Agreement defines key terms of the Mitigation Plan, the Director cannot enforce the Mitigation Plan without interpreting the terms of the 2015 Agreement. There is nothing nefarious in IGWA's analysis of the terms of the 2015 Agreement or in IGWA's insistence that the Director interpret those terms in accordance with Idaho law.

2. IDWR wrongly attempts to reframe IGWA's argument concerning the meaning of the Mitigation Plan as a question of interpretation of the word "annually."

IDWR's first response argument is a repeat of the Director's earlier attempt to reframe IGWA's primary argument. IDWR states: "To avoid a determination that IGWA breached its conservation requirement in 2021, IGWA asserted that the term 'annually' was ambiguous." (IDWR Resp., p. 13.) This statement is not followed by a citation to the record because IGWA has never actually made this argument.

After the Director issued the *Compliance Order* on September 8, 2022, IGWA requested a hearing to challenge the Director's findings "(a) that the Settlement Agreement is unambiguous

as to IGWA's share of the 240,000-acre-foot groundwater reduction; (b) that the Settlement Agreement is unambiguous as to the means by which compliance with IGWA's conservation obligation is measured; [and] (c) that the Settlement Agreement unambiguously precludes averaging for the purpose of measuring compliance with IGWA's conservation obligation." (R. 101-102.) IGWA did not raise an issue as to whether the term "annually" is ambiguous.

After the SWC moved for summary judgment on December 21, 2022, IGWA argued in response that the 2015 Agreement patently ambiguous because "the terms of the Agreement can reasonably be read to calculate the signatory districts' proportionate share relative to total diversions from the ESPA," and it is latently ambiguous because "the Agreement does not explain how each district's proportionate share is to be calculated." (R. 200-202.) Again, IGWA did not argue that the term "annually" is ambiguous.

At the hearing held February 8, 2022, IGWA once again did not present evidence that the term "annually" is ambiguous. IGWA's case focused on the term "proportionate share," highlighting the fact that the 2015 Agreement does not prescribe each district's proportionate share of 240,000 acre-feet or how compliance therewith is measured, and how that term was understood and implemented by IGWA. (*See* Statement of Facts, IGWA's Opening Br., p. 4-9.)

In light of the foregoing, IGWA was surprised to see the *Amended Compliance Order* base its decision on the meaning of the term "annually," without analyzing ambiguity of the term "proportionate share." (R. 415-418.)

IGWA made its position abundantly clear in *IGWA's Opening Brief* filed in this action, arguing:

> The phrase "proportionate share of the total annual ground water reduction" is patently ambiguous because it is subject to multiple reasonable interpretations. It could be interpreted to calculate each district's proportionate share relative to (a) total groundwater diversions *by all groundwater users*, (b) total groundwater diversions *by all ground water districts and irrigation districts with members pumping from the ESPA* (this is the interpretation implemented by IGWA), or (c) total groundwater diversions *by the signatory districts alone* (the Director deemed this the only reasonable interpretation).
>
> …
>
> In addition to the patent ambiguity regarding the method used to calculate each ground water district's proportionate conservation obligation, there is a latent ambiguity as to the metric used to calculate the proportionate conservation obligations. … Mr. Higgs identified at least nine different metrics that could be

> used to calculate the districts' proportionate conservation obligations, none of which are prescribed by the terms of the 2015 Agreement or any other part of the Settlement Agreement.

(IGWA's Opening Br., p. 12, 15.) IGWA identified multiple reasonable interpretations of the term "proportionate share of the total," and explained IGWA's understanding and implementation of the term in practice. (IGWA's Opening Br., p. 10-21.)

Remarkably, IDWR's Response does not challenge the alternative reasonable interpretations that IGWA laid out. IDWR does not even attempt to discredit them. Instead, IDWR argues since that the term "annually" is unambiguous, that ends the analysis.

To be clear, IGWA does not argue that the term "annually" is ambiguous. IGWA agrees that each signatory district is required to perform its proportionate share of 240,000 acre-feet annually. The issue is: how much is each district's proportionate annual obligation, and how is compliance with that obligation measured. The meaning of the word "annually" answers neither of those questions.

As explained in *IGWA's Opening Brief*, the IGWA-SWC Settlement Agreement and the orders approving it as a mitigation plan do not prescribe each district's proportionate mitigation obligation, nor do they prescribe how to measure compliance therewith. There are multiple reasonable ways of doing both; therefore, the Mitigation Plan is ambiguous.

3. IGWA does not argue that non-signatories are required to conserve groundwater under the Mitigation Plan.

IDWR argues that IGWA is attempting to impose upon third parties an obligation to conserve groundwater under the Mitigation Plan. (IDWR Resp., p. 11.) The SWC similarly argues that "IGWA wrongly argues that non-parties are somehow responsible for a share of that annual conservation action." (SWC Resp., p. 6.) Not true. IGWA has never argued that non-parties are bound by the terms of the 2015 Agreement. As stated in *IGWA's Opening Brief*, "IGWA expected that A&B, SWID, and other non-IGWA members would also be required to contribute toward mitigating injury to the SWC, albeit through separate agreements with SWC or under the terms of IDWR's Methodology Order governing the SWC delivery call." (IGWA Opening Br., p. 5.)

The fact that third parties are not required to conserve groundwater under the terms of the Mitigation Plan does not mean their diversions cannot be taken into account when calculating the signatory districts' proportionate obligations, as explained in *IGWA's Opening Brief*.

Importantly, neither IDWR nor the SWC assert that the alternative interpretations of the 2015 Agreement that IGWA has posited are not reasonable. IDWR and the SWC instead make ancillary arguments that do not dispute the fundamentals of IGWA's patent ambiguity and latent ambiguity arguments.

4. Determining how each district's proportionate share is calculated does not answer the question of whether averaging is appropriate for measuring compliance.

IDWR argues that the Director's determination that the signatory districts alone must conserve 240,000 acre-feet annually implicitly means averaging is prohibited. (IDWR Resp., p. 8.) However, the determination of each district's proportionate conservation obligation is a separate issue from how conservation will be measured. IDWR even admits that "[t]he SWC-IGWA Settlement Agreement is silent on how each district's compliance with the total annual 240,000 acre-feet reduction is to be measured." (IDWR Resp., p. 16.)

Even if there were no disagreement as each district's conservation obligation, the parties would still need to determine how to measure compliance therewith. As explained in *IGWA's Opening Brief*, there are multiple ways of defining the "baseline" from which conservation will be measured, and multiple ways of measuring compliance against the baseline. (IGWA Opening Br., p. 16-21.) IDWR admits that the Mitigation Plan does not prescribe any particular method: "How IGWA was to calculate the baseline is not prescribed in the SWC-IGWA Settlement Agreement, nor is it prescribed in any of the other documents constituting the Approved Mitigation Plan." (IDWR Resp., p. 16.)

Given this admission, the next question is whether the method for measuring compliance is a material term? Of course it is, or how could the districts be deemed to be in compliance or out of compliance. A term is material if it is "[o]f such a nature that knowledge of the item would affect a person's decision-making process; significant; essential." Black's Law Dictionary, 2d Pocket Ed., p. 441. An agreement, to be enforceable, "must be complete, definite and certain in all its material terms, or contain provisions which are capable of being reduced to certainty." *Vanderford Co. v. Knudson*, 150 Idaho 664, 672 (2011) (quoting *Giacobbi Square v. PEK Corp*., 105 Idaho 346, 348 (1983)). While disagreement regarding the meaning of an immaterial term

does not necessarily invalidate a contract, there must be "reasonable certainty as to the material terms." *Griffith v. Clear Lake Trout Co*., 143 Idaho 733, 737 (2007) (citing *Barnes v. Huck*, 97 Idaho 173, 178 (1975)).

Since the Mitigation Plan does not define the manner by which compliance will be measured, which is a material term, the Director must evaluate whether there are multiple reasonable interpretations of that term. *Swanson v. Beco Const. Co*., 145 Idaho 59, 62 (2007). If there are multiple reasonable interpretations, the term is ambiguous, and the Director must consult parol evidence to determine the parties' intent. *Sommer v. Misty Valley, LLC*, 170 Idaho 413, 425 (2021). If parol evidence clarifies their intent, the term must be interpreted and applied accordingly. If parol evidence demonstrates that there was no meeting of the minds on a material term, the contract is void. *Griffith*, 143 Idaho at 737.

IGWA presented evidence of multiple reasonable methods for measuring compliance with conservation, none of which are spelled out in the Mitigation Plan. (IGWA Opening Br., p. 16-21.) Neither IDWR nor the SWC challenge these interpretations. The Director should have found the Mitigation Plan ambiguous, then evaluated parol evidence to determine the parties' intent, of which the record contains substantial evidence. Since the Director mistakenly found the Mitigation Plan patently unambiguous, he never got that far.

5. The Director cannot "correct" the proportionate conservation obligation of the signature districts unless the Mitigation Plan clearly defines their obligations.

IGWA has argued that even if the Director properly determined that the 2015 Agreement unambiguously requires the signatory districts alone to conserve 240,000 acre-feet, the Mitigation Plan does not prescribe each district's proportionate share of that volume. It does not assign a percentage to each district, or a formula for calculating each district's proportionate share. Instead, the signature districts determined this on their own, after the 2015 Agreement was signed. (IGWA's Opening Br., p. 16-22.)

The signatory districts previously agreed to their respective shares based on average diversions from 2010-2014, taking into account diversions by A&B Irrigation District ("A&B") and Southwest Irrigation District ("SWID"), and assuming that averaging would be used for measuring compliance. If the judiciary rules that diversions by A&B and SWID cannot be considered, or that averaging is prohibited, the signatory districts will have to redetermine their respective proportionate shares. *Id*.

IDWR acknowledges that the neither the 2015 Agreement nor the order approving it as a mitigation plan prescribe each district's proportionate share of 240,000 acre-feet. (IDWR Resp., p. 16.) Yet, IDWR argues that the Director acted within his authority when he "corrected" the allocation. Which begs the question: corrected it based on what? Not on terms set forth in the Mitigation Plan .

While the Director does have authority to approve and disapprove mitigation plans, he does not have authority to unilaterally change approved mitigation plans, particularly in this instance where the Mitigation Plan is based on a contract submitted by stipulation under Conjunctive Management Rule 43.o. The parties did not authorize the Director to change the terms of their agreement. First example, it is not within the scope of the Director's authority to order IGWA to deliver more than 50,000 acre-feet, or to order the SWC to accept less than 50,000 acre-feet, under section 3.b.i of the 2015 Agreement.

Thus, even if the Director rightly found the signatory districts collectively responsible to conserve 240,000 acre-feet, the Director must comply with the terms of the 2015 Agreement in calculating their proportionate shares. Since the 2015 Agreement is silent on that issue, the Director must evaluate parol evidence to interpret that term of the Agreement in accordance with the intent of the parties. If the Director finds, through parol evidence, that there was no meeting of the minds, then the 2015 Agreement is void and the Director should vacate the orders approving it as a mitigation plan.

This has not been done. Rather than interpret the 2015 Agreement in accordance with established Idaho laws governing contract interpretation, the Director unilaterally assigned to each district a conservation obligation of his own making. In doing so, he acted outside his statutory authority and violated Idaho law.

6. IDWR has not offered a sound defense of its manifestly false and injurious finding of fact no. 43.

IGWA has argued that the Director had no reasonable basis in law or fact to state in finding of fact no. 43 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." (IGWA's Opening Br., p. 22.) This was no small error or oversight. It was a deliberate, damning accusation of utter failure—a personal attack telling IGWA and the

world that IGWA's legal counsel completely failed to present any evidence or argument supporting its case.

As demonstrated in *IGWA's Opening Brief*, IGWA explicitly argued ambiguity in its request for a hearing filed in September of 2022, in its summary judgment brief filed in January 2023, and in its evidentiary case presented at the hearing in February of 2023. (IGWA's Opening Br., p. 4-8, 11-21.) In light of this, finding of fact no. 43 is, indeed, inexplicable.

Rather than withdraw its false accusation, IDWR has doubled down, arguing that IGWA "views the Approved Mitigation Plan too narrowly" and "misunderstands the Director's conclusion," because "IGWA focused, and continues to focus, on the language of the SWC-IGWA Settlement Agreement alone." (IDWR Resp. Br., p. 28.) IDWR then states: "IGWA presented argument. IGWA presented evidence. However, IGWA did not present argument or evidence that supported the Approved Mitigation Plan, when read as a whole and in its entirety, was ambiguous." *Id.* at 28-29 (emphasis added). The Director's position has not changed. He does not argue that IGWA did not *prove* ambiguity; he still contends that IGWA neither *offered* or *presented* any argument or evidence of ambiguity. Finding of fact no. 43 is a complete farce.

IGWA's grievance with finding of fact no. 43 has nothing to do with a mistaken distinction between the 2015 Agreement and the Director's order approving it as a mitigation plan. Finding of fact no. 43 refers specifically to the "Mitigation Plan," which is defined by the Director as comprising six documents, including the 2015 Agreement. (R. 405.) Finding of fact no. 43 tells the world that IGWA's legal counsel offered no evidence or argument of ambiguity in the 2015 Agreement or any other component of the Mitigation Plan. Such a reckless and egregious accusation—from a government agency, no less—cannot go uncorrected, and such conduct must be penalized to avoid repetition.

7. The merger clause is inapplicable where an agreement is ambiguous.

The SWC argues that the 2015 Agreement merger clause precludes parole evidence in this matter. (SWC's Resp., p. 12.) However, a merger clause only prohibits parole evidence "[i]f the written agreement is complete upon its *face and unambiguous*." *Kimbrough v. Reed*, 130 Idaho 512, 515 (1997) (emphasis added). Since the Mitigation Plan is both incomplete and ambiguous, as explained above, the merger clause does not preclude parol evidence.

8. The Director's re-interpretation of the Mitigation Plan prejudices IGWA's substantial rights.

IDWR remarkably argues that the Director's interpretation of the Mitigation Plan in a way that makes compliance substantially more onerous and greatly increases the likelihood of curtailment of IGWA's members' groundwater rights does not prejudice IGWA's substantial rights. In reply, IGWA incorporates by reference the argument set forth on page 23 of its Opening Brief.

CONCLUSION

For the reasons set forth above and in *IGWA's Opening Brief*, IGWA respectfully requests that this Court set aside the Amended Compliance Order and make the following rulings:

A. The Settlement Agreement is ambiguous as to how each ground water district's proportionate groundwater conservation obligation is calculated.

B. The Settlement Agreement is ambiguous as to how compliance with each ground water district's proportionate groundwater conservation obligation is measured.

C. The Director's finding and conclusion that IGWA failed to present argument nor evidence of ambiguity is not supported by substantial evidence in the record, and/or is arbitrary, capricious, and an abuse of discretion.

D. The Director exceeded his statutory authority by reapportioning IGWA's contractual obligations without regard to parol evidence.

E. The Director's finding and conclusion that IGWA offered neither argument nor evidence of ambiguity was made without a reasonable basis in law or fact, entitling IGWA to attorney fees under Idaho Code § 12-117.

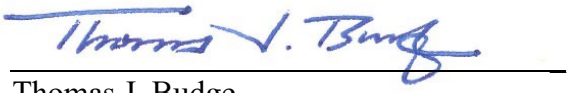
F. The Department must resolve the ambiguities in the Settlement Agreement based on parol evidence presented at the hearing.

RESPECTFULLY SUBMITTED this 3rd day of October 2023.

THOMAS J. BUDGE
Attorney for IGWA

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2023, I filed the foregoing document and served it upon the persons below via iCourt:



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