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**DISTRICT COURT OF THE STATE OF IDAHO
FOURTH JUDICIAL DISTRICT
ADA COUNTY**

IDAHO GROUND WATER
APPROPRIATORS, INC.,

Petitioner,

vs.

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

Respondents.

Case No. CV01-23-07893

**IGWA'S BRIEF IN SUPPORT OF
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
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

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, submits this brief pursuant to I.R.C.P. 84(r) and I.A.R. 42(b) in support of IGWA's Petition for Rehearing filed herewith. Capitalized terms not defined in this brief have the meaning set forth in IGWA's Opening Brief filed August 15, 2023, or in this court's Memorandum Decision and Order issued November 16, 2023 ("Decision").

Argument

IGWA requests rehearing concerning the Director's interpretation of the Settlement Agreement term that states: "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." In the interest of brevity, this term is referred to herein as the "proportionate share term." IGWA also requests rehearing of the court's ruling that the Final Order does not prejudice IGWA's substantial rights.

1. The Decision does not resolve IGWA's arguments concerning the proportionate share term.

IGWA's petition for judicial review challenges the Director's decision that six of the nine groundwater districts breached the Settlement Agreement by failing to meet their groundwater conservation obligations under the Agreement. This court affirmed the Director's decision by concluding that "the Settlement Agreement unambiguously requires a reduction in ground water diversions in the amount of 240,000 acre-feet each year." (Decision, p. 10.) This conclusion is based on the court's determination that the word "annually" is patently unambiguous, along with the statement in the Director's order approving the Mitigation Plan that "[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan." *Id.* at 10-13.

The court's ruling does not fully resolve the issue for which IGWA petitioned for judicial review. IGWA has not challenged the meaning of the words "annually," nor has it argued that non-signatory entities must comply with terms of the Settlement Agreement. No such arguments are made in IGWA's Opening Brief.¹ Rather, IGWA has challenged the Director's interpretation of the proportionate share term—specifically, "how each district's proportionate groundwater

¹ IGWA does not contend that A&B Irrigation District ("A&B") or Southwest Irrigation District ("SWID") are required to conserve groundwater under the Settlement Agreement; only that diversions by A&B and SWID may be taken into account in calculating the proportionate conservation obligations of the signatory districts.

conservation obligation is calculated,” and “how compliance with each district’s proportionate groundwater conservation obligation is measured.” (IGWA’s Opening Br., p. 10.)

It is axiomatic that the Director cannot find a ground water district in breach of the Settlement Agreement without first defining the district’s obligations and how compliance with those obligations is measured. Thus, the Director’s ruling that six ground water districts breached the Settlement Agreement is inherently predicated upon his determinations of (1) how much groundwater each district must conserve under the Settlement Agreement, and (2) how conservation will be measured.

The proportionate share term states: “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 conducting an equivalent private recharge activity.” (R. 437; emphasis added.) In finding that six ground water districts breach this term, the Director assigned the following conservation obligations to the ground water districts, as set forth in Table 2 of the Final Order:

Ground Water District	Conservation Obligation (acre-feet)
Bingham	40,914
Carey	821
Henry’s Fork	6,299
Magic Valley	37,931
Total	240,000

(Excerpt from Table 2, R. 412.)

These conservation volumes are not stated in the Settlement Agreement or in any other document comprising the Mitigation Plan. They were never agreed upon by IGWA and the SWC. They are different than the conservation volumes implemented by IGWA. The Director developed these figures on his own, using parol evidence.

At the evidentiary hearing before the Director, IGWA demonstrated that there are at least nine different ways of calculating each district’s proportionate share of 240,000 acre-feet, none of which are prescribed in the Settlement Agreement. (See IGWA’s Open. Br., p. 5-6.) IGWA also presented evidence as to its intent concerning the proportionate share term. (See IGWA’s

Open. Br., p. 5; R. 953-54.) However, the Director refused to consider parol evidence of party intent. He ruled that the Settlement Agreement is unambiguous, eliminating his ability to consider parol evidence. (R. 416-18.) Yet, the Director considered parol evidence to come up with the conservation obligations cited above, as discussed below.

In addition to assigning conservation obligations that are not specified in the Settlement Agreement, the Director selected a method for measuring compliance that is not specified in the Settlement Agreement. The Settlement Agreement does not specify a method for measuring compliance. IGWA developed and implemented one of various possible methods after the Settlement Agreement was signed. (*See* IGWA's Open. Br., p. 7-8.) The Director took the method developed by IGWA and modified it by proportionately increasing the groundwater conservation obligations of each ground water district, as shown in Table 2 of the Final Order. (R. 412.) The Director borrowed IGWA's method from a report that IGWA submitted to IDWR in 2021. (R. 411.) The method developed by IGWA is itself parol evidence.

However, the Director modified the way compliance is measured under IGWA's method. IGWA's method measures compliance by comparing *average* pre-Settlement Agreement diversions against *average* post-Settlement Agreement diversions. The Director's method compares *average* pre-Settlement Agreement diversions against *single-year* post-Settlement Agreement diversions. The Director's method may seem to be a small modification, but it makes a huge difference in practice because it forces groundwater irrigators to assume that every summer will experience the most extreme heat and drought when making planting decisions. In effect, it forces ground water districts to conserve much more than their proportionate share of 240,000 acre-feet in all but the most extreme drought years. IGWA explained at the evidentiary hearing that if averaging is not allowed for compliance, it does not make sense to use an average for the baseline. (*See* IGWA's Open. Br., p. 16-20.)

What matters here is that the Director's method is not specified in the Settlement Agreement, was not agreed to nor implemented by IGWA, and is based on parol evidence. The Director used parol evidence to develop conservation obligations and a compliance method that are not prescribed in the Settlement Agreement, yet he refused to consider IGWA's parol evidence of party intent by ruling that the Agreement is unambiguous. The Director cannot play both sides of the parol evidence coin. He cannot refuse to consider parol evidence of party intent by ruling that the Settlement Agreement ambiguous, and then use parol evidence to interpret the

proportionate share term the way he would like. As noted by this court, “[i]f the language of the contract is unambiguous, then its meaning and legal effect must be determined from its words.” (Decision, p. 9, quoting *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308 (2007).)

IGWA argued in its opening brief that the proportionate share term is ambiguous because the Settlement Agreement does not prescribe each district’s specific conservation obligation, nor how to measure compliance therewith. (IGWA’s Open. Br., p. 14-21.) If a contract is ambiguous, “interpretation of the [contract] becomes a question of fact determined by parole [sic] evidence of the facts and circumstances surrounding the [] transaction.” *Sommer v. Misty Valley, LLC*, 170 Idaho 413, 425 (2021). The purpose of examining parole evidence is “discovering the intention of the parties,” *Ida-Therm, LLC v. Bedrock Geothermal, LLC*, 154 Idaho 6, 9 (2012), which may be derived from the language of the contract as well as “the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings.” *Stanger v. Walker Land & Cattle, LLC*, 169 Idaho 566, 573 (2021).

Since the Decision upholds the Director’s conclusion that the Settlement Agreement is unambiguous, the questions on rehearing are: (1) where does the Settlement Agreement or Mitigation Plan state that Magic Valley Ground Water District, for example, is obligated to conserve 37,931 acre-feet annually, and (2) where do they state that compliance with this obligation will be measured by comparing its patrons’ annual diversions against average diversions from 2010-2014? If the Settlement Agreement is unambiguous, the Director must be able to point to language in the Agreement that specifies these terms. He has not done so, nor does this court’s Decision.

In sum, the Decision does not address IGWA’s argument concerning the proportionate share term, at least not with sufficient clarity for the parties and the Idaho Supreme Court to discern the court’s reasoning for finding this provision to be patently unambiguous despite neither the Settlement Agreement nor the Mitigation Plan defining each district’s individual conservation obligation or how compliance therewith will be measured. Therefore, IGWA respectfully requests that the court reconsider the Decision and clarify its ruling concerning the proportionate share term. This analysis should include the following inquiries:

1. Is the proportionate share term a material term of the Settlement Agreement?
2. If it is a material term, does the Settlement Agreement unambiguously define each district's annual conservation obligation to be the figures listed in the "Target Conservation Volume" column of Table 2 of the Final Order?
3. Does the Settlement Agreement unambiguously require the Director to measure each district's compliance with its annual conservation obligation by comparing single-year diversions post-Agreement against pre-Agreement average diversions from 2010-2014?
4. If the proportionate share term is a material term of the Settlement Agreement, and if the Settlement Agreement does not unambiguously define each district's annual conservation obligation or how to measure compliance therewith, did the Director err by declaring the Settlement Agreement to be unambiguous?
5. Since the Director declared the Settlement Agreement to be unambiguous, did he err by consulting parol evidence to determine each district's annual conservation obligation, and by consulting parol evidence to develop a method for measuring compliance that is not prescribed in the Agreement?
6. Since the Director considered parol evidence, did he err by only considering parol evidence of his choosing, and refusing to consider parol evidence presented by IGWA to demonstrate the intent of the parties?

Based on the foregoing, IGWA respectfully requests that this court reconsider its Decision concerning the proportionate share term by either (a) finding the term ambiguous and remanding the case to the Director to evaluate the intent of the parties based on the evidence in the record, or (b) clarifying the court's basis for finding the term to be unambiguous.

2. The Final Order prejudices IGWA's substantial rights.

The court ruled that IGWA's substantial rights were not prejudiced because "IGWA has failed to establish the Final Order was made in violation of Idaho Code § 67-5279(3)." (Decision, p. 15.) This ruling is presumably based on the court's finding that the Director did not err in finding the Settlement Agreement to be unambiguous. If, upon rehearing, the court finds that the Director did err, then the court should find that IGWA's substantial rights were prejudiced.

As noted in IGWA's Opening Brief, water rights are real property rights, which are, as a matter of law, substantial rights. The Final Order impairs the water rights of IGWA's members by forcing them to conserve more groundwater than is lawfully required under the Settlement Agreement, effectively diminishing their real property rights. (IGWA's Open. Br., p. 23.)

To the extent the Decision questions whether a failure by the Director to follow Idaho law governing contract interpretation violates Idaho Code § 67-5279(3), it most certainly does. "The

ability to enter freely into contracts that are neither illegal nor violate important public policies is a substantive right.” *Two Jinn, Inc. v. Idaho Dept. of Ins.*, 154 Idaho 1, 5 (2013). Further, “[w]hether a contract is ambiguous is a question of law over which [courts] exercise free review.” *Swanson v. Beco Const. Co.*, 145 Idaho 59, 62 (2007); *Wood v. Idaho Transportation Dep’t*, ___ Idaho ___, 532 P.3d 404, 410 (Idaho 2023) (“Court exercises free review over questions of law”). It would be chaotic indeed if government agencies were free to ignore Idaho law governing contract interpretation, and instead interpret contracts using rules of their own making. This is especially true where, as in this case, the contract governs valuable property rights. The Director’s failure to follow Idaho law governing contract interpretation qualifies as a violation of Idaho Code § 67-5279(3)(a) because it violates the constitutional right of “acquiring, possessing, and protecting property.” Idaho Const., Art. 1, § 1. It violates Idaho Code § 67-5279(3)(b) because it exceeds the statutory authority of the Director, who, as a state actor, has a duty to uphold Idaho law. It violates Idaho Code § 67-5279(3)(e) because the Director is not vested with discretion to disregard Idaho law governing contract interpretation.

Finally, the Decision suggests that IGWA’s substantial rights were not prejudiced because the Remedy Settlement Agreement resolved the dispute over compliance with the Settlement Agreement in 2021. This cannot be so. First, the Remedy Settlement Agreement was entered into under duress after the Director communicated to IGWA through back channels that he was planning to declare a breach and shut off the ground water districts’ members water rights in September of 2021, with only a few weeks of irrigation remaining to finish their valuable potato and sugar beet crops. Second, the Final Order imposes obligations under the Settlement Agreement that apply not only to 2021, but also to every future year.

Although IGWA’s performance in 2022 and 2023 is not presently before the court, the Director’s interpretation of the Settlement Agreement defines how much water IGWA’s members are permitted to divert, and how their compliance will be measured, in 2022 and beyond. In practice, the Director’s interpretation of the Settlement Agreement makes it much more likely that the water rights of IGWA’s members will be curtailed by IDWR. As such, the Final Order clearly affects the substantial rights of IGWA and its members.


Conclusion

Based on the foregoing, IGWA respectfully requests that this court either (a) find the proportionate share term ambiguous and remand the case to the Director to evaluate the intent of

the parties based on the evidence in the record, or (b) clarify the court's basis for finding the term to be unambiguous. In addition, IGWA requests that the court find that the substantial rights of IGWA and its members have been prejudiced.

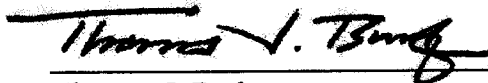
RESPECTFULLY SUBMITTED this 29th day of November, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2023, I filed the foregoing document via iCourt and served it upon the persons below via iCourt:



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