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9/12/2023 3:27 PM
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 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

IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND FOR THE

Case No. CV01-23-07893

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

RESPONDENT IDWR'S BRIEF

Judicial Review from the Idaho Department of Water Resources
Gary Spackman, Director, Presiding

RAÚL R. LABRADOR
ATTORNEY GENERAL

SCOTT L. CAMPBELL
Chief of Energy and Natural Resources Division

GARRICK L. BAXTER, ISB No. 6301
KAYLEEN R. RICHTER, ISB No. 11258
Deputy Attorneys General
P.O. Box 83720
Boise, Idaho 83720-0098
garrick.baxter@idwr.idaho.gov
kayleen.richter@idwr.idaho.gov

Attorneys for Respondents

Thomas J. Budge
Elisheva M. Patterson
RACINE OLSON, PLLP
201 E. Center St.
P.O. Box 1391
Pocatello, Idaho 83204
tj@racineolson.com
elisheva@racineolson.com

Attorneys for Petitioner

Candice M. McHugh
Chris M. Bromley
MCHUGH BROMLEY, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
cmchugh@mchughbromley.com
cbromley@mchughbromley.com

Attorneys for Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell

Sarah A. Klahn
Maximilian C. Bricker
SOMACH SIMMONS & DUNN, P.C.
1155 Canyon Blvd., Suite 110
Boulder, CO 80302
sklahn@somachlaw.com
mbricker@somachlaw.com

Attorneys for City of Pocatello

John K. Simpson
Travis L. Thompson
MARTEN LAW LLP
163 Second Ave. West
P.O. Box 63
Twin Falls, Idaho 83303-0063
jsimpson@martenlaw.com
tthompson@martenlaw.com

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

W.Kent Fletcher
FLETCHER LAW OFFICE
P.O. BOX 248
Burley, Idaho 83318
wkf@pmt.org

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

Skyler C. Johns
Nathan M. Olsen
Steven L. Taggart
OLSEN TAGGART PLLC
P.O. Box 3005
Idaho Falls, ID 83403-3005
sjohns@olsentaggart.com
nolsen@olsentaggart.com
staggart@olsentaggart.com

Attorneys for Bonneville-Jefferson Ground Water District

Dylan Anderson
DYLAN ANDERSON LAW PLLC
P.O. Box 35
Rexburg, Idaho 83440
dylan@dylanandersonlaw.com

Attorney for Bingham Groundwater District

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This is a judicial review proceeding in which member districts of the Idaho Ground Water Appropriators, Inc. ("IGWA"), appeal a final order issued by the Director of the Idaho Department of Water Resources ("Department") finding that certain IGWA members breached an Approved Mitigation Plan by failing to adequately reduce their proportionate share of ground water diversions. The order appealed is the April 24, 2023 *Amended Final Order Regarding Compliance with Approved Mitigation Plan* ("*Amended Final Order*").

B. Statement of Facts and Procedural Background.

i. The Approved Mitigation Plan

In July 2015, members of the Surface Water Coalition ("SWC")[1] and member districts of IGWA[2] executed an agreement titled "Settlement Agreement Entered Into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc." ("SWC-IGWA Settlement Agreement"). R. 436. The parties primarily sought to "mitigate for material injury to senior surface water rights" and to "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)." *Id*. The SWC-IGWA Settlement Agreement prescribes several long-term requirements, including the

[1] The SWC-IGWA Settlement Agreement identifies the SWC members to be 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.

[2] The SWC-IGWA Settlement Agreement identifies the IGWA member districts to be Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, Southwest Irrigation District, and Fremont-Madison Irrigation District. Southwest Irrigation District did not sign the SWC-Settlement Agreement and is not a party despite being a member of IGWA. Unless otherwise indicated, throughout this brief "IGWA" and "IGWA members" are intended to refer to the IGWA member districts that are parties to the Approved Mitigation Plan.

conservation obligation[3] in Section 3.a, which is at issue in this case. Section 3.a of the SWC-IGWA Settlement Agreement states in relevant part:

> 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.

R.437.

On October 7, 2015, IGWA and A&B Irrigation District ("A&B") entered into a separate agreement ("A&B-IGWA Agreement") to clarify "the scope of A&B's participation in the [SWC-IGWA] *Settlement Agreement*[.]" R. 498. In the A&B-IGWA Agreement, the parties stipulated:

> A&B agrees to participate in the [SWC-IGWA] *Settlement Agreement* as a surface water right holder only. 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. A&B agrees to not make a surface water delivery call against junior-priority ground water rights held by participating members of the Ground Water Districts as set forth in Paragraph 6 of the *Settlement Agreement*.

Id.

Concurrently in October 2015 the parties to the SWC-IGWA Settlement Agreement executed the Addendum to Settlement Agreement ("First Addendum") to clarify certain issues including the parties' reservation of rights to participate in proceedings "to establish a new area of common groundwater supply if the existing Conjunctive Management Rule 50 boundary is rescinded." R. 461.

On March 9, 2016, the SWC and IGWA submitted to the Department the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order*. The SWC and IGWA attached a proposed final order for the Director to sign and approve as a mitigation plan under Rule 43 of the Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"). Rather than sign the proposed order, the Director entered his own *Final Order*

[3] While the long term obligation in Section 3.a. is sometimes referred to as a "reduction obligation," the parties also use the broader term "conservation obligation" synonymously because the parties have agreed to count certain recharge activities towards IGWA's diversion reduction obligation. R. 403.

Approving Stipulated Mitigation Plan ("*Order Approving Mitigation Plan*") on May 2, 2016. In the order the Director found, among other things, that "[t]hrough the Mitigation Plan, the SWC and IGWA members agree to: (a) a total ground water diversion reduction of 240,000 acre-feet annually[.]" R. 894. One of the Director's conclusions of law included a discussion regarding the Mitigation Plan's required "numerous ongoing activities." R. 896. The Director concluded that "[t]he parties to the Mitigation Plan should be responsible for these activities and the ground water level goal and benchmarks should only be applicable to the parties to the Mitigation Plan as specified in the Mitigation Plan." *Id*.

When the Director entered the *Order Approving Mitigation Plan*, he approved the SWC-IGWA Settlement Agreement and its First Addendum as a CM Rule 43 mitigation plan subject to three (3) additional conditions included in the order. *Id*. The three (3) conditions were:

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

Id.

Because the Director did not sign and enter the SWC-IGWA proposed order, which included certain provisions that the Director did not incorporate into his order, the parties to the SWC-IGWA Settlement Agreement executed the Second Addendum to Settlement Agreement ("Second Addendum").[4] R. 477. The Second Addendum, dated December 14, 2016, detailed the parties' agreement regarding the implementation of terms in the SWC-IGWA Settlement

[4] The recitals to the Second Addendum explain:

> D. WHEREAS, on May 2, 2016, the Director entered a *Final Order Approving Stipulated Mitigation Plan* . . . approving the Settlement Agreement as a CMR 43 mitigation plan; and
>
> E. WHEREAS, the Director's Final Order did not include certain provisions set forth in the Parties' proposed Final Order; and
>
> F. WHEREAS, the Parties now set forth and incorporate into the Settlement Agreement to the provisions set forth in this Second Addendum.

R. 477.

Agreement. R. 478. With respect to the conservation obligation in Section 3.a of the SWC-IGWA Settlement Agreement, the Second Addendum provided:

> 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.

Id. The Second Addendum also expanded on the details of the Steering Committee and outlined the process for addressing a potential breach of the SWC-IGWA Settlement Agreement, particularly if the parties disagreed whether a breach 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.

On February 7, 2017, the SWC and IGWA submitted to the Department the *Surface Water Coalition's and IGWA's Stipulated Amended Mitigation Plan and Request for Order* with the Second Addendum attached. On May 9, 2017, the Director entered the *Final Order Approving Amendment to Stipulated Mitigation Plan* ("*Order Approving Amendment to Mitigation Plan*"), which accepted the Second Addendum as an amendment to the Mitigation Plan. The Director approved the amendment to the Mitigation Plan subject to two (2) 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.

R. 905. The Director's *Order Approving Amendment to Mitigation Plan* contained the same language as the Director's earlier *Order Approving Mitigation Plan* regarding the finding that the SWC and IGWA members agree to a total ground water diversion reduction of 240,000 acre-feet annually and the conclusion that the parties to the Mitigation Plan should be responsible for its obligations. R. 902; 904.

The Director's *Order Approving Amendment Mitigation Plan* was the last document executed or entered that set forth the terms of the Mitigation Plan and the parties' respective obligations. Therefore, these documents together constitute the Approved Mitigation Plan: (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*.

ii. IGWA's 2021 Breach of the Approved Mitigation Plan

On April 1, 2022, IGWA sent its 2021 Performance Report to the SWC and the Department. R. 709. A spreadsheet included in the report summarized IGWA's 2021 mitigation efforts, attributing shares of the annual target conservation to A&B and Southwest Irrigation District ("SWID"). R. 435. IGWA's summary spreadsheet is reproduced below as Table 1:

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.

Id.

On April 29, 2022, the SWC filed *Surface Water Coalition's Request for Status Conference* with the Department to address IGWA's compliance with the Approved Mitigation Plan due to the members' performance in 2021. The SWC's request noted "A&B Irrigation District and Southwest Irrigation District are not part of the districts' obligation under the settlement agreement or mitigation plan. IGWA has erroneously included A&B and SWID as part of its 240,000 af calculations every year, but until this year the nine districts have exceeded the 240,000 af reduction requirement." R. 2 n.1. The Director responded on May 5, 2022, directing the SWC and IGWA to comply with the process outlined in the Second Addendum by first addressing the compliance issue with the Steering Committee. R. 14–15.

The Steering Committee held several meetings to review the technical information submitted to determine whether IGWA breached the conservation obligation in the Approved Mitigation Plan. R. 21. On July 21, 2022, the SWC filed *Surface Water Coalition's Notice of Steering Committee Impasse / Request for Status Conference*, alerting the Director that the SWC and IGWA had reached an impasse and requested the Director determine whether IGWA breached the conservation obligation. R. 19, 22. The Director granted the SWC's request for a status conference and set the matter for August 5, 2022. R. 25.

On August 3, 2022, IGWA responded to the *Surface Water Coalition's Notice of Steering Committee Impasse / Request for Status Conference* ("*SWC's Notice*") explaining its position that IGWA members did not breach the SWC-IGWA Settlement Agreement. R. 29–30. The SWC replied on August 4, 2022, explaining its disagreement. R. 37–41. After the status conference, on August 12, 2022, IGWA filed a supplemental response to the *SWC's Notice*. R. 44. Six days later, on August 18, 2022, the Director notified the SWC and IGWA of his intent to take official notice of IGWA's 2021 Settlement Agreement Performance Report and supporting spreadsheet that the parties presented to the Director at the status conference. R. 55. On August 23, 2022, IGWA objected to the Director's notice and requested a hearing. R. 59–60.

On September 7, 2022, IGWA and the SWC entered into a Settlement Agreement intended to resolve their "dispute over IGWA's compliance with the Settlement Agreement and Mitigation Plan in 2021[.]" R. 68. IGWA withheld admitting it breached the terms of the Approved Mitigation Plan but nevertheless stipulated to a remedy. Further, the Settlement Agreement requested the Director "issue a final order regarding the interpretive issues raised by the SWC Notice." *Id*.

The Director acquiesced and issued a *Final Order Regarding Compliance with Approved Mitigation Plan* ("*Compliance Order*") on September 8, 2022. R. 71. The Director concluded, among other things, that certain IGWA members breached the Approved Mitigation Plan in 2021. R. 83. IGWA petitioned for reconsideration of the final order and requested a hearing.[5] R. 96. The Director granted IGWA's request for a hearing, then scheduled and held a prehearing conference. R. 105, 155.

In advance of the hearing, on December 21, 2022, the SWC moved for summary judgment. R. 179, 183. IGWA opposed the SWC's motion for summary judgment on January 4, 2023. R. 195. That same day, the Bonneville-Jefferson Ground Water District ("BJGWD") petitioned to intervene in the contested case. BJGWD also opposed the SWC's motion for summary judgment and asserted arguments IGWA had not raised in its opposition. R. 262, 272. On January 9, 2023, the SWC opposed BJGWD's motion to intervene and moved to strike BJGWD's response in opposition. R. 283. BJGWD opposed the SWC's opposition to its intervention and its motion to strike on January 17, 2023. R. 314. The SWC replied in support of its motion for summary judgment on January 11, 2023. R. 296.

On January 27, 2023, the Director denied the SWC's motion for summary judgment to allow IGWA to "make its case." R. 385. The Director explained "this matter involves compliance with 'an ongoing mitigation plan under the umbrella of an active delivery call.'" *Id*. The Director

[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.

found "it appropriate to evaluate the Compliance Order based on a fully developed evidentiary record." *Id*. In the Director's order denying the SWC's motion for summary judgment, the Director also conditionally granted BJGWD's petition to intervene. *Id*. The Director limited BJGWD's intervention to the issues presented by the SWC and IGWA prior to January 4, 2023, due to the untimeliness of BJGWD's petition. R. 386.

The matter proceeded to hearing on February 8, 2023. IGWA called two witnesses, Mr. Jaxon Higgs, and Mr. Timothy Deeg. R. 409. Neither the SWC nor BJGWD called any witnesses, although they both either examined or cross-examined IGWA's witnesses. *Id*. IGWA and the SWC both introduced exhibits. *Id*. At the conclusion of the hearing, BJGWD moved to adopt IGWA's arguments. *Id*. All parties waived post-hearing briefing. *Id*.

On April 24, 2023, the Director entered his *Amended Final Order Regarding Compliance with Approved Mitigation Plan* ("*Amended Final Order*"). Upon consideration of all the information available, the Director concluded: (1) the Approved Mitigation Plan unambiguously required IGWA to conserve 240,000 ac-ft each year—meaning averaging was prohibited; (2) the Approved Mitigation Plan unambiguously prohibited IGWA from apportioning A&B and SWID a percentage of the annual reduction obligation; (3) the Approved Mitigation Plan did not contain a latent ambiguity; (4) certain IGWA members breached the Approved Mitigation Plan in 2021; (5) the breaching member districts were not covered by an effectively operating mitigation plan and IGWA must implement the stipulated remedy; and (6) IGWA's procedural and evidentiary objections lacked merit. R. 415–21.

Based on the Director's conclusion that the Approved Mitigation Plan unambiguously prohibited IGWA from apportioning A&B and SWID a percentage of the annual reduction obligation, the Director reproportioned the total obligation among the IGWA members that were parties to the Approved Mitigation Plan. R. 412. Table 2 below illustrates IGWA's 2021 Performance Summary Table with yellow highlighted columns added by the Director. The "Re-proportioning" column in Table 2 redistributed the 34,603 ac-ft IGWA assigned to A&B and

SWID. 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 Approved Mitigation Plan. R. 412.

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.

Id. The Director found that "[w]hen A&B and Southwest are collectively apportioned 34,603 ac-ft of IGWA's conversation [sic] obligation, IGWA were 82,613 ac-ft short of its reduction obligation in 2021." *Id*. Further, the Director found that "[w]hen A&B and Southwest are not apportioned 34,603 ac-ft, IGWA were 117,216 ac-ft short of its reduction obligation in 2021." *Id*. Based on the analysis in Table 2, the Director found that American Falls-Aberdeen, Bingham, BJGWD, Jefferson-Clark, Magic Valley, and North Snake failed to satisfy their respective reduction requirements in 2021. *Id*.

Ultimately, on May 15, 2023, IGWA petitioned the Court for judicial review of the Director's *Amended Final Order*.

II. ISSUES PRESENTED ON APPEAL

Respondents' formulation of the issues presented is as follows:

1. Whether the Approved Mitigation Plan is unambiguous and does not allow IGWA to average its members' performance to determine annual compliance.

2. Whether the Approved Mitigation Plan unambiguously prohibits IGWA from allocating proportionate shares of its total annual conservation obligation to non-parties.
3. Whether the Director exceeded his authority when he corrected IGWA's unilateral reduction of its members' total conservation obligation.
4. Whether the Director's *Amended Final Order* prejudiced substantial rights.
5. Whether IGWA is entitled to attorney fees.

III. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court shall affirm the agency decision unless it finds 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); *Barron v. Idaho Dept. of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. I.C. § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. "Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion." *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

IV. ARGUMENT

This case is about the Director's determination that certain members of IGWA breached the Approved Mitigation Plan in 2021. At the outset of the hearing on February 8, 2023, the Director identified the scope of the question presented:

> So my understanding is that this particular hearing is to address a broad issue of whether the 2015 settlement agreement and subsequent addendums approved as a Mitigation Plan under the Conjunctive Management Rules was breached in 2021.
>
> And there's two subissues that I've identified. And those subissues are the averaging of annual obligation of—I'm sorry. The issue of whether 240,000 acre-feet annually is a fixed obligation or whether there's some averaging that was intended by the agreement.
>
> And the second issue is what the quantity of obligation is for IGWA. And the numbers I've written down are either 240,000 acre-feet or approximately 205,000 acre-feet. And those are the two issues that I've identified that are the subject of a fact-finding hearing today.

Tr. 25:10–26:1. To clarify the scope of the proceedings, and to briefly address the arguments BJGWD asserted in its petition to intervene, that the Director declined to consider, the Director explained to the parties:

> I also want to mention that because this is a hearing regarding the Mitigation Plan and not a hearing regarding a full interpretation of a contract, that we are not taking evidence on subjects of unjust enrichment, legal impracticality, unclean hands, or lack of damages. And there may be others. *So I want to ensure that the scope of this hearing is clear to the participants today.*

Tr. 26:2–9 (emphasis added). The Director asked counsel for IGWA, and counsel for BJGWD whether there were additional issues that they intended to explore at the hearing. Counsel for IGWA responded: "I might frame the issues a little differently, but they encompass the issues that we—that IGWA intends to address today. There are no other issues that we plan on exploring at this hearing." Tr. 26:13–16. With that, the parties agreed to the scope of the hearing.

Nevertheless, 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 and the Director's decisions in the *Amended Final Order*.

The primary issues identified by the Director at hearing and in his *Amended Final Order* are: (1) whether the Approved Mitigation Plan allows averaging to determine compliance with the obligation to reduce ground water diversion by 240,000 acre-feet annually; and (2) whether IGWA can reallocate some of the 240,000 acre-foot annual obligation to entities that are not signatories to the SWC-IGWA Settlement Agreement. These are the issues on which the Director received evidence at the hearing and addressed in the *Amended Final Order*. This brief will follow the Director's structure to address these issues.

A. The Approved Mitigation Plan is unambiguous, and it does not allow averaging to determine compliance.

The first of the two issues presented to the Director at the hearing is whether the Approved Mitigation Plan authorizes averaging to determine compliance with the 240,000 acre-feet annual conservation obligation. After reviewing the Approved Mitigation Plan in its entirety, considering IGWA's arguments, and receiving testimony from Mr. Jaxon Higgs and Mr. Timothy Deeg, the Director issued his *Amended Final Order*. In the Order, the Director concluded that the Approved Mitigation Plan, when considered in its entirety, unambiguously requires IGWA to conserve 240,000 acre-feet annually without averaging. R. 415–16.

The Director started by focusing on the first of the six documents constituting the Approved Mitigation Plan. Because one part of the Approved Mitigation Plan was a settlement agreement and the interpretation of a settlement agreement is "governed by the same rules and principles as are applicable to contracts generally[,]" the Director anchored his analysis and conclusions with contract law. *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, Inc.*, 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, 106 P.3d at 446.

The SWC-IGWA Settlement Agreement states in relevant part: "Total ground water diversion shall be reduced by 240,000 ac-ft annually." To avoid a determination that IGWA breached its conservation requirement in 2021, IGWA asserted that the term "annually" was ambiguous. The Director disagreed, looking first to various definitions of "annually" and second to the use of "annually" throughout the SWC-IGWA Settlement Agreement. R. 416. IGWA argued that the "annual" requirement could have been implemented in many ways causing the term "annual" to contain a latent ambiguity. Again, the Director disagreed:

> 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.

Id. The Director concluded that "averaging is not permitted because the SWC-IGWA [Settlement] Agreement unambiguously requires IGWA to conserve 240,000 ac-ft each and every year." *Id.*

In its opening brief in this appeal, IGWA argues:

> Since the [SWC-IGWA] Settlement Agreement does not prescribe how the baseline will be defined, or how conservation will be measured as compared to the baseline, and since there are multiple methods that could be used, with averaging being one reasonable method, the Director erred as a matter of law by failing to find the [SWC-IGWA Settlement] Agreement latently ambiguous.

Pet'r's Br. 21. IGWA claims that "[a]lthough the [SWC-IGWA] Settlement Agreement does not explicitly allow averaging, neither does it prohibit averaging." *Pet'r's Br.* 20. IGWA is correct that the SWC-IGWA Settlement Agreement does not explicitly allow averaging. However, IGWA is incorrect that it does not prohibit averaging. The SWC-IGWA Settlement Agreement is silent on many specifics of the implementation of the conservation obligation; however, it is not silent regarding the straightforward, fixed, annual diversion reduction requirement. Because the SWC-IGWA Settlement Agreement is not silent on the annual, 240,000 ac-ft, reduction requirement, this is not the case where additional terms and interpretation may flood in to fill the silence. As the Director explained in the *Amended Final Order*, the word "annually" is unambiguous and it "requires IGWA to conserve 240,000 ac-ft each and every year."

Indeed, the record reflects that IGWA members implemented their conservation efforts consistent with the unambiguous *annual* 240,000 acre-foot reduction requirement. For example, Mr. Deeg,[6] in his capacity as a director and chairman of the board of the Aberdeen-American Falls Ground Water District,[7] represented that the district allowed individual users to average their usage over four years when the district is determining compliance within the district. Mr. Deeg testified that "[m]embers can grow various row crop, and that way it allows them to be out of compliance a year and then come back in, provided they save water." Tr. 209:5–7. However, in a colloquy with counsel for the SWC, Mr. Deeg acknowledged that *the district* was obligated to meet its reduction requirement each year, without averaging:

> Q: But what does that have to do with the district as a whole, the district's obligation as a whole? You don't average that, do you?
>
> A: No.
>
> Q: So internally as a management practice your groundwater districts allowed various water users to average what – how much water they use over I guess you say a five-year period, is it?

[6] Mr. Deeg was also the Chairman of IGWA's Board for over twenty years, including during the drafting and execution of the SWC-IGWA Settlement Agreement. However, he was not the Chairman at the time of the hearing in this contested case.

[7] Aberdeen-American Falls is an IGWA member district and was a signatory to the SWC-IGWA Settlement Agreement.

> A: Well, it's a four-year period. End of the – end of the fourth year we turn them over to the Department for collection.
>
> Q: But each year your district is supposed to meet its allocated diversion reduction; correct?
>
> A: Yes.

Tr. 216:8–21. On re-cross Mr. Deeg expanded on his knowledge of the districts' practices regarding district-wide averaging:

> Q: And I guess, to your knowledge, did Aberdeen or any other groundwater district with a balance in one year attempt to carry that over the next year as a part of their conservation in that following year?
>
> A: Did anyone try to carry it over is what you're asking me?
>
> Q: Yes. And use it as part of their obligation the following year?
>
> A: No they have not.

Tr. 225:25–226:9. Of course, Mr. Deeg's subjective interpretation of the meaning of the language of the Approved Mitigation Plan and its requirements is irrelevant because the language is unambiguous. However, Mr. Deeg's testimony about how the districts have implemented the *annual* requirement since the execution of the SWC-IGWA Settlement Agreement and its acceptance as part of the Approved Mitigation Plan directly cut against IGWA's arguments that the term "annual," when implemented despite the silent terms, contains a latent ambiguity. The language unambiguously requires that 240,000 acre-feet be conserved annually, without averaging. IGWA's own testimony confirms that is what the districts understood, evidenced by how they have undertaken compliance.[8]

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[8] At the hearing, counsel for the SWC also inquired of Mr. Higgs regarding using averaging in his calculations of IGWA's annual mitigation performance:

> Q: —IGWA never attempted to use this mitigation balance from a prior year as part of its conservation obligation the following year?
>
> A: I can't answer that. As I stated previously, I was tasked with presenting what happened in that year, and I was not asked to pontificate on the compliance of the plan.
>
> Q: Okay. So at least for your purposes for creating all these [performance] charts, you were never instructed to apply that balance to the total conservation the following year?
>
> A: No.
>
> Q: Is that true?
>
> A: I—we never talked about that.

Tr. 164:3–16.

In addition, much of IGWA's argument regarding "latent ambiguity" includes extrinsic evidence of what IGWA would have liked the Approved Mitigation Plan to say, rather than evidence that the Approved Mitigation Plan, when viewed in its entirety, contains a latent ambiguity. The 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. Therefore, IGWA undertook calculating its own baseline to then compare with the members' mitigation efforts to determine compliance. 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. However, because IGWA had discretion to calculate its baseline to measure compliance due to the silent term in the agreement, it now seeks to amend, supplement, or perhaps renegotiate the Approved Mitigation Plan's other terms. For example, IGWA argues in relevant part:

> [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[.]

Pet'r's Br. 20.

IGWA misinterprets the effect that the absence of a term prescribing a baseline calculation method has on the unambiguous terms *included* in the Approved Mitigation Plan.[9] Further, extrinsic evidence is not admissible to supplement or contradict the unambiguous terms in an integrated[10] agreement. *Valley Bank v. Christensen*, 119 Idaho 496, 498, 808 P.2d 415, 417 (1990) ("If the written agreement is complete upon its face and unambiguous, no fraud or mistake being alleged, extrinsic evidence of prior or contemporaneous negotiations or

[9] IGWA also misinterprets the *Amended Final Order* when it argues "[t]he Amended Compliance Order erroneously concludes that the Settlement Agreement unambiguously prescribes how groundwater conservation will be measured." *Pet'r's Br.* 16. The Director did not "conclude that the Settlement Agreement unambiguously prescribes how groundwater conservation will be measured." The Director concluded that the Approved Mitigation Plan does not allow IGWA to use averaging to determine annual compliance. R. 415–16.

[10] Section 9 of the SWC-IGWA Settlement Agreement contains a merger clause.

conversations is not admissible to contradict, vary, alter, add to or detract from the terms of the written contract."). IGWA's subjective interpretation of the language and its recantation of IGWA's beliefs, goals, negotiations, and "practical applications" are irrelevant and must be disregarded. As the Director concluded: "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*." R. 416.

B. Only the parties to the Approved Mitigation Plan are obligated to conserve 240,000 acre-feet annually.

The second issue is whether IGWA can reallocate some of the 240,000 acre-foot annual obligation to entities that are not signatories to the SWC-IGWA Settlement Agreement. Section 3.a of the SWC-IGWA Settlement Agreement provides in relevant part:

> *a. Consumptive Use Volume Reduction*.[11]
>
> *i.* Total groundwater 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.

R. 437. IGWA calculated its members' proportionate shares by attributing a percentage of the 240,000 acre-feet annual conservation obligation to two entities that were not signatories to the SWC-IGWA Settlement Agreement. When IGWA did so, it effectively reduced its own conservation obligation from 240,000 acre-feet annually to 205,000 acre-feet annually. When reviewing the Approved Mitigation Plan in its entirety, the Director concluded that the agreement did not allow IGWA to unilaterally reduce its own obligation by attributing a share of the obligation to non-signatories. The Director summarized:

> [T]he 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

[11] The Director inquired at the hearing as to whether the language in the heading contradicted the language in the text, causing the text to be ambiguous. Mr. Higgs testified that it did. Tr. 186:13–187:2. However, on re-cross, counsel for the SWC directed Mr. Higgs to paragraph 10 of the SWC-IGWA Settlement Agreement, which provides that the "[h]eadings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text." Tr. 191:5–16; R. 440.

> 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.

R. 417 (emphasis added).

On judicial review, IGWA re-frames this issue into two arguments: (a) "The 2015 Agreement is patently unambiguous[12] as to the method of calculating each district's proportionate share of 240,000 acre-feet[;]" and (b) "The Agreement is latently ambiguous as to the metric used to calculate each district's individual conservation obligation." *Pet'r's Br.* 12, 14. IGWA's reframed argument views the language at issue too narrowly. IGWA focuses on the language of the SWC-IGWA Settlement Agreement alone, failing to acknowledge that the Approved Mitigation Plan *in its entirety* consists of six (6) documents including the SWC-IGWA Settlement Agreement. The Approved Mitigation Plan, when viewed in its entirety, unambiguously requires only the IGWA members that are parties to the Approved Mitigation Plan to conserve 240,000 acre-feet annually.

i. The Approved Mitigation Plan unambiguously bars IGWA from reducing its total annual conservation obligation by attributing proportionate shares to non-parties.

IGWA claims that the "phrase 'proportionate share of the total annual ground water reduction' is patently ambiguous because it is subject to multiple reasonable interpretations." *Pet'r's Br.* 12. To illustrate IGWA's purported multiple reasonable interpretations, IGWA asserts several possible definitions that add language absent from the SWC-IGWA Settlement Agreement. IGWA argues that each district's proportionate shares were to be calculated relative to the "total groundwater diversions by all groundwater districts and irrigation districts with members pumping from the ESPA."[13] *Id*. To support its interpretation, IGWA argues:

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[12] While the Director agrees that the Approved Mitigation Plan is patently unambiguous, the Department suspects IGWA intended to argue that it is patently *ambiguous*.

[13] IGWA's interpretation is undermined by the fact that it did not effectively attribute shares to *all* groundwater and irrigation districts with members pumping from the ESPA. For example, IGWA allocated proportionate shares to Falls Irrigation District, a non-party, in its Final SWC-IGWA Settlement Allocation 2016 dated November 3, 2016. R. 972. However, IGWA removed Falls Irrigation District from its performance compliance calculations after 2016 even though it continued to include SWID and A&B. Tr. 161:16–162:10. That fact that IGWA removed Falls from the allocation and only attributed shares to non-parties SWID and A&B undercuts IGWA's argument that the pumping obligation was to be shared by all irrigation districts on the ESPA.

> If the parties intended that the signatory districts alone would reduce their collective diversions by 240,000 acre-feet, section 3.a could have stated that very clearly and simply with language like: 'The ground water districts shall collectively reduce their diversions by 240,000 acre-feet annually,' or 'Total ground water shall collectively reduce their diversions by 240,000 acre-feet annually.' It does not, indicating that is not what the parties intended.

Pet'r's Br. 13. Again, IGWA's position fails to consider the Approved Mitigation Plan in its entirety. As a general tenet of contract law, entities that are not parties to a contract are generally not bound by its terms. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty.").

For relevant purposes, A&B and SWID are not parties to the Approved Mitigation Plan. Instead of agreeing to be bound by the SWC-IGWA Settlement Agreement in full, A&B and IGWA executed a separate agreement. The A&B-IGWA Agreement is one of the documents within the Approved Mitigation Plan. Critically, the A&B-IGWA Agreement provides:

> A&B agrees to participate in the [SWC-IGWA] *Settlement Agreement* as a surface water right holder only. 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. Paragraphs 2 through 4 of the SWC-IGWA Settlement Agreement encompass the conservation obligation at issue in paragraph/section 3. Therefore, A&B is plainly not obligated to conserve or be allocated a proportionate share of the 240,000 ac-ft annually under the SWC-IGWA Settlement Agreement and, by incorporation, the Approved Mitigation Plan.

Additionally, SWID is simply not a party to the SWC-IGWA Settlement Agreement. It appears that SWID was a *potential* party to the SWC-IGWA Settlement Agreement. The second footnote of the SWC-IGWA Settlement Agreement lists SWID as an IGWA member district. R. 22. The SWC-IGWA Settlement Agreement also included SWID as a potential signatory to the agreement, evidenced by the attached signature page. R. 46. Critically, however, SWID did not sign the signature page. Therefore, SWID did not join in the settlement and did not benefit from the protections it provided nor did it incur the settlement's obligations. SWID is not a party to the SWC-IGWA Settlement Agreement and is not obligated to conserve or be allocated a proportionate share of the 240,000 ac-ft annually under the Approved Mitigation Plan.

Further, to evaluate whether the language regarding the proportionate share allocation is ambiguous, one must consider the entirety of the Approved Mitigation Plan, which IGWA declines to do. In finding number 43 of the *Amended Final Order*, the Director found: "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." R. 414 (emphasis added). IGWA both misquotes and misunderstands this finding of fact. *See Pet'r's Br.* 14. IGWA argues that this finding and the Director's conclusion that IGWA did not offer evidence or argument that the Approved Mitigation Plan in its entirety was ambiguous are "inexplicable." *Pet'r's Br.* 14. IGWA complains that it presented both argument and evidence and "[i]n light of all this, the Director's bald assertion that IGWA 'offered neither evidence nor argument' to demonstrate ambiguity in the [SWC-IGWA] Settlement Agreement says much more about the Director's bias and predetermined outcome than it does about the merits of IGWA's case." *Id*.

However, IGWA misunderstands both the Director's finding and conclusion. In finding 43, the Director found Mr. Higgs and Mr. Deeg did not testify to ambiguity regarding the *Order Approving Mitigation Plan* and the *Order Approving Amendment to Mitigation Plan*, i.e., documents four (4) and six (6) of the six (6) documents that constitute the Approved Mitigation Plan. The Director's conclusion emphasizes that IGWA did not present argument or evidence regarding ambiguity in the Approved Mitigation Plan *when read as a whole in its entirety*. The Director's finding and conclusion are supported by substantial and competent evidence in the record, as detailed throughout.

In the Director's *Order Approving Mitigation Plan*, dated May 2, 2016, the Director "ORDERED that the Mitigation Plan submitted by the SWC and IGWA is APPROVED with the following conditions: a. All ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan." R. 896. In the two orders approving the mitigation plan, the Director found: "Through the Mitigation Plan, the SWC and IGWA members

agree to: (a) a total ground water diversion reduction of 240,000 acre-feet annually[.]"[14] R. 894, 902. The Director also concluded in both orders: "The parties to the Mitigation Plan should be responsible for these activities and the ground water level goal and benchmarks are only applicable to the parties to the Mitigation Plan as specified in the Mitigation Plan."[15] R. 896, 904). Therefore, any alleged ambiguity regarding IGWA's obligations is resolved when one considers the entirety of the Approved Mitigation Plan, which IGWA, Mr. Higgs, and Mr. Deeg did not.

ii. The Approved Mitigation Plan is silent—not ambiguous—regarding how each member district should be allocated proportionate shares.

Next, IGWA argues "[i]n 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 obligation." *Pet'r's Br.* 15. IGWA states the gist of its argument most clearly when it asserts: "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." *Id*. IGWA is correct; however, the "metrics" IGWA used to calculate each of its districts' proportionate shares are not relevant to IGWA's total obligation to conserve an annual 240,000 acre-feet.

How IGWA apportioned its members' proportionate shares of the total 240,000 acre-feet annual obligation is of no import to the fact that the signatory IGWA members are responsible for the *total volume* reduction. That the Approved Mitigation Plan is silent on the metric IGWA was to use to apportion shares does not create a latent ambiguity. Indeed, there are many metrics that could be used to divide a total volume reduction of 240,000 acre-feet proportionately among IGWA's members that entered into the Approved Mitigation Plan. How to do so was left to

[14] In the *Order Approving Mitigation Plan*, this language is in the fifth finding of fact. R. 894. In the *Order Approving Amendment to Mitigation Plan*, this language is in the fourth finding of fact. R. 902.

[15] In both the *Order Approving Mitigation Plan* and the *Order Approving Amendment to Mitigation Plan* this language is in the tenth conclusion of law. R. 896, 904.

IGWA. IGWA's only requirements under the Approved Mitigation Plan were to reduce a total volume of 240,000 acre-feet annually, allocated proportionately among the IGWA members that agreed to be bound.

As a result, Mr. Higgs' testimony in support of this argument is largely irrelevant. Rather than supporting IGWA's position that the Approved Mitigation Plan is ambiguous, Mr. Higgs' testimony demonstrates that he did not conform his calculations of proportionate shares to the language of the Approved Mitigation Plan.

The parties executed the SWC-IGWA Settlement Agreement in July of 2015, and the First Addendum and the A&B-IGWA Agreement in October of 2015. The parties submitted the documents to the Director as a proposed mitigation plan in March of 2016. The Director entered the *Order Approving Mitigation Plan*—with conditions—in May 2016. The parties executed the Second Addendum in December 2016 and submitted it to the Director as a requested amendment to the mitigation plan in February 2017. The Director entered the *Order Approving Amendment to Mitigation Plan* in May 2017.

IGWA hired Mr. Higgs in the "middle of 2015." Tr. 60:4. At the hearing, Mr. Higgs explained that IGWA hired him initially to "come present options for how to apportion the reduction obligation from the Settlement Agreement. So how would we measure and apportion the 240,000 acre-feet that was stipulated in the agreement." Tr. 60:10–14. On cross-examination, counsel for the SWC inquired whether Mr. Higgs reviewed the *Order Approving Mitigation Plan*. Tr. 135:16–17. Mr. Higgs responded that he was "sure [he] read it." Tr. 135:18. The SWC continued, asking whether Mr. Higgs made "any adjustments to IGWA's obligations as a result of what the final order said?" Tr. 135:19–20. Mr. Higgs responded: "No." Tr. 135:21. The SWC then drew Mr. Higgs' attention to the Director's fifth finding of fact in the *Order Approving Mitigation Plan*[16] and asked:

[16] For reference, the fifth finding of fact in the *Order Approving Mitigation Plan* states in relevant part: "Through the Mitigation Plan, the SWC and IGWA members agree to: (a) a total ground water diversion reduction of 240,000 acre-feet annually[.]" R. 894.

> Q: Okay. When you reviewed the order, did that give you pause about the allocations you'd been making?
>
> A: I don't recall reading the order. And I really don't recall having—it having an influence on the allocation.

Tr. 137:3–8. Counsel for the SWC moved on to the A&B-IGWA Agreement and Mr. Higgs' total volume allocation:

> Q: After A&B signed this agreement and IGWA agreed that they wouldn't be subject to those provisions of the agreement, you never adjusted the allocation and took A&B off the allocation; correct?
>
> A: Yes. And we also didn't hold A&B to their obligation.
>
> Q: But you included a number for A&B on your allocation; correct?
>
> A: Yes, because of the 240,000 acre-foot aquifer deficit.
>
> Q: I think it's fair to say, based upon your testimony, that you really can't take into account the wording of the final order when making your adjustments; correct?
>
> A: My adjustments?
>
> Q: I mean your allocations. I'm sorry.
>
> A: No, I was—we were—I was not tasked with reading through the agreement and incorporating that. I was given a number and allocated based on—
>
> Q: And the number that you allocated in total to the groundwater districts that belonged to IGWA was a 205,000 acre-feet annual obligation; correct?
>
> A: Somewhere around there.
>
> Q: Okay. And is there anything in the final order or the agreement that references 205,000 acre-feet?
>
> A: Not that I'm aware of.

Tr. 150:20–151:21. Based on Mr. Higgs' testimony, it appears that IGWA calculated its responsible members' proportionate shares regardless of the plain language in the Approved Mitigation Plan. IGWA perhaps did not appreciate the meaning of the terms it negotiated in the SWC-IGWA Settlement Agreement and did not appreciate the effect the Director's conditions in the *Order Approving Mitigation Plan* had on the conservation obligation in the Approved Mitigation Plan. However, IGWA's departure from complying with and adjusting for the plain language of the requirements in the Approved Mitigation Plan when it came to implementation does not create ambiguity in the language.

IGWA also argues that its interpretation of the Approved Mitigation Plan allowing it to attribute proportionate shares to A&B and SWID is "reinforced by the 240,000 acre-feet figure

not being adjusted downward when SWID—a named party with a designated signature line—elected not to sign the [SWC-IGWA Settlement] Agreement." *Pet'r's Br.* 13. IGWA continues: "If section 3.a was intended to calculate conservation obligations relative to total diversions by the named parties alone, the withdrawal of SWID would have necessitated a revision of the 240,000 acre-feet figure to deduct SWID's proportionate share—otherwise the withdrawal of SWID would have increased the conservation obligation of the districts that signed." *Id*. Indeed, that was the effect of SWID's withdrawal. However, IGWA insists "the withdrawal of SWID had no effect on the conservation obligations of the signatory districts because diversions by SWID would still be taken into account in calculating their proportionate shares. The fact that no adjustment was made to the 240,000 acre-feet figure confirms the reasonableness of IGWA's interpretation of section 3.a." *Id*.

IGWA's position manipulates the meaning of the plain unambiguous language in the Approved Mitigation Plan to conform it to IGWA's preferred meaning. The SWC and IGWA successfully negotiated and executed two addenda to the SWC-IGWA Settlement Agreement, which the Director adopted as part of the Approved Mitigation Plan. The parties executed the Second Addendum in response to the Director's *Order Approving Mitigation Plan* omitting terms the parties included in their proposed final order. These amendments demonstrate IGWA had the ability to negotiate additions or clarifications of material terms. IGWA and the SWC did not amend the 240,000 acre-feet figure when SWID withdrew. In addition, IGWA had not yet determined how it would calculate its members' proportionate shares of the 240,000 acre-feet when SWID withdrew. IGWA hired Mr. Higgs to do just that in the "middle of 2015," and he did not conform his calculations to the language in each document of the Approved Mitigation Plan as they were incorporated. The definite term "240,000 ac-ft" cannot reasonably mean "205,000 ac-ft" without an amendment to the Approved Mitigation Plan. To interpret it as IGWA suggests would render the term "240,000 ac-ft" meaningless. Although IGWA concedes "the Director's

interpretation of section 3.a of the [SWC-IGWA Settlement] Agreement may be reasonable," IGWA's interpretation is not. *Pet'r's Br.* 13.

C. The Director did not exceed his authority when he corrected IGWA's unilateral reduction of its members' total conservation obligation in the Approved Mitigation Plan.

IGWA asserts that the "Director exceeded his statutory authority to reapportion IGWA's contractual obligations without regard to parol evidence." *Pet'r's Br.* 21. However, IGWA does not address the Director's authority under Idaho Code § 42-222, the CM Rules, or the language of the Approved Mitigation Plan. In the December 8, 2022 *Order Granting Motion to Dismiss* in CV27-22-00945, this Court noted that this matter does not call for the Director's interpretation of an independent contract. Rather, the Court explained:

> [A]lthough based on a settlement agreement between the parties, the Approved Mitigation Plan – which adopts terms of the settlement agreement with certain additional conditions – is a final order of the Director issued in accordance with the CM Rules. *See e.g.*, IDAPA 37.03.11.043. The final order approves an on-going mitigation plan under the umbrella of an active delivery call. Contrary to IGWA's assertion, this is not a situation involving the Director interpretating an independent contract between the parties outside the scope of his authority. The Director clearly has authority to clarify his own final order.

Order Granting Mot. to Dismiss 7–8.

The Director is obligated to direct and control the distribution of water in accordance with the prior appropriation doctrine. I.C. § 42-602. As the Court recognized, 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 comply with an approved mitigation plan are protected from a curtailment order.

CM Rule 43.02 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 provides 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 . . . .” Accordingly, the Director can approve a mitigation plan “upon conditions.” *Rangen, Inc. v. Idaho Dep’t of Water Res.*, 160 Idaho 251, 257, 371 P.3d 305, 311 (2016). Therefore, conditions included in the Director’s orders approving the initial mitigation plan and its amendment became part of the Approved Mitigation Plan.

The Director included the SWC-IGWA Settlement Agreement as one of the documents in the Approved Mitigation Plan when he entered the *Order Approving Mitigation Plan*. When the Director entered the *Order Approving Amendment to Mitigation Plan*, he also incorporated the Second Addendum into the Approved Mitigation Plan. The Second Addendum states in relevant part:

> iii. If the Director determines based on all available information that a breach exists which has not been cured, the Steering Committee will request that the Director issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to immediate curtailment pursuant to CM Rule 40.05.
>
> iv. If the Surface Water Coalition and IGWA do not agree that a breach has occurred or cannot agree upon actions that must be taken by the breaching party to cure the breach, the Steering Committee will report the same to the Director and request that the Director evaluate all available information, determine if a breach has occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.

R. 479.

The Director, in his discretion and pursuant to the language of the Approved Mitigation Plan, evaluated all available information and determined whether a breach occurred. To determine if a breach occurred the Director considered the language of the obligations in the Approved Mitigation Plan as a whole and compared the obligation against the IGWA members’ stated performance to measure each district’s compliance. However, IGWA misinterpreted the Approved Mitigation Plan and misallocated proportionate shares of the conservation obligation to non-parties SWID and A&B. Therefore, to measure the districts’ compliance and identify member districts that may have breached, it was necessary for the Director to correct IGWA’s error and redistribute the improperly assigned SWID/A&B shares among the signatory districts.

The Approved Mitigation Plan allowed IGWA to calculate proportionate shares of the obligation among the signatory districts however it chose. When the Director redistributed the shares IGWA allocated to SWID and A&B, the Director did so consistent with IGWA's chosen calculations of proportionate shares. The Director did not "effectively [write] new terms into the [SWC-IGWA] Settlement Agreement that do not exist, for which he has no authority." *Pet'r's Br.* 22. The Director acted within his statutory authority, under the CM Rules, and pursuant to the Approved Mitigation Plan in its entirety.

D. The Director's ruling did not prejudice IGWA's substantial rights.

Even if the Court finds that the Director erred and met one of the conditions in Idaho Code § 67-5279(3), an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67-5279(4). IGWA argues that the *Amended Final Order* "prejudices the water rights of IGWA's members by forcing them to conserve more groundwater than they agreed to when they signed the [SWC-IGWA] Settlement Agreement—effectively diminishing their real property rights—and by increasing the likelihood of having their water rights curtailed by IDWR due to non-compliance with the Settlement Agreement." *Pet'r's Br.* 23.

On its face, IGWA's argument fails. An increased "likelihood" of having water rights curtailed in the future if IGWA continues to breach the Approved Mitigation Plan is not a cognizable injury to their water rights. This is especially true in this matter since, rather than curtail the non-compliant junior water rights, the Director's *Amended Final Order* adopted the SWC and IGWA's stipulated remedy as the appropriate remedy for non-compliance in 2021. IGWA's interpretation of the Approved Mitigation Plan unilaterally reduced its members' proportionate share of the conservation obligation. The Director's order correcting IGWA's error and conforming IGWA's conservation obligation to the language of the Approved Mitigation Plan does not prejudice IGWA's substantial rights. Instead, the Director's order vindicates the rights of the senior users. As this Court noted in its *Order Granting Motion to Dismiss*:

> The rationales and comments set forth by the Court in *Clear Springs* are heightened when a junior user does not act in accordance with an approved mitigation plan. In such circumstances, the Director has already found material injury to a senior water right based on junior water use. But for the approval of a mitigation plan, the offending junior water user would already be curtailed to remedy the resulting injury to the senior. The junior's continued out-of-priority water use is contingent upon compliance with the approved mitigation plan.

Order Grant Mot. to Dismiss 6 n.4. Therefore, the Director's actions have not prejudiced IGWA's substantial rights.

E. IGWA is not entitled to attorney fees.

IGWA claims it is entitled to attorney fees under Idaho Code § 12-117 "because the Director's finding of no evidence of ambiguity does not have a reasonable basis in fact or law." *Pet'r's Br.* 22. Specifically, IGWA asserts that the Director did not have a reasonable basis in law or fact by concluding: "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." *Pet'r's Br.* 22.

Idaho Code § 12-117(1) provides in relevant part:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency . . . and a person . . . the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

In support of its claim, IGWA restates the arguments it submitted in briefing and the evidence and testimony it presented at the hearing.

IGWA's argument suffers from the same flaw as its interpretation of the Approved Mitigation Plan—it views the Approved Mitigation Plan too narrowly. IGWA misunderstands the Director's conclusion. The Director concluded that IGWA did not present evidence or argument that the Approved Mitigation Plan "*when read as a whole and in its entirety*" was ambiguous. IGWA focused, and continues to focus, on the language of the SWC-IGWA Settlement Agreement alone. As explained, the Approved Mitigation Plan is made of six (6) documents that together constitute the Approved Mitigation Plan of which the SWC-IGWA Settlement Agreement is one (1). IGWA presented argument. IGWA presented evidence.

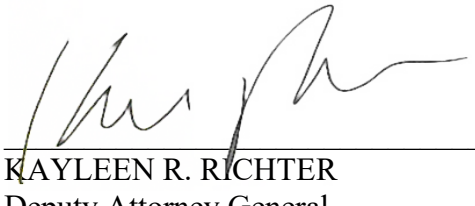
However, IGWA did not present argument or evidence that supported the Approved Mitigation Plan, when read as a whole and in its entirety, was ambiguous. The Director's conclusion is supported by both law and fact. Therefore, IGWA is not entitled to attorney fees.

V. CONCLUSION

Members of IGWA breached their conservation obligation in 2021 when they failed to reduce their total diversions by 240,000 acre-feet. The Approved Mitigation Plan is unambiguous when read in its entirety. The unambiguous language of the Approved Mitigation Plan prohibits IGWA from averaging diversions to measure compliance and from apportioning proportionate shares to entities that are not parties to the Approved Mitigation Plan. The Director's *Amended Final Order* is based upon analyses consistent with Idaho Code §§ 42-222, 42-602, the CM Rules, and the Approved Mitigation Plan. The *Amended Final Order* is based upon findings supported by substantial and competent evidence in the record. The Director's determination that members of IGWA breached their conservation obligation is consistent with the unambiguous language of the Approved Mitigation Plan in its entirety and the Director's obligations under the CM Rules. IGWA is not entitled to attorney fees and the Director's actions have not prejudiced IGWA's substantial rights. Accordingly, the Court should affirm the Director's *Amended Final Order Regarding Compliance with Approved Mitigation Plan*.

DATED this 12th day of September 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL



KAYLEEN R. RICHTER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of September 2023, I caused to be served a true and correct copy of the foregoing, via iCourt E-file and Serve, upon the following:

Thomas J. Budge
Elisheva M. Patterson
RACINE OLSON, PLLP
tj@racineolson.com
elisheva@racineolson.com

Candice M. McHugh
Chris M. Bromley
MCHUGH BROMLEY, PLLC
cmchugh@mchughbromley.com
cbromley@mchughbromley.com

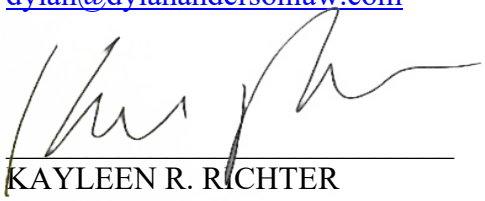
Sarah A. Klahn
Maximilian C. Bricker
SOMACH SIMMONS & DUNN, P.C.
sklahn@somachlaw.com
mbricker@somachlaw.com

John K. Simpson
Travis L. Thompson
MARTEN LAW LLP
jsimpson@martenlaw.com
tthompson@martenlaw.com

W.Kent Fletcher
FLETCHER LAW OFFICE
wkf@pmt.org

Skyler C. Johns
Nathan M. Olsen
Steven L. Taggart
OLSEN TAGGART PLLC
icourt@olsentaggart.com

Dylan Anderson
DYLAN ANDERSON LAW PLLC
dylan@dylanandersonlaw.com



KAYLEEN R. RICHTER
Deputy Attorney General