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IN THE DISTRICT COURT FOR THE SEVENTH JUDICIAL DISTRICT FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

BONNEVILLE JEFFERSON GROUND WATER DISTRICT,

Petitioner,

vs.

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 (COLLECTIVELY THE "SURFACE WATER COALITION"), THE IDAHO GROUND WATER APPROPRIATORS, INC., an Idaho non-profit corporation, FREMONT-MADISON IRRIGATION DISTRICT, JEFFERSON-CLARK GROUND WATER DISTRICT, BINGHAM GROUND WATER DISTRICT, AMERICAN FALLS-ABERDEEN GROUND WATER DISTRICT, MAGIC VALLEY GROUND WATER DISTRICT, NORTH SNAKE GROUND WATER DISTRICT, CAREY VALLEY

Case No. CV10-24-2909

PETITION FOR DECLARATORY JUDGMENT, EQUITABLE AND INJUNCTIVE RELIEF, AND BREACH OF CONTRACT

Fee Catergory: AA
Fee Amount: $221.00

GROUND WATER DISTRICT, JOHN AND JANE DOES 1-50,

Respondents.

The Bonneville Jefferson Ground Water District (hereafter "Bonneville-Jefferson"), acting for and on behalf of its respective members, through counsel, seeks a judgment from this Court declaring that the 2015 Settlement Agreement, as modified, between the Petitioner and Respondents is unenforceable and void as a matter of law. Bonneville-Jefferson further seeks a temporary restraining order and/or preliminary injunction against enforcement of the settlement agreement during this action.

Upon information and belief, Bonneville-Jefferson makes the following allegations in support of this Petition:

PARTIES

1. Petitioner, Bonneville-Jefferson, is a ground water district organized pursuant to title 42, chapter 52 Idaho Code, whose principal office is located in Bonneville County, State of Idaho and part of Jefferson County, State of Idaho. Members of Bonneville-Jefferson own water rights located in Bonneville County and Jefferson County. Bonneville-Jefferson's Members use and diver ground water on the Eastern Snake Plain Aquifer (hereafter "ESPA"), for farming, business, and other purposes.

2. Respondent, A&B Irrigation District, is an irrigation district organized under Idaho Code title 43 et. seq and its offices are located in Rupert, ID. A&B Irrigation District diverts surface water and ground water from the ESPA and the Snake River.

3. Respondent, American Falls Reservoir District #2, is an organization formed pursuant to Idaho Code title 43, et. seq., and its offices are located in Jerome, Idaho. American Falls Reservoir District #2 diverts surface water from the Snake River.

4. Respondent, Burley Irrigation District, is an irrigation district organized under Idaho Code title 43 et. seq., and its offices are located in Burley, Idaho. Burley Irrigation District diverts surface water from the Snake River.

5. Respondent, Milner Irrigation District, is an irrigation district organized under Idaho Code title 43 et. seq., and its offices are located in Murtaugh, Idaho. Milner Irrigation District diverts surface water from the Snake River.

6. Respondent, Minidoka Irrigation District, is an irrigation district organized under Idaho Code title 43 et. seq., and its offices are located in Rupert, Idaho. Minidoka Irrigation District diverts surface water from the Snake River.

7. Respondent, North Side Canal Company, is a canal company whose offices are located in Jerome, Idaho. North Side Canal Company diverts water from the Snake River.

8. Respondent, Twin Falls Canal Company, is a canal company whose officers are located in Twin Falls, Idaho. Twin Falls Canal Company diverts water from the Snake River.

9. Respondents, 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 have formed an organization collectively referred to hereafter the "Surface Water Coalition" or "SWC".

10. Respondent, Idaho Ground Water Appropriators, Inc. (hereafter "IGWA"), is an Idaho non-profit corporation, whose offices are located in Idaho Falls, Idaho, in Bonneville

County. IGWA's members include the ground water districts listed in paragraphs 11 through 17 of this Petition.

11. Respondent, Fremont-Madison Irrigation District, is a political entity organized pursuant to title 42, chapter 52 Idaho Code, whose members reside in part of Jefferson County, State of Idaho, and Clark County, State of Idaho. Member of Jefferson-Clark use ground water.

12. Respondent, Jefferson-Clark Ground Water District, is a political entity organized pursuant to title 42, chapter 52 Idaho Code, whose members reside in part of Jefferson County, State of Idaho, and Clark County, State of Idaho. Member of Jefferson-Clark use ground water.

13. Respondent, Bingham Ground Water District is a political entity organized pursuant to title 42, chapter 52 Idaho Code, whose members reside in Bingham County, State of Idaho. Members of use ground water.

14. Respondent, American Falls-Aberdeen Ground Water District, is a political entity organized pursuant to title 42, chapter 52 Idaho Code, whose members reside in part of Jefferson County, State of Idaho, and Clark County, State of Idaho. Member of Jefferson-Clark use ground water.

15. Respondent, Magic Valley Ground Water District, is a political entity organized pursuant to title 42, chapter 52 Idaho Code, whose members reside in part of Jefferson County, State of Idaho, and Clark County, State of Idaho. Member of Jefferson-Clark use ground water.

16. Respondent, North Snake Ground Water District, is a political entity organized pursuant to title 42, chapter 52 Idaho Code, whose members reside in part of Jefferson County, State of Idaho, and Clark County, State of Idaho. Member of Jefferson-Clark use ground water.

17. Respondent, Carey Valley Ground Water District, is a political entity organized pursuant to title 42, chapter 52 Idaho Code, whose members reside in part of Jefferson County, State of Idaho, and Clark County, State of Idaho. Member of Jefferson-Clark use ground water.

18. Petitioners and Respondents may be referred to individually hereafter as "Party".

19. Petitioners and Respondents are collectively referred to hereafter as "Parties".

JURISDICTION AND VENUE

20. This Court has subject matter jurisdiction over this action pursuant to and by virtue of Idaho Code § 1-705

21. This Court has personal jurisdiction over Petition and all Respondents pursuant to Idaho Code § 5-514 (a) and (c).

22. Venue is proper pursuant to and by virtue of Idaho Code § 5-404, and other applicable laws and rules.

ALLEGATION COMMON TO ALL COUNTS
Overview of the Dispute

23. This is a contract interpretation case involving the *Settlement Agreement Dated June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of Idaho Ground Water Appropriators, Inc.*, (hereafter "2015 Agreement"), as amended by the *Addendum to Settlement Agreement* dated October 19, 2015 (hereafter "Addendum"), and the *Second Addendum to Settlement Agreement* dated December 14, 2016 (hereafter "Second Addendum"). These documents are referred to collectively herein as the "Settlement Agreement."

24. The Settlement Agreement's purported purpose is to protect members of the ground water district, including Bonneville-Jefferson, from curtailment under a water rights delivery call made by the SWC.

25. The Settlement Agreement does not contain severability clauses and provides that its written terms and conditions are fully integrated in the Settlement Agreement.

26. Beginning in 2021, disputes have arisen between the Parties over the requirements of the Settlement Agreement in practice. Such disputes exposed that the Settlement Agreement is unenforceable and void.

COUNT I.
DECLARATORY JUDGEMENT
(The Settlement Agreement is unenforceable for lack of material terms)

27. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

28. In Idaho,

> [a] settlement agreement stands on the same footing as any other contract and is governed by the same rules and principles as are applicable to contracts generally. A contract must be complete, definite and certain in all its material terms, or contain provisions which are capable in themselves of being reduced to certainty.

Brunobuilt, Inc. v. Strata, Inc., 166 Idaho 208, 217, 457 P.3d 860, 869 (2020) (internal citations omitted).

29. The Settlement Agreement terms are incomplete, indefinite, and uncertain. The Settlement Agreement lacks the following material terms:

A. <u>There are no terms specifying a benchmark level or volume from which ground water diversions are to be reduced.</u>

30. Settlement Agreement Section 3.a.i provides that "[t]otal ground water diversion shall be reduced by 240,000 ac-ft annually."

31. The Settlement Agreement does not define which water diversions are included in the "total".

32. The Settlement Agreement does not define the baseline level or volume from which 240,000 ac-ft of diversion reductions will be measured.

33. There are no provisions in the Settlement Agreement specifying a process or method from which the any level or volume the 240,000 ac-ft annual reduction shall be reduced from is to be determined or calculated. The 240,00 ac-ft obligation exists in a vacuum and is subject to several competing methods concerning its measurement.

34. There is no term in the Settlement Agreement identifying whose responsibility it is to determine from where or what baseline level or volume the 240,000 ac-ft annual reduction shall be reduced.

35. Without this critical term, the Settlement Agreement is incomplete, unclear, indefinite, meaningless, and incapable of being performed by the Parties.

36. As such, Bonneville-Jefferson is entitled to a judgment declaring that there is a missing material term in the Settlement Agreement and a judgment declaring the Settlement Agreement unenforceable and void for the same reason.

B. <u>The Settlement Agreement does not define which Party is obligated to reduce 240,000 ac-ft annually, in that "Ground Water and Irrigation District[s]" are not defined, nor is any Districts' "proportionate share of the total annual ground water reduction" specified.</u>

37. Settlement Agreement Section 3.a.i states that "[t]otal ground water diversions shall be reduced by 240,00 ac-ft annually."

38. Section 3.a.i does not define with specificity who is ultimately responsible to reduce pumping by 240,000 ac-ft annually, or in what proportionate amount. Rather, which Party or Parties are subject to the 240,000 ac-ft reduction obligation is undefined.

39. Section 3.a.ii only provides that "[e]ach 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…" (Emphasis added).

40. There are no provisions in the Settlement Agreement defining identifying which "Ground Water and Irrigation Districts" are responsible for reducing their proportionate share of the total annual ground water reduction, other than that it includes districts "with members pumping from the ESPA".

41. The Settlement Agreement does not specify what each Ground Water and Irrigation Districts' proportionate share of the total annual ground water reduction is, nor does it clearly identify whether "Ground Water and Irrigation Districts" refers only to the membership of IGWA, who is a Party to the Settlement Agreement, referenced in Footnote 2 of the Settlement Agreement, or a broader set of water users pumping from the ESPA.

42. There are also no provisions in the Settlement Agreement specifying a process or method by which the Parties are to determine each Districts' proportionate share of the annual ground water reduction.

43. There are no provisions in the Settlement Agreement specifying that any Party or set of Parties is responsible for determining how the proportionate shares of the total annual ground water reduction will be allocated.

44. The language of section 3.a.ii is unclear and confusing in that it states Districts are "…responsible for reducing…" their share of the "…reduction" without further explanation.

45. The Parties disagree as to the meaning of these material terms. Without further definitions or provisions explaining the operation of these terms, the Settlement Agreement is incomplete, unclear, indefinite, meaningless, and incapable of being performed by the Parties.

46. As such, Bonneville-Jefferson is entitled to a judgment declaring that there are missing material terms in the Settlement Agreement and a judgment declaring the Settlement Agreement unenforceable and void for the same reason.

C. "Equivalent Private Recharge Activity" is undefined, and its application lacks certainty.

47. Settlement Agreement section 3.a.ii provides that "[e]ach Ground Water and Irrigation District with members pumping from the ESPA shall be responsible…in conducting an equivalent private recharge activity." (Emphasis added).

48. There are no provisions in the Settlement Agreement defining what "equivalent private recharge activity" means or defining how equivalent private recharge activity will be measured and accounted for – equivalent from what? There are no provisions in the Settlement Agreement describing a process or method for making this determination, how it can be tracked, or otherwise credited.

49. Without further definitions or provisions explaining the operation of this term, the Settlement Agreement is incomplete, unclear, indefinite, meaningless, and incapable of being performed by the Parties.

50. Bonneville-Jefferson is entitled to a judgement declaring that section 3.a.ii is incomplete, indefinite, and unclear, and for that reason the Settlement Agreement unenforceable and void.

D. Section 3.e. is incomplete, uncertain, and contains indefinite terms.

51. Settlement Agreement section 3.e – Ground Water Level Goal and Benchmarks – states:

> i. Stabilize and ultimately reverse the trend of declining ground water levels and return ground water levels to a level equal to the average of the aquifer levels from 1991-2001. Utilize groundwater levels in

mutually agreed upon wells with mutually agreed to calculation techniques to measure ground water levels. A preliminary list of 19 wells has been agreed to by the parties, recognizing that the list may be modified based on additional technical information.

ii. The following benchmarks shall be established:
- Stabilization of ground water levels at identified wells by April 2020, to 2015 ground water levels;
- Increase in ground water levels by April 2023 to a point halfway between 2015 ground water levels and the ground water level goal; and
- Increase of ground water levels at identified wells by April 2026 to the ground water level goal.

iii. Develop a reliable method to measure reach gain trends in the Blackfoot to Milner reach within 10 years.

iv. When the ground water level goal is achieved for a five-year rolling average, ground water diversion reductions may be reduced or removed, so long as the ground water level goal is sustained.

v. If any of the benchmarks, or the ground water level goal, is not achieved, adaptive measures will be identified and implemented per section 4 below.

52. Subsections i. through v. do not specify which Party or Parties are obligated to stabilize and reverse declining ground water levels.

53. There are no terms in the Settlement Agreement defining or explaining who is obligated to perform any of the specified obligations or how the obligations are to be allocated among each Party.

54. Without further definitions or provisions explaining the operation of these terms, the Settlement Agreement is incomplete, unclear, indefinite, meaningless, and incapable of being performed by the Parties.

55. Bonneville-Jefferson is entitled to a judgement declaring that section 3.e is incomplete, indefinite, and unclear, and for that reason the Settlement Agreement unenforceable and void.

E. <u>Section 3.f – Recharge – involves actions by non-parties and contains incomplete, indefinite, vague, and unenforceable terms.</u>

56. Settlement Agreement section 3.f – Recharge – provides that the "Parties will support State sponsored managed recharge program 250,000 ac-ft annual-average across the ESPA, consistent with the ESPA CAMP and the direction in HB 547. IGWA's contributions to the State sponsored recharge program will be targeted for infrastructure and operations above American Falls."

57. This provision involves vague and unclear references to a third party who is not Party to the Settlement Agreement.

58. The Parties cannot enforce this provision of the Settlement Agreement against the non-party "State," nor is it clear from the terms of the Settlement Agreement who is "the State" and what are the specific obligations of the "the State."

59. Section 3.f further requires actions and participation of non-parties to the Settlement Agreement and requires such actions and participation be "consistent" with un-enacted legislation.

60. The Settlement Agreement fails to define "IGWA's contributions" to the State sponsored recharge program, and it fails to define the prefacing language that such contributions "be targeted for infrastructure and operations above American Falls." Such terms are, therefore, vague and subject to multiple interpretations, rendering them meaningless and incapable of being enforced.

61. Without further definitions or provisions explaining the operation of these terms, the Settlement Agreement is incomplete, unclear, indefinite, meaningless, and incapable of being performed by the Parties.

62. Bonneville-Jefferson is entitled to a judgement declaring that section 3.f is incomplete, indefinite, and unclear, and for that reason the Settlement Agreement is unenforceable and void.

F. <u>Section 3.h – "Conversions" – is incomplete, uncertain, and contains indefinite terms.</u>

63. Settlement Agreement section 3.h provides that "IGWA will undertake additional targeted ground water to surface water conversions and/or fallow land projects above American Falls (target near Blackfoot area as preferred sites)."

64. This section does not define what "additional" means (i.e., against what benchmark is "additional" measured"), nor does the Settlement Agreement contain any provision quantifying the upper limit of IGWA's obligation in this regard.

65. This section also does not define "conversions" nor does the Settlement Agreement provide meaningful guidance as to its meaning.

66. The plain language of section 3.h cannot be relied upon to determine the full extent of Bonneville-Jefferson's obligation.

67. Without further definitions or provisions explaining the operation of these terms, the Settlement Agreement is incomplete, unclear, indefinite, meaningless, and incapable of being performed by the Parties.

68. Bonneville-Jefferson is entitled to a judgement declaring that section 3.h is incomplete, indefinite, and unclear, and for that reason the Settlement Agreement is unenforceable and void.

G. <u>Section 3.e.iv does not specify the process or rules the Director must use to determine breach, nor does it specify how he is to determine what actions are appropriate to cure a breach or what "subject to immediate curtailment means"</u>

69. Settlement Agreement section 3.e.iv states that "[i]t is the Parties' intent that the Director will evaluate the breach and, if a breach is found to exist, provide notice of violation and opportunity to cure to the breaching member. If the member fails to cure the breach the Parties will request the Director to issue an order against the breaching member requiring action to cure the breach or be subject to immediate curtailment as provided under [CM Rule] 40.05."

70. This provision does not specify how the Director is to determine a breach. It does not provide any rules or processes he is required to follow, nor does it state that the matter is within his discretion. It only states that the Director "evaluate the breach." As such, this term is uncertain and indefinite.

71. This provision also does not specify how a party is to cure the alleged breach, nor does it require the Director to specify how the breach will be cured. As such, a breaching party has no ability to determine what will cure a breach. The term is uncertain and indefinite.

72. Furthermore, the provision does not specify what subject to "immediate" curtailment means. Although it references CM Rule 40.50, the Settlement Agreement does not specify whether the Director is required to curtail if a water user is not determined to be "out-of-priority" under the Methodology Order that irrigation season. As such, the term is indefinite and uncertain.

73. Without further definitions or provisions explaining the operation of these terms, the Settlement Agreement is incomplete, unclear, indefinite, meaningless, and incapable of being performed by the Parties.

74. Bonneville-Jefferson is entitled to a judgement declaring that section 3.e.iv is incomplete, indefinite, and unclear, and for that reason the Settlement Agreement is unenforceable and void.

COUNT II.
DECLARATORY JUDGEMENT
(The Settlement Agreement is unenforceable for failure of a sufficient meeting of the minds on material terms)

75. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

76. Idaho law requires that

> [i]n order for a contract to be formed there must be a meeting of the minds. A meeting of the minds is evidenced by a manifestation of intent to contract which takes the form of an offer and acceptance. The "meeting of the minds" must occur on all material terms to the contract.

Barry v. Pac. W. Const., Inc., 140 Idaho 827, 831–32, 103 P.3d 440, 444–45 (2004) (internal quotations and citations omitted).

77. In general,

> …the determination of the existence of a sufficient meeting of the minds to form a contract is a question of fact to be determined by the trier of facts. The best evidence to support the parties' intent [relative to a settlement agreement] is to look at the words of counsel and their clients. Whether there was a meeting of the minds is an objective inquiry that does not focus on the subjective beliefs or intentions of the parties.

Brunobuilt, Inc. v. Strata, Inc., 166 Idaho 208, 217, 457 P.3d 860, 869 (2020) (internal citations omitted).

A. The Parties did not reach a meeting of the minds on the annual reduction obligation.

78. IGWA's proportionate share of the aquifer budget deficit is determined by the States aquifer budget deficit of 600,000 ac-ft, offset by the State's commitment to do recharge, and the ESPAM 2.1 data showing all IGWA member's proportionate share of the remaining deficit.

79. IGWA is only obligated to reduce its proportionate share of the 240,000 ac-ft annual ground water reduction obligation.

80. IGWA's proportionate share of the 240,000 ac-ft volume is 205,000 ac-ft.

81. Bonneville-Jefferson is only obligated to reduce its proportionate share of IGWA's of the annual ground water reduction obligation, estimated to be 18,264 ac-ft.

82. But, Bonneville-Jefferson has been asked by SWC and the Director to reduce is ground water usage by 21,341 ac-ft.

83. The Parties disagree on what each District's proportionate share of the total annual ground water reduction is and how such proportionate share of the total annual ground water reduction is to be calculated and allocated. As such, the Parties do not agree and the Settlement Agreement does not specify Bonneville-Jefferson's proportionate share of the total annual water reduction obligation.

84. As such, Bonneville-Jefferson is entitled to a judgement declaring that the Parties did not reach a meeting of the minds on these terms, and on that basis, they did not form an enforceable contract.

B. <u>The Parties did not reach a meeting of the minds on how compliance is measured</u>

85. Bonneville-Jefferson has always understood that the Settlement Agreement permits it use of a rolling average of its past conservation efforts to measure its compliance with the annual ground water reduction obligation.

86. This allows Bonneville-Jefferson to offset its annual ground water reduction obligation, and it has done this since the inception of the Settlement Agreement.

87. SWC and the Director have did not assert the position that the obligation is an annual one and not based on a rolling average until 2022.

88. As of the date of this filing, the Parties disagree over whether compliance can be met using a rolling average, and as such, the Parties never reached a meeting of the minds as to whether averaging was permitted under the Settlement Agreement.

89. How compliance with the annual ground water reduction obligation is measured is material to the Settlement Agreement.

90. Bonneville-Jefferson is entitled to a judgement declaring that the Parties did not reach a meeting of the minds on these terms, and on that basis, they did not form an enforceable contract.

COUNT III.
DECLARATORY JUDGEMENT
(The Settlement Agreement lacks formation and is unenforceable because it was based on a Mutual Mistakes of vital facts)

91. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

92. "Under Idaho law, a mutual mistake permits a party to rescind or modify a contract as long as the mistake is so substantial and fundamental as to defeat the object of that party." *Tricore Invs., LLC v. Est. of Warren through Warren*, 168 Idaho 596, 615, 485 P.3d 92, 111 (2021) (citation omitted).

93. "To establish mutual mistake, the mistake must be common to both parties. A mutual mistake occurs when both parties, at the time of contracting, share a misconception regarding a basic assumption or vital fact upon which the bargain is based." *Id.* (internal quotations and citations omitted).

94. "Generally, a mistake is an unintentional act or omission arising from ignorance, surprise, or misplaced confidence. A mutual mistake occurs when both parties share a misconception about a vital fact upon which they based their bargain at the time of contracting."

Thieme v. Worst, 113 Idaho 455, 458, 745 P.2d 1076, 1079 (Ct. App. 1987) (internal quotations and citations omitted).

95. The material terms of the Settlement Agreement were purportedly based upon IDWR tools, such as the Methodology Order, and the ESPAM Model. These tools predict the ESPA conditions, and such tools were apparently relied upon to determine what actions should be taken to reach certain goals under the terms of the Settlement Agreement.

96. ESPAM version 2.1 was used to predict SWC's water supplies each irrigation season by looking at data points in the ESPA.

97. ESPAM version 2.1 was the most current version in 2014 and 2015, and it provided the basis from which the Parties determined what the Short-Term Practices and Long-Term Practices would be, where the Pumping Reductions and Sentinel Well Levels would be established, and the timing in which each goal would be achieved.

98. ESPAM 2.1 was used to justify the 240,000 ac-ft obligation and the sentinel well index goals.

99. The data the Parties attained from ESPAM 2.1 was vital to determining what the District's obligations would be, where the goals and benchmarks should be set, and the timing in which the goals and benchmarks would be achieved.

100. ESPAM version 2.1 was updated and ESPAM version 2.2 was finished in 2020 and formally reported in May 2021.

101. ESPAM 2.2 showed that the ESPA was differently shaped, having a much larger storage capacity than what ESPAM 2.1 showed. In other words, it would take much more water to fill the upper, easterly portion of the ESPA. Raising the Sentinel Well Index and increasing

reach gains, as attempted under the Settlement Agreement was going to take longer and more water than originally predicted under ESPAM version 2.1

102. This change rendered the Near-Term and Long-Term Practices, Benchmarks, and Goals of the Settlement Agreement impracticable and impossible to achieve because the new data in ESPAM 2.2 showed that Districts could never satisfy these terms within the prescribed time of the Settlement Agreement even if they performed each Near-Term and Long-Term Practice perfectly. In other words, the ESPAM 2.1 set the Parties up for failure from day one, rendering material terms of the Settlement Agreement hopelessly incorrect, unachievable, and meaningless. The scientific and technical foundation of the Settlement Agreement was no foundation at all – it was illusory and made the settlement agreement impossible to perform.

103. The Settlement Agreement did not contemplate what measures could be taken if the ESPAM model showed the aquifer was larger than expected.

104. These terms cannot be materially altered without significantly affecting the underlying Settlement Agreement.

105. Therefore, Bonneville-Jefferson is entitled to a judgement declaring the Settlement Agreement void and unenforceable because material terms were based upon mutual mistakes over the vital facts that determined the obligations, benchmarks, and goals of the Parties.

COUNT IV.
DECLARATORY JUDGEMENT
(The Settlement Agreement contains "mere agreements to agree" on material terms)

106. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

107. "No enforceable contract comes into being when parties leave a material term for future negotiations, creating a mere agreement to agree." *Treasure Valley Home Sols., LLC v. Chason*, 171 Idaho 655, 659, 524 P.3d 1272, 1276 (2023) (citations omitted).

108. The Settlement Agreement is unenforceable because it contains mere agreements to agree on material terms.

A. <u>Section 2.f is a mere agreement to agree on legislation at a later date.</u>

109. Section 2.f provides that the "Parties will work to identify and pass legislative changes needed to support the objectives of this Settlement Agreement, including, development of legislation memorializing conditions of the ESPA, obligations of the parties, and ground water level goal and benchmarks identified herein."

110. The Parties merely agreed to work on identifying and passing legislation at a later date.

111. The Parties merely agreed to agree to determine, at a later date, unspecified conditions of the ESPA.

112. The Parties merely agreed to agree to determine their obligations at a later date.

113. Such terms are material because they are contained in the Near-Term Practices, and they purport to place a duty to act on all Parties to the Settlement Agreement.

114. Because such provisions are mere agreements to agree, they are unenforceable.

115. Therefore, Bonneville-Jefferson is entitled to a judgment declaring these provisions void and unenforceable. Because the terms are material, Bonneville-Jefferson is further entitled to a judgment declaring the Settlement Agreement void and unenforceable.

B. <u>Adaptive Management provisions are mere agreements to agree on material terms at a later date.</u>

116. Section 3.e.v provides that "[i]f any of the benchmarks, or ground water level goal, is not achieved, adaptive measure will be identified and implement per section 4 below."

117. Section 3.m – Steering Committee – subsection ii provides that "[t]he Steering Committee will develop an adaptive management plan for responding to changes in aquifer levels and reach gain trends, review progress on implementation and achieving benchmarks and the ground water goals."

118. Section 4 – Adaptive Water Management Measures – provides that

> a. [i]f any of the benchmarks or the ground water level goal is not met, additional recharge, consumptive use reductions, or other measures as recommended by the Steering Committee shall be implemented by the participating ground water parties to meet the benchmarks or ground water level goal.
> b. The SWC, IGWA and State recognize that even with full storage supplies, present (2015) reach gain levels in the Near Blackfoot to Milner reach (natural flows) are not sufficient to provide adequate and sustainable water supplies to the SWC.
> i. The intent of the Adaptive Management Provisions is to provide a forum for the Parties to resolve implementation issues, without a party seeking an enforcement order from the Department or a district court…

119. In practice, SWC has requested modification of material terms of the Settlement Agreement through the "Adaptive Management" provisions over the objection of the Districts. When the Districts did not agree with proposed modifications, the Director then created and imposed new obligations upon the Districts. These new obligations altered what Bonneville-Jefferson understood its obligations under the Settlement Agreement were.

120. The Adaptive Management provisions are mere agreements to agree at a later date, and they are unenforceable under Idaho law. Worse the provisions have been sued to require new obligations – unilaterally write new terms into the Settlement Agreement – that did not previously exist.

121. These provisions are material to the Settlement Agreement.

122. The Parties cannot rely upon these provisions to cure, or alter, any material terms of the Settlement Agreement, and they certainly cannot rely on Adaptative Management to add new or fill in missing terms for the Settlement Agreement.

123. Therefore, Bonneville-Jefferson is entitled to a declaratory judgement finding that these terms are mere agreements to agree, and for that reason, the Settlement Agreement is void and unenforceable.

COUNT V.
DECLARATORY JUDGMENT
(The Agreement Violates State Law)

A. The Settlement Agreement mistakenly assigns responsibilities to the Director that exceeds his statutory authority.

124. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

125. As a matter of law, Idaho state agencies have no inherent authority; they only have such powers granted by the legislature. *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 102 Idaho 744, 750 (1981); *Idaho Retired Firefighters Assoc. v. Pub. Emp. Ret. Bd.*, 165 Idaho 193, 196 (2019). They are, in other words, "tribunals of limited jurisdiction." *In re Idaho Workers Comp. Bd.*, 167 Idaho 13, 20 (2020) (citing *Washington Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho 875, 879 (1979)).

126. Section 2.b.3.e.iv of the Second Addendum has been mistakenly interpreted to grant the Director, who is not a Party, authority to interpret the Settlement Agreement terms and fashion remedies to resolve contractual disputes, other than priority administration of water right for breach as determine through existing Idaho statutes.

127. The Parties cannot grant authority to the Director beyond the authority granted to the Direct under Idaho Code nor is such grant of power enforceable under Idaho law.

128. Because the Settlement Agreement in practice has resulted in the SWC and the Director adding and enforcing new terms to the Settlement Agreement over the objection of Bonneville-Jefferson and other Parties, the terms are void and unenforceable.

129. On this basis, Bonneville-Jefferson is entitled to a judgment declaring these provisions of the Settlement Agreement void as they violate state statute.

B. <u>The Perpetual Term of the Settlement Agreement is void as a Matter of Public Policy</u>

130. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

131. The Idaho Supreme Court has held that perpetual terms in contracts involving public entitles "…violate public policy." *Barton v. State*, 104 Idaho 338, 340–41, 659 P.2d 92, 94–95 (1983) (see also *Shultz v. Atkins*, 97 Idaho 770, 775, 554 P.2d 948, 953 (1976) (where the Idaho Supreme Court questioned "whether a definite promise to do, or not to do, an act or a series of acts in perpetuity is legally enforceable as such a promise may be contrary to public policy.") (See also *Boise City v. Sinsel*, 72 Idaho 329, 241 P.2d 173 (1952) (city council without authority to make a valid contract permanently alienating city street or permitting building a warehouse thereon); *Yellow Cab Taxi Service v. City of Twin Falls*, 68 Idaho 145, 190 P.2d 681 (1948) (use of street for taxi stand for 16 years does not create any rights in the user as against the city); *Keyser v. City of Boise*, 30 Idaho 440, 165 P. 1121 (1917) (city is without authority to grant a private person a permit to erect or maintain a permanent obstruction in a private street for a private purpose); *Boise City v. Wilkinson*, 16 Idaho 150, 102 P. 148 (1909) (dedication of street to city precluded the legislature and the mayor of the city from validly conveying title to private individual); *Boise City*

v. Hon, 14 Idaho 272, 94 P. 167 (1908) (dedication of street to city prevented later conveyance to private individual from being effective).

132. Section 7 of the Settlement Agreement states that it "is a perpetual agreement."

133. Bonneville-Jefferson is a public entity organized under Idaho Code §§ 42-5201 et. seq.

134. The Settlement Agreement seeks to bind Bonneville-Jefferson in perpetuity.

135. Binding Bonneville-Jefferson in perpetuity is not in the best interest of public as it impedes Bonneville-Jefferson's ability to govern in the best interest of the public it serves, therefore, the Settlement Agreement is void for public policy reasons.

136. Bonneville-Jefferson is entitled to a judgment declaring the Settlement Agreement Term is unenforceable and therefore, the Settlement Agreement is void for these reasons.

COUNT VI.
DECLARATORY JUDGEMENT
The promise of "Safe Harbor" is illusory.

137. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

138. "A supposed promise may be illusory because it is so indefinite that it cannot be enforced, or by reason of provisions contained in the promise which in effect make its performance optional or entirely discretionary on the part of the promisor." *Spooner v. Rsrv. Life Ins. Co.*, 47 Wash. 2d 454, 458, 287 P.2d 735, 738 (1955) (internal citations omitted).

139. In Spring 2022, the SWC claimed that the Settlement Agreement required IGWA to conserve 240,000 ac-ft each year, instead of its proportionate share of the 240,000 ac-ft, which was 205,000 ac-ft.

140. SWC also claimed that IGWA could not use a rolling average to measure it compliance, which prevented them from offsetting their Reduction Obligations in future dry years by conserving additional water through increased pumping reductions and aquifer recharge on wet years when lots of water was available.

141. The Steering Committee met throughout the summer of 2022 to determine if a breach occurred, but it did not come to an agreement because IGWA believed it was only required to conserve 205,000 ac-ft and they could use a rolling average to measure their efforts to protect them during hot, dry weather cycles.

142. In Spring 2022, SWC filed a *Notice of Impasse* with IDWR requesting the Director settle the dispute, and the Director issued an Order on September 8, 2022, finding that the Settlement Agreement required the current IGWA members to reduce 240,000 ac-ft, and that compliance was measured annually, without averaging being permitted.

143. In that the Director found that the Districts, including Bonneville-Jefferson, are not permitted to use a rolling average, all of Bonneville-Jefferson's conservation must now take place in a single irrigation year.

144. This interpretation of the Settlement Agreement in effect renders null the "Safe Harbor" provisions afforded to Bonneville-Jefferson in Section 5 of the Settlement Agreement. Such provision guarantees that "[n]o ground water user participating in this Settlement Agreement will be subject to a delivery call by the SWC members as long as the provision of the Settlement Agreement are being implemented."

145. During hot, dry weather cycles, where excess ground water pumping is required to keep crops alive and little to no storage water is available for them to use for recharge to offset

their in-season pumping, Bonneville-Jefferson can only achieve the annual ground water reduction obligation by fallowing farmland (i.e., self-curtailing its ground water pumping).

146. Although SWC promised that Bonneville-Jefferson will not be curtailed if it complies with the Settlement Agreement, it advocated for an interpretation of the Reduction Obligation and Compliance Measures that will force Bonneville-Jefferson into curtailing ground water pumping in greater quantities and more often.

147. As such, SWC's promise of "safe harbor" in exchange for the Bonneville-Jefferson's compliance with the Long-Term Practices of the Settlement Agreement means nothing, and cannot be relied upon by Bonneville-Jefferson.

148. As such, Bonneville-Jefferson is entitled to a judgement from the Court declaring the Settlement Agreement to be void and unenforceable on these grounds.

COUNT VII.
DECLARATORY JUDGMENT
(The Agreement was based on unilateral mistakes)

149. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

150. Typically, "[a] party to a contract 'who makes a mistake unilaterally cannot rescind or modify the agreement absent' misrepresentation or knowledge of the mistake by the other party." *Tricore Invs., LLC v. Est. of Warren through Warren*, 168 Idaho 596, 616, 485 P.3d 92, 112 (2021) (citations omitted).

151. Bonneville-Jefferson relied upon a unilateral mistake of facts regarding their proportionate share of the 240,000 ac-ft ground water reduction obligation was and that a rolling average could not be used to measure its compliance with the reduction obligation.

152. SWC knew that the 240,000 ac-ft reduction obligation was based upon all Irrigation and Ground Water Districts pumping from the ESPA, not just the Districts who signed the Settlement Agreement.

153. SWC and IGWA submitted a joint stipulation supporting the use of a rolling average to measure the Districts' compliance with the annual reduction obligation.

154. SWC knew that IGWA and the Districts were only conserving their proportionate share of the used rolling average to measure its compliance with the annual reduction obligation, but never filed an administrative or district court action to enjoin or prevent IGWA from using a rolling average.

155. IGWA and the Districts used a rolling average as part of their custom and practice from 2016 to 2022.

156. SWC never filed an administrative or district court action to prevent IGWA or the Districts regarding Bonneville-Jefferson's method for calculating its proportionate of the annual ground water reduction obligation or preventing the use of a rolling average.

157. SWC through its actions and representations misled Bonneville-Jefferson into believing that its proportionate share of the annual ground water reduction obligation was 18,264 ac-ft and that a rolling average could be used by Bonneville-Jefferson to measure its compliance with the annual ground water reduction obligation.

158. The facts regarding Bonneville-Jefferson's calculated proportionate share of the annual ground water reduction obligation and whether a rolling average could be used to measure its compliance are material to the Settlement Agreement.

159. As such, Bonneville-Jefferson is entitled to a judgment declaring that Bonneville-Jefferson made a unilateral mistake of these material facts and as a result, the Settlement Agreement is void and unenforceable.

COUNT VIII.
DECLARTORY JUDGEMENT
(The Agreement was not fully executed by all the Parties identified in the Agreement)

160. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

161. An agreement, unless specified that it can be executed in counterparts, is binding only when all the parties sign the agreement.

162. The Settlement Agreement does not contain any provisions permitting it to be executed in counterparts.

163. The membership of IGWA, who is a named Party to the Settlement Agreement, is identified specifically in Footnote 2 of the Settlement Agreement.

164. Footnote 2 identifies Southwest Irrigation District as a member of IGWA

165. Section 3.a.ii refers to "Ground Water and Irrigation Districts" reducing their proportionate share of the 240,000 ac-ft annual ground water diversion reduction.

166. Page 22 of the Settlement Agreement specifically provides a signature page for Southwest Irrigation District to sign.

167. The Agreement by its very terms contemplated that Southwest Irrigation District was a Party to the Agreement.

168. However, Southwest Irrigation District did not sign the Agreement.

169. For this reason, Bonneville-Jefferson is entitled to judgement declaring that the Settlement Agreement was never fully executed, and for that reason it is void and unenforceable.

COUNT IX.
DECLARATORY JUDGMENT
Alternatively, the Settlement Agreement contains ambiguous terms that must be clarified by parole evidence.

170. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

171. If the Court does not declare the Sentiment Agreement void due to a lack of material terms of a lack of meeting of the minds as tot material terms, he should find the Settlement Agreement ambiguous.

172. The provisions reference in paragraphs 27 to 90 of this Petition are ambiguous.

173. The Settlement Agreement is ambiguous regarding the amount of Bonneville-Jefferson's proportionate obligation of the annual ground water reduction is to be and how compliance with the annual ground water reduction is measured.

174. The Settlement Agreement is ambiguous as to how Bonneville-Jefferson's recharge activities are accounted for or credited.

175. Section 3.h is ambiguous when read in conjunction with Section 3.a.ii. that each District is responsible for "reducing their proportionate share of the total annual ground water reduction". Section 3.h says "IGWA will undertake additional targeted ground water to surface water conversions and/or fallow land projects above American Falls."

176. Section 2.b.iii of the Second Addendum identifies "recharge, CREP, conversions, and end-gun removals, etc." as diversion reductions, but it is ambiguous as to if or how these activities are credited toward Bonneville-Jefferson's annual ground water reduction obligation.

177. Section 5 – Safe Harbor – is ambiguous as to the meaning of "safe harbor".

178. Similar to the allegations in paragraph 128, the meaning of "curtailment" in Sections 2.c.iv. of the Second Addendum, Section 3.m.iv, is ambiguous.

179. All the above reference terms are subject to multiple reasonable interpretations.

180. The Parties disagree as to the interpretation of those provisions.

181. Those provisions are subject to multiple reasonable interpretations by the Parties.

182. The provisions are material to the Settlement Agreement.

183. Parole evidence, including customs and practice, is necessary to determine the meaning and intention of these terms.

184. As such, the Settlement Agreement contains ambiguous material terms that render it unenforceable, or that must be clarified with parole evidence to determine the intention of the Parties.

COUNT X.
UNJUST ENRICHMENT
(SWC Has Been Unjustly Enriched by SWC Receiving More Water than it was Entitled to Receive from Bonneville-Jefferson)

185. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

186. Although Bonneville-Jefferson argues that no valid agreement exists between the Parties, "unjust enrichment does not depend upon the existence of a valid contract. *Hertz v. Ficus*, 98 Idaho 456, 457, 567 P.2d 1, 2 (1977) (citation omitted).

187. "The essence of the quasi-contractual theory of unjust enrichment is that the defendant has received a benefit which would be inequitable to retain at least without compensating the plaintiff to the extent that retention is unjust." *Id.*

188. Even "one [Party] acting through a mistake caused by [its] own lack of due care may be entitled to restitution where unjust enrichment has been found." *Id.* (*referring to* Restatement, Restitution (1936) ss 53(3), 59).

189. Here, Bonneville-Jefferson members refrained from raising certain high use water crops with high financial returns on average to pump less water from the ESPA 2016 to 2021, which provided additional water supplies to SWC. As a result, Bonneville-Jefferson members lost income as a result of raising crops that use less water.

190. Bonneville-Jefferson also paid millions of dollars to lease storage water that was then placed in the ESPA via aquifer recharge sites believing that SWC would acknowledge and credit that water towards Bonneville-Jefferson's annual ground water reduction obligation using a rolling average from 2016 through 2021.

191. Bonneville-Jefferson also leased storage water and delivered it directly to SWC through the Snake River and connected water delivery systems.

192. Bonneville-Jefferson leased additional storage water for ESPA recharge above and beyond what it believed it was required to purchase during years where excess storage water was available for lease.

193. As a direct and proximate result of Bonneville-Jefferson's actions, SWC received more water than it otherwise would have received in 2021, 2022, and 2023, than SWC was entitled to receive under any contract, rule, or law.

194. Despite this, SWC has sought administrative actions against Bonneville-Jefferson seeking to impose additional pumping restricts and/or curtailment of ground water use, despite having received more water than SWC was entitled to receive from Bonneville-Jefferson.

195. Upon information and belief, SWC did not put all of the additional water provided by Bonneville-Jefferson to beneficial uses related to irrigation of farmland owned by SWC.

196. SWC has been unjustly enriched by the actions taken by Bonneville-Jefferson, and Bonneville-Jefferson is entitled to monetary compensation equal to the amount in which it unjustly enriched SWC.

COUNT XI.
QUANTUM MERUIT
(In the alternative, Bonneville-Jefferson is entitled to recover funds related to actions that provided SWC with additional water)

197. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

198. Should the Court not be persuaded that SWC has been unjustly enriched, Bonneville-Jefferson alleges as follows:

199. Should the Court find that a contract was not formed, Bonneville-Jefferson is entitled to recovery under a theory of Quantum Meruit:

> Though some courts do not differentiate between the measure of recovery under unjust enrichment and quantum meruit, this Court has carefully done so. 66 Am.Jur.2d Restitution and Implied Contracts § 66 (1973 & Supp.1996). In *Peavey v. Pellandini*, 97 Idaho 655, 658, 551 P.2d 610, 613 (1976), this Court stated that quantum meruit is the appropriate recovery under a contract implied in fact. A contract implied in fact exists where there is no express agreement but the parties' conduct evidences an agreement. *Id.* (quoting *Continental Forest Prod., Inc. v. Chandler Supply Co.*, 95 Idaho 739, 518 P.2d 1201 (1974)). Unjust enrichment, or restitution, is the measure of recovery under a contract implied in law. *Id.* A contract implied in law, or quasi-contract, "is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent of the agreement of the parties, and, in some cases, in spite of an agreement between the parties."
>
> *Id.* Recovery under a quantum meruit theory is measured by "the reasonable value of the services rendered or of goods received, regardless of whether the defendant was enriched." *Erickson v. Flynn*, 138 Idaho 430, 434–35, 64 P.3d 959, 963–64 (Ct.App.2002). Recovery under an unjust enrichment theory, on the other hand, is limited to the amount by which the defendant was unjustly enriched. *Id.* at 434, 64 P.3d at 963. Here, the contract between Quality and Pac–West was express, but failed because of illegality. Any recover by Quality is limited to restitution, and Quality must prove that Pac–West was unjustly enriched.

Barry v. Pac. W. Const., Inc., 140 Idaho 827, 833–34, 103 P.3d 440, 446–47 (2004).

200. As set forth in paragraphs 200-212, Bonneville-Jefferson members chose to forego raising crops that had higher financial returns to reduce ground water pumping and leased millions of dollars in storage water for ESPA recharge and direct delivery through the Snake River and connected delivery systems to SWC.

201. In exchange for Bonneville-Jefferson's actions, SWC did not make water delivery calls, seeking further pumping restrictions and/or curtailment of ground water use of Bonneville Jefferson's members from 2016 to 2021.

202. Bonneville-Jefferson' actions were taken based upon and implied contract of fact that exists by the custom and practice of the parties.

203. The implied contract in fact protected Bonneville-Jefferson members from further pumping reductions and/or curtailment if they conserved their proportionate share of 205,000 ac-ft of water, 18,264 ac-ft, through pumping reductions, ESPA recharge, and delivery of storage water directly to SWC, measured using a five-year rolling average.

204. Despite this, SWC has now denied that this agreement exists and sought administrative actions against Bonneville-Jefferson seeking to impose additional pumping restricts and/or curtailment of ground water use, despite having received more water than SWC was entitled to receive from Bonneville-Jefferson.

205. Bonneville-Jefferson undertook actions performed additional conservation at a substantial cost which consequently provided a benefit the SWC. All such actions were taken to benefit the reach gains enjoyed by SWC.

206. As such, Bonneville-Jefferson is entitled to a judgement awarding it the reasonable value of the actions it took to provide additional water to the SWC from Bonneville-Jefferson's additional conservation in an amount to be determined at trial.

COUNT XII.
PROMISSORY ESTOPPEL
(Bonneville-Jefferson Detrimentally Relied on SWC's Representations)

207. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

208. Bonneville-Jefferson can establish a claim for promissory estoppel if they prove"

> (1) reliance upon a specific promise; (2) substantial economic loss to the promisee as a result of such reliance; (3) the loss to the promisee was or should have been foreseeable by the promisor; and (4) the promisee's reliance on the promise must have been reasonable.

Speaking more broadly, this Court has generally described the doctrine of promissory estoppel as meaning that

> a promise which the promisor should reasonably expect to induce action or forebearance on the part of the promisee or a third person and which does induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise."

SilverWing at Sandpoint, LLC v. Bonner Cnty., 164 Idaho 786, 795, 435 P.3d 1106, 1115 (2019) (Internal quotations and citations omitted).

209. SWC represented to IGWA and the Director that Bonneville-Jefferson was only required to reduce 18,264 ac-ft annually and that Bonneville-Jefferson could use a rolling average to measure it conservation activities.

210. SWC never sought an administrative or legal action to prevent Bonneville-Jefferson from using averaging until 2021.

211. From 2016 to 2021, Bonneville-Jefferson's members chose to forego raising crops that had higher financial returns to reduce ground water pumping and leased millions of dollars in

storage water for ESPA recharge and direct delivery through the Snake River and connected delivery systems to SWC relying on the promises and representations of SWC.

212. SWC actually knew that Bonneville-Jefferson was leasing additional storage water and conserving its pumping from 2016 to 2021 to build up credit to be used on dry years where little to no storage water is available for lease.

213. SWC could reasonably foresee that Bonneville-Jefferson would sustain a loss if SWC refused to give Bonneville-Jefferson credit for its extra conservation of pumping and recharge in that the profits lost from not growing high grossing crops and spending resources on recharge would not provide Bonneville-Jefferson the benefit of credits it could rely upon in hot, dry weather cycles, such credit Bonneville-Jefferson anticipated it would receive from SWC.

214. In 2022, SWC did not permit credit for past conservation or recharge when it filed its first administrative action since 2016 alleging Bonneville-Jefferson did not meet its obligations under the Settlement Agreement when the Parties experienced the first hot, dry weather cycle of the Agreement in 2021.

215. Bonneville-Jefferson's reliance on the promises and representations of SWC was reasonable because the Parties discussed the methods from which proportionate shares of the annual ground water reduction obligations would be based. Furthermore, Bonneville-Jefferson's belief as to what its obligation is coincides with these discussions and the Parties negotiated and actually supported the use of averaging with the Director. Additionally, SWC did not bring a formal administrative action contesting Bonneville-Jefferson's custom and practice under from 2016 to 2021.

216. Bonneville-Jefferson relied to its detriment in providing millions of dollars in excess conservation and recharge based upon the promises and representations of SWC. Bonneville-Jefferson was also

217. Bonneville-Jefferson was also required to devote millions of dollars to purchase storage water so as to permit its members to keep pumping in 2022 and 2023 after SWC sought administrative enforcement actions against Bonneville-Jefferson based on these terms.

218. Bonneville-Jefferson's reliance on SWC' promises has caused millions of dollars in damages, all because of SWC's misleading promises and representations.

219. Bonneville-Jefferson has been damaged by SWC's actions in an amount to be proven a trial.

COUNT XIII.
BREACH OF CONTRACT
(In the alternative, SWC breached its implied covenant of good faith and fair dealing)

220. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

221. **"**Idaho law recognizes a cause of action for breach of an implied covenant of good faith and fair dealing. No covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties. The covenant requires that the parties perform in good faith the obligations imposed by their agreement," and a violation of the covenant occurs only when either party ... violates, nullifies or significantly impairs any benefit of the ... contract. ..." *River Range, LLC v. Citadel Storage, LLC*, 166 Idaho 592, 603, 462 P.3d 120, 131 (2020) (internal quotations and citations omitted).

222. SWC and IGWA jointly filed a proposed order with the Director supporting the use of a rolling average to measure compliance with the annual ground water reduction obligation.

223. SWC did not pursue any remedy until a hot, dry year occurred, where Bonneville-Jefferson had little to no ability to conserve water.

224. Despite its earlier filing with the Director supporting the use of averaging, SWC represented to the Director in 2021 that it did not support the use of averaging to measure Bonneville-Jefferson's compliance.

225. Bonneville-Jefferson fulfilled every obligation under the Settlement Agreement, and even exceeded its obligations during certain years.

226. SWC took advantage of the situation to harm Bonneville-Jefferson, rather than work with it in good faith. As such, SWC violated its covenant to deal fairly with the Bonneville-Jefferson. This is a breach of the covenant of good faith and fair dealing.

227. Bonneville-Jefferson has been damaged as a direct and proximate cause of SWC's breach in an amount to be determine at trial.

COUNT XIV.
TEMPORARY RESTRAINING ORDER AND PRELIMINARY RESTRAINING ORDER

228. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

229. Bonneville-Jefferson seeks a temporary restraining order, preliminary injunction, and/or permanent injunction directed to all Respondents, preventing them from enforcing any terms of the Settlement Agreement until such time the Court is able to determine the merits of the claims alleged in this Petition.

230. Based on the allegations contained in this Petition, Bonneville-Jefferson is likely to prevail on the merits of its claims.

231. The Settlement Agreement, as interpreted and enforced by SWC and the Director, has and will continue to cause great and/or irreparable financial harm to Bonneville-Jefferson, and

will continue to cause Bonneville-Jefferson to incur costs of procuring storage water and to lose money by reducing pumping raising lower consumptive crops with less crop financial returns to comply with the mandates of the Department and the demands of the SWC.

232. Following a hearing on a temporary restraining order pursuant to I.R.C.P. 65(b), Bonneville-Jefferson further requests that the Temporary Restraining order be continued in the form of a Preliminary Injunction to be effective during the pendency of this case.

233. Bonneville-Jefferson requests that a Temporary Restraining Order be entered without written or oral notice in that, if the SWC and the Director continue with enforcement action, administrative or otherwise, under the terms of the Settlement Agreement, Bonneville-Jefferson will suffer great or irreparable harm.

234. As required by I.R.C.P. 65(c), the security for this action is storage water leases and equivalent private recharge equal to Bonneville-Jefferson's share of the predicted Demand Shortfall of the SWC for the 2024 irrigation season.

COUNT XV.
ATTORNEY FEES

235. Bonneville-Jefferson restates and realleges the preceding paragraphs and incorporate them herein by reference as though fully set forth.

236. Bonneville-Jefferson has been required to retain the services of Olsen Taggart PLLC to prosecute this action and have agreed to pay a reasonable attorney fees and costs incurred in pursing this action and that $50,000.00 is a reasonable attorney fee should this action result in a default judgment, plus costs and such other sums as the Court deems proper should the action be contested and that said fees and costs should be awarded pursuant to any applicable rule, statute or agreement.

WHEREFORE, Bonneville-Jefferson requests that the Court grant the following relief:

1. As to Count I, a declaratory judgment as specified in the associated Count.

2. As to Count II, a declaratory judgment as specified in the associated Count.

3. As to Count III, a declaratory judgment as specified in the associated Count.

4. As to Count IV, a declaratory judgment as specified in the associated Count.

5. As to Count V, a declaratory judgment as specified in the associated Count.

6. As to Count VI, a declaratory judgment as specified in the associated Count.

7. As to Count VII, a declaratory judgment as specified in the associated Count.

8. As to Count VIII, a declaratory judgment as specified in the associated Count.

9. As to Count IX, a declaratory judgment as specified in the associated Count.

10. As to Count X, equitable relief as specified in the associated Count.

11. As to Count XI, equitable relief as specified in the associated Count.

12. As to Count XII, equitable relief as specified in the associated Count.

13. As to Count XIII, a judgment awarding damages for breach of contract as specified in the associated Count.

14. As to Count XIV, a temporary restraining order and/or preliminary injunction as specified in the associated Count.

15. As to Count XV, a judgment awarding attorney fees as specified in the associated Count.

[SPACING IS INTENTIONAL]

16. Any other legal or equitable remedy as determined appropriate by the Court.

DATED: May 23, 2024.

OLSEN TAGGART PLLC

/s/ *Skyler C. Johns*
Skyler C. Johns
Attorney for Petitioner