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

IDAHO GROUND WATER APPROPRIATORS, INC.,

Petitioner,

vs.

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

Respondents,

And

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

Intervenors.

Case No. CV01-23-7893

IDAHO GROUND WATER APPROPRIATORS, INC.'S OPENING BRIEF

Judicial Review from the Idaho Department of Water Resources
Gary D. Spackman, Director
Honorable Eric J. Wildman, Presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE

I. Nature of the case

This case involved the interpretation of a settlement agreement between nine ground water districts who are members of Idaho Ground Water Appropriators, Inc. ("IGWA") and seven canal companies and irrigation districts who are members of the Surface Water Coalition ("SWC"). IGWA's petition for judicial review challenges an order issued by the Director of the Idaho Department of Water Resources ("IDWR" or "Department") which rules that the settlement agreement, which was approved by the Director as a mitigation plan under the Rules for Conjunctive Management of Surface and Ground Water Resources ("Conjunctive Management Rules"), unambiguously defines how groundwater conservation obligations are calculated and implemented under the terms of the agreement.

II. Procedural History

In response to an ongoing delivery call by the SWC, all members of the SWC and certain members of IGWA entered into the *Settlement Agreement Entered into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of Idaho Ground Water Appropriators, Inc*. ("2015 Agreement") to provide a new and different way of mitigating injury to the SWC. (R. 436-60.) Three months later, in October 2015, the SWC and IGWA entered into an *Addendum to Settlement Agreement* ("First Addendum") to define additional settlement provisions. (R. 461-76.) At that time, IGWA and A&B Irrigation District ("A&B") entered into a separate *Settlement Agreement* ("IGWA-A&B Agreement") to define settlement provisions specific to A&B. (R. 498-508.)

In March of the following year, IGWA and the SWC jointly submitted the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* ("Mitigation Plan") to the Director for approval as a mitigation plan under rule 43 of the Conjunctive Management Rules. (R. 509-75.) The 2015 Agreement, First Addendum, and IGWA-A&B Agreement were all attached as exhibits to the Mitigation Plan, as well as a proposed order. *Id.* On May 2, 2016, the Director issued the *Final Order Approving Stipulated Mitigation Plan* ("Order Approving Mitigation Plan"). (R. 893-900.)

In December 2016 the parties executed a *Second Addendum to Settlement Agreement* ("Second Addendum"). (R. 477-97.) The parties then filed a *Stipulated Amended Mitigation Plan and Request for Order* ("Amended Mitigation Plan") with the Department on February 7, 2017. (R. 586-612.) The Director issued a *Final Order Approving Amendment to Stipulated Mitigation Plan* ("Order Approving Amended Plan") on May 9, 2017. (R. 901-09.)

Collectively, the 2015 Agreement, First Addendum, IGWA-A&B Agreement, and the Second Addendum are commonly referred to as the "IGWA-SWC Settlement Agreement," and is referred to herein simply as the "Settlement Agreement."

A key provision of the 2015 Agreement requires the ground water districts to each reduce groundwater diversions by their "proportionate share" of 240,000 acre-feet. As discussed in more detail below, neither the 2015 Agreement nor any of the other documents that make up the Settlement Agreement specify how to calculate each district's proportionate share, nor how to measure compliance therewith. IGWA figured this out after-the-fact and reported its actions to the SWC and the Department in annual performance reports and in-person meetings.

On April 27, 2022, the SWC requested a status conference with the Director to address what they claimed was a breach of the Settlement Agreement that occurred in 2021. (R. 1-12.) Specifically, the SWC claimed that IGWA had been wrongly calculating each district's proportionate share of 240,000 acre-feet, and wrongly measuring compliance therewith. *Id*. The SWC argued that the Settlement Agreement should be interpreted differently than it had been implemented since 2016. Under the SWC's interpretation, some of the ground water districts did not achieve their proportionate groundwater reduction obligation in 2021. IGWA disputed the breach allegation because these districts were in compliance with the Settlement Agreement as it had been implemented historically.

On May 5, 2022, the Director responded to the SWC's request, setting a status conference for May 25, 2022. (R. 15.) However, the Director declined to address the SWC's breach argument until it complied with a term of the Settlement Agreement that requires the steering committee (a component of the Settlement Agreement) to report unresolved breach allegations between the parties to the Director. *Id.*

On July 21, 2022, the SWC filed a *Notice of Steering Committee Impasse/Request for Status Conference* ("Impasse Notice"), reporting the steering committee was at an impasse as to the SWC's alleged breach of the Settlement Agreement. (R. 21-22.) The Impasse Notice asked

the Director to set a second status conference to address the annual diversion reduction requirement, whether certain districts complied in 2021, and how the Department would respond if it determined that a breach occurred. (R. 22.) In response, the Director set a status conference for August 5, 2022, to discuss the alleged noncompliance in 2021. (R. 25.)

Notably, the Impasse Notice was not a motion and was not supported by declarations or affidavits, and the Director's *Notice of Status Conference* did not treat it as such. (R. 19-22, 29-43, 45-46.) IGWA anticipated that the status conference would be used to informally discuss the issues and determine whether a hearing should be scheduled to formally address the merits of the SWC's allegation. To IGWA's surprise, the Director requested oral argument at the status conference and advised the parties that he would issue a written decision. IGWA filed a written response advising the Director that the Department's rules of procedure require the filing of a motion with supporting briefs and affidavits before the Director rules on the SWC's alleged breach. (R. 45-46.) This was ignored.

On September 7, 2022, under the threat of curtailment by the Director, the parties entered into a Settlement Agreement ("2021 Remedy Agreement") which resolved the parties' dispute regarding compliance with the Settlement Agreement in 2021. (R. 67-70.) On September 8, 2022, without holding an evidentiary hearing, the Director issued a *Final Order Regarding Compliance with Approved Mitigation Plan* ("Compliance Order") which adopted the SWC's interpretation of the Settlement Agreement, concluded that certain ground water districts breached the Settlement Agreement in 2021, and accepted the Remedy Agreement as satisfaction of the breach. (R. 79-92.)

On September 22, 2022, IGWA petitioned for reconsideration of the Compliance Order and requested a hearing. (R. 96-104.) The Director granted the request for a hearing. (R. 105-08.) A hearing was held February 8, 2023, where IGWA presented evidence demonstrating patent and latent ambiguities in the Settlement Agreement. On April 24, 2023, the Director issued the *Amended Final Order Regarding Compliance with Approved Mitigation Plan* ("Amended Compliance Order") which essentially rubber stamped the Compliance Order, finding no ambiguity in the terms of the Settlement Agreement. (R. 403-27.)

IGWA's petition for judicial review challenges the Amended Compliance Order.

III. Statement of Facts

The 2015 Agreement was negotiated over the winter and spring of 2015 with assistance from state leaders and Department staff. It prescribes short-term actions (year 2015) and long-term actions (post-2015) that ground water districts would take to mitigate material injury to the SWC and avoid curtailment. The negotiating parties finalized the 2015 Agreement on June 30, 2015, but it was subject to "approval and submission by the respective boards of IGWA and the SWC to the Director by August 1." (R. 437; Deeg, Tr. 197:11-16.) Signatures to the 2015 Agreement are dated between July 1 and July 29, 2015. (R. 441-60.)

One of the signature lines is for Southwest Irrigation District ("SWID"), an IGWA member whose patrons divert groundwater from the Eastern Snake Plain Aquifer ("ESPA"). (R. 460.) SWID did not sign the 2015 Agreement. Instead, SWID agreed with the SWC to continue mitigating under a separate settlement agreement they had entered previously. (Higgs, Tr. 112:8-113:14.)

The central component of the 2015 Agreement requires the ground water districts to reduce groundwater pumping or to conduct equivalent aquifer recharge (referred to collectively herein as "groundwater conservation"). (R. 437.) Section 3.a.i of the 2015 Agreement states: "Total ground water diversion shall be reduced by 240,000 ac-ft annually." *Id.* Section 3.a.ii then states: "Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity." *Id*.

The 240,000 acre-feet figure was derived from a water budget analysis performed by IDWR. The Department calculated that the volume of water stored in the ESPA had been declining by 216,000 acre-feet annually on average since the 1950s. (R. 952; Higgs, Tr. 106:1-108:14.) Based on computer modelling, IDWR determined that 240,000 acre-feet of groundwater conservation, together with state-sponsored aquifer recharge, would raise the water table in the ESPA to the average water level from 1991-2001 by the year 2023, assuming average weather conditions. (R. 953-55.)

The 216,000 acre-feet water budget deficit was attributable to groundwater pumping by all groundwater users, not just IGWA members. (Deeg, Tr. 200:4-12.) Since IGWA's members account for approximately 80% of all pumping from the ESPA, they were willing to do their fair share to stabilize the ESPA, but they were not willing to mitigate for water users outside their

districts. (Deeg, Tr. 201:4-10.) Accordingly, section 6 of the 2015 Agreement states: "Any ground water user not participating in this Settlement Agreement or otherwise have another approved mitigation plan will be subject to administration." (R. 440.) IGWA expected that A&B, SWID, and other non-IGWA members would also be required to contribute toward mitigating injury to the SWC, albeit through separate agreements with SWC or under the terms of IDWR's Methodology Order governing the SWC delivery call. (Higgs, Tr. 112:12-114:11.)

After the 2015 Agreement was finalized on June 30, 2015, the ground water districts held meetings with their patrons to explain the terms of the agreement and seek support for signing the agreement. (Deeg, Tr. 197:18-198:4; 203:1-17.) A letter dated July 2, 2015, titled "Questions and Answers" was provided by IGWA's legal counsel for use in these meetings. (R. 953-60; Deeg, Tr. 203:1-17.) Question number four asks: "How will the 240,000 acre-foot reduction in groundwater withdrawals be allocated between the districts?" (R. 953.) The answer: "Each of the twelve (12) ground water and irrigation districts that divert water from the ESPA will be allocated their proportionate share of the total annual ground water reduction based on the number of cfs and/or irrigated acres within each district." *Id*. Question number five asks: "If one or more districts choose not to participate in the settlement, will the participating districts have to further reduce diversions in order to reach the cumulative 240,000 acre-foot reduction in groundwater use?" *Id*. The answer: "No, each district will only be responsible for its share of the 240,000 acre-feet." (R. 954.) The ground water districts understood when they signed the 2015 Agreement that their "proportionate share" of 240,000 acre-feet would be calculated relative to groundwater diversions by all 12 ground water districts and irrigation districts whose members divert from the ESPA, not just those who signed the 2015 Agreement. (Deeg, Tr. 207:20-208:4.)

The 12 districts whose members divert from the ESPA are the nine ground water districts that signed the Settlement Agreement, plus SWID, A&B, and Falls Irrigation District. Since the signatory districts' proportionate shares of 240,000 acre-feet was to be calculated relative to diversions by all 12 districts, the decision by SWID to not sign the 2015 Agreement has no affect on the proportionate shares of the signatory districts, and, therefore, did not require an adjustment of the 240,000 acre-feet figure. (Higgs, Tr. 113:5-14.)

The 2015 Agreement does not prescribe how each district's proportionate share of 240,000 acre-feet would be calculated. (Higgs, Tr. 55:25-56:6.) IGWA hired Jaxon Higgs with Water Well Consultants to help with this. As Mr. Higgs explained at the hearing, there are

several different ways of doing it—it could be based on water right acres, irrigated acres, water right cfs, historic pumping flow rates in cfs, volume pumped per water right volume, spatial variation based on impact to the ESPA, consumptive use, evapotranspiration, or a combination thereof. (Higgs, Tr. 56:7-57:2.)

In the July-August 2015 timeframe, Mr. Higgs prepared a presentation to explain two options to the IGWA board for calculating each district's proportionate share. (Higgs, Tr. 58:19-60:5; 76:1-4.) The presentation includes a chart showing one method using water right diversion data in the IDWR Water Management Information System ("WMIS") database. (R. 967; Higgs, Tr. 76:9-77:10.) The chart includes an "Out of District" figure representing groundwater diversions from wells that are not included in any irrigation district or ground water district, an "In District, Not Reported by District" figure representing groundwater diversions from wells within the boundary of an irrigation district or ground water district boundary but belonging to a non-patron of the district, and diversion data for A&B, Raft River Ground Water District ("Raft River"), and SWID. (Higgs, Tr. 77:11-78:25.) Although A&B and Raft River were not represented by IGWA, and SWID did not sign the 2015 Agreement, Mr. Higgs included their groundwater diversions in calculating the proportionate shares of the signatory districts because the 240,000 acre-feet figure was presented to, and understood by, IGWA to represent an aquifer-wide figure, as explained above, and because diversions within A&B, Raft River, and SWID had been included in charts prepared by the Department around that time concerning the 2015 Agreement. (Higgs, Tr. 78:18-25.)

A technical workshop was held September 23, 2015, in Burley to discuss how to calculate each district's proportionate conservation obligation, and how to measure compliance therewith. (Higgs, Tr. 86:3-23.) As shown on the meeting agenda, Department staff (Mat Weaver, Matt Anders, Bill Kramber, and Cindy Yenter) gave presentations addressing different water use metrics that may be used to evaluate groundwater conservation. (R. 970-71.) The agenda includes a list of objectives for the meeting, several of which document the fact that the 2015 Agreement does not prescribe the method for calculating each district's proportionate share of 240,000 acre-feet, nor how to measure compliance therewith. *Id*. The objectives included:

1. Discuss and reconcile the inconsistent usage of "diversion reduction," "consumptive reduction," and "demand reduction" language by the term sheet . . . .

6. Determine whether "diversion reduction" or "consumptive use reduction" will be the standard used by the GWDs in implementing their collective practices to achieve the term sheet's benchmarks and goals.
7. Determine the data and methods that will be used to proportionately split the 240,000 acre foot obligation up amongst all the parties (i.e. GWDs, A&B, SWID, and others).
8. Determine the data and methods that will be used to establish "baseline conditions."
9. Determine the data and methods that will be used to measure year-to-year performance of the GWDs in achieving the term sheet's benchmarks and goal.

Id. Objective no. 7 also documents the understanding by IGWA and Department staff that diversions by A&B, SWID, and non-IGWA members would be taken into account in calculating the proportionate conservation obligations of IGWA's members. (Higgs, Tr. 91:12-92:3.)

The method for calculating each district's proportionate obligation, and how to determine compliance therewith, were not decided at the September 2015 workshop. Mr. Higgs continued to work with IGWA over the next year to develop acceptable and workable methods, eventually reaching a final determination in November of 2016. (Higgs, Tr. 96:24-97:25; R. 972.)

The method eventually adopted by IGWA consisted of utilizing average annual diversion volumes in each district from 2010-2014 to define the "baseline" against which groundwater conservation would be measured. (Higgs, Tr. 100:9-102:10.) The 2015 Agreement does not prescribe a baseline based on a 5-year average. IGWA also considered using a 3-year average or peak diversions as the baseline, both of which would have allowed a greater volume of pumping for IGWA than the 5-year average. (Higgs, Tr. 103:5-104:20.) At the hearing, Mr. Higgs used a chart to demonstrate this. (R. 974.) While the 3-year average or peak pumping volumes would have been advantageous to IGWA by creating higher baseline volumes, IGWA adopted the 5-year average in good faith. (Higgs, Tr. 104:7-20.)

After taking into account diversions within A&B and SWID, the collective groundwater conservation obligations of the ground water districts is 205,397 acre-feet. (R. 33.) This volume was allocated pro rata among the ground water districts based on the respective diversion volumes within each district over the baseline period. (Higgs, Tr. 125:11-126:7; R. 840-45.) IGWA submitted annual performance reports to the SWC and IDWR showing this. (Higgs, Tr. 53:10-54:2; R. 685-712.)

With the baseline determined, the next task was to determine how to measure conservation against the baseline, and whether averaging would be utilized on both sides of the

equation. As shown in the chart cited below that compares a 5-year average, 3-year average, and peak pumping volume, pumping amounts during the 5-year baseline period fluctuated considerably based on weather conditions and other factors. (Higgs, Tr. 121:23-122:6; R. 974.) Since averaging was used to develop the baseline condition, the ground water districts used averaging to measure groundwater conservation as compared to the baseline. (Tr. 123:22-24.) Averaging was also important to accommodate crop rotations. (Tr. 123:24-124:4.)

On March 9, 2016, IGWA and the SWC jointly filed the Mitigation Plan with the Department along with a proposed order that contemplated the use of averaging for the purpose of measuring groundwater conservation. Section 2.a. of the proposed order states: "Total groundwater diversions from the ESPA shall be reduced by 240,000 acre-feet annually starting in 2016 and based on a 3-year rolling average going forward." (R. 519.) Thus, as of 2016, the SWC agreed to the use of averaging to measure compliance with the Mitigation Plan. The Director's order approving the Mitigation Plan did not incorporate section 2.a. of the proposed order—it neither condoned nor prohibited the use of averaging to measure compliance. (R. 893-900.)

Over the five-year period 2017-2021, the ground water districts collectively conserved 348,207 acre-feet annually on average—142,810 acre-feet more than their collective obligation of 205,397 acre-feet. (R. 841-45.)[1] In sum, they conserved 714,050 acre-feet more than required during that period. *Id.* Even if they were collectively responsible for 240,000-acre-feet, which IGWA maintains they are not, between 2017 and 2021 they conserved an excess of 108,207 acre-feet on average annually, and 541,035 acre-feet in total. *Id.*

In 2021, a year of severe drought, the ground water districts conserved 122,784 acre-feet. (R. 845.) Despite far exceeding the reduction requirement in the previous four years, the SWC charged the ground water districts with breaching the Settlement Agreement, arguing that they must collectively conserve 240,000 acre-feet, and that averaging cannot be considered in measuring compliance. (R. 2-3.) Despite Department staff participating in the September 2015 workshop, and despite IGWA submitting performance reports since 2016 that showed the collective conservation obligation being 205,397 acre-feet, the Director ruled in the Compliance

[1] R. 841-45 are IGWA's performance spreadsheets. In 2017 (R. 841) IGWA's total conservation was 495,384 acre-feet; in 2018 (R. 842) total conservation was 387,930 acre-feet; in 2019 (R. 843) total conservation was 426,738 acre-feet; in 2020 (R. 844) total conservation was 308,199 acre-feet; and in 2021 (R. 845) total conservation was 122,784 acre-feet. The average total conservation between 2017 to 2021 is 348,207 acre-feet.

Order and again in the Amended Compliance Order that the 2015 Agreement (a) unambiguously precludes diversions of A&B and SWID from being taken into account when calculating the proportionate groundwater conservation obligations of the ground water districts, and (b) unambiguously prohibits the ground water districts from utilizing averaging to measure compliance with their individual conservation obligations. (R. 80-82.) Based upon these rulings, the Director concluded that certain ground water districts breached the Settlement Agreement in 2021. (R. 82-83.)

STANDARD OF REVIEW

Judicial review of the Amended Compliance Order is governed by the Idaho Administrative Procedure Act. Idaho Code §§ 42-1701A(4), 67-5240, 67-5270 *et seq*. Under the Act the court shall affirm the agency action unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3). The party challenging the agency decision must show that the agency erred in a manner specified in I.C. § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417 (2001).

This case involves interpretation of a contract (the 2015 Agreement) to determine whether it is ambiguous. "Whether a contract is ambiguous is a question of law over which [courts] exercise free review." *Swanson v. Beco Const. Co*., 145 Idaho 59, 62 (2007) (quoting *Howard v. Perry*, 141 Idaho 139, 142 (2005)). This standard applies when courts are reviewing agency interpretations of contracts. *Wood v. Idaho Transp. Dept*., __ Idaho __, 532 P.3d 404, 410 (2022). Courts are "free to correct errors of law in the agency's decision." *Mercy Med. Ctr. v. Ada Cty*., 146 Idaho 226, 229 (2008).

If the Amended Compliance Order is not affirmed, it shall be set aside in whole or in part and remanded for further proceedings as necessary. Idaho Code § 67-5279(3).

ISSUES ON APPEAL

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

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

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

4. Whether the Director's conclusion of law that "IGWA offered neither evidence nor argument that the Mitigation Plan—when read as a whole in its entirety—was ambiguous concerning IGWA's obligation to conserve 240,000 ac-ft" is supported by substantial evidence in the record as a whole, or is arbitrary, capricious, or an abuse of discretion.

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

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

SUMMARY OF THE ARGUMENT

The plain language of the Settlement Agreement does not prescribe either (a) how each ground water district's proportionate conservation obligation is to be calculated, or (b) how compliance therewith is to be measured. Undisputed evidence shows that there were multiple ways of doing this, and there was no agreement between the parties before the Settlement Agreement was signed. The ground water districts had to figure it out after-the-fact.

It cannot reasonably be argued that the Settlement Agreement is unambiguous with respect to the foregoing issues, yet that is what the Director concluded in the Amended Compliance Order. This conclusion is inexplicable, was made without a reasonable basis in law or fact, and, as a result, entitles IGWA to attorney fees under Idaho Code § 12-117.

For the reasons set forth below, IGWA respectfully requests that this Court set aside the Amended Compliance Order and make the following rulings:

1. The Settlement Agreement is ambiguous as to how each district's proportionate groundwater conservation obligation is calculated.
2. The Settlement Agreement is ambiguous as to how compliance with each district's proportionate groundwater conservation obligation is measured.
3. The Director's finding and conclusion that IGWA failed to present evidence that the Mitigation Plan is ambiguous is not supported by substantial evidence in the record, and/or is arbitrary, capricious, and an abuse of discretion.
4. The Director exceeded his statutory authority by reapportioning IGWA's contractual obligations without regard to parol evidence.
5. The Director's finding and conclusion that IGWA offered neither argument nor evidence of ambiguity was made without a reasonable basis in law or fact, entitling IGWA to attorney fees under Idaho Code § 12-117.
6. The Department must resolve the ambiguities in the Settlement Agreement based on parol evidence presented at the hearing.

ARGUMENT

1. The Amended Compliance Order erroneously concludes that the Settlement Agreement unambiguously prescribes the method and metric for calculating each district's proportionate groundwater conservation obligation.

If a contract is unambiguous, its plain meaning is controlling. *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 266 (2012). A contract is ambiguous if there are "two different reasonable interpretations of the term." *Swanson*, 145 Idaho at 62. If a contract is ambiguous, "interpretation of the [contract] becomes a question of fact determined by parole [sic] evidence of the facts and circumstances surrounding the [] transaction." *Sommer v. Misty Valley, LLC*, 170 Idaho 413, 425 (2021). Parol evidence is considered to determine the intent of the parties, which may be derived from the language of the contract as well as "the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings." *Stanger v. Walker Land & Cattle, LLC*, 169 Idaho 566, 573 (2021). A court may also "look to custom and trade practice in interpreting an agreement as well as using such to supply an essential term which is reasonable in the circumstances to the agreement." *Bischoff v. Quong-Watkins Properties*, 113 Idaho 826, 829 (Ct. App. 1987).

As explained below, the 2015 Agreement is both patently and latently ambiguous with regard to how each district's proportionate groundwater conservation obligation is calculated. The Director's failure to recognize and address these ambiguities is an error of law.

a. The 2015 Agreement is patently unambiguous as to the method of calculating each district's proportionate share of 240,000 acre-feet.

"Idaho courts look solely to the face of a written agreement to determine whether it is patently ambiguous." *Swanson*, 145 Idaho at 62 (quoting *Ward v. Puregro Co*., 128 Idaho 366, 369 (1996)). "In determining patent ambiguity, the contract as a whole is considered." *Buku Properties, LLC v. Clark*, 153 Idaho 828, 832 (2012).

Section 3.a of the 2015 Agreement requires the signatory ground water districts to conserve groundwater. However, it does not prescribe a specific volume that each district must conserve. Rather, it requires each district to conserve a "proportionate share" of 240,000 acre-feet. It reads:

> *i.* Total ground water diversions 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.) The phrase "proportionate share of the total annual ground water reduction" is patently ambiguous because it is subject to multiple reasonable interpretations. It could be interpreted to calculate each district's proportionate share relative to (a) total groundwater diversions by *all groundwater users*, (b) total groundwater diversions by *all ground water districts and irrigation districts with members pumping from the ESPA* (this is the interpretation implemented by IGWA), or (c) total groundwater diversions *by the signatory districts alone* (the Director deemed this the only reasonable interpretation).

IGWA's interpretation is grounded in the language of section 3.a which provides that "[e]ach ground water and irrigation district with members pumping from the ESPA" is responsible for a proportionate share of the total. *Id*. It is also grounded in the language of the 2015 Agreement when read as a whole, which explicitly assigns several obligations to IGWA's member districts specifically, including section 2.a ("IGWA on behalf of its member districts will acquire a minimum of 110,000 ac-ft for assignment"), section 3.b.i ("IGWA will provide

50,000 ac-ft of storage water through private leases"), section 3.b.ii ("IGWA shall use its best efforts to continue existing conversions in Water Districts 130 and 140"), and section 3.f ("IGWA's contributions to the State sponsored recharge program will be targeted for infrastructure and operations above American Falls"). (R. 437-39.) 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 diversion by IGWA's member districts shall be reduced by 240,000 acre-feet annually." It does not, indicating that is not what the parties intended.

IGWA's interpretation is further 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 2015 Agreement. 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. By contrast, under IGWA's interpretation of section 3.a, 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. (R. 46; Higgs, Tr. 112:8-113:14.) 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.

Notwithstanding, the Director ruled that the only reasonable interpretation is that the signatory districts' proportionate share be calculated relative to total groundwater diversions by the signatory districts only, thereby requiring the signatory districts to collectively conserve 240,000 acre-feet. (R. 416-17.) In other words, the Director ruled that the withdrawal of SWID shifted its proportionate share onto the signatory districts.

While the Director's interpretation of section 3.a of the 2015 Agreement may be reasonable, it is not the only reasonable interpretation. Since IGWA's interpretation of section 3.a is also reasonable, the Director erred as a matter of law by failing to find the 2015 Agreement patently ambiguous.

The Amended Compliance Order does not explain why IGWA's interpretation is not reasonable. Rather, it states that "not every phrase in a contract must be defined, nor is a contract

rendered ambiguous by an undefined term," then cites a few provisions in the 2015 Agreement and the A&B-IGWA Agreement that do nothing to explain how each district's proportionate share is to be calculated. (R. 418.) Apparently recognizing the lack of any sound basis for disregarding the patent ambiguity, the Amended Compliance Order absurdly makes a finding of fact that "Neither Mr. Higgs nor Mr. Deeg testified that the Order Approving Mitigation Plan or Order were ambiguous or otherwise unclear concerning the apportionment of the 240,000 ac-ft reduction obligation," followed by a conclusion of law that "IGWA offered neither evidence nor argument that the Mitigation Plan—when read as a whole in its entirety—was ambiguous concerning IGWA's obligation to conserve 240,000 ac-ft." (R. 414, 418.) These findings and conclusions are inexplicable.

While the Director requested neither pre-hearing nor post-hearing briefs, IGWA's request for a hearing requested reconsideration of the following rulings in the Compliance Order:

> (a) that the Settlement Agreement is unambiguous as to IGWA's share of the 240,000-acre-foot groundwater reduction; (b) that Settlement Agreement is unambiguous as to the means by which compliance with IGWA's conservation obligation is measured; (c) that the Settlement Agreement unambiguously precludes averaging for the purpose of measuring compliance with IGWA's conservation obligation; …

(R. 101-02.) Later, after the SWC moved for summary judgment, IGWA set forth its arguments concerning patent and latent ambiguity in its response brief. (R. 200-04.) At the hearing, IGWA's entire evidentiary case focused on demonstrating the ambiguity in the Settlement Agreement. (*See* Statement of Facts, *supra*, and section 2, *infra*.)

In light of all this, the Director's bald assertion that IGWA "offered neither evidence nor argument" to demonstrate ambiguity in the Settlement Agreement says much more about the Director's bias and predetermined outcome than it does about the merits of IGWA's case.

b. The Agreement is latently ambiguous as to the metric used to calculate each district's individual conservation obligation.

"A latent ambiguity is not evident on the face of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist." *Swanson*, 145 Idaho at 62 (quoting *In re Estate of Kirk*, 127 Idaho 817, 824 (1995)). In determining if a latent ambiguity exists, the court will first look at the language of the instrument, and second look at reasonable alternative meanings suggested by the parties. *Sommer*, 170 Idaho at 425 (quoting 11 Williston

on Contracts § 30:5 (4th ed.)). The fact finder can use "extrinsic evidence of the structure of the instrument; the parties' relative positions and bargaining power; the parties' bargaining history; the party drafting the instrument; and any conduct of the parties which reflects their understanding of the contract's meaning to determine whether language within the instrument is reasonably susceptible of more than one meaning." *Id*. (internal citations omitted).

In addition to the patent ambiguity regarding the method used to calculate each ground water district's proportionate conservation obligation, there is a latent ambiguity as to the metric used to calculate the proportionate conservation obligations. This was explained by Mr. Higgs at the hearing:

> Q. …Were you involved in the calculation of each of IGWA's District's proportionate shares of the 240,000 acre-feet?
>
> A. Yes.
>
> Q. Does this agreement explain how that calculation should be done?
>
> A. No
>
> Q. Is there more than one way that it could have been calculated?
>
> A. Yes.
>
> Q. Please explain some of the different ways it could have been done.
>
> A. Since we were given a volume to reduce by, there's different ways that you can -- you can look at proportionate -- or splitting up that volume. And you can do it by water right acres. You could do it by irrigated acres. You could do it by water right cfs, you could do it by historically -- historic pumping flow rates in the form of cfs. You could do it by the volume pumped, by the water right volume. You can -- you can incorporate location into that and impact. You can look at consumptive use. You can look at evapotranspiration data. So there's many different ways that you could go about splitting up that – that obligation.
>
> Q. And the agreement does not specify which of those methods should be used?
>
> A. No.

(Tr. 55:19-57:9.) 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. This testimony was unrefuted.

The 2015 Agreement not only fails to specify the metric, at the time the 2015 Agreement was signed in July of 2015 neither IGWA nor IDWR had determined the metric that would be used. A technical workshop was held in September of 2015 to evaluate the various options, as

shown by the meeting agenda. (*See* Statement of Facts, p. 6-7, *supra*.) When asked why the 2015 Agreement did not dictate how to calculate proportionate shares, Mr. Higgs testified:

> My understanding was that in an effort to move things along and start to implementation, the agreement needed to be signed to avoid curtailment, and IGWA had to assume that they would be able to come up with a way to proportion that before the following irrigation season began.

(Tr. 58:9-18.)

This ambiguity is latent because it is not apparent on the face of the 2015 Agreement but it becomes apparent when applying section 3.a to the facts as they exist.

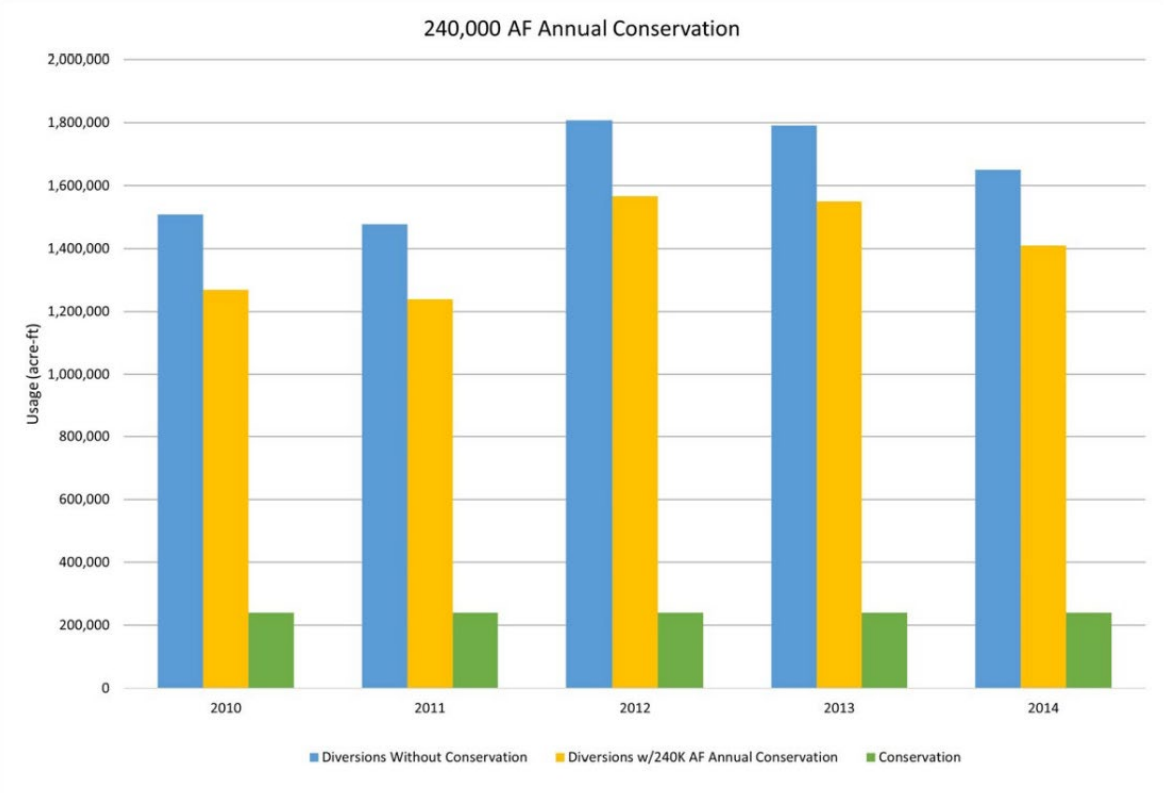
The Director ruled otherwise, finding no latent ambiguity in the Settlement Agreement. (R. 417-18.) Remarkably, however, he did not demonstrate that the terms of the Settlement Agreement do in fact prescribe which metric would be used to implement section 3.a in practice. Rather, as explained above, he cited a few provisions in the 2015 Agreement and the A&B-IGWA Agreement that have no bearing on the issue, and then asserted incredulously that IGWA offered no evidence or argument of latent ambiguity.

Since the Settlement Agreement does not prescribe the metric to be used to calculate each district's proportionate share of 240,000 acre-feet, and since there are multiple reasonable metrics that could be used, the Director erred as a matter of law by failing to find the 2015 Agreement latently ambiguous.

2. The Amended Compliance Order erroneously concludes that the Settlement Agreement unambiguously prescribes how groundwater conservation will be measured.

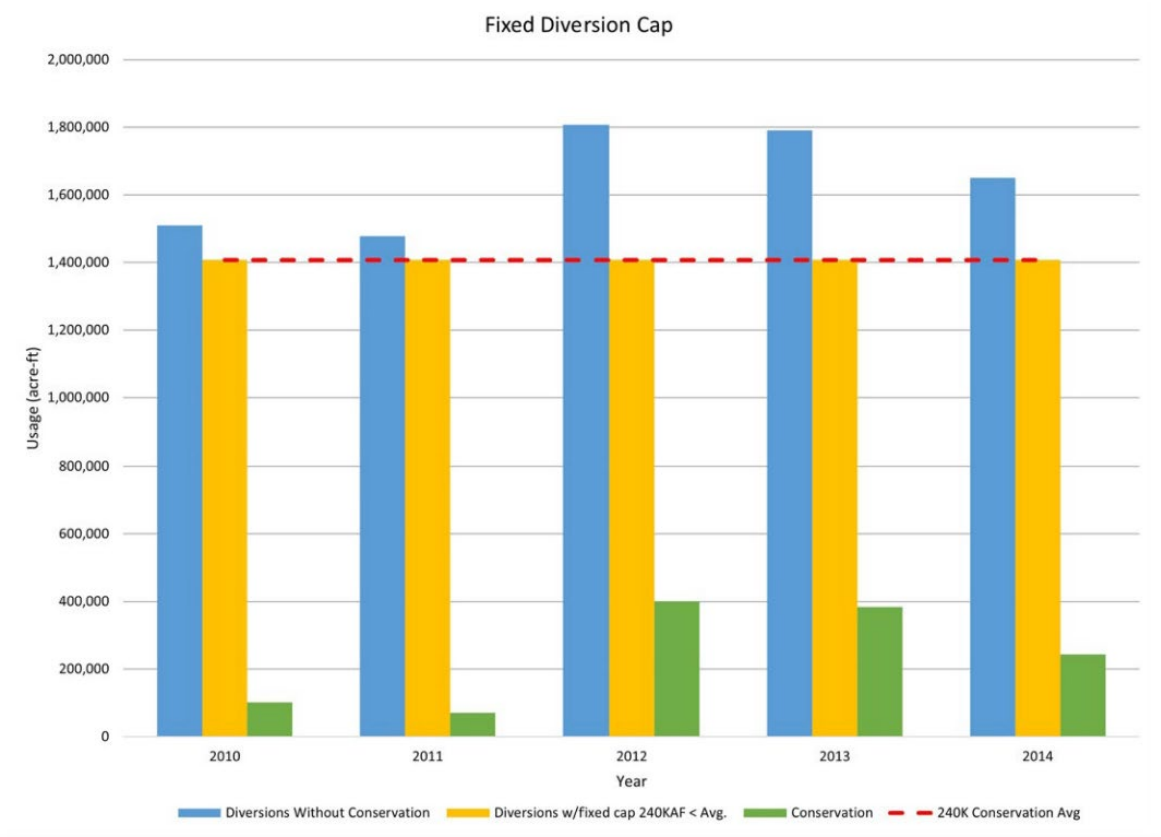
In addition to not prescribing the method or metric used to calculate each district's proportionate mitigation obligation, the Settlement Agreement does not prescribe how compliance therewith will be measured, other than to say that it will occur annually. IGWA presented evidence at the hearing to demonstrate that this becomes ambiguous in practice because groundwater diversions fluctuate from year-to-year based on climate and crop mix. Consequently, implementation of the 2015 Agreement required IGWA to determine how to define the "baseline" against which groundwater conservation would be measured, and whether to measure annual conservation on a single-year basis or by averaging diversions over multiple years. The terms of the Settlement Agreement are silent on both issues.

Mr. Higgs used two charts at the hearing, Exhibits 118 and 120, to demonstrate the historic fluctuation in groundwater diversions, and to illustrate the practical effect of using averaging to measure compliance with groundwater conservation obligations. (R. 973, 975; Tr. 120:8-121:11; 122:21-123:16.) Exhibit 118 shows the yearly diversion volumes that would have occurred (yellow bars) and the amount of groundwater that would have been conserved (green bars) if total diversions were 240,000 acre-feet less than *actual* diversions during the baseline period (2010-2014).



(R. 973; Higgs, Tr. 120:20-121:11.)

By contrast, Exhibit 120 shows in the yearly diversion volumes that would have occurred and the amount of groundwater that would have been conserved if total diversions were 240,000 acre-feet less than *average* diversions during the baseline period.



(R. 975; Higgs, Tr. 122:21-123:13.)

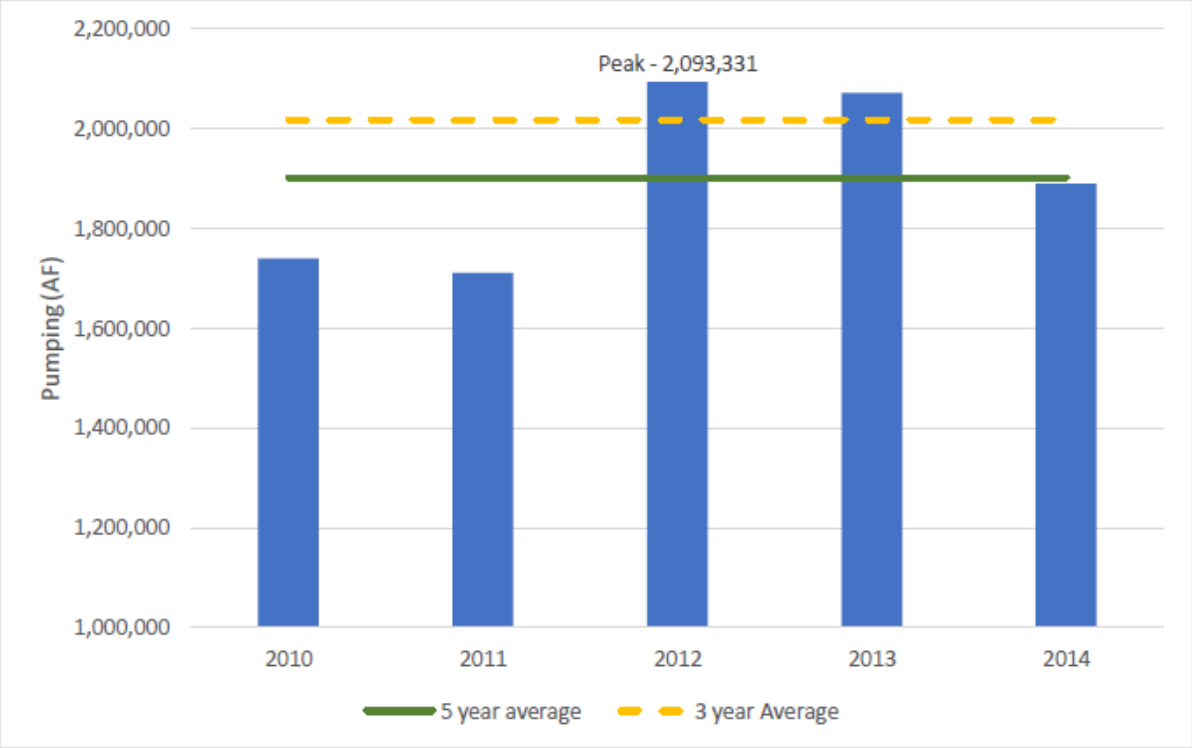
In an ideal world, we could know how much groundwater would be diverted in a given year without conservation measures in place, and then compare that with actual diversions to determine whether each district conserved its proportionate share of 240,000 acre-feet. That's impossible, of course, because farmers cannot farm the same land in the same year both with and without conservation measures in place. Instead, the most pragmatic way of measuring conservation is to compare groundwater use after 2015 against groundwater use before 2015.

There are multiple ways of comparing pre- versus post-2015 groundwater use. One is to compare post-2015 diversions in a given year against pre-2015 diversions in an analog year of similar weather and water supply conditions. (R. 210.) Another option, which IGWA implemented, is to compare pre- and post-2015 diversions without regard to weather and water supply conditions. The Settlement Agreement does not prescribe any particular approach.

Mr. Higgs explained at the hearing that IGWA considered three different options for defining pre-2015 diversions (the "baseline") against which post-2015 diversions would be compared—peak diversions, a 3-year average, and a 5-year average, illustrated by Exhibit 119:

Year	Total Pumping (AF)	5 year Average	3 Year Average	Peak Diversions
2010	1,739,793			
2011	1,710,914			
2012	2,093,331	1,900,511		2,093,331
2013	2,070,287		2,017,282	
2014	1,888,227			

*includes entities currently listed on IGWA annual report



(R. 974.) Although using peak diversions or a 3-year average as the baseline would have allowed IGWA to divert a larger volume post-2015, IGWA elected to use a 5-year average to define the baseline. (Higgs, Tr. 103:5-104:20.)

Since a 5-year average was used to define the pre-2015 baseline, IGWA utilized average diversions post-2015 to measure compliance against the baseline. Mr. Higgs explained this at the hearing:

> A. … if you're averaging on your baseline, then in my mind it makes sense to average on your actual pumping, because you will have these large fluctuations in crop water requirement. And it doesn't necessarily mean that you're not

> performing, but it makes – it makes sense to average if your baseline is an average. And we -- we did -- we talked about this with most of the IGWA districts and at the board meetings, and it's kind of again one of those good-faith things where we were trying to find out something that would work. And so we were looking at the baseline as an average and expected there -- and assumed there would be averaging in the implementation.

(Tr. 123:22-124:12.)

Tim Deeg, the president of IGWA during negotiation and implementation of the Settlement Agreement, and Mr. Higgs explained that averaging was also important because the districts needed to preserve the ability of their patrons to rotate crops, which by itself causes diversions to fluctuate between years. (Higgs, Tr. 118:20-119:3; Deeg, Tr. 209:3-7.) Averaging allows a farmer to fallow ground one year to enable high water use crops the next year. (Higgs, Tr. 119:14-18.) Further, averaging incentivizes districts to conserve more water generally. As explained above, from 2017 to 2021, districts conserved much more than required under the Settlement Agreement, which they did because the districts expected that some of that benefit to carry forward into future years through averaging. (Deeg, Tr. 223:7-224:3.) Without averaging, there is no incentive for the districts to conserve additional water.

Although the Settlement Agreement does not explicitly allow averaging, neither does it prohibit averaging. And if 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. In fact, the SWC explicitly acknowledged that averaging may be used to measure compliance, as shown in the proposed order that IGWA and the SWC jointly submitted to the Director in 2016 which states: "Total groundwater diversions from the ESPA shall be reduced by 240,000 acre-feet annually starting in 2016 and based on a 3-year average going forward." (R. 519.)

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. The practical application of a single-year "fixed cap" method ignores the dynamic nature of real-world water requirements which fluctuate within irrigation seasons and between irrigation seasons by crop type, temperature, precipitation, and other factors. If averaging is used for the baseline, averaging should be used to measure compliance

Since the 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 2015 Agreement latently ambiguous.

3. The Director exceeded his statutory authority to reapportion IGWA's contractual obligations without regard to parol evidence.

As a matter of law, Idaho state agencies have no inherent authority; they only have those 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)). When implementing express statutory powers, "administrative agencies have the implied or incidental powers that are reasonably necessary in order to carry out the powers expressly granted." *Vickers v. Lowe*, 150 Idaho 439, 442 (2011) (citing 2 Am.Jur.2d *Administrative Law* § 57 (2004)). If an agency acts outside of its express and implied powers, such actions are void. *Wernecke v. St. Maries Joint Sch. Dist. No. 401*, 147 Idaho 277, 286 n.10 (2009) (citing 73 C.J.S. *Public Admin. Law & Procedure* § 112).

Therefore, "[a] court must always make an independent determination whether an agency regulation [or act] is 'within the scope of the authority conferred,' and that determination includes an inquiry into the extent to which the legislature intended to delegate discretion to the agency." *Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada Cty*., 136 Idaho 809, 813 (2001) (abrogated on separate grounds by *Ada Cty. Bd. of Equalization v. Highlands, Inc*., 141 Idaho 202 (2005), regarding standard of review from tax board appeals) (citing *Yamaha Corp. of America v. State Bd. of Equalization*, 960 P.2d 1031, 1041 (Cal. 1980)).

As discussed above, the Settlement Agreement does not prescribe how to calculate each ground water district's proportionate share of 240,000 acre-feet, nor how compliance therewith will be evaluated. It was left to IGWA to decide. IGWA utilized a 5-year average to define the baseline, and, correspondingly, the ground water districts utilized averaging to measure compliance with their respective groundwater conservation obligations. The Director ruled that the use of averaging was wrong—that the only reasonable interpretation of the 2015 Agreement

precludes averaging. (R. 416.) If the Director is correct, and IGWA is not allowed to use averaging for the purpose of measuring compliance, then IGWA will cease using a 5-year average as the baseline as well.

Rather than resolve the obvious ambiguity by evaluating parol evidence, however, the Director simply reapportioned the groundwater conservation obligations of the districts by (i) retaining the 5-year average diversion as the baseline, (ii) using groundwater diversions as the metric for apportioning the 240,000 acre-feet, and (iii) allocating each district's conservation obligation based on historic diversion volumes. (R. 412.) In so doing, the Director effectively wrote new terms into the Settlement Agreement that do not exist, for which he has no authority.

Therefore, the Amended Compliance Order should additionally be set aside because the Director acted outside his statutory authority.

4. IGWA 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.

As discussed above, the Settlement Agreement is patently ambiguous, because a plain reading of it results in multiple interpretations, and it is latently ambiguous because there were multiple ways of applying it in practice, which became evident during IGWA's implementation of the 2015 Agreement. The Department was fully aware of the ambiguity from the beginning, having led a technical workshop that included as objectives: "Determine the data and methods that will be used to proportionately split the 240,000 acre foot obligation up amongst all the parties (i.e. GWDs, A&B, SWID, and others)," and "Determine the data and methods that will be used to measure the year-to-year performance of the GWDs in achieving the term sheet's benchmarks and goal." (R. 970-71.)

If this Court agrees that the Settlement Agreement is ambiguous with respect to the method of calculating each district's proportionate share of 240,000 acre-feet, the metric used to calculate each district's individual conservation obligation, or the method by which groundwater conservation must be measured, then the Court must next decide whether the Director had a reasonable basis in law or fact for ruling that "IGWA offered neither evidence nor argument that the Mitigation Plan—when read as a whole in its entirety—was ambiguous concerning IGWA's obligation to conserve 240,000 ac-ft." (R. 418.)

Idaho Code § 12-117(1) provides:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or 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.

The purpose of awarding attorney's fees "is to deter groundless or arbitrary agency action and to provide a remedy for persons who have borne unfair and unjustified financial burdens attempting to correct mistakes agencies should have never made." *Musser v. Higginson (In Re General Adjudication of Rights)*, 125 Idaho 392, 397 (1994).

IGWA requested a hearing for the express purpose of demonstrating ambiguity in the Settlement Agreement. (R. 96-104.) IGWA submitted numerous pre-hearing brief outlining its ambiguity argument. (*Id.*; R. 200-04.) And IGWA's entire evidentiary case demonstrated the validity of its ambiguity argument.

In light of the foregoing, the Director's ruling that "IGWA offered neither evidence nor argument that the Mitigation Plan—when read as a whole in its entirety—was ambiguous concerning IGWA's obligation to conserve 240,000 ac-ft" is inexplicable was very clearly made without a reasonable basis in fact or law. Therefore, fees should be awarded to IGWA under Idaho Code § 12-117(1).

5. The Director's rulings prejudice substantial rights of the ground water districts.

Water rights are real property rights. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797 (2011) (quoting *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101 (1983); Idaho Code § 55-101). Real property rights are, as a matter of law, substantial rights. *See Clear Springs Foods*, 150 Idaho at 814. The Amended Compliance Order prejudices the water rights of IGWA's members by forcing them to conserve more groundwater than they agreed to when they signed the 2015 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.

CONCLUSION

For the reasons set forth above, IGWA respectfully requests that this Court set aside the Amended Compliance Order and make the following rulings:

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

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

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

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

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

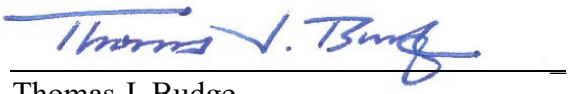
F. The Department must resolve the ambiguities in the Settlement Agreement based on parol evidence presented at the hearing.

RESPECTFULLY SUBMITTED this 15th day of August 2023.

THOMAS J. BUDGE
Attorney for Petitioner-IGWA

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2023, I filed the foregoing document and served it upon the persons below via iCourt:



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