



Capitol Law Group, PLLC, and hereby file this *Protest* to Idaho Ground Water Appropriators, Inc.'s ("IGWA") *Mitigation Plan for the Surface Water Coalition Delivery Call* ("Mitigation Plan"), filed with the Idaho Department of Water Resources ("Department") on November 9, 2009 pursuant to the provisions of Conjunctive Management Rule 43, IDWR Procedural Rule 250 and other applicable law.

The SWC is authorized to oppose the Mitigation Plan due to the fact that the Plan attempts to mitigate injury to the SWC's senior water rights caused by the members of IGWA. The initial bases for the SWC's *Protest* are as follows:

1. The Mitigation Plan does not identify, with particularity, the water rights benefiting from the Mitigation Plan.
2. The Mitigation Plan relies exclusively on unspecified storage water to supply mitigation water in times of shortage. The Plan failed to provide any information indicating that IGWA has the right to control the use of specific storage that can be delivered to SWC entities as mitigation at the time material injury is occurring.
3. The Mitigation Plan is vague and ambiguous and provides no opportunity to evaluate the reliability of the source of replacement water over the term in which it is proposed to be used under the Mitigation Plan, since the precise source of replacement water is not specified.
4. The Mitigation Plan is unclear in that it states that water will be made "available for direct delivery of replacement water by the Water District 1 Watermaster when necessary during the irrigation season," *IGWA Plan* at 3, but that "actual shortfall to be made up by the Ground Water Users" will not be determined until the "year-end accounting" process, *id.* at 4 &

5. Any water provided to mitigate for material injury must be provided in-season at the time of need or it is untimely.

5. The Mitigation Plan contains no “contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable” and therefore violates Rule 43.03.c.

6. The Mitigation Plan seeks to mitigate only in-season material injury and fails to consider the role of carryover storage in the SWC’s irrigation practices. *IGWA Plan* at 3-5. IGWA attempts to penalize SWC members who attempt to conserve water in water-short seasons so that carryover may be available in future seasons by seeking to avoid mitigation responsibilities in the event that a SWC member diverts less than the Director-determination “full water supply” and has carryover storage remaining at the end of the irrigation season. *IGWA Plan* at 4-5. This is inconsistent with the Director’s *Final Order* and the District Court’s *Order on Judicial Review*, in Gooding County Case No. 2008-551 (*A&B Irr. Dist. et al. v. Spackman, et al.*), each of which recognize that the SWC is entitled reasonable carryover.

7. The Mitigation Plan states that all spilled water will be measured and that “unreasonable waste shall be accounted for and deducted from any obligation of the Ground Water Districts.” *IGWA Plan* at 5. The Mitigation Plan does not define “unreasonable waste” and is therefore vague. The Mitigation Plan also fails to consider that the SWC members deliver water to their shareholders and landowners who apply the water to beneficial use. Furthermore, during the Call proceedings, the Director previously determined that the SWC diversion and delivery facilities are reasonable.

8. The Mitigation Plan attempts to decrease mitigation obligations by the amount of any diversions “on any day” that are “less than the natural flow that is available to [the SWC

member's] water rights in priority." *IGWA Plan* at 5. Such a requirement fails to account for weather fluctuations and other climate-based water conditions that may require increased water use at different times of the irrigation season. IGWA fails to recognize that SWC members rely on natural flow primarily during the early and late irrigation season when there is typically more rain and other moisture. Simply because a SWC member does not use all natural flow during these months does not mean that that member's material injury is any less during the hot and dry summer months when water supplies are stressed.

9. The Mitigation Plan seeks to avoid mitigation obligations to the extent that the Department's analysis of "diversion and climate-based water requirements ... indicates that a full water supply was available to [the SWC member] with a diversion less than" the Director-determined "full water supply." *IGWA Plan* at 5. At the same time, the Mitigation Plan seeks to artificially cap all future mitigation requirements based on the Director-determined "full water supply," *id.* at 4-5, without any consideration as to whether the Department's analysis of "diversion and climate-based water requirements" may indicate that more water is needed for a particular irrigation season. IGWA cannot have it both ways. It cannot reap the benefit of a privilege that it prevents the SWC from enjoying.

10. The Mitigation Plan attempts to establish monetary compensation (based on the Water District 1 Rental Pool rate) for any shortfall that cannot be made up with available storage supplies. *IGWA Plan* at 6. This proposal violates Water District 1's Rental Pool Rules and is contrary to Idaho law, including the Gooding County District Court's recent decision issued in *Clear Springs Foods, Inc. v. Spackman et al.*, (5<sup>th</sup> Jud. Dist., Consolidated Case Nos. 09-241 and 09-270).

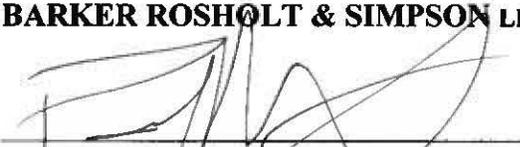
11. In general, the Mitigation Plan is vague and ambiguous, does not provide for adequate mitigation, provides no certainty that replacement water will be delivered to prevent injury, is contrary to existing findings and determinations of the Director and the District Court, is not in compliance with Idaho law, does not provide a reliable source of replacement water, could result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge and otherwise fails to adequately mitigate for injury caused by junior ground water users to the senior water rights of the SWC.

12. For such other and further reasons as may be discovered or offered at the hearing on this matter.

Wherefore, the SWC requests that the Director deny and dismiss the Mitigation Plan, and for such other relief as the Director deems proper.

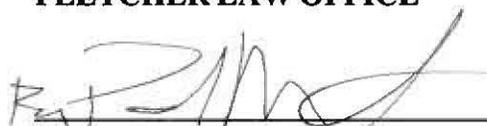
DATED this 14<sup>th</sup> day of December, 2009.

**BARKER ROSHOLT & SIMPSON LLP**

  
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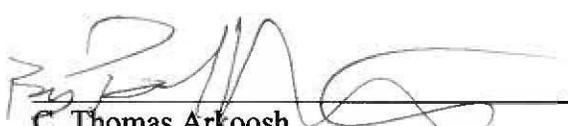
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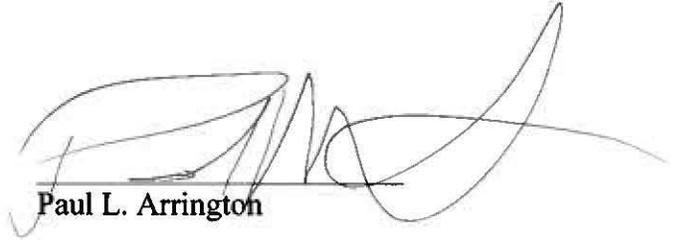
  
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C. Thomas Arkoosh

*Attorneys for American Falls Reservoir District #2*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of December, 2009, I served a true and correct copy of the foregoing **SURFACE WATER COALITION'S PROTEST TO IGWA'S MITIGATION PLAN FOR THE SURFACE WATER COALITION DELIVERY CALL**, by email and by depositing same in the United States mail, postage prepaid, addressed to the following:

Randall C. Budge  
Candice M. McHugh  
**RACINE OLSON NYE BUDGE & BAILEY**  
P.O. Box 1391  
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Paul L. Arrington

**FOR OFFICE USE ONLY**  
Fee: \$25.00 <sup>175</sup>  
Receipt No. 50 31203  
Receipt by: C. Budge  
Date Received: 12/14/09