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IDAHO DEPARTMENT OF WATER RESOURCES

IN RE IGWA’S AMENDED THIRD
PLAN TO MITIGATE MATERIAL INJU-
RY TO WATER RIGHT NOS. 36-02551
& 36-07694 HELD BY RANGEN, INC.,
AND OTHER WATER RIGHTS IN WA-
TER DISTRICT 36A.

Docket No. CM-MP-2014-005

IGWA’s Response to Joint Motion to Dismiss IGWA’s Amended Third Mitigation Plan

Idaho Ground Water Appropriators, Inc. (IGWA) submits this response in opposition to the *Joint Motion to Dismiss IGWA’s Amended Third Mitigation Plan* (“Joint Motion”) filed July 15, 2014, by Thousand Springs Water Users’ Association, Inc., and Robert and Susan Gisler (the “Protestants”).

The Joint Motion asks the Director to dismiss IGWA’s Third Mitigation Plan on the basis that “the Director has approved the *Second Mitigation Plan* and there is no need to force water users into the cost and expense of challenging this *Third Mitigation Plan*.”¹ Alternatively, the Joint Motion asks the Director to “stay all proceedings on the *Third Mitigation Plan* until IGWA aborts the *Second Mitigation Plan*.”² Yet, there is no legal basis for these requests. In fact, the Joint Motion fails to cite a single statute, court decision, or administrative rule that supports its requests.

¹ Joint Motion at 1.

² Id.

The Joint Motion is predicated on the mistaken assumption that junior water users are not allowed to pursue more than a single mitigation plan. Apparently, the Protestants think IGWA should have evaluated every possible mitigation solution before filing any mitigation plan. Yet, this is not required by the IDWR's Rules for Conjunctive Management of Surface and Ground Water Sources³ (CM Rules), nor is it realistic.

CM Rule 43 sets forth the procedure for evaluating any "proposed mitigation plan."⁴ Nothing in Rule 43 or any other CM Rule limits the number of mitigation proposals that may be filed, and the Protestants have not cited any legal authority for their argument that once a mitigation plan is approved, no other mitigation proposals can be submitted. It would certainly be contrary to the intent of the CM Rules to construe Rule 43 in a manner that closes the door to all other forms of mitigation once one mitigation proposal has been approved by the IDWR.

The Joint Motion also argues IGWA's Third Mitigation Plan should be dismissed unless IGWA first aborts its Second Mitigation Plan. This is a bizarre argument, since aborting the Second Mitigation Plan would have no effect on the Protestants' participation in the Third Mitigation Plan. Most grrrand third mitigation plans before finding out which mitigation proposals in the Third Mitigation Plan will be approved. This is an interesting strategy by the Protestants, but, again, without any legal support.

The Protestants, or at least their counsel, are well aware of the significant cost of implementing the Second Mitigation Plan. Given the heavy burden of existing mitigation obligations imposed on IGWA's members, and the likelihood of additional mitigation obligations from pending and future delivery calls, IGWA's members must be careful to implement only the most cost-effective mitigation solutions. Requiring IGWA to implement the Second Mitigation Plan when much more cost-effective proposals in the Third Mitigation Plan are likely to be approved, would be at least impractical, if not reckless.

The Protestants complain that it is unfair to allow junior water users to present more than one mitigation plan, which they contend "prejudices the water users of the Hagerman Valley who are forced to continually monitor and defend against a litany of mitiga-

³ IDAPA 37.03.11.

⁴ IDAPA 37.03.11.043.

tion plans advanced by IGWA that may never even be developed.”⁵ This concern would be understandable, if IGWA did not plan to actually implement any of its mitigation plans. The fact is, IGWA is already implementing its First Mitigation Plan, and, and as IGWA has publicly stated, IGWA will implement one or more mitigation plans based on an evaluation of feasibility and cost issues once pending plans have been approved by the Director.

IGWA’s members would have gladly accepted an opportunity to investigate and evaluate all potential mitigation solutions before filing any mitigation plans, but this was not afforded. The Rangen curtailment order, issued January 29, 2014, scheduled curtailment to begin six weeks later, on March 14, 2014. This forced juniors to investigate, evaluate, and submit mitigation options as expeditiously as possible. The First Mitigation Plan was submitted immediately to request credit for mitigation activities that were already underway. As soon as the Tucker Springs Project was identified as a potential solution to not only the Rangen call, but also to other water needs in the Hagerman Valley, it was proposed as IGWA’s Second Mitigation Plan. Unfortunately, objections raised against the Tucker Springs Project, combined with the subsequent identification of other, more cost-effective solution, necessitate IDWR evaluation of the proposals outlined in the Third Mitigation Plan.

The Protestants contend that IGWA’s mitigation plans are “nothing more than mitigation speculation.”⁶ This is a remarkable accusation, considering IGWA has a long history of implementing mitigation plans. IGWA’s mitigation plans for Water District 36 water users are only as speculative as the curtailment that will be imposed by the IDWR if IGWA does not meet its mitigation obligations.

IGWA has stated repeatedly, and will again here, that its members are committed to meet their mitigation obligations, to the extent their resources allow. The Protestants should welcome and support Third Mitigation Plan, because its cost savings over the Second Mitigation Plan will enhance the ability of IGWA’s members to provide mitigation that will benefit of Hagerman Valley water users, including the Protestants. The

⁵ Joint Motion at 3-4.

⁶ Joint Motion at 4.

Protestants contend it “is unclear what IGWA intends with all of these mitigation plans—particularly in light of the Hagerman concept,”⁷ but this is precisely the purpose of the Third Mitigation Plan—to both (1) avoid the concerns of Hagerman Valley water users with the Second Mitigation Plan, and (2) more cost-effectively solve the Rangen problem so IGWA’s members can afford to undertake efforts to benefit the broader community of the Hagerman Valley water users.

The reality is that Hagerman Valley water users are lining up to shut off groundwater wells that they allowed to be permitted, licensed, and decreed without objection, and that the State of Idaho assured groundwater users would be protected from curtailment by Hagerman area spring users so long as the Swan Falls minimum flows are met. This imposed huge burdens on IGWA’s members in terms of time, money, and uncertainty, but this is an incident of property ownership. The privilege of living in a country that allows private ownership of property, governed by the rule of law, carries with it the obligation to engage in the legal process to protect ones’ interests from time to time.

In that regard, IGWA proposes the following options to the Protestants to avoid or their limit costs associated with the Third Mitigation Plan:

- (1) Participate *pro se*, or limit the degree of activity its attorneys undertake.
- (2) IGWA is willing to bifurcate the proceeding on the proposal to improve the Curren Tunnel. IGWA understands this is the primary concern of other Hagerman Valley water users. Addressing this separately will enable the Protestants can avoid litigation expenses related to the other proposals in the Third hearings on the Curren Tunnel improvement and the other proposals would be held back-to-back on the dates presently scheduled.
- (3) If the Protestants will pay the incremental cost of implementing the Second Mitigation Plan over the most cost-effective proposal in the Third Mitigation Plan, IGWA can agree to abort the Third Mitigation Plan.

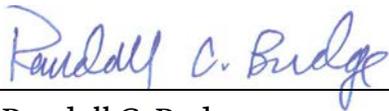
In any case, the Protestants’ argument that the Third Mitigation Plan should be dismissed simply because the Second Mitigation Plan has been approved is without legal

⁷ Joint Motion at 4.

foundation, and, arguably, frivolous. Therefore, IGWA respectfully asks the Director to deny the *Joint Motion to Dismiss IGWA's Amended Third Mitigation Plan*.

RESPECTFULLY SUBMITTED this 18th day of July, 2014.

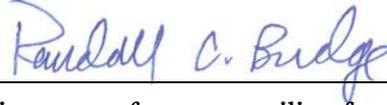
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By: 

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CERTIFICATE OF MAILING

I certify that on this 18th day of July, 2014, the foregoing document was served on the following persons in the manner indicated.



Signature of person mailing form

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