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**DEPARTMENT OF WATER RESOURCES
STATE OF IDAHO**

IN THE MATTER OF THE MITIGATION
PLAN FILED BY THE CITY OF
POCATELLO

CM-MP-2015-001
CM-MP-2015-004
CM-MP-2015-005

IN THE MATTER OF THE COALITION
OF CITIES MITIGATION PLAN FOR
DIRECT DELIVERY AND MANAGED
RECHARGE

**IGWA's Reply in Support of
Petition to Intervene**

IN THE MATTER OF THE CITY OF
IDAHO FALLS MITIGATION PLAN FOR
THE SURFACE WATER COALITION

Idaho Groundwater Appropriators, Inc. ("IGWA"), acting for and on behalf of its members, hereby replies to the *Cities' Response to IGWA's Petition to Intervene* ("Cities' Response") filed February 24, 2016, in the matters identified above.

The Cities oppose *IGWA's Petition to Intervene* ("IGWA's Petition") on the basis that IGWA does not have a direct substantial interest in the Cities' mitigation plans. The Cities do not contend that IGWA's Petition is untimely, or that it will unduly broaden the issues, or that IGWA'S interests are adequately represented by other parties. The only issue is whether IGWA has a direct and substantial interest in the Cities' mitigation plans.

The Cities first contend IGWA does not have a direct and substantial interest on the basis that "IGWA has yet to file a mitigation plan with the

Idaho Department of Water Resources.”¹ The Cities next make the exact opposite argument, claiming that since IGWA has its own mitigation plan to the SWC it is “impossible” that the Cities’ plans could affect IGWA.²

Whether or not IGWA files its own mitigation plan, Conjunctive Management Rule (CMR) 43.03.m requires the Cities to provide for participation in their plans by other groundwater users on an equitable basis.³ Because IGWA’s members must provide mitigation to the Surface Water Coalition (SWC), they have a direct and substantial interest in equitable participation under the Cities’ plans.

The Cities next argue that the Cities mitigation plan has no bearing on IGWA’s mitigation obligations or its plan since “[t]he Cities’ mitigation plans only seek to mitigate for the impacts caused by the Cities’ diversion of ground water under its junior-priority rights.”⁴ The Cities cite a recent court decision requiring each junior to mitigate “that portion of the senior’s material injury attributable to his offending diversion.”⁵

However, this highlights a second important reason for IGWA to intervene in this matter: to ensure the Cities’ plans do in fact mitigate fully for the material injury attributable to their diversions. If the Cities’ plans fail in that regard, the impacts of their diversions would be shifted to IGWA’s members to mitigate.

Pocatello’s mitigation plan perfectly illustrates this, since it proposes to deliver surface water to mitigate impacts caused by Pocatello’s diversions of groundwater from the Eastern Snake Plain Aquifer (ESPA). This may have been adequate under the Second Methodology Order, which did not take into account aquifer conditions, but not under the Third Methodology Order. The Third Methodology Order made a major change to the way material injury to the SWC is calculated by adding into the equation spring flows from the ESPA at Box Canyon.⁶

The settlement agreement entered into between IGWA and the SWC, and the mitigation plan that will soon be filed based on that settlement, requires IGWA’s members to mitigate material injury to the SWC by reducing their diversions from the ESPA and taking other actions to restore

¹ Cities’ Response p. 2

² *Id.* at 3.

³ IDAPA 37.03.11.43.m.

⁴ Cities’ Response p. 4.

⁵ Cities’ Response p. 4

⁶ Third Amended Final Order Regarding Methodology for Determining Material Injury to Reason In-Season Demand and Reasonably Carryover (April 16, 2015) p. 16 ¶ 47.

the groundwater level in the ESPA to the average from 1991-2001. Indeed, the heart of the injury to the SWC, to spring users in the Thousand Springs area, and to Swan Falls minimum flows, is declining groundwater levels. In fact, legislation is in progress and expected to pass to affirm State of Idaho support for the goal of returning ESPA water levels to the 1991-2001 average. If Pocatello only delivers surface water to the SWC it will not in fact mitigate the injury attributable to Pocatello's diversions from the ESPA, and that injury will then be shifted to IGWA's members to mitigate.

Idaho Falls' and the Coalition of Cities' mitigation plans do better by proposing to mitigate with recharge, but IGWA still has a substantial interest in ensuring they fully mitigate "that portion of the senior's material injury attributable to his offending diversion." Significantly, these plans provide scant detail about how much water they divert, how much is consumed, how much recharge they intend to provide for mitigation, where such recharge will be conducted, and what analyses will be performed to insure the Cities in actuality mitigate "that portion of the senior's material injury attributable to his offending diversion."

Because IGWA's members will ultimately be required to make up for any under-mitigation by the Cities, IGWA's Petition to Intervene accurately states that "mitigation provided to the SWC by the Cities or others could potentially affect the mitigation provided to the SWC by IGWA."⁷ IGWA has a substantial interest in protecting it and its members from having to make up for under-mitigation by the Cities; therefore, IGWA's Petition to Intervene should be granted.

DATED this 29th day of February, 2016.



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⁷ IGWA's Petition to Intervene page 2

CERTIFICATE OF MAILING

I certify that on this 29th day of February, 2016, the foregoing document was served on the following persons in the manner indicated.


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