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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

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

IN THE MATTER OF THE MITIGATION
PLAN FILED BY THE COALITION OF
CITIES

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

Docket Nos. CM-MP-2015-001, CM-MP-
2015-004, CM-MP-2015-005

**CITIES' SUPPLEMENTAL BRIEF
OPPOSING IGWA'S PETITION TO
INTERVENE**

The Coalition of Cities, the City of Pocatello, and the City of Idaho Falls (collectively “Cities”), by and through their above-identified counsel, submit this Supplemental Briefing opposing Idaho Ground Water Appropriators, Inc.’s (“IGWA”) *Petition to Intervene* (“Petition”), dated February 18, 2016 and Reply dated February 29, 2016. IGWA’s reply raised new arguments not previously alleged in their Petition to Intervene. The Cities offer this Supplemental Brief to respond to IGWA’s new arguments.

I. IGWA’S REPLY BRIEF ELABORATES ON THEIR EFFORTS TO UNDULY BROADEN THE ISSUES IN THE CAPTIONED MATTER

As the Cities argued in their Response (*see* Cities Response at 4-5), IGWA’s participation would unduly broaden the issues in the Cities’ mitigation plan. The Cities’ concerns in this regard are confirmed by the new arguments included in IGWA’s reply, to wit: the putative IGWA/SWC 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 the groundwater level in the ESPA to the average from 1991-2001” and that the putative IGWA/SWC settlement

fundamentally changed the injury standard for conjunctive management, such that “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.” Reply at 2-3.

As a starting point, the Cities reject the idea that a private settlement (which is not even fully executed) between IGWA and SWC can change the injury standard in Idaho; the Cities also reject the idea that their efforts to obtain mitigation plans to satisfy SWC in the *SWC Delivery Call* are related in any manner to other obligations related to delivery calls made by Springs Users or by the State’s efforts to enforce the Swan Falls agreement.

In a related argument, IGWA erroneously suggests that the addition of Box Canyon spring flows to the equation used in the Third Methodology Order requires the Director to evaluate injury to water levels. The Third Methodology Order included Box Canyon spring flows as a term in the modified equation for predicting the shortage to the SWC water rights, not for purposes of requiring inquiry into aquifer water levels.

Only by rejecting IGWA’s petition to intervene can the Director avoid IGWA’s efforts to unduly broaden the issues in the Cities mitigation plan.

II. AS A MATTER OF LAW IGWA CANNOT BE MADE RESPONSIBLE FOR INJURY ASSOCIATED WITH THE CITIES’ DEPLETIONS, AND THUS IGWA HAS NO INTEREST IN THE CITIES’ PLAN

In addition to injecting the above referenced issues into the Cities’ mitigation plan, IGWA suggests that it wants to make sure the Cities do not impose on IGWA any of the Cities’ mitigation obligations. As held by Judge Wildman, the Director cannot impose any unmitigated portion of the Cities’ junior depletions on other junior water users like IGWA; nor can the Director impose a portion of IGWA’s depletions on the Cities, even if it appears that IGWA is

unable to comply with its own agreement.¹ *Memorandum Decision and Order*, Case No. CV-2015-172, pp. 10-11 (Fifth Jud. Dist., Minidoka County, Sept. 8, 2015).

III. CMR 43.03M DOES NOT PROVIDE A BASIS FOR IGWA TO INTERVENE

Finally, IGWA argues that it should be allowed to intervene because CMR 43.03.m permits IGWA to participate. Reply at 2. The provisions of CMR 43.03.m create a kind of regulatory “shield” for water users not covered by a mitigation plan to be added, after the fact, to an approved mitigation plan. The Cities’ invoked Rule 43.03.m in their Motion to Consolidate because they were aware of the numerous unrepresented cities that the Association of Idaho Cities proposes to work with to bring under the umbrella of the Cities’ mitigation plan. In this instance, Rule 43.03.m is inapposite, as IGWA would use the provision as a sword to insert itself and its interests into the Cities’ mitigation plan. The Cities oppose the use of Rule 43.03.m in this regard—either directly or as a basis for intervention.

IV. IGWA’S EFFORTS TO INTERVENE AT THIS TIME WILL INTERFERE WITH THE CITIES’ NEGOTIATIONS AND WILL SET A DANGEROUS PRECEDENT

Given the stage of proceedings in this matter and the fact that the Cities have a settlement in principle with the SWC, allowing IGWA’s intervention will interfere with the Cities’ ability to achieve a final stipulated agreement with SWC. Further, it would set a dangerous precedent. For example, juniors that are not members of IGWA would then be authorized to object to any forthcoming mitigation plan by IGWA and question whether, *inter alia*, its technical bases are sound and will in fact result in mitigation for all injury from IGWA’s junior pumping, permit discovery into how the settlement is being implemented and whether it will be successful, and

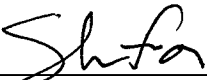
¹ It also appears that IGWA may, for unknown reasons, be attempting to impose a portion of IGWA’s mitigation obligations on the Cities. Any inquiry into whether IGWA has obligated itself to provide more mitigation water to SWC than required by law is not relevant to the validity of the Cities’ Mitigation Plans; nor is IGWA’s ability to satisfy its own agreements. It warrants repeating: the nature and extent of IGWA’s mitigation obligation is not a valid basis for it to seek intervention in the captioned matter and, allowing IGWA to participate on this basis will unduly broaden the issues before the Director.

generally allow intervenors to question a mitigation plan filed by another ground water user in the context of the intervenors' own interests.

For the reasons above, the Cities renew their request that the Petition be denied.


Respectfully submitted this 1st day of March, 2016.

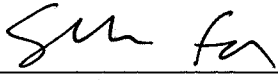
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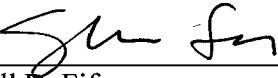
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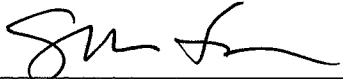
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2016, I caused to be served a true and correct copy of the foregoing **Cities' Supplemental Brief Opposing IGWA's Petition to Intervene in Docket Nos. CM-MP-2015-001, CM-MP-2015-004, and CM-MP-2015-005** upon the following by the method indicated:



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