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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

TWIN FALLS CANAL COMPANY, NORTH  
SIDE CANAL COMPANY, A & B IRRIGA-  
TION DISTRICT, AMERICAN FALLS RE-  
SERVOIR DISTRICT #2, BURLEY IRRIGA-  
TION DISTRICT, MILNER IRRIGATION DIS-  
TRICT, and MINIDOKA IRRIGATION DIS-  
TRICT,

Petitioners,

vs.

GARY SPACKMAN, in his capacity as Interim  
Director of the Idaho Department of Water Re-  
sources, and THE IDAHO DEPARTMENT OF  
WATER RESOURCES,

Respondents,

and

THE IDAHO GROUND WATER APPRO-  
PRIATOR'S, INC.

Intervenor.

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IN THE MATTER OF THE IDAHO GROUND  
WATER APPROPRIATORS, INC.'S MITIGA-  
TION PLAN IN RESPONSE TO THE SUR-  
FACE WATER COALITION'S WATER DELI-  
VERY CALL

**Case No. CV-10-3075**

**IGWA'S BRIEF IN OPPOSITION TO  
SWC'S MOTION TO ALTER OR  
AMEND AND FOR STAY**

Idaho Ground Water Appropriators, Inc. (“IGWA”), pursuant to Rule 7(b)(3) of the Idaho Rules of Civil Procedure, respectfully submits this brief in opposition to the *Surface Water Coalition’s Motion to Alter or Amend and for Stay* (the “*Motion*”) dated February 8, 2011.

The *Motion* asks the Court to 1) vacate its *Judgment and Memorandum Decision & Order on Petition for Judicial Review* dated January 25, 2011 (the “*Order*”), and 2) stay proceedings in this case until the Court issues a final decision on the consolidated appeal of the *Methodology Order* (Gooding County Case No. CV-2010-382). Both requests should be denied. The motion is not well-grounded in law and fact and appears to have been made for an improper purpose, forcing IGWA to incur unnecessary expenses to defend the motion.

### ARGUMENT

#### **A. The motion to alter and amend the *Order* is actually a motion to vacate the *Order* and should be denied.**

Despite its title, the *Motion* does not seek to alter or amend the *Order*. Rather, the *Motion* asks the Court to vacate the *Order* entirely. (*Motion* 3-4).

A motion to alter and amend is very different from a motion to vacate a judgment. Rule 59(e) allows the Court to alter or amend a judgment to “correct legal and factual errors occurring in proceedings before it.” *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 707 (1999). In contrast, to vacate means to “nullify or cancel; make void; invalidate.” Black’s Law Dictionary, 7<sup>th</sup> Ed. P. 1546 (1999). Whereas amending a judgment leaves it in place, vacating a judgment dismisses it entirely. Accordingly, a different rule of procedure—Rule 60(b)—applies to a motion to vacate a judgment.

Thus, despite the title of the *Motion*, its request to vacate the *Order* is subject to Rule 60(b) and not Rule 59(e). The Surface Water Coalition (“SWC”) neither cites Rule 60(b) nor argues that criteria provided by the rule have been met. Further, the rationale given by the SWC for vacating the *Order*—that it “could be” affected by the outcome of the *Methodology Order*—patently fails to meet any of the criteria for vacating a judgment under Rule 60(b). (*Motion* 3.) Therefore, the motion to vacate should be denied.

#### **B. There is no sound reason for staying the *Order*.**

The SWC also asks the Court to stay the *Order* until the Court enters a decision on the *Methodology Order*. (*Motion* 3-4.) This request is also made under Rule 59(e), but again it does not properly fall under that rule since it does not seek to revise any aspect of the *Order*.

The SWC claims the *Order* should be stayed because it is “contingent upon the validity

of the *Methodology Order*” which is currently on appeal in a different case. (*Motion 2*; internal quotes omitted.) The request for stay relies heavily on the statement in the *Order* that if the *Methodology Order* “is found to be unlawful in whole or in part in the 2010-382 case, such a determination may affect the validity of the *Order Approving Mitigation Plan* and render parts of this opinion moot.” (*Motion 3*, quoting *Order 31*.) This argument fails to recognize that the *Methodology Order* is only incidentally tied to the *Order* and has no bearing on the fundamental holdings of the *Order*.

The *Methodology Order* is concerned with the method for calculating the extent to which the SWC suffers injury, which in turn determines the amount of mitigation required for groundwater users to avoid curtailment. In contrast, the purpose of the *Mitigation Plan* is to obtain approval of one source of mitigation (the delivery of storage water), whatever the mitigation obligation may be. R. Vol. 2, p. 191. The *Methodology Order* deals with how much injury exists, whereas the *Mitigation Plan* deals with what type of mitigation can be provided to offset that injury. The *Methodology Order* is a product of CM Rule 42, whereas the *Mitigation Plan* is a product of CM Rule 43. While the methodology for calculating injury and the suitability of storage as a source of mitigation are related, they involve distinct legal issues, hence the distinct administrative and judicial proceedings.

The *Order* incorporates the *Methodology Order* to the extent that it sets forth procedures for calculating the quantity of mitigation required and the annual deadlines for providing storage water as mitigation. (*Order 11*.) However, these two issues—quantity and mitigation deadlines—have no material impact on the fundamental holdings of this case, namely:

1. The CM Rules permit long-term mitigation plans.
2. Curtailment is an acceptable “contingency provision.”
3. The Director did not act arbitrarily or capriciously or abuse his discretion by allowing IGWA to secure replacement water on an annual basis.
4. There is substantial evidence in the record to support the Director’s consideration of the reliability of storage as a source of mitigation.
5. The *Mitigation Plan* is not the same as the “replacement water plan” rejected in the Gooding County 551 Case.
6. The Director did not act arbitrarily or capriciously or abuse his discretion in approving storage water as the source of replacement water for mitigation.
7. No substantial right of the SWC or its members was prejudiced with respect to the implementation of the *Mitigation Plan* for the 2010 irrigation season.

These holdings will not be materially impacted if the appeal of the *Methodology Order* results in a change to the methodology for calculating injury or a change in the deadlines by which mitigation must be provided. Either way, storage water is still a suitable source of mitigation.

If the SWC wishes to appeal this Court's conclusion that storage water is a suitable form of mitigation, that long-term mitigation plans are permissible under the CM Rules, etc., there is no reason to wait.

For the above reasons, IGWA requests that the SWC's motion be denied.

DATED this 18<sup>th</sup> day of February, 2011.

RACINE OLSON NYE BUDGE &  
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Randall C. Budge  
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Thomas J. Budge

## CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> day of February, 2011, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated:

<p><i>Original to:</i>                  Julie Murphy                  SRBA Deputy Clerk                  253 3<sup>rd</sup> Ave. North                  PO Box 2707                  Twin Falls, ID 83303-2707</p>	<p><input type="checkbox"/> U.S. Mail  <input checked="" type="checkbox"/> Facsimile – 208-736-2121  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Email</p>
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