

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

IN THE MATTER OF JERRY D. AND
VALERIE H. BINGHAM'S
MITIGATION PLAN FOR THE
SURFACE WATER COALITION

Docket No. CM-MP-2026-004

**PRELIMINARY ORDER DENYING
APPROVAL OF BINGHAMS' FIFTH
MITIGATION AND CURTAILMENT PLAN**

PROCEDURAL HISTORY

On May 28, 2026, Jerry D. Bingham and Valerie H. Bingham (the "Binghams") submitted *Binghams' Fifth Mitigation and Curtailment Plan* ("*Fifth Plan*") to the Idaho Department of Water Resources ("Department"). Notice of the Binghams' *Fifth Plan* was published in accordance with the Department's Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"). See IDAPA 37.03.11.043.02. Idaho Ground Water Appropriators, Inc. ("IGWA") protested the plan.

On August 4, 2026, the Binghams filed *Binghams' Motion for Summary Judgment*. The Binghams' moved for summary judgment on "the issues raised" in IGWA's protest. *Binghams' Mot. for Summ. J.* at 1; see also *Mem. in Supp. of Binghams' Mot. for Summ. J.* at 7. The Binghams also requested that the Hearing Officer make "two findings": (1) "that there is no legal basis or standard that a one-year mitigation plan is not allowable"; and (2) "that there is no requirement under Idaho law that an individual mitigation plan is improper for an irrigator who was formerly a member of a ground water district." *Mem. in Supp. of Binghams' Mot. for Summ. J.* at 4. On August 28, 2026, the Hearing Officer issued an *Order Denying in Part and Granting in Part Binghams' Motion for Summary Judgment; and Notice of Intent to Take Official Notice ("Order on Summary Judgment")*. The Hearing Officer denied summary judgment on the sufficiency of the *Fifth Plan*, holding that, "[a]s the proponents of the *Fifth Plan*, the Binghams bear the burden of establishing that the plan satisfies CM Rule 43 and that they are entitled to approval as a matter of law," and that "the sufficiency of the *Fifth Plan* turns on disputed factual questions that must be decided on the evidence at hearing." *Order on Summary Judgment* at 4. The Hearing Officer further noted that "the Binghams' *Fifth Plan* is an individual plan and that no evidence of any stipulation to the plan by the [Surface Water Coalition], consistent with CM Rule 43.03.o, has been supplied in this contested case." *Id.* Summary judgment was granted on two discrete legal issues: (1) that "[o]ne-year mitigation plans are not categorically prohibited; and (2) that "[a]n individual mitigation plan is not improper as a matter of law for an irrigator who was formerly a member of a ground water district." *Id.* at 5.

An evidentiary hearing on the *Fifth Plan* was held by the Department on September 9, 2026. Exhibits 1–12 (inclusive of Exhibit 8B) and 100–118 were stipulated to by the parties and admitted into the record. Eric C. Miller and R. Jeffrey Davis, P.E testified as experts for the Binghams and Jerry Bingham testified on his own behalf. Sophia C. Sigstedt, PH-GW testified as an expert witness for IGWA. Additionally, without objection, the Hearing Officer took official notice of the *Amended Final Order Approving Stipulated Mitigation Plan* ("*Order Approving*

2024 Plan”), dated February 7, 2025, issued under Department Docket No. CM-MP-2024-003. At the close of the hearing, the parties were directed to file simultaneous post-hearing briefs, which the Bingham and IGWA filed on September 18, 2026.

The matter is now under advisement. The Hearing Officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. This contested case arises within the context of the long-running Surface Water Coalition ("SWC") delivery call matter, assigned Department Docket No. CM-DC-2010-001. When the Department determines material injury under the SWC delivery call, all ground water users with consumptive water rights junior to the relevant priority date within the Eastern Snake Plain Aquifer Area of Common Ground Water Supply are curtailed. In 2026, the Department determined a material injury that required all ground water users with consumptive water rights junior to October 11, 1900, within the Eastern Snake Plain Aquifer Area of Common Ground Water Supply, to be curtailed unless the junior user mitigates under a Department approved mitigation plan. Ex. 102, at 2, 12.

2. Each of the Bingham's six water rights for which the *Fifth Plan* proposes mitigation—Water Right Nos. 35-2202B, 35-2205E,¹ 35-2183D, 35-2266, 35-2269G, and 35-12226—bears a priority date junior to October 11, 1900. Ex. 1, at 2; *see also* Exs. 7, 8, 8B, 9, 10, 11, 12.

3. The *Fifth Plan* is limited in time to the 2026 irrigation season. It is intended to sufficiently mitigate material injury to water rights held by members of the SWC so that the Bingham may divert ground water out-of-priority to irrigate their land during the 2026 irrigation season. Ex. 1, at 4–5.

4. The *Fifth Plan* proposes that during the 2026 irrigation season the Bingham will completely curtail Water Right Nos. 35-12226, 35-2266, and 35-2269G, and reduce ground water diversions under Water Right Nos. 35-2202B, 35-2205E, and 35-2183D. *Id.* at 2–3. The *Fifth Plan* does not propose any other sources of mitigation aside from full or partial nonuse of their six identified water rights.

5. The *Fifth Plan* includes a requirement to submit a ground water accounting report by December 31, with validated metered readings. Ex. 1, at 3–4.

¹ During the hearing it was established that as of May 12, 2026, Water Right No. 35-2205E was split by the Department into Water Right Nos. 35-2205E and 35-14955. Ex. 8B, at 3. Jerry D. Bingham and Valerie H. Bingham own Water Right No. 35-14955, not Water Right No. 35-2205E. *Id.* at 1; Ex. 8. After the split, Water Right No. 35-2205E was reduced to a total diversion rate of 0.08 CFS, volume of 28 AF, and place of use of 7 acres. Ex. 8. Water Right No. 35-14955 was allotted the lion's share of the pre-split right, with a total diversion rate of 2.36 CFS, volume of 800 AF, and place of use of 200 acres. Ex. 8B, at 1. All references to Water Right No. 35-2205E in this matter shall be considered a reference to Water Right No. 35-14955.

6. To establish the Binghams' mitigation obligation for their six rights, the *Fifth Plan* uses a baseline five-year average annual diversion volume of 2,933 acre-feet and a corresponding average annual consumptive-use volume of 2,464 acre-feet. Ex. 1, at 2. It estimates that complete curtailment of Water Rights Nos. 35-12226, 35-2266, and 35-2269G will produce "at least an in-season benefit of 223 AF in-stream benefit" *Id.* at 3.²

7. Through their experts, the Binghams' assert that the 2025 curtailment of their water rights resulted in approximately 1,349.18 AF of "realized curtailment-based conservation." Ex. 3, at 5–6. Although the 2025 curtailment and alleged benefits were mentioned, the Binghams' post-hearing brief says, they "did not rely upon the benefit of this excess 2025 conservation to reach their ultimate conclusion." *Binghams' Br.* at 9.

8. The *Fifth Plan*'s proposed combination of full and partial nonuse of the Binghams' subject water rights would not fully offset the depletive effect of the proposed out-of-priority use. Modeling by the Binghams' experts estimates that complete curtailment of all the Binghams' water rights during the 2026 irrigation season would produce approximately 543 acre-feet of reach gains to the Near Blackfoot-to-Minidoka reach in 2026, while the mitigation proposed under the *Fifth Plan* would produce only approximately 350 acre-feet of water for use by the SWC. Hr'g Tr. 3:01:34–3:02:48. The difference represents depletion that the *Fifth Plan* does not offset. When asked whether "352 acre-feet of reach benefits from the mitigation plan is sufficient to offset 543 acre-feet of reach gain impacts from the out of priority water use," Mr. Miller said "No." Hr'g Tr. 3:04:35–3:04:54. IGWA's expert, Sophia C. Sigstedt, independently modeled the depletive effect of the Binghams' proposed out-of-priority use during the 2026 irrigation season and similarly concluded that, "the Fifth Mitigation Plan reduces the modeled reach depletion, but it does not eliminate the depletion associated with continued out-of-priority groundwater use in 2026;" and further, that "the plan does not provide replacement water at the time and place required to fully offset that depletion." Ex. 113, at 8.

9. The Binghams' expert report does not demonstrate that the *Fifth Plan* will provide replacement water sufficient to offset the depletive effect of the Binghams' out-of-priority ground water use. On cross-examination, when asked, "You are not rendering an opinion today that the fifth mitigation plan will provide sufficient replacement water to offset the depletive effect of the Binghams' junior priority ground water use?" Mr. Miller answered, "We are not offering that opinion." Hr'g Tr. 2:17:10–2:17:32; *see also* Ex. 3.

10. The *Fifth Plan* differs materially from the 2024 Stipulated Mitigation Plan to which the Binghams' experts compare it. The Binghams' expert report uses the Ground Water Districts' approved 2024 Stipulated Mitigation Plan as a comparative technical benchmark and evaluates whether the Binghams' proposed mitigation is "functionally equivalent to or greater than the proportional mitigation obligations that would have been attributable to the Binghams' Water Rights under the conservation and storage framework of the 2024 Stipulated Mitigation Plan." Ex. 3, at 1. The 2024 Stipulated Mitigation Plan is a multi-year stipulated plan with an initial four-year term that requires participating ground water districts to conserve ground water

² The 223 AF estimate in the *Fifth Plan* differs from the larger benefit predicted by the Binghams' experts. The 223 AF figure is an unsupported initial estimate; therefore, this order will only further address the benefit predicted by the Binghams' experts.

every year through reductions, to secure storage water to meet the SWC's irrigation and carryover needs, and to contribute financially to a reach gain fund. *Order Approving 2024 Plan* ¶¶ 4–5, at 2–3. The *Fifth Plan*, by contrast, is a one-year plan for 2026, provides no storage-water component, and requires no financial contribution.

11. The Binghams offered no evidence that public-interest considerations warrant approval of the *Fifth Plan*. See Hr'g Tr. 3:05:10–3:05:46.

12. The record does not show that the SWC has entered into an agreement with the Binghams concerning the acceptability of the *Fifth Plan*.

CONCLUSIONS OF LAW

1. When a senior-priority water right holder makes a delivery call and the Director finds that junior-priority usage is causing material injury, the Director must either curtail the junior rights or allow out-of-priority diversion of water pursuant to a mitigation plan that has been approved by the Director. *Rangen, Inc. v. Idaho Dep't of Water Res.*, 160 Idaho 251, 256, 371 P.3d 305, 310 (2016), *abrogated in part on other grounds by 3G AG LLC v. Idaho Dep't of Water Res.*, 170 Idaho 251, 509 P.3d 1180 (2022); IDAPA 37.03.11.040.01.

2. A mitigation plan is "[a] document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply." IDAPA 37.03.11.010.15; *see also* I.C. § 42-5101(13).

3. The Binghams' *Fifth Plan* must be evaluated and approved or rejected in accordance with CM Rule 43.

4. CM Rule 43.03 sets forth the "[f]actors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights," including, but not limited to, factors (a) through (o). IDAPA 37.03.11.043.03. The word "may" in CM Rule 43.03 is permissive, so that the Director's consideration of the enumerated factors is generally discretionary; consideration of a particular factor becomes mandatory only where the rule employs mandatory language. *Rangen*, 160 Idaho at 256–57, 371 P.3d at 310–11.

5. The CM Rules "provide that the Director must consider several factors to determine whether the proposed plan 'will prevent injury to senior rights'" *In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 654, 315 P.3d 828, 842 (2013)).

6. It is the Binghams' burden to sufficiently demonstrate that the *Fifth Plan* "will prevent injury to senior rights." *See In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 654, 315 P.3d 828, 842 (2013)). Given the *Fifth Plan* must be evaluated in accordance with the CM Rules, the clear and

convincing evidence standard applies to the Bingham's burden. *S. Valley Ground Water Dist. v. Idaho Dep't of Water Res.*, 173 Idaho 762, 792, 548 P.3d 734, 764 (2024), *as amended* (Jan. 12, 2024) ("the clear and convincing evidence standard applies to the junior right holder's burden, whether in cases under the CM Rules or in cases brought by the Director under section 42-237a.g.").

7. The central factor here is CM Rule 43.03.b, which asks whether the plan "will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion." IDAPA 37.03.11.043.03.b. This factor goes to the heart of whether the Bingham's mitigation plan will prevent injury to the SWC's senior rights.

8. The Bingham's did not carry their burden under CM Rule 43.03.b. Their own expert declined to offer the opinion that the *Fifth Plan* will provide replacement water sufficient to offset the depletive effect of their out-of-priority ground water use. On this record, the *Fifth Plan* reduces, but does not eliminate, the depletive effect of the Bingham's out-of-priority use. The Bingham's draw from the 2024 Stipulated Mitigation Plan to propose a proportional figure that they argue is sufficient to offset their depletive effect; however, the 2024 Stipulated Mitigation Plan proportionate share is a negotiated allocation of a collective, multi-year conservation-and-storage obligation among participating ground water districts, it is not the measure of an individual plan's obligation under CM Rule 43.03.b.

9. Because the two plans are materially different, the Bingham's comparison between the *Fifth Plan* and the 2024 Stipulated Mitigation Plan is inapposite.

10. CM Rule 43.03.c requires that a mitigation plan "include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable." IDAPA 37.03.11.043.03.c. Unlike the other Rule 43.03 factors, this requirement is stated in mandatory terms. The sole source of mitigation in the *Fifth Plan* is the Bingham's own conservation—full or partial nonuse of their six water rights—the sufficiency of which the plan does not propose to verify until a year-end accounting report. Ex. 1, at 3–4. The *Fifth Plan* contains no provision assuring protection of the SWC's senior rights during the 2026 irrigation season if the conservation does not occur or proves insufficient. By the time any shortfall is detected through the year-end accounting, the senior rights' in-season need will already have gone unmet. Because the *Fifth Plan* supplies no contingency mechanism to protect the senior rights in that event, it does not satisfy the mandatory requirement of CM Rule 43.03.c.

11. CM Rule 43.03.j allows consideration of whether the plan "is consistent with the conservation of water resources, the public interest or injures other water rights." The public-interest factor in CM Rule 43.03.j does not warrant approval of the *Fifth Plan*. The Bingham's presented no evidence that public-interest considerations justify approving a plan that does not fully offset the depletive effect of their out-of-priority use.

12. CM Rule 43.03.o permits the Director to consider "[w]hether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such

plan may not otherwise be fully in compliance with these provisions." IDAPA 37.03.11.043.03.o. The record does not show that the SWC has entered into any agreement accepting the *Fifth Plan*. The Hearing Officer draws no inference from the lack of an agreement or protest to the plan in the record that the SWC is offering their tacit approval of the *Fifth Plan*. Therefore, safe harbor under CM Rule 43.03.o is unavailable.

13. The Bingham's contention that CM Rule 43.03 is not "an exclusive evidentiary checklist" and that no separate storage component is required does not rescue the *Fifth Plan*. *Bingham's Br.* at 6, 10. While consideration of the individual CM Rule 43.03 factors is generally discretionary because "may" is permissive, *Rangen*, 160 Idaho at 256–57, 371 P.3d at 310–11, the discretion afforded by that language does not relieve the Bingham's of their burden to show that the plan will prevent injury to the SWC's senior rights. CM Rule 43 does not require any particular form of mitigation, but it does require that the mitigation, in whatever form, "will prevent injury," not *partially* prevent injury.

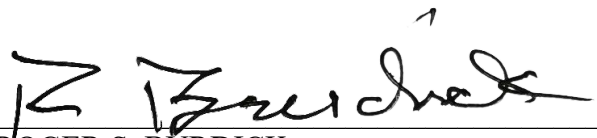
14. The Bingham's objection to the Department's complete curtailment of their water rights and any disagreement with the timing and opportunity for "junior ground water users with approved mitigation plans" to demonstrate that they have sufficiently secured "their proportionate share of the April IDS" discussed in the Step 3 of the *Sixth Methodology Order* is outside the scope of this contested case. *See Bingham's Br.* at 14–15, 19–21. The question currently before the Hearing Officer in this case is whether the *Fifth Plan* satisfies the CM Rule 43 requirements for approval. Issues concerning curtailment and methodology orders entered in the SWC delivery call are not properly before the Hearing Officer in this mitigation plan proceeding.

15. The *Fifth Plan* does not satisfy CM Rule 43 and should be denied.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the *Bingham's Fifth Mitigation and Curtailment Plan* is DENIED.

DATED this 2nd day of October 2026.



ROGER S. BURDICK
Hearing Officer

CERTIFICATE OF SERVICE

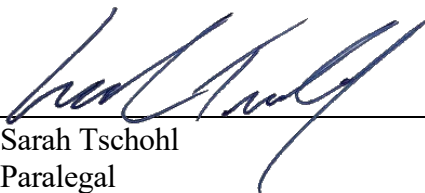
I HEREBY CERTIFY that on this 2nd day of October 2026, the above and foregoing was served by the method indicated below, and addressed to the following:

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EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with Preliminary Orders issued in Department actions when a hearing was held or when decided on summary judgment and all Board actions)

The accompanying document is a “**Preliminary Order**” issued by the Idaho Department of Water Resources (“Department”) or the Idaho Water Resource Board (“Board”) pursuant to Idaho Code § 67-5243. **This preliminary order can and will become a final order without further action of the agency, unless a party requests reconsideration or review as further described below.**

The following statements describe the procedures and time limits for seeking reconsideration or other administrative relief as required by Idaho Code §§ 67-5245 and 67-5248:

PETITION FOR RECONSIDERATION

(See Idaho Code § 67-5243(3))

Any party may file a petition for reconsideration of this preliminary order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be filed with the Agency within this fourteen (14) day period.** The presiding officer will issue a written order disposing of the petition for reconsideration within twenty-one (21) days of its filing, or the petition will be considered denied by operation of law.

PETITION FOR REVIEW (EXCEPTIONS)

(See Idaho Code § 67-5245)

Any party may petition the agency head for review of this preliminary order by filing a written petition for review with the agency within fourteen (14) days after: (a) the service date of this preliminary order, (b) the service date of the presiding officer’s denial of a petition for reconsideration, or (c) the failure of the presiding officer to dispose of a petition for reconsideration within twenty-one (21) days.¹ Any brief in support of a requested review must be filed at the same time as the petition. Parties shall have fourteen (14) days after a petition for review is filed with the agency to file any briefs in opposition. No further briefing by any party will be permitted unless the agency head, in their discretion, requests it. If the agency head determines that oral argument is necessary before issuing a final order, reasonable notice will be provided to the parties.

The agency head will issue a final order within fifty-six (56) days of filing of the final written brief or oral argument, whichever is later, unless extended for good cause shown. Additionally, the agency head may remand the matter for or hold an evidentiary hearing if further factual development of the record is necessary before issuing a final order.

¹ The agency head may decide to review this preliminary order upon their own motion. Should the agency head decide to do so, they will provide written notice to the parties within the period the parties are allowed to petition the agency head for review of this preliminary order.

APPEAL OF A FINAL ORDER TO DISTRICT COURT

(See Idaho Code §§ 67-5246(3), 67-5270 through 67-5279)

If no party requests reconsideration or review of this preliminary order within fourteen (14) days from the service date, or reconsideration is requested but the presiding officer fails to dispose of the petition within twenty-one (21) days of its filing and a petition for review is not pending before the agency head, then this preliminary order will immediately become final without further notice or action of the agency. Should this preliminary order become final, parties then have twenty-eight (28) days to file a petition for judicial review of the final order with a district court. Filing an appeal to a district court does not in itself stay the effectiveness or enforcement of the final order appealed.

FILING AND SERVICE

(See IDAPA 37.01.01.053; I.R.C.P. 84(d))

All documents filed with the Department or Board in connection with a petition for reconsideration or review of this preliminary order shall be filed and served in accordance with the Rules of Procedure of the Department and the Board.

Any petition for judicial review filed in connection with an appeal of a final order shall be served on the agency and all parties to the administrative proceedings in accordance with Idaho Rule of Civil Procedure 84.