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DEPARTMENT OF
WATER RESOURCES

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Attorney for Jerry D. Bingham and Valerie H. Bingham

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

Water Rights of Jerry D. Bingham and)
Valerie H. Bingham,)
1675 W 400 N)
Blackfoot, ID 83221-5051)
)
Water Rights No: 35-12226, 35-2202B,)
35-2205E, 35-2266, 35-2269G, and)
35-2183D,)
)
)
_____)

Docket No. CM-MP-2026-004

**MEMORANDUM IN SUPPORT OF
BINGHAMS' MOTION FOR
SUMMARY JUDGMENT**

COME NOW Jerry D. Bingham and Valerie H. Bingham ("Binghams"), by and through their counsel of record, and hereby submit this Memorandum in Support of Binghams' Motion for Summary Judgment.

I. INTRODUCTION AND RELEVANT FACTS

On May 28, 2026, the Binghams submitted their Fifth Mitigation and Curtailment Plan to the Idaho Department of Water Resources ("IDWR"), as an ongoing attempt to provide mitigation in response to the Surface Water Coalition's ("SWC") Delivery Call. The Fifth Mitigation Plan was substantially different from the four previously proposed mitigation plans submitted by the

Binghams, so the IDWR assigned a new docket number, and a Notice of the Mitigation Plan was published in accordance with the Department's CM Rules.

The water rights that would benefit from Binghams' proposed mitigation plan are as follows:

1. Shakey Farm, 250 acres, priority date 1951, Water Right #35-2202B;
2. Havens Farm, 207 acres, priority date 1951, Water Right #35-2205E;
3. Cinder Block Farm, 155 acres, priority date 1952, Water Right #35-2266;
4. Over the Hill, 240 acres, priority date 1952, Water Right #35-2269G;
5. Home Place, 156 acres, priority date 1950, Water Right #35-2183D; and
6. Shakey Farm, 35 acres, with a priority date 1987, Water Right# 35-12226.

All of the water rights listed above have been curtailed for the 2026 irrigation season, and Binghams have voluntarily curtailed their 1987 water right for several years before any curtailment order was issued that would curtail its use.

On June 16, 2026, IGWA filed a Notice of Protest with the IDWR. The Notice of Protest did not make any claim of injury to IGWA that would result from the Binghams' proposed Mitigation Plan, instead it made in essence the following two claims:

1. That the Binghams should not be allowed to submit a one year mitigation plan; and
2. That it is improper for individual farmers, like Binghams, to submit their own mitigation plan when a ground water district mitigation plan already exists for the same water call.

As set forth below, the hearing officer should issue summary judgment finding that Binghams are entitled to summary judgment on the claims set forth in IGWA's Notice of Protest because it has a complete failure of proof concerning the primary elements of its case.

II. LEGAL STANDARD

IDWR's Rules of Procedure, IDAPA 37.01.01, govern motions for summary judgment. Specifically, Rule 220.03 authorizes motions for summary judgment and states that "Rule 56(a), (c), (d), (e), and (f) of the Idaho Rules of Procedure, apply to such motions before the agency." IDAPA 37.01.01.220.03. Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); *Marchand v. JEM Sportswear, Inc.*, 143 Idaho 458, 458 (2006). The burden of establishing the absence of a genuine issue of material fact belongs to the moving party. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

Furthermore, "[a] moving party is entitled to summary judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial." *Navo v. Bingham Mem'l Hosp.*, 373 P.3d 681, 688 (Idaho 2016) (citations omitted). No genuine issue will exist where there is a complete failure of proof "concerning an essential element of the nonmoving party's case"; in such a case, all other facts are rendered immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

A motion for summary judgment should not be regarded with disfavor. *Celotex Corp.* 477 U.S. at 327. Rather, it should be viewed as an important part of the Idaho Rules of Civil Procedure, which are designed to "secure the just, speedy and inexpensive determination of every action." *See Id.*; I.R.C.P. 1(a).

III. ARGUMENT

Binghams are entitled to summary judgment because IGWA has a complete failure of proof concerning the primary elements of its Notice of Protest. By this motion, Binghams are requesting that the Hearing Officer enter an order making two findings. First that there is no genuine dispute that there is no legal basis or standard that a one-year mitigation plan is not allowable; and second, 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.

A. **Binghams are not precluded from filing a one-year mitigation plan.**

In its Notice of Protest, IGWA states as follows:

First, although a one-year mitigation plan may be allowable if it fully offsets the impacts of out-of-priority diversions during the applicable year, the [Binghams'] Fifth Mitigation Plan does not purport to meet that standard. It relies on asserted reductions in diversion and consumptive use that appear to be based on generalized percentages and assumptions, without demonstrating that those actions will in fact fully offset the depletive effects of the Binghams' out-of-priority groundwater diversions in 2026.

Second, although mitigation plans that do not fully offset the impacts of curtailment in a single year may be approved **if** they include long-term mitigation actions, the Fifth Mitigation Plan does not purport to do so. It is a short-term proposal limited to the 2026 irrigation season and does not include durable, sustained mitigation actions comparable to those required under other approved mitigation plans. Instead, **the Binghams seek to play Methodology Order risk on a year-to-year basis—providing no mitigation in years when curtailment is not ordered and only partial mitigation in years when their water rights would be fully curtailed.**

Id., at p. 1 [*emphasis added*].

IGWA is adding to the law. There is no provision that would preclude a one-year mitigation plan. In fact, the Surface Water Coalition (“SWC”) and other entities have been allowed to enter into interim one-year mitigation plans in the past. *See e.g., Docket No. CM-MP-2016-002.*

Rule 43.03(b) provides that a mitigation plan must provide replacement water sufficient to offset the depletive effect of ground water to prevent injury to senior rights. However, there is nothing in Rule 43 requiring a that multi-year plan be filed, or limiting the manner in which a one-year plan be filed. Though IGWA alleges that Bingham's proposed Fifth Mitigation Plan is "generalized percentages and assumptions" and does not offset the depletive effect of ground water to prevent injury to the SWC, IGWA is not in the position to determine whether or not Bingham's Fifth Mitigation Plan (proposing reduction of Bingham's baseline Diversion Volume and Consumptive Use Volume by 41%) is sufficient to offset the depletive effect of ground water to prevent injury to the SWC. IGWA goes on to state that Bingham's proposed Mitigation Plan "does not include durable, sustained mitigation actions comparable to those required under other approved mitigation plans." Again, IGWA has no legal basis to require Bingham's plan to compare to other mitigation plans.

Further, by publishing Bingham's proposed Fifth Mitigation and Curtailment Plan, IDWR has already determined that the plan meets the requirements of the Rule 43.01. Director Weaver stated in his April 7, 2026 Order Denying Motion for Service of Mitigation Plans, Docket No. CM-DC-2010-001, as follows:

Once the Director receives a proposed mitigation plan that meets the requirements of Rule 43.01 of the Department's Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"), IDAPA 37.03.11, the Director will publish notice of the proposed mitigation plan pursuant to Rule 43.02.

Id., at p. 1 [*emphasis added*].

IGWA goes on to falsely, and without any basis whatsoever, allege that, "the Bingham seek to play Methodology Order risk on a year-to-year basis—providing no mitigation in years when curtailment is not ordered and only partial mitigation in years when their water rights would be fully

curtailed.” In fact, Bingham’s goal is to have a long-term mitigation plan in place. However, in May, 2026 when Bingham’s proposed Fifth Mitigation Plan was filed, it was done with an offer of drastic reduction and curtailment as a desperate attempt by the Bingham to save their 2026 crops after multiple attempts to secure a mitigation plan had failed. In fact, counsel for the SWC recommended they file a one-year plan to have a better chance of mitigation for 2026.

Finally, IGWA’s statement that Bingham would only provide “partial mitigation in years when their water rights would be fully curtailed” should be disregarded, as under the first in time first in right doctrine, there is no need for Bingham to mitigate when there is no call or curtailment.

B. An irrigator who was formerly a member of a ground water district is not precluded from filing a mitigation plan.

IGWA’s second argument in its Notice of Protest is that because the Bingham Ground Water District (“BGWD”) already has an approved mitigation plan, Bingham are precluded from filing a mitigation plan for their water rights with the IDWR. Again, this puzzling argument by IGWA is adding to the law. Bingham were allowed to be excluded from BGWD, which is expressly allowed pursuant to Idaho Code §§ 42-5251, 42-5252, and 42-5253. On September 3, 2021 Bingham were granted exclusion by the BGWD. *See Declaration of Reed W. Larsen, Exhibit A, filed concurrently herewith.* Though Idaho Code § 42-5251 allows lands to remain in the district for mitigation purposes, it does not preclude an irrigator from filing a mitigation plan, and it is not “improper” for an individual irrigator to file a proposed mitigation plan. IGWA’s claim that Bingham’s request is “inconsistent with the statutory framework established by the Groundwater District Act” is without merit, as they can point to no requirement under the Act that an irrigator who was lawfully precluded from a groundwater district is not allowed to present a proposed mitigation plan to the IDWR.

Furthermore, the Conjunctive Management Rules (IDAPA 37.03.11) provide no indication that a mitigation plan may only be filed by water districts or water users not covered by a water district. Rule 43 requires the name and mailing address of the person or persons submitting the plan; identification of the water rights for which benefit the mitigation plan is proposed; and other factors to determine “whether a proposed mitigation plan will prevent injury to senior rights.” *Id.*, Rule 43.03(a) through (o).

Finally, the Director’s Final Order Regarding April 2026 Forecast Supply ordered that

[B]y May 1, 2026, ground water users with consumptive water rights “junior to October 11, 1900, within the [ESPA ACGWS]” are required to “establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted April IDS of 181,600 acre-feet in accordance with an approved mitigation plan.” *As-Applied Order, at 7*. If a junior ground water user does not establish that they can mitigate for their proportionate share of the predicted April IDS “in accordance with an approved mitigation plan” the ground water user will be subject to this “order curtailing the junior-priority ground water user.” *Id.*

The Director’s Order referenced above, as well as the preceding curtailment orders from past years, explicitly state that ground water users can submit a proposed mitigation plan to the Director for approval.

IV. CONCLUSION

Based on the foregoing, Bingham respectfully requests that the Hearing Officer grant their Motion for Summary Judgment on the claims set forth in IGWA’s Notice of Protest because it has failed to provide proof of the primary elements of its Notice of Protest.

Respectfully submitted.

DATED this 4th day of August, 2026.

COOPER & LARSEN, CHARTERED

By /s/ Reed W. Larsen
REED W. LARSEN
*Attorney for Jerry D. Bingham and
Valerie H. Bingham*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of August, 2026, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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