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DEPARTMENT OF
WATER RESOURCES

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STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

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

Docket No. CM-MP-2026-004

**IGWA'S RESPONSE TO BINGHAMS'
MOTION TO STRIKE NOTICE OF
PROTEST**

Idaho Ground Water Appropriators, Inc. ("IGWA"), by and through counsel and on behalf of its member ground water districts, hereby responds to *Binghams' Response and Motion to Strike IGWA's Notice of Protest* filed August 4, 2026 ("Motion to Strike"). The motion lacks merit and should be denied entirely, as explained below. This response is supported by the Declaration of Thomas J. Budge filed herewith.

FACTUAL AND PROCEDURAL BACKGROUND

On August 19, 2025, the Binghams filed Bingham's Fifth Mitigation and Curtailment Plan ("Bingham Mitigation Plan") pursuant to Conjunctive Management ("CM") Rule 43. The plan proposes to mitigate for the Binghams' groundwater use in response to the Surface Water Coalition delivery call.

The Idaho Department of Water Resources published notice of the Bingham Mitigation Plan pursuant to CM Rule 43.02 and Idaho Code section 42-222. The published notice stated that protests against approval of the plan had to be filed with the Department, together with the required protest fee, on or before September 22, 2025. IGWA timely filed its Notice of Protest opposing approval of the Bingham Mitigation Plan. IGWA's Notice of Protest stated IGWA's initial grounds for protest, including its position that the plan does not satisfy the mitigation requirements of CM Rule 43.03.b and does not demonstrate actual ground water savings sufficient to offset the depletive effect of the Binghams' ground water use.

The Binghams then filed their Motion to Strike requesting that the hearing officer strike IGWA's Notice of Protest, arguing that (a) IGWA does not qualify as a protestant under Department rule of procedure, (b) IGWA's Notice of Protest does not assert what interest IGWA's

members have in the Bingham Mitigation Plan, (c) IGWA does not qualify for intervention under Department rules of procedure, and (d) IGWA does not have standing. The Bingham's arguments are without merit and should be denied, as explained below.

Notably, the Motion does not present evidence demonstrating that the Bingham Mitigation Plan satisfies CM Rule 43, nor does it ask the Hearing Officer to decide the ultimate merits of IGWA's protest. Instead, the Motion argues that IGWA has no right to participate as a protestant at all. IGWA responds to the Bingham's arguments without undertaking to litigate the merits of the adequacy of the Bingham Mitigation Plan, which must be resolved on the evidentiary record.

ARGUMENT

A. IGWA qualifies as a protestant because Rule 43.02 incorporates Idaho Code section 42-222, which grants a statutory right to protest to anyone who desires to protest.

The Bingham's first argue that "IGWA does not meet the definition of a protestant under Rule 154." (Motion, p. 2.) That argument ignores CM Rule 43.02, which provides that mitigation plans be processed "in accordance with the procedures set forth in Section 42-222, Idaho Code." Idaho Code § 42-222, in turn, authorizes the filing of a protest by "anyone who desires to protest." By incorporating § 42-222, Rule 43.02 supplies the statutory right Rule 154 requires.

Rule 154 defines a protestant as a person who opposes an application and "has a statutory right" to contest the authority sought. IDAPA 37.01.01.154. IGWA satisfies both parts of that definition. It opposes approval of the Bingham Mitigation Plan, and its statutory right to protest comes from Idaho Code § 42-222 as incorporated by CM Rule 43.02. The Bingham's contrary reading would make Rule 43.02's incorporation of § 42-222 meaningless and would narrow the Legislature's express authorization that "anyone who desires to protest" may do so.

The statutory protest right is intentionally broad at the threshold stage. A protest initiates the contested-case process; it does not adjudicate the ultimate merits of the mitigation plan or require the protestant to prove injury before the proceeding begins. If the Bingham's believe IGWA's grounds lack merit, their remedy is to prove the plan satisfies CM Rule 43 on the evidentiary record, not to strike a timely protest authorized by statute.

B. Idaho Code section 42-222 does not require a protestant to plead a separate interest in its notice of protest.

The Bingham's next argue that IGWA's Notice of Protest should be stricken because it "does not assert any interest that IGWA may have in Bingham's Mitigation Plan" and instead states only "generalized claims." (Motion, p. 2.) But nothing in CM Rule 43 or Idaho Code § 42-222 requires IGWA to prove the merits of its protest, or litigate disputed factual questions regarding plan adequacy, at the threshold protest stage. The law requires only a timely protest, setting forth the initial grounds for opposition. IGWA filed one.

IDWR's standard Notice of Protest form confirms the limited purpose of the filing. The one-page form asks the protestant to identify the application, provide contact information, pay the

protest fee, certify service, and state the reasons for protesting. (Decl. of Thomas J. Budge, Ex. B.) It does not require a legal brief, a supporting affidavit, or an explanation of the protestant's interest in the application. The protest is simply a notice pleading that preserves the protestant's right to participate in the matter; it is not the hearing itself.

IGWA's Notice of Protest did what the statute and IDWR practice require. It identified the mitigation plan being protested and stated IGWA's grounds for opposition. The Bingham may dispute those grounds, but disagreement with a protestant's stated grounds is not a basis to strike the protest before the merits are heard.

C. IGWA is not required to file a petition to intervene because it timely protested.

The Bingham devote most of their motion to Rule 353, which governs petitions to intervene. Those arguments are misplaced. IGWA is not a nonparty seeking discretionary entry into an existing contested case; IGWA is a timely protestant whose participation is authorized by CM Rule 43.02 and Idaho Code § 42-222. A timely protestant need not separately satisfy Rule 353's intervention requirements. Therefore, the hearing officer should reject the Bingham's argument concerning intervention.

Even if the hearing officer were to judge IGWA's Notice of Protest against the intervention standards set forth in Rule 353, IGWA meets those standards for the reasons set forth below.

D. IGWA has associational standing to represent its ground water district members in this proceeding.

Lastly, the Bingham argue that IGWA lacks standing because it has not alleged a "distinct, palpable injury" or shown how approval of the Bingham Mitigation Plan would affect its members. (Motion, pp. 2–3.) Because the Bingham ask the Hearing Officer to strike IGWA's protest and terminate IGWA's participation before hearing, their standing argument is dispositive in nature and should be evaluated under the summary judgment standard. Under that standard, the Motion should be denied out of hand because the Bingham have presented no admissible evidence negating IGWA's standing or showing the absence of a genuine factual dispute.

The Idaho Supreme Court's decision in *Camp Easton Forever, Inc. v. Inland Northwest Council Boy Scouts of America* is instructive. There, the district court resolved standing on summary judgment, and the Supreme Court applied the summary judgment standard: summary judgment is proper only when the pleadings, depositions, admissions, and affidavits show no genuine issue of material fact and entitlement to judgment as a matter of law. 156 Idaho 893, 897, 332 P.3d 805, 809 (2014). The Court emphasized that "standing is not mere pleading requirements but rather an indispensable part of the plaintiff's case," and therefore each element must be supported "with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 898, 332 P.3d at 810. At summary judgment, a party may not rest on "mere allegations," but must set forth "specific facts" by affidavit or other evidence. *Id.*

Accordingly, the Bingham bear the initial burden to support their motion with admissible evidence showing that IGWA's member districts will not be adversely affected by approval of the

Bingham Mitigation Plan, that no under-mitigation could increase their mitigation obligations, and that no relief in this proceeding could redress the asserted injury. They have not met that burden. The Motion to Strike cites no affidavit, expert analysis, modeling, administrative record, or other admissible evidence establishing any of those facts. A movant cannot obtain summary dismissal of a protest by simply asserting that the protestant lacks standing while offering no evidence to support the assertion. For that reason, the standing argument should be denied.

If the Hearing Officer nevertheless considers the standing issue on the merits, the record and governing law support standing. The governing legal principles are straightforward. Idaho law asks whether the party invoking jurisdiction has a sufficient stake in the dispute. In *Miles v. Idaho Power Co.*, the Idaho Supreme Court explained that standing “focuses on the party seeking relief and not on the issues the party wishes to have adjudicated,” and requires “a ‘distinct palpable injury’ to the plaintiff” and “a ‘fairly traceable’ causal connection between the claimed injury and the challenged conduct.” 116 Idaho 635, 641, 778 P.2d 757, 763 (1989).

Idaho does not require that the injury already be fully realized before standing exists. In *Evans v. Teton County*, the Court held that neighboring landowners had standing because their properties “may be adversely affected” by the challenged development; they were not required to prove actual harm. 139 Idaho 71, 75-76, 73 P.3d 84, 88-89 (2003) (underline added). The Court explained that “the existence of real or potential harm is sufficient to challenge” the decision, while proof of actual harm goes to the remedy. *Id.* at 76, 73 P.3d at 89.

Standing does not disappear merely because others may share the injury. In *Miles*, the Court explained that “[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.” 116 Idaho at 642, 778 P.2d at 764. Nor is standing defeated because the asserted injury affects a class of similarly situated persons. *Camp Easton Forever, Inc. v. Inland Northwest Council Boy Scouts of America* held that individual scouts had standing because they would lose the use of a specific camp they previously could use; the injury was distinct because “Scouts used the camp, not everyone in the area.” 156 Idaho 893, 898, 332 P.3d 805, 810 (2014).

Finally, Idaho recognizes associational standing. *Idaho Schools for Equal Educational Opportunity v. Evans* held that school districts had standing where they alleged a “distinct palpable injury” caused by the State’s funding decisions and further held that an association had standing because “an organization whose members are injured may represent those members in a proceeding for judicial review.” 123 Idaho 573, 584–85, 850 P.2d 724, 735–36 (1993). Where an organization’s members would have standing in their own right, the organization may represent those members collectively.

IGWA’s member ground water districts satisfy those standards. They are not members of the general public asserting a policy preference. They are statutory ground water districts organized under Idaho Code title 42, chapter 52, whose members are subject to conjunctive administration, mitigation obligations, and curtailment exposure in the same ESPA/SWC administrative framework in which the Bingham seek approval of their mitigation plan. See Idaho Code §§ 42-

5201, 42-5224, 42-5244A, 42-5244B. The member districts have statutory authority to develop, implement, and administer mitigation plans for the benefit of their members and otherwise act to protect their members' water rights. See Idaho Code §§ 42-5224(23), 42-5244A, 42-5244B. Those statutory responsibilities give the districts a direct and concrete interest in whether individual junior ground water users are allowed to satisfy mitigation obligations through a plan that may undermitigate the injury caused by their pumping.

The pathway of injury is straightforward. IDWR approved the 2024 Stipulated Mitigation Plan ("2024 Plan") in Docket No. CM-MP-2024-003, and IGWA's member districts mitigate under that plan. The 2024 Plan requires those districts to conserve 205,000 acre-feet of ground water annually and to provide a storage water component that is tied to Snake River reach gains between Blackfoot and Minidoka Dam: the storage obligation is 75,000 acre-feet but increases to 82,500 acre-feet if post-2026 reach gains are less than or equal to the 2023 benchmark. Thus, IGWA's members' mitigation obligations are directly affected by whether reach gains are maintained.

That gives IGWA's members a concrete interest in the Bingham Mitigation Plan. If the plan allows the Bingham to pump out of priority without fully mitigating the depletive effect on the Near Blackfoot-Minidoka reach, the shortfall may reduce ESPA groundwater levels, depress reach gains, and increase the mitigation burdens and curtailment risk borne by IGWA's member districts under the 2024 Plan. In that circumstance, part of the Bingham's mitigation burden would effectively be shifted to other groundwater users, creating a distinct, practical injury fairly traceable to approval of an inadequate plan and redressable by denial, modification, or conditioning of the plan. For that reason, IGWA's member districts have standing.

IGWA, in turn, has associational standing to represent those districts collectively. IGWA's members are the ground water districts whose statutory mitigation functions, administration exposure, and members' water-right interests may be affected by the Bingham Mitigation Plan. This proceeding does not require each district to assert a separate individualized claim; the same legal and factual question—whether the plan satisfies CM Rule 43 and adequately mitigates the Bingham's depletive effects—affects the districts collectively. Under *Idaho Schools*, IGWA may represent its injured members in this proceeding.

That is not a novel role. IGWA has represented ground water districts and their members for decades in IDWR proceedings, district court proceedings, and Idaho Supreme Court proceedings involving the Surface Water Coalition delivery call, mitigation obligations, conjunctive administration, and related water-right administration disputes. Its participation here is the same representative function it has long performed: presenting the collective position of ground water districts whose members' water rights and mitigation obligations may be affected by the outcome.

CONCLUSION

The Motion to Strike should be denied for four independent reasons. First, IGWA qualifies as a protestant under IDAPA 37.01.01.154 because CM Rule 43.02 incorporates Idaho Code § 42-222, which grants a statutory protest right to "anyone who desires to protest." Second, § 42-222 does not require IGWA to plead a separate interest or prove standing facts in its Notice of Protest;

IDWR's protest form requires only a statement of the grounds for protest, which IGWA provided. Third, because IGWA timely protested, it is not a nonparty seeking discretionary intervention and therefore is not required to satisfy Rule 353's separate intervention standard. Fourth, the Bingham's standing challenge fails under the summary judgment standard because they offered no admissible evidence negating standing; in any event, IGWA's member ground water districts have standing in their own right, and IGWA has associational standing to represent them collectively. IGWA respectfully requests that the Hearing Officer deny the Motion to Strike and allow IGWA's protest to proceed on the merits.

Dated this 11th day of August, 2026.

RACINE OLSON, PLLP

By: 
Thomas J. Budge
Attorneys for IGWA

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 2026, I caused the foregoing document to be served on the persons listed below by email at the addresses indicated:


Thomas J. Budge

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