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DEPARTMENT OF
WATER RESOURCES

Thomas J. Budge (ISB# 7465)
Elisheva M. Patterson (ISB# 11746)
RACINE OLSON, PLLP
201 E. Center St. / P.O. Box 1391
Pocatello, Idaho 83204
Phone: (208) 232-6101
tj@racineolson.com
elisheva@racineolson.com

Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE MITIGATION
AND CURTAILMENT PLAN OF JERRY D.
BINGHAM AND VALERIE H. BINGHAM
FOR WATER RIGHT NOS. 35-12226, 35-
2202B, 35-2205E, 35-2266, 35-2269G, AND
35-2183D

Docket No. CM-MP-2025-003

IGWA'S NOTICE OF PROTEST

Idaho Ground Water Appropriators, Inc. ("IGWA"), by and through counsel, acting for and on behalf of its members, submits this notice of protest pursuant to rule 43.02 of the Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules") and rule 154 of the Rules of Procedure of Idaho Department of Water Resources & Water Resource Board, in response to the *Mitigation and Curtailment Plan* ("Bingham Mitigation Plan") filed August 19, 2025, in this matter.

The Bingham Mitigation Plan proposed to mitigate for the out-of-priority diversion and use of groundwater under water right no. 35-12226 by ceasing irrigation under that right. (Bingham Mit. Plan, p. 2, ¶ C.1.) IGWA does not object to this component of the Bingham Mitigation Plan.

The Bingham Mitigation Plan proposed to mitigate for the out-of-priority diversion and use of groundwater under water right nos. 35-2202B, 35-2205E, 35-2266, 35-2269G and 35-2183D¹ (referred to collectively herein as the "Remaining Rights") by "turning off this water on each Sunday," which the Bingham's assert represents "a 14.2% reduction in water usage." *Id.* at ¶¶ C.2-C.6. The 14.2% figure represents one of seven days.

The Bingham Mitigation Plan additionally proposes to mitigate for the out-of-priority diversion and use of groundwater under the Remaining Rights by voluntarily diverting less water than is authorized under the Remaining Rights. *Id.* at ¶¶ D-D.f.

¹ The case caption in the Bingham Mitigation Plan mistakenly refers to water right no. 35-2186D. The correct water right number is 35-2183D, as set forth in paragraph C.6 of the Bingham Mitigation Plan.

IGWA initially protests the Bingham Mitigation Plan for two reasons. First, it does not correspond with mitigation obligations under the Methodology Order.² Under the Methodology Order, curtailment dates and mitigation obligations adjust from year to year based on water supply and weather conditions. In the absence of an agreement under CM Rule 43.03.o, mitigation plans must “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 from the surface or ground water source.” (CM Rule 43.03.b.) The Bingham Mitigation Plan does not do this.

Second, the groundwater conservation proposed by the Bingham Mitigation Plan appears to be fictitious. The proposal to not irrigate on Sundays does not provide real groundwater savings if it does not represent a reduction in historic groundwater use. Likewise, the proposal to divert less than the maximum volume authorized under their water rights does not provide real groundwater savings if it does not represent a reduction in historic groundwater use.

Under Idaho law, the diversion volume element of a water right defines the maximum authorized volume that may be diverted *when needed*. “It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes.” *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915); see also *Mountain Home Irr. Dist. v. Duffy*, 79 Idaho 442, 319 P.2d 968 (1957) (“It must be remembered that the policy of the law of this state is to secure the maximum use and benefit of its water resources”), *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960) (“The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources”), *State v. Hagerman Water Right Owners* (“*Basin-Wide Issue 10*”), 947 P.2d 400, 408 (Idaho 1997) (“The governmental function in enacting . . . the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing maximum use and benefit of our natural water resources”), and *Rangen, Inc. v. IDWR*, 369 P.3d 897, 907 (Idaho 2016) (“As we recently stated in *Clear Springs*, the policy of securing the maximum use and benefit, and least wasteful use of Idaho’s water resources, has long been the policy in Idaho.”). Accordingly, “[a] prior appropriator is only entitled to the water to the extent that he has use for it *when economically and reasonably used*.” *Goodrich*, 27 Idaho at 44, 147 P. at 1079 (italics added). “[N]o person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation.” *Id.* This principle is captured in the CM Rules which require consideration of whether both the senior and the junior user are “using water efficiently and without waste.” (CM Rule 40.03.)

The Bingham Mitigation Plan claims to offset the depletive effect of groundwater use under the Remaining Rights by diverting less than the maximum authorized volume, but this does not represent real savings because the Bingham’s crops do not need the maximum volume to be grown to maturity. Indeed, few if any groundwater irrigators in southern Idaho ever actually need or use the maximum volume authorized under their groundwater rights. By offering to not irrigate on Sundays and divert less than the maximum authorized volume, the Bingham Mitigation Plan allows them Bingham to continue using just as much groundwater as they have historically, making no real sacrifice to mitigate material injury to the Surface Water

² The Surface Water Coalition delivery call is currently governed by the *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”) entered July 19, 2023, in IDWR Docket No. CM-DC-2010-001.


Coalition, and doing nothing to offset the depletive effect of their groundwater withdrawals as required by CM Rule 43.03.b.

Since the Bingham Mitigation Plan does not correspond with mitigation obligations under the Methodology Order, and since it does not require the Bingham to actually conserve groundwater or otherwise mitigate the impacts of their out-of-priority groundwater use, the depletive effect of their groundwater use will ultimately be borne by IGWA's members and other groundwater users, some of whom have water rights that are senior in priority to the Bingham's water rights.

This protest is continuing in nature and IGWA reserves the right to raise additional objections to the proposed mitigation plan as additional information is discovered.

Dated this 23rd day of September, 2025.

RACINE OLSON, PLLP

By: 
Thomas J. Budge
Attorneys for IGWA

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September, 2025, I cause the foregoing document to be served on the persons below via the method below:


Thomas J. Budge

Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 file@idwr.idaho.gov	U.S. Mail and Email
Garrick Baxter Idaho Department of Water Resources garrick.baxter@idwr.idaho.gov	Email
Reed W. Larsen COOPER & LARSEN, CHARTERED reed@cooper-larsen.com	Email
Candice McHugh Chris M. Bromley MCHUGH BROMLEY, PLLC cmchugh@mchughbromley.com cbromley@mchughbromley.com	Email
Courtesy Copies sent by Email:	
Sarah Klahn Maximillian Bricker SOMACH SIMMONS & DUNN sklahn@somachlaw.com mbricker@somachlaw.com	Rob Harris HOLDEN KIDWELL HAHN AND CRAPO, PLLC rharris@holdenlegal.com
Travis Thompson Norm Semanko Abby Bitzenburg Garrett Kitamura PARSONS BEHLE & LATIMER tthompson@parsonsbehle.com nsemanko@parsonsbehle.com Abitzenburg@parsonsbehle.com gkitamura@parsonsbehle.com	