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

IN THE MATTER OF DISTRIBUTION OF  
WATER TO VARIOUS WATER RIGHTS  
HELD BY OR FOR THE BENEFIT OF  
A&B IRRIGATION DISTRICT,  
AMERICAN FALLS RESERVOIR  
DISTRICT #2, BURLEY IRRIGATION  
DISTRICT, MILNER IRRIGATION  
DISTRICT, MINIDOKA IRRIGATION  
DISTRICT, NORTH SIDE CANAL  
COMPANY, AND TWIN FALLS CANAL  
COMPANY

Docket No. CM-DC-2010-001

**SURFACE WATER COALITION'S  
OPPOSITION TO GROUNDWATER  
USERS' MOTION FOR  
RECONSIDERATION OF ORDER  
DENYING MOTION FOR  
CONTINUANCE**

COME NOW, A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR  
DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT,  
MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, and TWIN  
FALLS CANAL COMPANY ("Surface Water Coalition," "Coalition," or "SWC"), by and  
through counsel of record, and pursuant to the Department's Rules of Procedure (IDAPA  
37.01.01.220) hereby file the following response in opposition to the *Motion for Reconsideration*

*of Denial of Continuance (“Motion”)* filed jointly by the Coalition of Cities, Cities of Idaho Falls and Pocatello, the Idaho Ground Water Appropriators, Inc. (“IGWA”), Bonneville-Jefferson Ground Water District, and Bingham Ground Water District (hereinafter collectively referred to as “Groundwater Users”) on May 5, 2023. For the reasons set forth below, as well as those stated on the record at the April 28, 2023 pre-hearing conference, the Director should deny the motion for reconsideration.

### STANDARD OF REVIEW

The Director denied the Groundwater Users’ motion for a continuance. *See Order Denying the Appointment of an Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* (May 5, 2023) (“*May 5 Order*”). The Groundwater Users now ask the Director to reconsider that decision pursuant to Department Rule of Procedure 711 (IDAPA 37.01.01.711). *See Motion* at 2-3. The Director’s review of the motion is governed by the same standard of review of the underlying motion. *See e.g. Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012).

The Department’s rules authorize a presiding officer to “continue proceedings for further hearing.” Rule 560. Although not stated, the decision to grant a motion for a continuance is presumably vested in the presiding officer’s discretion. Idaho case law provides that the “decision to grant a motion for a continuance rests within the sound discretion of the trial court.” *See State v. Labbee*, 2023 WL 1131212 at \*2 (Idaho Ct. App., Jan. 31, 2023). The Coalition submits that the Director properly exercised his discretion in denying the Groundwater Users’ motion given the unique circumstances of water right administration and the requirement to protect senior water rights during the irrigation season. The Director identified these reasons both at the pre-hearing conference and in his *May 5 Order*.

The Coalition offers the following points in support of the Director’s decision and in opposition to the Groundwater Users’ present request for reconsideration.

**I. IGWA Has No Authority and Has Not Proposed to Mitigate for Non-Member Junior Ground Water Right Holders.**

A fatal flaw in the Groundwater Users’ request for a continuance is their erroneous claim that “IGWA has enough the [sic] water to mitigate for its 2021 breach and for the predicted demand shortfall for the upcoming 2023 season.” *See* Motion at 6. The Groundwater Users also wrongly allege that the “other remaining junior users account a fractional percentage of the groundwater depletions which are allegedly causing injury” and “the Director should consider the junior water users ‘as a whole’ are complying with mitigation plans.” *Id.* at 7.

IGWA’s representative districts do not represent and have no authority to mitigate for any junior groundwater right holders who are not members of a groundwater district. *See* I.C. § 42-5224(6). This is also confirmed in IGWA’s *Notice of Ground Water District Mitigation* (“*Notice*”) wherein the districts represent they are only proposing to mitigate for their members.<sup>1</sup> *See Notice* at 2-3 (“These districts’ proportionate shares of the 63,645 acre-feet demand shortfall predicted in the April 2023 As-Applied Order are as follows . . .”). Stated another way, the *Notice* does not indicate that the districts will mitigate for the entire predicted demand shortfall of 75,200 acre-feet.

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<sup>1</sup> IGWA provided notice of mitigation for Bingham, Bonneville-Jefferson, and Jefferson Clark Ground Water Districts pursuant to its “storage water” mitigation plan (CM-MP-2009-007) and for Aberdeen-American Falls, Carey Valley, Henry’s Fork/Madison, Magic Valley and North Snake Ground Water Districts pursuant to the 2016 stipulated mitigation plan (CM-MP-2016-001). The Districts mistakenly believe they pick and choose which mitigation plans to follow. The Coalition reserves all rights with respect to IGWA’s *Notice* and any notion that the Districts are free to “mix and match” compliance with prior plans and orders. Further, contrary to the Groundwater Users’ claim, nothing in the 2023 *Notice* applies to the parties’ prior settlement concerning certain Districts’ 2021 breach of their mitigation plan. *See* 2021 Settlement at 2 (Sept. 7, 2022) (“Such amounts will be in addition to the long-term obligations set forth in section 3 of the Settlement Agreement and approved mitigation plan”) (emphasis added).

Nowhere in the *Notice* does IGWA claim to represent or mitigate for junior ground water rights represented in the difference between their proportionate share (63,645 af) and the predicted in-season demand shortfall (75,200 af), which is approximately 11,555 acre-feet (i.e. 15%).<sup>2</sup> The Groundwater Users' attempts to minimize this quantity or have it swept into considering junior users "as a whole" across the ESPA is contrary to law and the facts and should be rejected.

Whereas the Director has indicated he does not plan to issue a curtailment order until after the hearing in this matter, each day that passes is critical for purposes of water right administration during the 2023 irrigation season. Thus, any delay in the schedule would inevitably delay administration of any affected junior ground water rights not covered through an approved mitigation plan. Every day that passes furthers the potential that unmitigated pumping will continue to injure senior surface water rights without adequate mitigation as the irrigation season has already commenced throughout the various administrative basins across Eastern Snake Plain Aquifer ("ESPA").

Further exacerbating potential injury this year is a pending sentinel well index measurement for April 2023 that may be approaching the April 2015 level. The attached groundwater level data from one USGS monitoring well going back to early 1950s (2N35E35DCC1) shows a record low reading this spring. *See Ex. A.* The declining groundwater levels are likely reducing hydraulically connected reach gains in the Near Blackfoot to Minidoka reach of the Snake River this year, further reducing available water to the Coalition members. Contrary to the Groundwater Users' theory, just looking at the current snowpack does not tell the whole story on injury to the Coalition, the health and status of the ESPA, or trends in reach gains in the Snake River. *See Motion for Continuance* at 3, (Apr. 28, 2023).

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<sup>2</sup> This number includes the proportionate share assigned to A&B (458 acre-feet).

## II. The Requested Continuance Does Not Account for Non-Compliant Ground Water Districts and Continuing Injury from Out-of-Priority Diversions.

The Steering Committee for the SWC and IGWA held a meeting on April 12, 2023 concerning the Ground Water Districts' 2022 performance and their April 1<sup>st</sup> report. A joint letter was signed and submitted by counsel for IGWA and SWC to the Director stating that SWC asserts that in 2022 certain Districts breached the 2016 stipulated migration plan and order based upon information provided by IGWA. *See Travis L. Thompson April 13, 2023 Letter to Director Gary Spackman*. The Districts disagree that a breach occurred in 2022 and their counsel has indicated they intend to appeal the Director's *Amended Final Order Regarding Compliance with Approved Mitigation Plan* (April 24, 2023) to district court.

At the April 28<sup>th</sup> pre-hearing conference the Director appeared to indicate that he would not address the alleged 2022 breach until after a hearing was held on the Fifth Methodology Order. Based upon IGWA's recent *Notice of Ground Water District Mitigation*, several Districts indicated they intend to mitigate pursuant to the 2016 Stipulated Plan and Order, while Bingham, Bonneville-Jefferson, and Jefferson-Clark Ground Water Districts apparently propose to mitigate pursuant to a prior "storage only" mitigation plan.<sup>3</sup> *See Notice* at 2-3. Despite receiving "safe harbor" from 2015-2022 and not securing sufficient storage to mitigate predicted in-season injuries in certain years pursuant to the Director's order, these districts now believe they are free to "pick and choose" which plan to follow. Through this filing it is apparent that these three Districts that are parties to the 2015 Settlement Agreement and 2016 Stipulated Mitigation Plan no longer believe they are bound by the Director's orders approving that plan and subsequent addendums.

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<sup>3</sup> The Coalition reserves the right to pursue all administrative and judicial remedies with respect to the Districts' breach of the 2015 Settlement Agreement, the 2016 Stipulated Mitigation Plan and final order approving the same.

Further, it is now known that Bingham, Bonneville-Jefferson, and Jefferson-Clark Ground Water Districts have each breached the 2016 Stipulated Mitigation Plan and Order again in 2022.<sup>4</sup> These Districts' continued non-compliance in 2022 will have impacts on the Coalition's water supply in 2023. To date, these districts have failed to present any viable proposals to cure the non-compliance despite receiving safe harbor from administration in 2022. The Director's 2016 Order approving the Stipulated Mitigation Plan requires the Ground Water Districts to take actions to restore groundwater levels on the ESPA and it is now obvious that the three named districts will not comply with that order again in 2023. *See Notice* at 2 ("The Districts identified in the following table will provide mitigation to the SWC under the Storage Water Plan").<sup>5</sup>

A delay in the hearing will presumably result in a delay of any required actions by the Districts that breached the 2016 Order in 2022 (according to the Director's indication at the April 28<sup>th</sup> pre-hearing conference), thus further depleting aquifer levels and the source of SWC's natural flow supplies. All the while, the three named Districts will no doubt claim "safe harbor" from administration and will pump their out-of-priority ground water rights unrestricted without taking actions to replenish the aquifer as they previously promised.

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<sup>4</sup> Counsel for IGWA has represented they intend to appeal the Director's recent *Amended Final Order Regarding Compliance with Approved Mitigation Plan* (April 24, 2023). Given this position and the parties' impasse at the April 12, 2023 Steering Committee meeting as documented in the April 13, 2023 letter, the Director should address the Districts' failure to undertake the required conservation obligations in 2022 pursuant to the Second Addendum process and his order approving the same. *See Second Addendum* at 3, section 2.c.iv; *Final Order Approving Amendment to Stipulated Mitigation Plan* (May 9, 2017). The fact Bingham, Bonneville-Jefferson, and Jefferson-Clark Ground Water Districts are representing they will not comply with that mitigation plan at the outset of 2023 is further reason for the Director to address this matter as soon as possible.

<sup>5</sup> The Districts continued non-performance under the 2016 Stipulated Mitigation Plan exacerbates declining reach gains which were specifically acknowledged in that agreement. To the contrary, the Storage Water Plan does not address the long-term obligations the Districts committed to in 2015.

The blatant repeated failure by Bingham, Bonneville-Jefferson, and Jefferson-Clark Ground Water Districts to comply with the Director's orders approving the 2016 Stipulated Plan is yet another reason to deny the Groundwater Users' motion to reconsider the denial of their motion for continuance of the hearing in this matter.

### **III. IDWR Has Held Conjunctive Administration Hearings Under Similar Schedules / Virtual Participation Accommodation.**

The bulk of the Groundwater Users' reason for asking for a continuance is the current schedules of certain consultants and counsel. *See Motion* at 3-5. Certainly participating in an administrative with numerous parties, counsel, and expert witnesses can be challenging. On April 21, 2023, cognizant of these challenges and proactively addressing likely petitions for hearing, the Director set a hearing for June 6-10, 2023. While individual schedules may need to be adjusted in order for a particular person to participate in this matter, all parties are subject to the same schedule and deadlines set by the Director, which gave the parties over six weeks to prepare for the hearing.<sup>6</sup> The Groundwater Users fail to recognize that the Surface Water Coalition and its consultants are all required to work within the same timeframe and will have to address their individual schedules as well.

Further, IDWR has previously scheduled and held hearings within similar timeframes, including in this very case. Accordingly, the Groundwater Users should not be surprised as to this type of scheduling in conjunctive administration matters occurring at the outset of an irrigation season.

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<sup>6</sup> The Coalition opposes the Groundwater Users' theory that this hearing could be moved and replace an already scheduled hearing in another contested case. *See Motion* at 8. The consolidated Big Wood River / Snake River Moratorium matter involves a host of other parties, counsel, consultants, and IDWR staff that are not involved in this case. Given the difficulty in scheduling in that matter with the number of counsel involved, the Director had to delay a proposed hearing timeframe from August to October. Further, the moratorium case hearing was set over a month ago and the parties are subject to pending deadlines in that case. *See Notice of Hearing* (March 31, 2023). The Groundwater Users do not speak for the others involved in that matter and have no basis to suggest changing that schedule in the context of a wholly separate case.

In 2010 the Director issued the first methodology order on April 7<sup>th</sup> and held a hearing on both the methodology and the first April As Applied order (dated April 29, 2010) on May 24-26, 2010 (i.e. roughly a similar six-week schedule). On appeal Judge Wildman found that the process employed by IDWR did not violate IGWA's or the City of Pocatello's rights to due process. *See Memorandum Decision* at 35-36, 47 (Gooding County Dist. Ct., Fifth Jud. Dist. CV-2010-382 et al., Sept. 26, 2014). Clearly, water right administration, and any necessary administrative procedures must occur in a timely fashion in order to be effective. The Groundwater Users' requested continuance is the type of situation Judge Wood warned against that would inevitably harm senior rights. *See Order on Plaintiffs' Motion for Summary Judgment* at 97 (*AFRD#2 et al. v. IDWR*, Gooding County Dist. Ct., Fifth Jud. Dist., Case No. CV-2006-600, June 2, 2006) ("In practice, an untimely decision effectively becomes the decision; i.e. 'no decision is the decision.'")

In addition to the prior May hearings held in this case back in 2010, the Director recently initiated an administrative proceeding in Basin 37 in early May 2021 and then held a hearing in early June that year. Requests for continuance and injunctive relief were denied in that case, and the parties accommodated the schedule and presented evidence and exhibits during a five-day hearing held between June 8-12, 2021.

Although travel and participation by out-of-state consultants may pose further challenges in this case,<sup>7</sup> the Coalition would propose that consultants who cannot travel to Boise between June 6 and 10, be allowed to present testimony virtually (i.e. Zoom, Webex, etc.).<sup>8</sup> As virtual

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<sup>7</sup> The City of Pocatello's consultant, Greg Sullivan, has a scheduled trip to Europe but will be back before the hearing and does not claim he cannot attend in person. *See Dec. of Greg Sullivan* at 5, ¶ 20.

<sup>8</sup> The Director has already approved allowing Candice McHugh to participate remotely to accommodate her travel to a college football event. *See Scheduling Order* (May 2, 2023); *see Dec. of Candice McHugh* at 2; *see also, May 5 Order* at 2, n. 1. In light of that accommodation, certainly IGWA's consultant Ms. Sigstedt should be allowed to



hearings have been routinely used in prior administrative and court proceedings around the State of Idaho (particularly during the COVID-19 epidemic), the Department has the technology and capability of handling such requests. A virtual participation accommodation will address the concerns raised by IGWA and the Cities regarding their consultants that may be located out-of-state during that time, or unable to travel to Boise for medical reasons.

The Coalition would agree to work with the parties and their consultants to accommodate such participation during the hearing timeframe and would request the same consideration if needed.

### **III. Bonneville-Jefferson Ground Water District's Decision to Hire New Counsel and Consultants at this Stage Does Not Justify a Continuance.**

Finally, Bonneville-Jefferson Ground Water District makes a specific plea for continuance on the basis that the District recently hired new counsel and consultants. *See Motion* at 5-6. Although the District was previously represented by the law firm of Racine Olson and retained consultants Sophia Sigstedt and Jaxon Higgs, including through the technical working group process last fall and winter, the District has apparently substituted counsel and retained new consultants (Bryce Contor and Thane Kindred, Rocky Mountain Environmental Associates).<sup>9</sup>

While the District has the right to make such changes, those recent changes do not justify continuing a hearing that would inevitably delay conjunctive administration for the benefit of

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participate virtually given her medical restriction that requires her to stay in Colorado until mid-July. *See Dec. of Sophia Sigstedt* at 5. The Coalition would stipulate to Ms. Sigstedt's virtual participation.

<sup>9</sup> Mr. Johns has attended meetings for Bonneville-Jefferson in the past, including the summer of 2022, and recently participated in the hearing on the Director's September 8, 2022 Order held on February 8, 2023. Given that background certainly Mr. Johns has some familiarity with the SWC delivery call and prior orders regarding conjunctive administration. It is not known when Bonneville-Jefferson retained its new consultants.

their members.<sup>10</sup> Moreover, the timing of Bonneville's change is at their own risk given the Director's intention to make adjustments to the methodology order that have been known for months, including by their prior consultants that participated in the technical working group. Such a request for delay is particularly troublesome given Bonneville-Jefferson's repeated failures to comply with its mitigation plan in 2021 and 2022, and its notice that it will not comply with the 2016 Stipulated Plan in 2023. *See Notice* at 2. Moreover, the Director's methodology in this case has been in the public record at IDWR for well over a decade. It is presumed that Bonneville-Jefferson has been fully apprised of the various methodology orders issued between 2010-2016 through its prior counsel and consultants.<sup>11</sup>

In sum, there is no prejudice to Bonneville-Jefferson where it has been aptly represented on these issues by prior counsel and consultants for years, including through the technical working group initiated by IDWR last fall. Changing counsel and consultants is not a valid reason for the Director to reconsider the denial of the motion for continuance.

### **CONCLUSION**

In conclusion the Coalition submits the Director properly exercised his discretion in denying the Groundwater Users' motion for continuance. Time is of the essence for conjunctive administration this irrigation season, and given present aquifer levels and likely decreased reach gains this summer, any delay in the process stands to harm the Coalition's senior surface water rights. The Coalition therefore submits the Groundwater Users' motion for reconsideration should be denied.

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<sup>10</sup> None of the declarations of Bonneville-Jefferson's new counsel or consultants indicate they would not be available to participate at the June 6-10, 2023.

<sup>11</sup> The Technical Working Group presentations and comments were all provided to Bonneville-Jefferson's prior consultants (Ms. Sigstedt and Mr. Higgs) and counsel (Mr. Budge). Further, while the Coalition has similarly retained additional consultants that did not participate in the workgroup, they will likewise be subject to the same timeframe and deadlines to respond and participate in this case.

DATED this 8<sup>th</sup> day of May, 2023.

**MARTEN LAW LLP**



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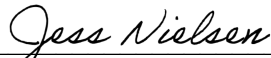
## CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of May, 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

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 Jessica Nielsen  
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Exhibit

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An official website of the United States government  
Here's how you know

MENU



IMPORTANT [Legacy real-time page](#)

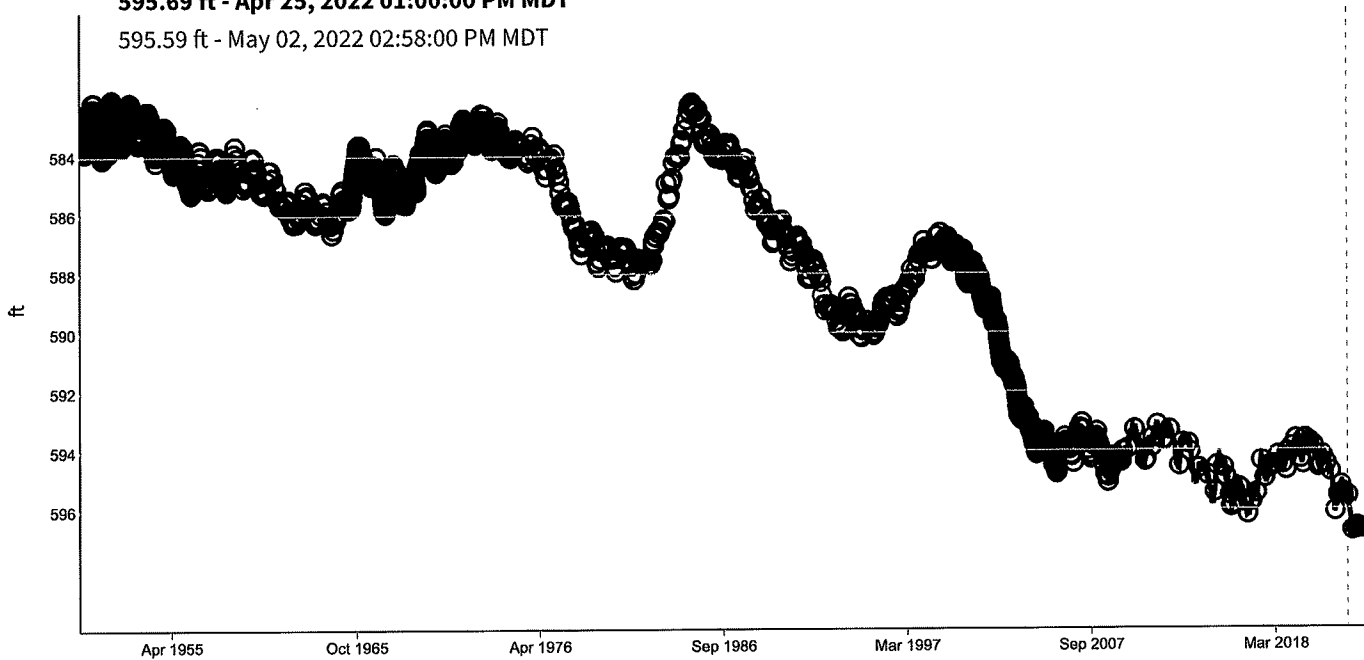
7 days  30 days  1 year  
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# 02N 31E 35DCC1 Usgs 1 - 432700112470801

January 1, 1950 - April 30, 2023

Depth to water level, ft below land surface

595.69 ft - Apr 25, 2022 01:00:00 PM MDT  
595.59 ft - May 02, 2022 02:58:00 PM MDT



Show legend

	Value	Status
Latest May 08, 2023 07:00:00 AM MDT	596.93	Provisional
Selected Apr 25, 2022 01:00:00 PM MDT	595.69	Approved
Selected field visit Mav 02. 2022 02:58:00 PM MDT	595.59 ft	Approved

Questions or Comments