

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
MARTEN LAW LLP
163 Second Ave. West
P.O. Box 63
Twin Falls, Idaho 83303-0063
Telephone: (208) 733-0700
Email: jsimpson@martenlaw.com
tthompson@martenlaw.com

*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company, and Twin Falls
Canal Company*

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Email: wkf@pmt.org

*Attorneys for American Falls
Reservoir District #2 and Minidoka
Irrigation District*

**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
RESPONSE TO IGWA'S AMENDED
NOTICE OF MITIGATION**

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" or "Coalition"), by and through
counsel of record, and hereby submits the following response to *IGWA's Amended Notice of*

Mitigation.

On June 1, 2023, the Idaho Ground Water Appropriators, Inc. (“IGWA”), acting on behalf of its member Ground Water Districts (“Districts”) filed an amended notice (“Notice”) that claims to provide “notice that the Districts can mitigate for their proportionate share of the demand shortfall predicted in the *Final Order Regarding April forecast Supply (Methodology Step 1-3)*(“*April 2023 As-Applied Order*”) issued April 21, 2023, in this matter.” IGWA claims that it has 77,714 acre-feet of storage water rented that can be used for mitigation. The Coalition submits that the Notice is deficient and does not provide adequate notice of mitigation for the 2023 irrigation season.

IGWA is attempting to mitigate using the mitigation plan it refers to the “Storage Water Plan.” In an earlier attempt to demonstrate mitigation through the Storage Water Plan, the Director held “the plan clearly states that IGWA will mitigate for all ground water users, not just its members and non-member participants.” *See Order Determining Deficiency in IGWA’s Notice of Secured Water* at 3. Despite this finding issued on May 23, 2023, IGWA claims that it is only mitigating for its “proportionate share of the demand shortfall”, see Notice at 1, and “[t]he *April 2023 As-Applied Order* states that IGWA’s share of the total predicted demand shortfall of 75,200 acre-feet is 63,645 acre feet.” *See* Notice at 3. IGWA’s Notice creates uncertainty concerning the amount of water it proposes to provide – is it 75,200 acre-feet as would be required by the Storage Water Plan or what IGWA determines to be its proportionate share of 75,200 acre-feet - 63,645 acre-feet?

Further, the Notice does not address all of IGWA’s storage water mitigation obligations for 2023. The Director found that IGWA breached the mitigation plan IGWA refers to as the “Settlement Agreement Plan” in 2021, and to prevent curtailment in 2022, the Coalition and

IGWA entered into a Settlement Agreement in which IGWA promised to advise the Coalition of its ability to deliver 30,000 acre-feet of storage by April 1, 2023. IGWA has not done so. If IGWA wants to rely on the Storage Water Plan to mitigate its storage water obligations in 2023, it must demonstrate that it can rent the injury amounts of 75,200 acre-feet plus 30,000 acre-feet for a total of 105,200 acre-feet. It has not done so, and it is not entitled to the protections provided by the mitigation orders.

By attempting to mitigate pursuant to the Storage Water Plan, if IGWA believes or hopes that its 2023 obligation will be reduced by the next step Order under the Methodology, and if IGWA does not deliver 50,000 acre-feet required by the Settlement Agreement Plan, then IGWA is subjecting all of its Ground Water Districts, including those who are otherwise complying with the Settlement Agreement Plan, to a claim of breach of that Plan. If IGWA mitigates pursuant to the Settlement Agreement Plan, it is required to deliver 50,000 acre-feet of storage water. This amount and the additional 30,000 acre-feet required by the 2021 breach settlement totals 80,000 acre-feet. It is the Coalition's position that the minimum amount of storage water that is required to be delivered in 2023 in order to comply with IGWA's existing obligations is 80,000 acre-feet, and IGWA has not demonstrated that it can deliver that amount to date.

Finally, it is implied by IGWA's filing that it believes that can deliver storage water pursuant to the Storage Water Plan and that is all that is required to mitigate in 2023. Storage water is but one component of the Settlement Agreement Plan. The *Second Addendum to Settlement Agreement* dated December 14, 2016 and adopted by the Director in *that Final Order Approving Amendment to Stipulated Mitigation Plan* dated May 9, 2017, states that "Prior to April 1 annually the Districts will submit to the Steering Committee....their proposed actions to be taken for the upcoming irrigation season, together with supporting information compiled by

the Districts’ consultants.” IGWA has not done so, and therefore has not complied with its mitigation obligations for 2023.

IGWA has not demonstrated that it can comply with its existing 2023 mitigation obligations pursuant to either the Storage Water Plan or the Settlement Agreement Plan. Further, IGWA cannot rely solely on the delivery of storage water to satisfy its mitigation obligations – it must comply with the terms of the Settlement Agreement Plan and the 2021 Settlement Agreement. For all of the foregoing reasons the Coalition requests that the Director enter an order determining that IGWA’s Amended Notice of Mitigation is deficient and does not comply with the orders of the Director.

DATED this 5th day of June, 2023.

MARTEN LAW LLP

/s/ Travis L. Thompson
Travis L. Thompson

*Attorneys for A&B Irrigation District,
Burley Irrigation District, Milner Irrigation
District, North Side Canal Company, and
Twin Falls Canal Company*

FLETCHER LAW OFFICE

/s/ W. Kent Fletcher
W. Kent Fletcher

*Attorneys for American Falls
Reservoir District #2 and Minidoka
Irrigation District*

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

<p>Director Gary Spackman Garrick Baxter Sarah Tschohl State of Idaho Dept. of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail</p> <p>gary.spackman@idwr.idaho.gov garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov file@idwr.idaho.gov</p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only</p> <p>mhoward@usbr.gov</p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only</p> <p>Tony.olenichak@idwr.idaho.gov</p>
<p>T.J. Budge Elisheva Patterson Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only</p> <p>tj@racineolson.com elisheva@racineolson.com</p>	<p>Sarah A. Klahn Max C. Bricker Diane Thompson Somach Simmons & Dunn 2033 11th St., Ste. 5 Boulder, CO 80302 *** service by electronic mail only</p> <p>sklahn@somachlaw.com mbricker@somachlaw.com dthompson@somachlaw.com</p>	<p>David Gehlert ENRD – DOJ 999 18th St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only</p> <p>david.gehlert@usdoj.gov</p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only</p> <p>rdiehl@pocatello.us</p>	<p>William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only</p> <p>wparsons@pmt.org</p>	<p>Corey Skinner IDWR – Southern Region 650 Addison Ave W, Ste. 500 Twin Falls, ID 83301-5858 *** service by electronic mail only</p> <p>corey.skinner@idwr.idaho.gov</p>
<p>W. Kent Fletcher Fletcher Law Offices P.O. Box 248 Burley, ID 83318 *** service by electronic mail only</p> <p>wkf@pmt.org</p>	<p>Kathleen Carr U.S. Dept. Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway, Ste. 400 Boise, ID 83706 *** service by electronic mail only</p> <p>kathleenmarion.carr@sol.doi.gov</p>	<p>Candice McHugh Chris M. Bromley McHugh Bromley, PLLC 380 South 4th Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only</p> <p>cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>

