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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
RESPONSE TO IGWA'S REPLY**

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 responds to *IGWA's Reply to SWC's Response to IGWA's Amended Notice of
Mitigation* dated June 6, 2023 ("IGWA Reply") as follows.

The IGWA Reply asserts two main points while ignoring whether IGWA has demonstrated that it can comply with existing mitigation plans and the Director's Orders. First, the IGWA Reply effectively states that the Director's Finding of Fact in the *Order Determining Deficiency in IGWA's Notice of Secured Water* ("Order") doesn't mean what it says. As pointed out earlier by the Coalition, the Director explicitly found that the Storage Water Mitigation Plan states "IGWA will mitigate for all ground water users, not just its members and non-member participants." That language would require IGWA to supply the entire injury amount of 75,200 acre-feet.

The IGWA Reply argues that since the Storage Water Mitigation Plan Order states "IGWA's obligation for mitigation shall be determined as set forth in the Methodology Order," IGWA's obligation is reduced to its proportionate share, even though IGWA has never attempted to amend the Storage Water Mitigation Plan Order and no order amending the Plan has been entered to reduce IGWA's obligation to less than what the Plan Order says. IGWA's interpretation is misguided - the amount of total injury is determined by the methodology orders, not IGWA's proportionate share of the Storage Water Plan. If IGWA is relying on the Storage Water Mitigation Plan to mitigate, it must mitigate for all ground water users, not just its members, in order to conform to the wording of the Plan.

Even if IGWA is correct in its interpretation, its mitigation submission is deficient. Under IGWA's interpretation, it would owe 62,635 acre-feet in 2023 mitigation water pursuant to the Storage Water Mitigation Plan. IGWA does not dispute that it also owes 30,000 acre-feet in 2023 to satisfy its obligation for its 2021 breach of the 2015 Settlement Agreement and Order entered by the Director approving that Agreement ("Settlement Agreement Plan"). To adequately

mitigate using IGWA's interpretation, IGWA must show the ability to provide a total of at least 92,635 acre-feet of mitigation water (*See 2022 breach below*), and it has not done so.

In the IGWA Reply, IGWA ignores the Settlement Agreement Plan. IGWA offers no argument as to why it can ignore that Plan, a plan approved by all of IGWA's member Ground Water Districts and approved by the Director. As stated in the *Surface Water Coalition's Response to IGWA's Amended Notice of Mitigation*, IGWA owes 50,000 acre-feet of mitigation storage water to the SWC every year, independent of injury determination. In consideration of this and the other required actions of the Settlement Agreement Plan, IGWA's member Ground Water Districts received safe harbor from all curtailment orders issued since the Settlement Agreement was approved by the Director until 2021, at which time the Director determined the Agreement was breached. To remedy the breach, IGWA agreed to furnish 30,000 acre-feet of storage water to the Coalition in 2023 to stop curtailment in 2022. Further, since 2016 IGWA's member Ground Water Districts have taken advantage of safe harbor, all the while SWC members were facing reduced supplies. Pursuant to the Settlement Agreement Plan and the breach Settlement Order, IGWA must demonstrate it can supply 80,000 acre-feet of mitigation water in 2023 and it has not done so.

Further, the SWC Response points out that IGWA has further breached the Settlement Agreement Plan by failing to submit to the Steering Committee its proposed actions to be taken for the upcoming irrigation season together with supporting information. In addition, a 2022 breach of the Settlement Agreement Plan is pending before the Director and in order to assure in-time, in-place mitigation, it is imperative that the 2022 breach be resolved. Again, SWC members endured short supplies in 2022 and uncertainty in 2023. Breaches of annual obligations impact SWC supplies for years into the future.

It is apparent that IGWA believes it can pick and choose which mitigation plan it can use to satisfy the Director's Orders. As shown in its original notice of mitigation, it attempted to mix and match plans, apparently because member Ground Water Districts could not agree on how to comply with mitigation, a proposal that was rejected by the Director. This was reinforced by the testimony of Lynn Carlquist last week – IGWA's members have not decided how to apportion mitigation obligations among themselves.

As further evidence that at least one Ground Water District's intention is to further breach the Settlement Agreement Plan, attached as Exhibit A is the *Declaration of Alan Jackson in Support of Motion to Stay Based on IDWR's Interference with Lawful Discovery* dated May 31, 2023, filed in the District Court of the Fourth Judicial District of the State of Idaho, Ada County, Case No. CV01-23-8306 ("Jackson Affidavit"). See Ex. A. In the Jackson Affidavit, Mr. Jackson states he is the manager of Bingham Ground Water District ("BGWD"). BGWD is a member of IGWA. In paragraph 14 of the Jackson Affidavit, Mr. Jackson states: "The feedback we had received from our patrons is that they would rather face curtailment from the State, than a voluntary curtailment under the newly interpreted settlement agreement" [referring to the Settlement Agreement Plan].

By ignoring the Settlement Agreement Plan and by failing to demonstrate that it can provide adequate mitigation storage water, IGWA is subjecting all of its member districts to a curtailment order pursuant to the provision of the Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 ("Conjunctive Management Rules"). IDAPA 37.03.11.040.05 states:

05. Curtailment of Use Where Diversions Not in Accord With Mitigation Plan or Mitigation Plan Is Not Effective. Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such approved plan or the plan fails to mitigate the material injury resulting from

diversion and use of water by holders of junior-priority water rights, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefiting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights.

CM Rule 40.

The Coalition would certainly prefer that IGWA comply with the Settlement Agreement Plan and the resulting partnership seeking to restore the ESPA groundwater levels. The Coalition has engaged in unsuccessful discussions with IGWA in attempts to amend the Plan and address IGWA's concerns with the Plan. However, if IGWA elects to ignore or breach the Plan, it is the position of the Coalition that the Director must enforce the terms of the Conjunctive Management Rules.

As stated in the Coalition's earlier response, it is the position of the Coalition that IGWA cannot ignore the comprehensive terms of the Settlement Agreement Plan and mitigate only with the Storage Water Mitigation Plan to satisfy its 2023 obligations. Further, IGWA must demonstrate that it can comply not only with the Settlement Agreement Plan, but that it can comply with the 2021 Settlement Agreement, and that IGWA is required to furnish a minimum of 80,000 acre-feet in mitigation water in 2023 to satisfy the storage water portions of the Settlement Agreement Plan and the Settlement Agreement. By failing to do so, IGWA is electing to subject itself to the remedial provisions of the Conjunctive Management Rules.

DATED this 12th day of June, 2023.

MARTEN LAW LLP

/s/ Travis L. Thompson
Travis L. Thompson

Attorneys for A&B Irrigation District et al.

FLETCHER LAW OFFICE

/s/ W. Kent Fletcher
W. Kent Fletcher

Attorneys for American Falls Reservoir District #2 et al.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

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/s/ Jessica Nielsen

Jessica Nielsen
Assistant for Travis L. Thompson

Exhibit

A

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CITY OF POCA TELLO, CITY OF IDAHO FALLS,
CITY OF BLISS, CITY OF BURLEY, CITY OF
CAREY, CITY OF DECLO, CITY OF DIETRICH,
CITY OF GOODING, CITY OF HAZELTON,
CITY OF HEYBURN, CITY OF JEROME, CITY
OF PAUL, CITY OF RICHFIELD, CITY OF
RUPERT, CITY OF SHOSHONE, CITY OF
WENDELL, IDAHO GROUND WATER
APPROPRIATORS, BINGHAM GROUND
WATER DISTRICT, BONNEVILLE-JEFFERSON
GROUND WATER DISTRICT, and MCCAIN
FOODS USA, INC.,

Petitioners,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES and GARY SPACKMAN, in his
capacity as Director of the Idaho Department of
Water Resources,

Respondents.

Case No. CV01-23-8306

**DECLARATION OF ALAN
JACKSON IN SUPPORT OF
MOTION TO STAY BASED ON
IDWR'S INTERFERENCE WITH
LAWFUL DISCOVERY**

IN THE MATTER OF THE DISTRIBUTION OF
WATER TO VARIOUS WATER RIGHTS HELD
BY AND 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

I Alan Jackson, declare and state as follows:

1. I am over the age of 18 and competent to testify. I have personal knowledge of the facts set forth herein and, if called upon as a witness, I could and would competently testify thereto.
2. I am the manager of Bingham Ground Water District (BGWD), a position I have held since April 2017.
3. In the spring of 2022 the SWC asserted that BGWD had breached the mitigation plan agreement because the pumping in 2021 exceeded what they interpreted as an annual limit, which was a baseline established subsequent to the agreement, and in the context of averaging yearly pumping to determine compliance with the mitigation plan.
4. Up to that point it was understood by BGWD that the annual limit would be measured on an average basis because of the difficulty in determining a single year pumping need and reduction. This approach is similar to other components of the agreement, and other agreements with SWC. However, the SWC pursued their claim of breach and ultimately the Director agreed that the plain language of the agreement stipulated an annual limit without averaging or cumulative benefit.
5. The baseline average was not mentioned in the settlement agreement, but the Director adopted it as a yearly limit, despite the fact that it included years where pumping requirements were much higher, and much lower than this baseline.

6. Upon analysis of the impact of an annual limit, which was based on a reduction from the average usage between 2010-2014, BGWD determined that in order to comply with the pumping limit, it would have to cease irrigation on at least as many acres as would have been curtailed during the worst projected demand shortfall. Roughly 30,000 acres, similar to a 1976 curtailment date.
7. The total volume of ground water pumping in BGWD on an annual basis fluctuates significantly depending on the crop water demand. It is expensive to pump water from the aquifer so care is taken to ensure that no more water is pumped than is required. This means that when crop water demands are above average there is very little room to meet a hard pumping limit through pumping reductions without causing crop damage, especially when the limit is based on an average. The only way to stay within limits is to reduce irrigated acres and the loss of planted acres during the season would be devastating to a farm operation. It is impossible to accurately predict the total crop water demand for a growing season so the only way to ensure that a hard pumping limit is met is to assume the highest crop water demand every year and only plant as many acres as are certain to have enough water.
8. The crop water demand in 2021 was among the highest ever which meant that ground water pumping was much higher than the average. Irrigators in BGWD diverted on average about 2 acre-feet per acre which led to a districtwide usage totaling about 60,000 acre-feet greater than the hard pumping limit in the agreement, as interpreted by the Director. Based on the 2 acre-foot per acre average usage BGWD would have had to reduce irrigated acres for the entire season by about 30,000 acres in order to comply with the pumping limit. Comparatively, the in-season demand curtailment in

2021, based on the 4th Methodology Order, would have curtailed 26,650 acres in BGWD with a curtailment date of June 14, 1977. Given the similarity in idled acres every year under both scenarios BGWD determined that the settlement agreement did not in fact offer any safe harbor. In fact the settlement agreement was worse than the result of the 4th Methodology Order because along with the similar acreage reduction it required the acquisition of a significant amount of reservoir storage every year to comply with the terms of the agreement.

9. Throughout the settlement process, BGWD voiced its concerns about the settlement agreement, and that its patrons felt that facing the curtailment each year was actually a better outcome than meeting the demands of the settlement agreement as interpreted by the Director. This was based on the number of acres that would be dried up, the inability to get storage water for mitigation purposes on dry years, and crop insurance implications due to an agreed reduction.
10. Multiple sources reported back to BGWD that this position was interpreted as ignoring any responsibility to the SWC or to help stabilize the aquifer because the Department would not actually curtail. Although this is not the position BGWD took, or had any intention of taking, it became a theme among political and state officials.
11. A meeting was held with department staff, elected officials, SWC and representatives of all other ground water districts to create a straw man for settlement talks. BGWD was the only ground water district not invited. We believe that this is because of BGWD's position on curtailment.

12. During settlement conferences with the SWC, BGWD repeated this comparison often. It was also explained during the winter 2023 negotiations to amend the settlement agreement in the presence of IDWR staff and multiple elected state officials.
13. Prior to beginning one session of the settlement conference, Lt. Governor Bedke had invited Director Spackman to speak. He explained that if people did not believe he would curtail, they would be wrong, because if he ordered curtailment, the department would follow through with it.
14. Again, BGWD took the opportunity to explain that it did not doubt the Director's resolve in issuing a curtailment. On the contrary, we were advising patrons and developing plans to prepare for curtailment if we were not able to mitigate through other means. The feedback we had received from our patrons is that they would rather face curtailment from the State, than a voluntary curtailment under the newly interpreted settlement agreement.
15. The fact that the methodology of using the steady state condition in the ground water model to determine curtailment was no worse than the Director's interpretation of the terms in the settlement agreement was obviously a hindrance to the winter negotiations in which the SWC was calling for even greater pumping reduction and/or more storage mitigation.
16. As depositions have progressed in this case, there has been no new technical evidence presented that would require the Department to switch from the steady state condition in the methodology order, to transient state condition when determining curtailment dates. In fact, the questioning has shown that they knew as much about the impacts of transient vs steady state 7 years ago as they do today. It has also been made clear that

the decision to switch to transient coincides with settlement talks this spring. Why did the Department feel the need for such a drastic overhaul of the methodology order in such a short window without any notice or due process consideration? Furthermore, why is the department limiting Groundwater users from discovering any information related to the Directors decision, other than technical information that seems static and unchanged for years?

17. It is easy to conclude that the Director's decision to switch to the transient model is in direct retaliation to BGWD's position that curtailment is better than the Director's interpretation of the settlement mitigation plan. BGWD patrons feel that they have repeatedly been threatened and manipulated to comply with settlement agreement obligations which are substantially different from what they understood upon entering into the agreement, while the Department is simultaneously implementing a manifold increase in the consequences of curtailment under the 5th Methodology Order. BGWD desires to understand the Director's decision to go to the transient model and any influence from within or without the Department that may have pressured him to so undermine our position in settlement negotiations, but his limitation on Discovery is not allowing us to do so.

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

Dated May 31, 2023

/s/ Alan Jackson
Alan Jackson,
Manager, Bingham Groundwater District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31th day of May, 2023, I caused to be filed a true and correct copy of the foregoing document via iCourt E-File and Serve, and upon such filing, the following parties were served via electronic mail:

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