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Attorney for Bingham Ground Water District (BGWD)

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

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

Docket No. CM-DC-2010-001

**NOTICE OF BINGHAM GROUND WATER DISTRICT
2024 MITIGATION**

The recent Final Order Regarding April 2024 Forecast Supply places ground water users in a precarious situation. The Department acknowledged our predicament in an April 19th press release, stating: “Despite past cooperation amongst surface and ground water users in managing this delivery call, there is currently much ongoing litigation following the drought years of 2021 and 2022. Because of this litigation over questions of past compliance, there is uncertainty about the legal applicability of IGWA’s previously approved mitigation plans.” Director Weaver has repeated that concern in public meetings over the last two weeks. The Bingham Ground Water District (BGWD) is committed to adhering to the Conjunctive Management Rules regarding calls from senior surface water users, but due to the legal uncertainty of both the 2015 and 2009 mitigation plans and because BGWD’s 2024 mitigation plan has yet to be given a hearing date, BGWD members have no approved path to mitigate their proportionate share of the predicted shortfall. At this time, we hope the Department will recognize earnest mitigation efforts as we ask the Director to stay any curtailment orders based on the following explanation.

Background

The current legal battles and diplomatic impasses we are facing began in 2022 when the SWC alleged a breach of the 2015 Settlement Agreement. Director Spackman, in finding that annual pumping reductions must be met every year, determined that the average baseline would become a cap from which all reductions must be measured. This ruling completely

disregards the fact that ground water pumping is dynamic, and that water requirements change from year to year, depending on a multitude of factors such as temperature and precipitation. This new benchmark would make compliance in some years nearly automatic with no incentive to reduce, while other years would necessitate nearly double the required reductions to stay in compliance. BGWD was only in breach when measured against this new benchmark. In years with high water requirements like 2021, there is no way to meet the required reductions without widespread curtailment within the District. Based on this fact it was determined that in a year like 2021, a reduction of over 29,000 acres in the District would have been needed in order to stay within compliance. By contrast the 6/14/1977 curtailment date under the 2021 Methodology Order would have curtailed fewer than 27,000 District acres. The fatal flaw of this new interpretation is that, at the time of planting, ground water users cannot predict the impacts of variable weather conditions on the season's ground water pumping. The only way to guarantee compliance would be to plan for the highest demand *every year* and shut off nearly 30,000 acres of groundwater. This combined with the 50,000-acre-foot storage water requirement means the Settlement Agreement offered safe harbor at a cost much higher than curtailment. Furthermore, the SWC has recently alleged breach of the aquifer recovery targets under the Settlement Agreement and called for "adaptive measures" which will only translate into more storage mitigation and deeper pumping reductions.

The lack of actual safe harbor under the 2015 Settlement Agreement was explained during negotiations in February 2023. In April 2023 the Director, without warning, changed the methodology to use the transient response function rather than steady state to determine curtailment, which resulted in much earlier curtailment dates. BGWD members still do not understand why that change came when it did, and why it came the way it did. The Director refused to elaborate on, or allow any questions regarding, his deliberative process during the hearing which was subsequent to the order. This change made curtailment more devastating, but did nothing to make compliance with the Settlement Agreement more attainable.

In August 2023 the Director found BGWD in breach of the Settlement Agreement, though no curtailment was ordered due to the absence of injury to the SWC. The SWC has challenged the Director's response and asked for more penalties. Additionally, the SWC recently alleged another breach because of the plan's failure to meet the sentinel well benchmarks. Faced with another inevitable breach, on top of the limitations already outlined, BGWD cannot mitigate under the 2015 Settlement Agreement.

IGWA members did not mitigate under the Settlement Agreement in 2023, but instead utilized the 2009 mitigation plan which relies on reservoir storage to offset injury (although one IGWA member takes a different position regarding the 2009 mitigation plan). Last year, ground water districts spent millions of dollars on storage water that, ultimately, was unneeded, and this year has the potential of playing out the same way. BGWD currently has 8,590 acre-feet of storage under contract to use for mitigation purposes (see Lease Agreement, Exhibit A); however, BGWD does not have the budget, or the support of its members, to spend millions of dollars on unneeded storage water. In addition to the legality of the plan being brought into question by a preliminary ruling from Hearing Officer Burdick, the Department has also ruled that the 2009

mitigation plan does not allow members to mitigate for their proportionate share, but rather requires that the participant(s) cover the full injury amount in order for any district to receive protection from curtailment. Because one member of IGWA has taken the position that the 2009 plan is no longer active, and will not participate in that plan, it does not appear to be an option for mitigation.

This has left BGWD, and all ground water districts, in a precarious state. Foreseeing such a circumstance, ground water districts filed individual mitigation plans in December 2023 and January 2024. Against the wishes of BGWD, there is still no date for a hearing for our mitigation plan. It is frustrating that when the Department wants to change the methodology, have an expedited hearing, or provide the SWC with a hearing to challenge the Department's ruling on a 2022 breach, these hearings are held over the objection of ground water users, but when ground water districts need a hearing on a mitigation plan in hopes of avoiding massive curtailment, it is delayed indefinitely.

At this time, BGWD has no assurance that an approved mitigation plan is available, and no hearing date to hear our proposed mitigation plan. A plan, by the way, which offers the most aggressive reduction of ground water irrigated acreage ever proposed in a mitigation plan. BGWD must ask that any order on curtailment be stayed because of the outstanding legal questions surrounding all mitigation plans – the same reason the Department has given for delaying a hearing for BGWD's mitigation plan.

In the meantime, BGWD has completed approximately 26,000 acre-feet of recharge within District boundaries, and recharge is ongoing. BGWD members have also completed over 2,200 acres of conversions, and there are over 3,600 acres of fallowed ground in the district, which includes 2,461 acres enrolled in CREP (see Affidavit Exhibit B). BGWD is engaged in the most aggressive and revolutionary initiative in Idaho to implement telemetry and automation to both better understand the aquifer response to ground water pumping and to facilitate conversions from ground water to surface water. BGWD members are proud to be among the most efficient water users in the State, adding hundreds of millions of dollars annually to the State's economy. If the Director will not stay a curtailment order until legal decisions have been issued and ground water districts' mitigation plans can be heard, then over 103,000 acres of individually-owned ground water rights are at risk of curtailment within BGWD boundaries.

In consideration of the above, BGWD proposes the following alternatives:

1. The Department, citing the extreme uncertainty and impossibility of mitigation due to legal rulings and different positions of IGWA members, will delay curtailment orders until the legal questions surrounding current and proposed mitigation plans can be answered.
2. The Department will allow BGWD to mitigate under its proposed mitigation plan, CM-MP-2024-001, on an interim basis, pending approval.
3. The Director will take into account BGWD's conversion of 2,254 acres of ground water-irrigated land, 2,461 acres enrolled in CREP, and 26,432 acre-feet of recharge to determine a mitigation credit under the CM-MP-2009-006 mitigation plan, and accept

8,590 acre-feet of storage water as sufficient to demonstrate adequate ability to mitigate a shortfall, should there be one at the end of the year.

DATED this 2nd day of May 2024,

 /s/ Dylan Anderson .

Dylan Anderson

Attorney for Bingham Ground Water District

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2024, I served the foregoing document on the persons below via email or as otherwise indicated:

/s/ Dylan Anderson
Dylan Anderson
Attorney for Bingham Ground Water District

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