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DEPARTMENT OF
WATER RESOURCES

John K. Simpson, ISB#4242
Travis L. Thompson, ISB#6168
Abby R. Bitzenburg, ISB#12198
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
abitzenburg@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	DC **Docket No. CM-~~MP~~-2010-001** **SURFACE WATER COALITION'S RESPONSE TO IGWA'S CONDITIONAL NOTICE OF MITIGATION COMPLIANCE / PETITION FOR RECONSIDERATION**

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 (hereafter collectively referred to as "Surface Water Coalition" "SWC" or "Coalition"), by and through counsel of record, and pursuant to IDAPA 37.01.01.220.b and the Director's May 17, 2024 *Order Shortening Time to Respond*, hereby

submit this response to *IGWA's Conditional Notice of Mitigation Compliance; Petition for Reconsideration; and Request for Expedited Decision* ("*Second Petition*")[1] filed by the Idaho Ground Water Appropriators, Inc. ("IGWA") on May 14, 2024.

RESPONSE

I. The Director's Continued Delay in Conjunctive Administration is Troubling and Prejudicial to SWC.

The Director issued the Steps 1-3 Order on April 18, 2024. The ground water districts were "ordered" to establish, "to the satisfaction of the Director," that they could mitigate the predicted in-season demand shortfall of 74,100 acre-feet with a secured volume of water pursuant to an approved mitigation plan "on or before May 2, 2024." *See 2024 Steps 1-3 Order* at 6 (emphasis added). The Districts[2] failed to establish they could meet the Director's ordered mitigation. *See Order Determining Deficiency in IGWA's Notice of Secured Water* ("*Deficiency Order*"). Given that failure the SWC expected the Director would have issued a curtailment order and notice no later than May 3, 2024. No such order was issued and instead the Director waited until May 10, 2024 to issue the *Deficiency Order*. Each day that passes without enforcement and administration of the Director's orders simply means that non-complying junior ground water users will continue to pump additional groundwater out-of-priority without consequence.

Although the Director concluded the Districts did not comply with the *2024 Steps 1-3 Order*, he gave the Districts another two weeks, until May 17, 2024, to submit an additional

[1] Despite the individual notices of mitigation, the eight individual ground water districts are apparently represented by IGWA in the *Second Petition*. The districts have individually appeared through separate counsel but are now taking a different approach in the present filing through IGWA. To avoid multiple filings and avoid future confusion the Director should require these entities to clarify who is representing who in this case and for what purpose.

[2] The reference herein does not include American Falls-Aberdeen Ground Water District which provided notice that it intends to continue to implement the 2016 Plan in 2024.

notice of compliance. *See Deficiency Order* at 11. Rather than comply as ordered, the Districts yet again submitted a deficient "conditional notice" on May 14, 2024. Apparently, the Districts now believe they can dictate the terms of complying with the Director's orders. Instead of issuing a curtailment notice in response to the Districts' defiant filing, the Director yet again delayed action and issued the *Order Shortening Time* indicating he would not issue a curtailment order until after the response period closes on Friday May 24, 2024. Given the upcoming holiday weekend, the Coalition speculates the earliest the Director would issue an order is Tuesday May 28, 2024, or nearly a month after the original May 2nd deadline. The only party prejudiced by this delay is the Surface Water Coalition and their members' senior priority surface water rights. If the Districts cannot comply with the Director's orders, allowing those junior ground water users to pump out-of-priority for an additional month stands to only further injure the Coalition's senior water rights. The Director should, at a minimum, issue orders regarding the Districts' non-compliance as soon as possible and consider the additional groundwater pumping that has occurred since May 2nd for purposes of any curtailment date to ensure the predicted injury is fully mitigated. Specifically, if the original curtailment priority date listed in the *2024 Steps 1-3 Order* assumed those water rights would be curtailed for the entire irrigation season, that will clearly not happen given the delay in action. Any revised priority date must take into account the pumping that has occurred from the beginning of the irrigation season (i.e. April 1 or 15).

Moreover, the Director's current actions on this issue are directly at odds with the District Court's prior decision. In the *Memorandum Decision* reviewing the Director's 2010 order approving IGWA's 2009 Plan, the Court found:

> With respect to the procedures for determining IGWA's obligation for mitigation in a given year, as well as the deadlines by which IGWA has to prove its pre-irrigation season commitment to the Director, the *Order* incorporates those procedures and deadlines set forth in the *Methodology Order*.

> * * *
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> The replacement water is secured with a contract for the commitment of water at the beginning of the irrigation season as opposed to merely an accounting of the shortfall owed. The failure to provide proof of such commitment results in curtailment or partial curtailment **at the outset of the irrigation season pursuant to a firm deadline**. Curtailment in accordance with the deadlines at the outset of the irrigation season will satisfy the contingency requirement in the event replacement water is not secured.
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> Accordingly, the Court cannot find that the Director acted arbitrarily, capriciously, or abused his discretion in approving the *Mitigation Plan* for an indefinite period provided the conditions are met and the deadlines are **strictly enforced** should curtailment or partial curtailment become necessary.

Memorandum Decision at 11, 17-19 (emphasis added).

The Director's continued delay does not adhere to the Court's "firm deadline" or the requirement that such deadlines must be "strictly enforced." To the detriment of the Coalition, the Director is not honoring the District Court's order that the Director "strictly enforce" his own deadlines regarding the 2009 Plan. Consequently, the parties are left with additional weeks of uncertainty that will apparently continue for the foreseeable future. The Director should at a minimum enforce the prior orders and decisions of the District Court in this regard.[3] Since the Districts failed to meet the May 2nd deadline and now proposed to "conditionally" provide additional notice, the Director should enforce his prior orders accordingly without delay. In the end, if the Director is going to allow the Districts to use the 2009 Plan in 2024 at a minimum he must implement that plan as previously ordered. To date that has not been done.

[3] This assumes the 2009 Plan is available for the Districts to implement. The Coalition disputes this contention and reserves all rights concerning the Director's action in this regard. The viability of the 2009 Plan was at issue before Hearing Officer Burdick and he issues a summary judgment decision concluding it was not an option for the Districts. The Coalition's arguments on the substance of IGWA's petition are provided herein for argument's sake without waiving any rights as to the pending recommended order from Hearing Officer Burdick.

II. IGWA's Second Petition for Reconsideration Should be Denied.

IDWR's rules of procedure authorize a single motion for reconsideration. *See* IDAPA 37.01.01.740.02.b. The Director's *Deficiency Order* and *Final Order Denying IGWA's Petition for Reconsideration of April As-Applied Order* were issued as "final orders." Notwithstanding the rule, IGWA filed an unauthorized "second" petition for reconsideration that the Director will now apparently consider. *See generally, Second Petition*; *Order Shortening Time* . The procedural delay is not authorized by Idaho law and the Director should dismiss IGWA's *Second Petition* outright. Again, the Director's reaction to IGWA's filing is troubling as the continued delay benefits non-complying junior ground water users to the detriment of the SWC.

As to the substance, IGWA believes that section 42-5224(11) provides the Districts with an "end around" the Director's prior final orders concerning the 2009 Mitigation Plan.[4] IGWA believes that under the statute they can only "mitigate any material injury caused by ground water use within the district." *Second Petition* at 2. The Director has previously found that IGWA proposed to "mitigate any and all material injury by guaranteeing and underwriting the senior water user's water supply" and that the "Mitigation Plan will fully mitigate and compensate the senior water user for material injury." *Deficiency Order* at 4. The former Director made the same finding. *See Order Determining Deficiency in IGWA's Notice of Secured Water* at 4 (May 23, 2023). In that decision former Director Spackman noted that "[t]he *Order Approving Mitigation Plan* issued on June 3, 2010, makes clear that any obligation determined will be set based on the amount of shortfall determined through the methodology order process . . . [the *Order*] makes clear that if IGWA does not provide the required storage, all ground water rights

[4] The Coalition disputes the Director's initial decision to allow the Districts to try and mitigate with the 2009 Plan at the outset of the 2024 irrigation season. Hearing Officer Burdick issued an order on summary judgment that presumably will be part of the final recommended order to the Director that is still pending. Post-hearing briefing was submitted in that matter on April 8, 2024.

are subject to curtailment." *Id.* IGWA did not ask for a hearing on the Director's May 23, 2023 Order. Moreover, IGWA never appealed the underlying *Order Approving Mitigation Plan* that was issued years ago back in 2010. Although the Coalition appealed that order, it was confirmed on judicial review by Judge Wildman. *See Memorandum Decision and Order on Petition for Judicial Review* (Twin Falls Dist. Ct., Fifth Jud. Dist., Case No. CV-2010-3075).

If IGWA disagreed with the Director's final order issued in 2010 or the District Court's decision it should have appealed the same. IGWA cannot now, some fourteen years later, argue the orders are in error, or should be amended, based upon the ground water district statute (section 42-5224).[5] The doctrines of *res judicata* and waiver preclude IGWA from re-litigating the Director's decisions now. As for *res judicata*, the matter involves the same parties (SWC, IGWA, and IDWR), there was a final judgment on the merits concerning IGWA's 2009 Plan (District Court's 2010 decision), and that decision bars IGWA from re-litigating that issue now. *See Monitor Finance, L.C. v. Wildlife Ridge Estates, LLC*, 164 Idaho 555, 560, 433 P.3d 183, 188 (2019). Regarding "waiver," IGWA waived any right to claim a statutory defense based upon the Ground Water District Act when it intentionally filed the 2009 Storage Plan and claimed that it would "mitigate for any and all material injury." *See Deficiency Order* at 4. IDWR and the Director relied upon this representation in its approval of the plan. SWC is also entitled to rely upon IGWA's prior representations and waiver of any statutory argument given the Director's conditional approval and the subsequent District Court decision. IGWA cannot change its position years later just because it now disagrees with the Director's decision. *See Knipe Land Co. v. Robertson*, 151 Idaho 449, 457-58, 259 P.3d 595, 603-04 (2011).

[5] The language IGWA relies upon in section 42-5224(11) was part of the original Ground Water District Act passed in 1995. *See* 199 Idaho Sess. Law, Chp. 290, § 1, p. 994. Had IGWA believed this statute was applicable to its mitigation plan or the Director's order approving the same IGWA had an opportunity to raise that argument back in 2010. IGWA made no such claim at the time.

Finally, any issues concerning the District's implementation of the 2009 Plan and the Director's prior orders regarding the same are moot in light of Hearing Officer Burdick's *Order on Motions for Partial Summary Judgment* (March 12, 2023). Although the parties are still waiting for the recommended order and the Director's final order in that case, the Director has the ability to apply the reasoning and analysis to IGWA's present arguments as they seek to yet again breach the 2016 Plan during the 2024 irrigation season. It is the Coalition's position that the 2016 Plan superseded the Districts' prior mitigation plans and that the Director approved the plan on the representation the Districts would implement the plan from that point forward. The Districts did just that and used it to obtain safe harbor from 2016 through 2023. Although the Districts attempted to partially mitigate under the 2009 Plan in 2023 they ultimately delivered the full 50,000 acre-feet to the Coalition and presumably performed the 240,000 acre-foot conservation obligation (based upon the preliminary performance reports submitted in April).

Why the Districts would not continue to perform under the 2016 Plan and instead seek safe harbor under a superseded plan is beyond comprehension. The Districts' actions are particularly questionable as they are not even complying with the Director's orders on the 2009 Plan and instead have provided "conditional notice" attempting to dictate the terms of mitigation and conjunctive administration altogether. The Districts have essentially backed the Director into a corner and are daring him to perform his duties under Idaho law. The Coalition urges the Director to follow the clear mandate under Idaho law and act accordingly.

CONCLUSION

The Director should deny IGWA's "second petition" and confirm the Districts' non-compliance with the ordered deadlines previously set in the *Sixth Methodology Order* and the *2024 Steps 1-3 Order*. IGWA's "conditional notice" is nothing more than an affront to the Department's authority to administer water rights pursuant to Idaho law and should be rejected

outright. The continued delay is not warranted and only stands to prejudice the Coalition's senior water rights.

DATED this 23rd day of May, 2024.

MARTEN LAW LLP

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

for

W. Kent Fletcher

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

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2024, I served a true and correct copy of the foregoing *Surface Water Coalition's Response to IGWA's Conditional Notice of Mitigation Compliance / Petition for Reconsideration* on the following by the method indicated:

Director Mat Weaver Garrick Baxter Sarah Tschohl Idaho Dept. of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail mat.weaver@idwr.idaho.gov garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov file@idwr.idaho.gov	Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only mhoward@usbr.gov	Craig Chandler IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only craig.chandler@idwr.idaho.gov
T.J. Budge Elisheva Patterson Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only tj@racineolson.com elisheva@racineolson.com	Sarah A. Klahn Max C. Bricker Veva Francisco Somach Simmons & Dunn 1155 Canyon St., Suite 110 Boulder, CO 80302 *** service by electronic mail only sklahn@somachlaw.com mbricker@somachlaw.com vfrancisco@somachlaw.com	David Gehlert ENRD – DOJ 999 18th St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only david.gehlert@usdoj.gov
Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only rdiehl@pocatello.us	William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only wparsons@pmt.org	Corey Skinner IDWR – Southern Region 650 Addison Ave W, Ste. 500 Twin Falls, ID 83301-5858 *** service by electronic mail only corey.skinner@idwr.idaho.gov
W. Kent Fletcher Fletcher Law Offices P.O. Box 248 Burley, ID 83318 *** service by electronic mail only wkf@pmt.org	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 kathleenmarion.carr@sol.doi.gov	Candice McHugh Chris M. Bromley McHugh Bromley, PLLC 380 South 4th Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only cbromley@mchughbromley.com cmchugh@mchughbromley.com
Robert E. Williams Williams, Meservy & Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only rewilliams@wmlattys.com	Robert L. Harris Holden, Kidwell, Hahn & Crapo, PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only rharris@holdenlegal.com	Michael A. Kirkham City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only mkirkham@idahofallsidaho.gov

Skyler Johns Steven Taggart Nathan Olsen Olsen Taggart PLLC P.O. Box 3005 Idaho Falls, ID 83403 *** service by electronic mail only sjohns@olsentaggart.com staggart@olsentaggart.com nolsen@olsentaggart.com	Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, ID 83440 *** service by electronic mail only dylan@dylanandersonlaw.com	

Travis L. Thompson