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DEPARTMENT OF
WATER RESOURCES

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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

**BGWD'S RESPONSE TO AFA'S MOTION FOR
RECONSIDERATION OF ORDER DETERMINING
DEFICIENCY IN NOTICES OF SECURED WATER.**

Bingham Ground Water District, through counsel, files the following brief in response of American Falls-Aberdeen Ground Water District's (AFA) *Motion for Reconsideration of Order Determining Deficiency in Notices of Secured Water*.

Safe Harbor Under the 2016 Plan is Not Contingent Upon the Showings Required Under the 2024 Steps 1-3 Order, but the Amount to be Mitigated Should Be Established.

The *Order Determining Deficiency in Notices of Secured Water* ("Order Determining Deficiency") specifies that the 50,000 acre-feet required under the 2016 settlement agreement is a prerequisite for any district to receive safe harbor under that plan. Although the Director has never required ground water districts mitigating under that plan to provide proof of storage water, the fact that only one district is mitigating under this plan does make the Director's concerns warranted. The Director made clear that for AFA to mitigate under the 2016 plan, the

entire 50,000 acre-feet must be delivered. It appears now that in addition to objecting to the requirement to provide proof of the 50,000 acre-feet, AFA is asking that it be allowed to only provide its proportionate share to avoid curtailment. If this is the case, it should be clear what AFA's proportionate share of the 50,000 acre-feet is.

In past orders, the Director has never addressed the issue of an individual ground water district's proportionate share of the 50,000-acre-foot requirement because SWC had never alleged a breach of that requirement. AFA seems to contend that it should be allowed to mitigate its proportionate share only, with the idea that all other ground water districts will ultimately be found in breach and assessed their proportionate share. In this way, AFA will have individually mitigated through the 2016 plan in practice. Bingham Ground Water District (BGWD) does not object to AFA mitigating under the 2016 plan or simply providing its proportionate share. It doesn't appear the mitigation plan allows for such a thing, but BGWD would not object if there were some legal way to do it. However, BGWD objects to the idea that such actions would initiate obligations on other ground water districts related to the 50,000 acre-feet or any other obligations of the 2016 plan. Certainly, the Department will not take this position after presenting ground water districts the option to mitigate under the 2009 plan. Such an action would result in double benefits to SWC, and a loss of credibility to the Department.

SWC states in its Response to AFA's motion for Reconsideration that it is not concerned about the apportionment of the 50,000 acre-feet of storage, or the apportionment for "adaptive management." This is the prerogative of SWC, but it seems to be couched in a position that they believe they can come after other ground water districts for any shortfall. In this point, BGWD takes issue.

Proportionate Obligations are Not Established. However, Regardless of Proportionate Obligations, Proportionate Impacts can be Established

AFA continues to contend that its obligations are set, and its proportionate share is established. IGWA allocated the 50,000 acre-feet and pumping reduction requirement under the 2016 mitigation plan using historical pumping, rather than impacts. There are various contentions among IGWA whether this allocation is sustainable or would continue as obligations under the 2016 plan increase. Ground water districts, in light of how the 2016 settlement agreement has been interpreted, have now decided to mitigate under the 2009 mitigation plan. The allocation among IGWA members is still disputed and in flux. Currently, there is a verbal agreement to divide up proportionate obligations among participating districts using the steady state model, as the Department did last year. It is yet to be seen if that model would be accepted going forward. However, the various methods of determining proportionate share of mitigation are less relevant than the proportionate share of injury.

BGWD does not have a large concern about what AFA's proportionate storage water and reduction obligations are. BGWD is more concerned with AFA's proportionate share of the injury. In other words, what AFA does and what SWC accepts as mitigation are not as important as the amount of injury covered by that mitigation. Whatever AFA provides as mitigation must take the place of AFA's share of the injury, regardless of how well any mitigation affects actual injury. Perhaps AFA's proportionate share of the 2016 plan is sufficient to mitigate its proportionate injury; perhaps it is not. In any event, SWC's acceptance of mitigation from AFA, regardless of what their proportionate share is determined to be, must be for AFA's proportionate impacts. If there is a shortfall between AFA's proportionate share of mitigation and proportionate impact, SWC must accept that shortfall. It cannot, as it has attempted to do with

other districts, accept mitigation from one district and continue to demand mitigation for full injury from other districts or from IGWA. An ad hoc “collateral source rule” applied to mitigation injury creates a windfall for SWC. It allows SWC to create sweetheart deals with some ground water users while shifting the burden to others. This essentially makes SWC the arbiter of winners and losers among ground water pumpers. Such a practice circumvents the priority doctrine and conjunctive management rules. A sweetheart deal related to *mitigation* allocation should not result in a sweetheart deal related to *injury* allocation by offloading the injury obligation of other Districts.

Mitigation Practices for One District Should be Available to All Districts

Accepting a “sweetheart deal” from one district and shifting the burden to remaining districts is not the only way SWC can create a windfall, pick winners and losers, or circumvent the rules. Allowing one district to mitigate in a certain way while not allowing another district to mitigate in that same way is, likewise, prejudicial. For example, if SWC accepts storage water to mitigate for a district’s proportionate share of the injury but does not allow other districts to do so, then SWC would be allowed to pick winners and losers. If SWC allows one district to mitigate through cash compensation but not another district, then SWC would be allowed to pick winners and losers. If SWC allowed one district to mitigate through excess surface water return flows but not another district, this again would allow SWC to pick winners and losers. BGWD is not opposed to other districts striking deals with SWC. But that cannot mean the unmitigated burden is shifted to other districts.

Conclusion

In sum, BGWD does not object to AFA’s desire to mitigate with its proportionate share under the 2016 plan, but only on the condition that AFA’s proportionate impact on the injury is

not otherwise redistributed to other districts. If AFA's proportionate share under the 2016 plan mitigates for their whole proportionate injury, good for SWC. If it does not, good for AFA, but SWC must bear the brunt of any deficit, not other ground water districts. What's more, no future obligations under the 2016 plan should be redirected to other ground water users. If AFA decides to mitigate under the 2016 plan and the Department accepts that option to avoid curtailment, then it must do so knowing that AFA is acting on its own. AFA and SWC support cannot be used as an end-run to double benefits by forcing districts to comply with the 2016 mitigation plan after having already mitigated with the 2009 mitigation plan.

DATED this 24th day of May 2024,

/s/ Dylan Anderson
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Attorney for Bingham Ground Water District

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2024, I served the foregoing document on the persons below via email or as otherwise indicated:

/s/ Dylan Anderson
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