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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 Nos. CM-DC-2010-001
~~CM-MP-2016-001~~

**RESPONSE TO AMERICAN FALLS-
ABERDEEN GROUND WATER DISTRICT'S
MOTION FOR RECONSIDERATION OF
ORDER DETERMINING DEFICIENCY IN
NOTICES OF SECURED WATER**

North Snake Ground Water District and Magic Valley Ground Water District (“MV,” “NS,” or the “Districts”), through undersigned counsel and pursuant to IDAPA 37.01.01.220.02.b, collectively submit this response to American Falls-Aberdeen Ground Water District’s (“AFA”) *Motion for Reconsideration of Order Determining Deficiency in Notices of Secured Water* (May 17, 2024) (“Motion”).

**I.
BACKGROUND**

On May 10, 2024, the Director issued his *Order Determining Deficiency in Notices of Secured Water* (“Order”) in response to several notices of proposed mitigation filed by individual IGWA member groundwater districts. In response to the Order, IGWA filed its *Conditional Notice*

of Mitigation Compliance; Petition for Reconsideration; and Request for Expedited Decision (May 14, 2024) (“Mitigation Notice”) and a *Notice of Storage Water Leases* (May 17, 2024) (“Lease Notice”) on behalf of eight of its member groundwater districts (excluding AFA).

Regarding NS and MV in particular, the Mitigation Notice and the Lease Notice were outgrowths of their prior *Joint Notice of Compliance—Magic Valley Ground Water District & North Snake Ground Water District’s 2024 Irrigation Season Mitigation Commitments* (May 2, 2024) (“Joint Notice”) in that NS and MV remain committed to mitigating their respective, proportionate shares of the April 2024-predicted IDS of 74,100 AF attributed to the Twin Falls Canal Company. The difference between the Joint Notice and Lease Notice being, however, a collective storage water delivery commitment of 13,907 AF in the Lease Notice (MV: 10,638 AF and NS: 3,269 AF), as opposed to the collective 15,590 AF contained in the Joint Notice owing to application of Idaho Code Section 42-5224 (which question—the impact of Section 42-5224 on the sharing of the 74,100 AF predicted IDS—is still pending decision by the Director). *Compare* Joint Notice, pp. 2-3 and Lease Notice, p. 2; *see also*, Mitigation Notice, and the Director’s *Order Shortening Time to Respond* (May 17, 2024).

The Districts, among others, chose to proceed under the 2009 Storage Water Plan (CM-MP-2009-007) given the plan’s ongoing (at least in the interim) viability for the 2024 irrigation season. *See, e.g., Final Order Regarding April 2024 Forecast Supply Methodology Steps 1 – 3* (Apr. 18, 2024) (“April IDS Order”), pp. 5-6, Note 8. For its part, AFA seeks 2024 irrigation season safe harbor under the 2016 IGWA Mitigation Plan (CM-MP-2016-001). *See, e.g., Motion, generally*. The Surface Water Coalition (“SWC”) supports AFA’s proposal under the 2016 Plan, but not those of the remaining groundwater districts proceeding under the 2009 Storage Water

Plan. *Surface Water Coalition’s Response to American Falls-Aberdeen Ground Water District’s Motion for Reconsideration* (May 17, 2024) (“SWC Response”).

II. ARGUMENT

A. The Concept of Proportionate Sharing of Mitigation Obligation—Regardless of Mitigation Plan—Is the Correct Approach

As a threshold matter, it seems all parties agree that ultimate fairness dictates that the groundwater districts mitigate for their proportionate share of the material injury attributable to their, respective pumping. This share-based outcome is what NS and MV propose. *See* Joint Notice. This (or at least a) share-based outcome is also sought by IGWA, AFA, and the SWC (albeit that AFA and the SWC propose and condone a share-based approach under the 2016 IGWA Mitigation Plan only). *See* Mitigation Notice; Lease Notice; Motion; and SWC Response.

An individualized, share-based outcome is consistent with applicable law. *See, e.g.*, IDAPA 37.03.11.010.14 (determining material injury water right to water right, owner to owner); 37.03.11.020.02 (engrafting all elements of Idaho’s prior appropriation doctrine including, therefore, the share-based concepts espoused by Judge Wildman in *Cities of Bliss, et al.*, below); 37.03.11.020.04 (authorizing delivery calls against “the holder of a junior-priority water right” where exercise of “the junior-priority water right causes material injury”); *see also, Cities of Bliss, et al. v Spackman*, Minidoka County Case No. CV-2015-172, *Memorandum Decision & Order* (Sept. 8, 2015), pp. 7-8 (“[A] stipulated plan cannot transfer or impose upon any non-stipulating junior any portion of the total mitigation obligation attributable to the stipulating junior’s diversion.”); p. 10 (Under IDAPA 37.03.11.010.15, the focus of mitigation is individual—a plan designed to offset injury actually caused by the junior’s (“his”) water use. Consequently, “an offending junior is only responsible for mitigating that portion of the senior’s material injury

attributable to his offending diversion. If successful, the mitigating junior has satisfied his legal obligation to the senior and may avoid curtailment as a matter of law.”); and I.C. § 42-5224(11) (groundwater districts are authorized to develop and implement mitigation plans to mitigate material injury to seniors “caused by ground water use within the district”).

Finally, and notwithstanding AFA and the SWC’s current position, the proposed use of proportionate share-based storage water delivery as mitigation is also well-worn and well-accepted by both IDWR and the SWC. *See, e.g., Final Order Approving Mitigation Plan* (Dec. 16, 2015) (CM-MP-2015-003; A&B Irrigation District), *Falls Irrigation District Letter to WD 01 Watermaster* (Apr. 30, 2024) (CM-DC-2010-001), and *A&B Irrigation District Letter to the Director* (May 1, 2024) (CM-DC-2010-001).

B. The Districts Object to AFA’s Proposed Proportioning of Obligations Under the 2016 IGWA Mitigation Plan

AFA’s proposed mitigation approach during the 2024 irrigation season, as the Districts understand it, is to proceed under the approved 2016 IGWA Mitigation Plan (CM-MP-2016-001), but to do so based on shares “historically” developed (or “divided”) internally amongst IGWA districts between 2016 and 2022 under the ESPAM 2.1 and 2.2 steady-state model rubric, and further used by the Director in his *Amended Final Order Regarding Compliance With Approved Mitigation Plan* (Apr. 24, 2023) (CM-MP-2016-001) (“Compliance Order”), Table 2. Motion, p. 6, Note 12; *see also, Declaration of Timothy P. Deeg in Support of AFA’s Motion for Reconsideration of Order Determining Deficiency in Notices of Secured Water* (May 17, 2024) (“Deeg Dec.”).

The Districts neither agree, nor concede, that: (a) AFA’s proportionate share of the 50,000 AF storage water delivery obligation is merely 8,705 AF; or (b) AFA’s proportionate share of the 240,000 AF conservation/pumping reduction obligation is only 16.4% (or 39,395 AF) as

previously applied by the Director at Table 2 of the Compliance Order. *See* Motion, p. 6, Note 10; *see also* AFA’s 2023 Performance Report, dated April 1, 2024 referenced in Note 10 and attached hereto as **Exhibit A**.¹

The Districts disagree with AFA’s proposed apportionment of obligations under the 2015 Agreement (and 2016 Mitigation Plan) because it is stale and finds no support under either the now-applicable transient modeling regime under ESPAM 2.2, or the Director’s present interpretation and application of the 2015 Agreement and the resultant 2016 Mitigation Plan. *See and accord Fifth Amended Final Order Regarding Methodology For Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (Apr. 21, 2023), FOF Nos. 81-89, and Order ¶¶ 3, 13, 16, and 20 (deploying transient ESPAM 2.2 modeling to replace prior steady-state model runs under ESPAM 2.1 and 2.2); *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1 – 3)* (Apr. 21, 2023), FOF Nos. 15-16 and COL No. 3 (applying transient modeling under ESPAM 2.2 as the best available science); and *Final Order Regarding April 2024 Forecast Supply (Methodology Steps 1 – 3)* (Apr. 18, 2024), FOF 16 and COL 3 (likewise, applying transient modeling under ESPAM 2.2 as the best available science).²

¹ AFA also seemingly applies this Compliance Order-based 16.4% “share” to the Director’s additional requirements under his *Final Order Specifying Additional Actions* (May 3, 2024) (*i.e.*, agreeing to 2024 conservation/pumping reductions of 41,328 AF (or 16.4% of the new, increased obligation of 252,000 AF imposed by the Director in his order as an adaptive management measure). Motion, p. 6, Note 13.

² Steady-state modeling under ESPAM 2.1 last occurred in April 2021. *Final Order Regarding April 2021 Forecast Supply (Methodology Steps 1 – 3)* (Apr. 19, 2021), FOF 15, including Note 4. ESPAM 2.2 was deployed under methodology steps 1 thru 3 beginning in April 2022, but still in a steady-state application. *Final Order Regarding April 2022 Forecast Supply (Methodology Steps 1 – 3)* (Apr. 20, 2022), FOF Nos. 15-16, COL No. 3. Transient modeling under ESPAM 2.2 under methodology steps 1 thru 3 began in April 2023. *See* above.

The 2016 Mitigation Plan does not define each district's proportionate share of the 240,000 AF conservation obligation. The Director assigned AFA a "re-proportioning" share of 16.4% based on IGWA performance reports submitted from 2016 thru 2022. Compliance Order, pp. 8-10 (FOF Nos. 12-19). Those performance reports pre-dated the April 2023 shift to transient modeling. Consequently, the prior rationale apportioning AFA 16.4% no longer applies due to this significant modeling shift, and because IGWA's member districts are no longer in agreement regarding obligation apportionment as demonstrated by their individual district-based 2023 performance report submissions and their individual district-based 2024 irrigation season mitigation compliance notices.

AFA's proposal, together with the SWC's support, disregards the disparate impacts that pumping within each groundwater district has on the SWC's water supply (Near Blackfoot to Neeley reach gains), and is scientifically and technically unsupportable as a result. As the Director is abundantly aware, he must use the best available science for determining the impact of junior groundwater diversions. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 814, 252 P.3d 71, 95 (2011); *see also* IDAPA 37.03.11.043.03.e (where a mitigation plan is based on computer simulations and calculations, the Director should ensure that the formulae and calculations employed are appropriate and reflective of depletive effects). Since April 2023, the Director has determined and applied transient modeling under EPAM 2.2 as the best available science. AFA's attempts to turn back the clock under the 2016 IGWA Mitigation Plan are patently *disproportionate*, and inconsistent with the best available science.

To be clear, the Districts do not oppose AFA's desire to mitigate its proportionate share of SWC injury under the 2016 IGWA Mitigation Plan—that is its prerogative. But if AFA chooses to do so, its mitigation obligation under that plan must bear a rational relationship to the Director's

deployment and use of transient modeling under ESPAM 2.2, as well as his present interpretation and application of the 2016 Mitigation Plan under the Compliance Order.

The technical and scientific basis underpinning (and the resulting proportionality within) the 2016 Mitigation Plan changed dramatically in April 2023. *See* Compliance Order, *generally*. How or what IGWA “historically divided” internally amongst its member districts prior to April 2023 (Deeg Dec., ¶¶ 5-6) has no bearing now, if it ever even did (*i.e.*, there is no prior written agreement or stipulation amongst IGWA’s members memorializing these historical divisions, or agreement or stipulation with the SWC or IDWR in this regard either).³

At most, IDWR determined proportionate shares of IGWA district conservation obligations based on IGWA-submitted performance reports in the Director’s Compliance Order. But, those shares touched upon the 240,000 AF annual conservation/pumping reduction component only—no such determination has ever been made with respect to the 50,000 AF storage water obligation owed under the 2016 Mitigation Plan. And, the shift to transient modeling is a major change. While NS and MV are not necessarily looking to pull that transient modeling output lever in their favor in 2024 (*see* Joint Notice, p. 3), they object to potential AFA efforts to obtain an order from the Director fixing its mitigation obligations under the 2016 IGWA Mitigation Plan on some basis other than transient modeling under ESPAM 2.2.

³ Absent from the Deeg Dec. are acknowledgements regarding ongoing internal IGWA member struggles adjusting/determining shares of the 240,000 AF conservation obligation upon the Director’s clarification of that annual obligation. *Compare again* Compliance Order, Tables 1 and 2 (including and then omitting shares of A&B Irrigation District and Southwest Irrigation District). Also absent from the Deeg Dec. are acknowledgements regarding internal IGWA member struggles adjusting/determining shares upon: (a) the lost use of averaging; and (b) IDWR’s shift to transient use of ESPAM 2.2. These issues remain unresolved within IGWA to date.

**III.
CONCLUSION**

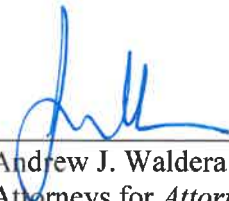
To the extent that AFA seeks to cement, via Director order, an 8,705 AF storage water proportionate share delivery obligation under the 2016 IGWA Mitigation Plan based on “historical[] divi[sion]” of mitigation plan obligations amongst IGWA member districts, the Director should reject that effort. The Director should likewise reject any AFA effort to cement, via order, a proportionate share conservation/pumping reduction obligation of only 16.4%. Both variables are the product of steady-state ESPAM model application no longer used or recognized as the best available science in this matter. Both variables are also products of former IGWA member understandings and actions taken implementing the 2016 IGWA Mitigation Plan that the Director and the SWC disagree with as discussed and ordered in the Compliance Order.

The Districts agree with AFA’s Motion conclusion—that it (AFA) should not be required to prove access to, and provide, the entire 50,000 AF of storage water under the 2016 IGWA Mitigation Plan. But, the Districts disagree that the sum quantity of 8,705 AF of storage water, or a 16.4% share of conservation obligation are sufficient under the current landscape of transient modeling and Director application of the 2016 Mitigation Plan under the Compliance Order.

DATED this 21st day of May, 2024.

SAWTOOTH LAW OFFICES, PLLC

By



Andrew J. Waldera
Attorneys for *Attorneys for*
Magic Valley Ground Water District and
North Snake Ground Water District

CERTIFICATE OF SERVICE

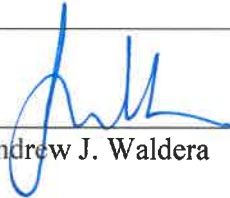
I HEREBY CERTIFY that on this 24th day of May, 2024, I caused a true and correct copy of the foregoing **RESPONSE TO AMERICAN FALLS-ABERDEEN GROUND WATER DISTRICT’S MOTION FOR RECONSIDERATION OF ORDER DETERMINING DEFICIENCY IN NOTICES OF SECURED WATER** to be served by the method indicated below, and addressed to the following:

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<p>Michael A. Kirkham City Attorney, City of Idaho Falls PO Box 50220 Idaho Falls, ID 83405 mkirkham@idahofallsidaho.gov</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email / CM/ECF</p>
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<p>Dylan Anderson DYLAN ANDERSON LAW PLLC PO Box 35 Rexburg, ID 83440 dylan@dylanandersonlaw.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email / CM/ECF</p>
<p>COURTESY COPY TO: Craig Chandler IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 Craig.chandler@idwr.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email / CM/ECF</p>
<p>COURTESY COPY TO: Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 Corey.skinner@idwr.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email / CM/ECF</p>

COURTESY COPY TO: William A. Parsons PARSONS, LOVELAND, SHIRLEY & LINDSTROM, LLP PO Box 910 Burley, ID 83318 wparsons@pmt.org wparsons@magicvalley.law	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email / CM/ECF
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Andrew J. Waldera

SETTLEMENT AGREEMENT PERFORMANCE REPORT

TO: IGWA-SWC Settlement Agreement Steering Committee
FROM: American Falls-Aberdeen Ground Water District
DATE: April 1, 2024
RE: 2023 Performance Report

Introduction

This report details American Falls-Aberdeen Ground Water District's ("AFAGWD") 2023 performance of its proportionate share of IGWA's obligation under paragraph 3.a of the IGWA-SWC Settlement Agreement¹ ("Agreement"). AFAGWD understands IGWA's obligations to include reducing its members' ground water diversions, or accomplishing recharge, to conserve 240,000 acre-feet ("AF") per year. Paragraph 2.a. of the *Second Addendum to Settlement Agreement* requires the districts to report annually to the Steering Committee by April 1 "their groundwater diversion and recharge data for the prior irrigation season and their proposed actions to be taken for the upcoming irrigation season, together with supporting information compiled by the Districts' consultants."

2023 Performance

The enclosed spreadsheet contains AFAGWD's 2023 conservation data and shows that AFAGWD is in compliance with paragraph 3.a. of the Agreement.

As shown in Table 2 of both the *Amended Final Order Regarding Compliance with Approved Mitigation Plan* dated April 23, 2023, and the *Final Order Regarding IGWA's 2022 Mitigation Plan Compliance* dated August 2, 2023, AFAGWD's proportionate share of IGWA's 240,000 AF conservation obligation is 39,395 AF. When measured against the baseline of 2010-2014 annual average diversions by patrons within AFAGWD (284,886 AF), this means that AFAGWD must reduce its diversions to 245,491 AF per year or, if it exceeds that amount, accomplish an equal amount of recharge for every AF in excess of that amount.

As shown in the "Summary" tab of the spreadsheet and the Performance Summary Table below, AFAGWD diverted 234,588 AF in 2023, meaning that it reduced its diversions by 50,298 AF. AFAGWD also recharged 3,390 AF. Thus, its conservation efforts totaled 53,688 AF, or 14,293 AF above its obligation.

The "Recharge" tab provides details on AFAGWD's recharge efforts in 2023, including the volume, source of water, recharge location, and date the recharge was performed. The "Diversion Reduction" tab lists the 2023 diversion volumes for each well within AFAGWD, by WMIS number. Where challenges or errors were encountered in the data for a particular well, the

¹ The Settlement Agreement consists of the *Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of Idaho Ground Water Appropriators, Inc.* ("IGWA"), the *Addendum to Settlement Agreement* dated October 19, 2015, the *Agreement* between A&B Irrigation District and participating members of IGWA dated October 7, 2015, and the *Second Addendum to Settlement Agreement* dated December 14, 2016.

spreadsheet notes how AFAGWD addressed it. For example, diversions that could not be reliably calculated due to broken meters or other factors have been assigned an imputed value based on the power consumption coefficient or historic diversion data for the well. AFAGWD's consultants continue to work with district patrons and IDWR staff to address questions and correct errors as needed.

Questions concerning the collection and reporting of data and compilation of this report may be directed to Jaxon Higgs, Water Well Consultants, Inc., AFAGWD's lead consultant.

2024 Conservation Efforts

In 2024, AFAGWD will continue to implement its Reduction Plan to ensure its patrons adequately reduce diversions in accordance with its conservation obligations. Additionally, AFAGWD will engage in recharge to the extent it has water supplies and can find canals willing to run the water. Thus, AFAGWD does not anticipate any compliance issues with its conservation obligation in 2024.

IDWR Review

Paragraph 2.b.iii. of the *Second Addendum to Settlement Agreement* provides that the parties "will request the Department to verify each District's annual diversion volume, and other diversion reduction data (recharge, CREP, conversions, end-gun removals, etc.) to confirm the accuracy of the data." A copy of this report will be submitted to the Department with a request that it commence verification. The Department's analysis is normally provided to the Steering Committee by July 1.

2023 AFAGWD Performance Summary Table

all values in acre-ft

	(1) Conservation Obligation	(2) Baseline Diversions	(3) 2023 Diversions	(4) Diversion Reduction	(5) Recharge Accomplished	(6) Total Conservation	(7) Mitigation Balance
American Falls-Aberdeen GWD	39,395	284,886	234,588	50,298	3,390	53,688	14,293

Notes

- (1) Per Table 2 in *Amended Final Order Regarding Compliance with Approved Mitigation Plan* (Apr. 24, 2023) and *Final Order Regarding IGWA's 2022 Mitigation Plan Compliance* (Aug. 2, 2023)
- (2) Annual average diversions by AFAGWD patrons from 2010-2014. See "Diversion Reduction" tab.
- (3) Sum of diversions by AFAGWD patrons in 2023. See "Diversion Reduction" tab.
- (4) Equal to (2) minus (3).
- (5) Amount recharged by AFAGWD in 2023. See "Recharge" tab.
- (6) Equal to (4) plus (5)
- (7) Equal to (6) minus (1)