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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 **A&B IRRIGATION DISTRICT'S CONSOLIDATED RESPONSE TO AFA MOTION / IGWA MOTION FOR SUMMARY JUDGMENT**

COMES NOW, A&B IRRIGATION DISTRICT ("A&B or "District"), by and through counsel of record, pursuant to IDAPA 37.01.01.220.02.b[1] and the *Order Granting A&B's Motion to Amend Deadlines* (Nov. 25, 2025), and hereby submits this consolidated response to the *American Falls-Aberdeen Ground Water District's Motion to Reconsider et al.* ("AFA Motion") and the *Idaho Ground Water Appropriators, Inc.'s Motion for Summary Judgment* ("IGWA Motion") filed on November 18, 2025. This response is supported by the *Declaration of Travis L. Thompson* ("*Thompson Dec.*") and exhibits attached thereto. For the reasons set forth below, the Director and/or Hearing Officer should deny the motions.

[1] Citations to the *Rules of Procedure of the Idaho Department of Water Resources and the Water Resource Board* (IDAPA 37.01.01 et seq.) (3-18-22) will hereinafter be referred to shorthand as "Rule."

INTRODUCTION

AFA and IGWA generally ask the Department to vacate and dismiss the upcoming hearing on res judicata grounds. Both parties mistakenly believe the June 2023 hearing decided the questions presently pending before the Hearing Officer. The Director granted A&B's requests for hearing on the April and July 2025 As Applied Orders, and this contested case will provide an opportunity for the parties to exhaust their administrative remedies and create a full record for a decision on these important issues.

Issues regarding mitigation responsibility have been subject to confusion and uncertainty over the past two years, largely due to the actions of the Ground Water Districts. Whereas the agency applied a steady-state model analysis to determine a curtailment priority date and a storage water mitigation obligation from 2016 through 2022, that changed in the spring of 2023 when the Director moved to a "transient" analysis, but only for identifying the curtailment priority date. A&B had successfully implemented a surface water conversion project of 3,573 acres since 2016 and the Director did not require the district to mitigate for groundwater rights covered by those conversions.[2] The earliest groundwater right priority date for curtailment during those first seven years was June 14, 1977. A&B's senior groundwater right 36-2080 with a September 9, 1948 priority date was not subject to the delivery call in any way.

Between 2023 and 2024 the Ground Water Districts filed a flurry of new mitigation plans and proposed to mitigate under the decades-old 2009 Storage Water Plan. The Director concluded the Districts could mitigate under the 2009 Plan, but such mitigation would cover <u>all groundwater users</u> on the ESPA, thereby obviating A&B's obligation altogether. As described below, this was the state of the mitigation questions at the time of the June 2023 hearing. Certain

[2] *See Final Order Curtailing Non-Enlargement Ground Water Rights Junior to April 12, 1994, and Enlargement Ground Water Rights Junior to March 14, 1971* at 4 (June 7, 2019) (CM-DC-2010-001).

districts attempted to mitigate pursuant to a "transient" model analysis, while others tried to parse out their mitigation share through different methods. Eventually the Surface Water Coalition and nine affected Ground Water Districts entered into a new stipulated mitigation plan in the fall of 2024. As the Director continued to issue new As Applied Orders throughout the irrigation season, A&B's 1948 groundwater right was subject to the call for the first time in July 2025. How IDWR determines a proportionate share of the mitigation obligation had not been previously decided or applied to A&B's senior right. A&B exercised its statutory right to request a hearing and the consolidated contested case has been proceeding for several months.

The Department's rules advise that "[e]vidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development." IDAPA 37.01.01.600. The administrative hearing is the vehicle for the agency to develop a complete evidentiary record and hear information related to determining a proportionate share of an identified mitigation obligation. With the recent changes in model use, the new boundary of the area of common ground water supply, and an opportunity to receive additional technical information on alternatives, there is no basis to vacate the hearing and foreclose the opportunity to actually decide the issues presented to the agency.

Finally, due process also requires that A&B receive a hearing on these issues, particularly as they have implicated the district's senior groundwater right 36-2080 for the first time. If a water right, a real property interest, is subject to curtailment and/or a mitigation obligation, due requires an opportunity for a hearing on that agency decision prior to curtailment. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815, 252 P.3d 71, 96 (2011). For the reasons set forth below, A&B respectfully requests the Hearing Officer to deny the motions filed by AFA and IGWA accordingly.

AFA Motion to Reconsider / Clarify Scope of Hearing

PRESIDING OFFICER / FORMAL PROCEEDINGS

AFA's motion is not filed in compliance with IDWR's Rules and therefore should be denied on procedural grounds. AFA alleged that it has filed its motion with the "Director," not the Hearing Officer assigned to hear this contested case. *See* AFA Motion at 1-2. A&B filed two requests for hearing, one for the April As Applied Order (Steps 1-3) on April 29, 2025, and a second one for the July As Applied Order (Steps 5-6) on July 24, 2025. The Director granted the requests for hearing and found as follows:

> 10) The issues identified for hearing in A&B's July hearing request relate to, and even mirror at times, the issues identified in its April request. A&B has not previously been afforded an opportunity for a hearing to contest either the *April Forecast Supply Order* or the *July As-Applied Order*.

Order Granting A&B Irrigation District's Requests for Hearing at 2 (Sept. 3, 2025).

The Director further consolidated the proceedings, set the matter for a pre-hearing conference, and appointed Gerald F. Schroeder to serve as the hearing officer. The scope of the Hearing Officer's authority was not limited. *See* IDWR Rule 412. Accepting the contested case so designated, AFA voluntarily petitioned to intervene in the contested case on September 17, 2025.[3] AFA was not required to participate in this contested case. *See e.g.*, *Porter as Tr. of Brian L. Porter Revocable Tr. v. Remmich,* 174 Idaho 263, 272, 553 P.3d 925, 934 (2024) (cleaned up) (citations and internal quotation marks omitted) ("Importantly, the landowner, as an intervenor, could not assert any conflicting claims in the second case, *because an intervenor*

[3] A&B stipulated to AFA's intervention on the basis that the District represents ground water right holders subject to the SWC delivery call. A&B would not have stipulated to AFA's intervention had AFA disclosed that it was intervening on the basis to wait several weeks and then ask the Director to vacate the hearing altogether. That issue could have been addressed up front as part of the AFA's grounds for intervention.

takes a case as he finds it. He is not entitled to raise new claims outside the scope of the original parties' pleadings") (emphasis added).[4]

The Hearing Officer held the prehearing conference on September 18, 2025 where AFA's intervention was granted and a discovery and hearing schedule was set. *See Order on Intervention et al.* ("Oct. 7, 2025). AFA did not oppose the Hearing Officer's jurisdiction and fully participated in setting the schedule. Since that time A&B has served discovery requests on various parties, conducted two depositions of IDWR employees, and submitted an expert report. In other words, significant time and resources have been spent in preparation for the hearing previously granted by the Director over three months ago.

IDWR's Rules define the terms related to this matter as follows:

> **09. Hearing Officer**. A hearing officer is a person other than the agency head appointed to preside over a formal proceeding in a contested case on behalf of the agency. . . .
>
> **15. Presiding Officer**. One (1) or more members of the Board, the Director, or duly appointed hearing officer presiding over a formal proceeding as authorized by statute or rule. . . .
>
> **102. FORMAL PROCEEDINGS**. When the agency determines that informal proceedings are unlikely to resolve a contested case, the agency will initiate formal proceedings by issuing a Notice of Prehearing Conference and identifying a presiding officer. Representation of parties and other persons in formal proceedings is governed by Rule 201.02.

IDAPA 37.01.01 (emphasis in original).

[4] Furthermore, "[i]ntervention is not an independent proceeding but an ancillary and supplemental one that, unless otherwise provided for by legislation, must be in subordination to the main proceeding, and, as a general rule, an intervenor is limited to the field of litigation open to the original parties …. [E]ven aside from any such express declaration, the rule is stated to be that one who intervenes in a pending action ordinarily must come into the case as it exists and conform to the pleadings as the intervenor finds them or that an intervenor must take the case as the intervenor finds it. An intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding…. [T]he intervenor is bound by the previous proceedings and the record of the case at the time of intervention. *See* 59 Am. Jur. 2d Parties § 226 (footnotes omitted).

The present contested case concerning the April and July As Applied Orders is a "formal proceeding" that is presided over by Hearing Officer Schroeder. AFA seeks to side-step the ongoing formal proceeding and have the Director issue a new order despite his previous assignment. A&B submits the contested case is properly before the designated hearing officer, that the scope of his authority is not limited, and that the Director is no longer "presiding" over the matter set for hearing in January. Accordingly, AFA's motion for reconsideration and request to vacate the hearing is procedurally misplaced at this point and should be denied accordingly.

AFA's request to clarify the scope of the hearing should be denied as well. Contrary to AFA's interpretation of the initial expert report, A&B is not attempting to use this proceeding "as a vehicle to advocate for the adoption of a GMP." *See* AFA Motion at 7. The Director previously reviewed A&B's requests for hearing and identified the scope of the consolidated hearing in his *Order Granting A&B Irrigation District's Requests for Hearing* (Sept. 3, 2025). AFA has provided no meritorious basis to reconsider or clarify the scope of the hearing based on its unilateral interpretation of A&B's expert report. If AFA wishes to object to evidence offered at the hearing it will have an opportunity to raise such objections at the appropriate time. Rule 600 (Evaluation of Evidence); Rule 603 (Objections).

Alternatively, if AFA's motion to vacate the hearing is considered for a ruling by the Hearing Officer, A&B submits it should be denied for substantive reasons as well. As set forth below, A&B's requests for hearing are not moot, and should not be barred under res judicata, law of the case, or the quasi-estoppel doctrine.

FACTUAL AND PROCEDURAL BACKGROUND

From 2016 through 2022, the Director applied the *Fourth Amended Methodology Order* to the SWC delivery call every year. The predicted in-season demand shortfall ("IDS"), or predicted material injury, ranged from a low of 0 acre-feet (2017, 2018, 2020) to a high of 170,000 acre-feet (July 2021 Steps 5 & 6 Order).[5] The corresponding curtailment date for affected ground water rights ranged from the most junior date of May 31, 1989 (2022 Step 9 Order) to the most senior date of June 14, 1977 (2021 Steps 5 & 6 Order).

During this time A&B delivered surface water to approximately 3,573 acres that were formerly irrigated with groundwater pursuant to water rights with priorities ranging from April 1, 1962 to April 12, 1994 (enlargement water right priority date condition).[6] *See* I.C. § 42-1426. During this time the Director did not require A&B to mitigate for its groundwater rights that were not used, or for those irrigated lands that had been converted to a surface water supply. *See Final Order Curtailing Non-Enlargement Ground Water Rights Junior to April 12, 1994, and Enlargement Ground Water Rights Junior to March 14, 1971* at 4 (June 7, 2019) ("A&B will not have a mitigation obligation for this year if A&B curtails the enlargement ground water rights and if the priority date for curtailment for 2019 remains junior to A&B's other ground water rights").

[5] Copies of the various orders issued by the Director in the delivery call are available on the IDWR's website: https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/.

[6] After completion of its second pumping plant on the Snake River, A&B was able to deliver surface water to additional lands previously only irrigated with groundwater. *See Stipulation Regarding A&B Irrigation District's Amended Mitigation Plan* at 2 (Dec. 27, 2023) ("A&B has curtailed the diversion of groundwater to approximately 3,573.6 acres within the Unit B portion of the irrigation district. A&B has delivered surface water to these 'soft conversion' acres dating back to 1994 (1,378 acres) and 2016 (2,195 acres).

Moreover, since the Director's curtailment orders never affected A&B's senior groundwater right 36-2080 (Sept. 9, 1948), and A&B's junior rights were part of its surface water conversion deliveries, there was no immediate or actual need to litigate or challenge how the Director apportioned mitigation obligations amongst junior ground water rights across the ESPA. During this time (2016-2022), the Director also approved a variety of stipulated mitigation plans without deciding a contested "mitigation apportionment standard" or how the plans would work together to ensure ground water rights were properly administered as amongst each other.[7] In other words, the priority date of ground water rights was not at issue in the context of how the Department required the various rights to mitigate a "proportionate share" of a predicted injury in a given irrigation season. A&B's surface water conversion program also ensured that it had no mitigation obligation during this time period.

The Director changed his method for identifying a groundwater right curtailment date in the spring of 2023 with the issuance of the *Fifth Amended Methodology Order* (April 21, 2023). In that order the Director adopted a "transient" simulation of ESPAM 2.2 which evaluated the predicted impacts of pumping from groundwater rights and the corresponding responses that would occur in the Near Blackfoot to Minidoka reach of the Snake River during that same irrigation season. The reasons for this change in model use were described as follows:

> 84. Steady-state analysis does not calculate the time to reach steady-state conditions nor describe the seasonal timing of the impacts. . . . The assumption of continuous curtailment does not reflect reality in the SWC Delivery Call. . . . It is important to predict what benefits to the river are realized during the irrigation season in which injury has been determined. A steady-state ESPAM simulation cannot predict what benefits are realized during the irrigation season. In contrast, a transient ESPAM simulation will predict the timing of changes in river reach gains.

[7] *See generally*, https://idwr.idaho.gov/legal-actions/mitigation-plan-actions/swc/. Approved plans included the IGWA 2016 Settlement Mitigation Plan (CM-MP-2016-001); the Coalition of Cities (CM-MP-2016-002; 2019-001); and Southwest Irrigation District's 2018 Mitigation Agreement Plan (CM-MP-2010-001).

* * *

89. Transient simulations are necessary to evaluate the impacts of aquifer stresses applied for short periods of time (i.e. short-term curtailments with varying priority dates). Transient simulations are necessary to simulate the short-term curtailments prescribed in the methodology.

Fifth Amended Methodology Order at 29-31.

The Director sua sponte issued a notice of hearing concurrent with the issuance of the fifth order and the April 2023 As Applied Order. *See Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* (April 21, 2023). The scheduled June 2023 hearing specifically addressed the Director's *Fifth Methodology Order* and the *Final Order Regarding April 2023 Forecast Supply* both issued on April 21, 2023. *See id.* The hearing did not, as AFA suggests, specifically address "five of the six issues" raised in A&B's present 2025 requests for hearing. Importantly, the hearing did not address any agency decision related to A&B's senior water right 36-2080 with a September 9, 1948 priority date.

In the *Fifth Methodology Order* the Director adopted a "transient" model analysis for determining a curtailment date of junior priority ground water rights. Issues related to apportionment of the mitigation obligation amongst junior ground water rights were not addressed or explained. Further, the Director limited the scope of topics that IDWR witnesses could provide testimony and evidence on at the June 2023 hearing.

Notably, Jennifer Sukow's testimony was limited to: "steady-state vs. transient modeling / simulations for the Eastern Snake Plain Aquifer Model (ESPAM); calculation of curtailment priority dates for the SWC's delivery call." *See Notice of Materials Department Witnesses May Rely Upon at Hearing and Intent to Take Official Notice* (May 5, 2023).[8]

[8] A&B requested a hearing and identified two issues related to the 2023 April As Applied Order, however no ruling was issued on those issues, and the Director's limitation on the scope of the June hearing was issued that very same day. *See Surface Water Coalition's Request for Hearing and Statement of Issues* at 2-3 (May 5, 2023).

Ms. Sukow had previously addressed this issue in the fall of 2024 with the parties' technical working group, and that presentation did not address apportioning the mitigation obligation amongst junior ground water rights. *See* **Ex. A** to *Thompson Dec.* The issue was limited to what the differences were between using a steady state analysis versus a transient analysis for identifying a curtailment date that would supply the required water to meet the in-season demand shortfall during the irrigation season.

AFA's reference to testimony from Jennifer Sukow at the June 2023 hearing concerned a "courtesy" email and calculation related to the individual ground water districts' share of the predicted in-season demand shortfall. *See* **Ex. B** to *Thompson Dec.* Throughout the spring and early summer of 2023 the Ground Water Districts were attempting to provide storage water mitigation under a variety of mitigation plans, and they were trying to identify the individual district's mitigation responsibilities. *See Order Determining Deficiency in IGWA's Notice of Secured Water* (May 23, 2023) ("*Deficiency Order*"). The Director described what was being attempted that year as follows:

> Since the 2015 Settlement Agreement Mitigation Plan was approved by the Department, IGWA has only mitigated under that plan. This year, IGWA is proposing something new. Certain ground water district members are seeking to mitigate under the 2009 Storage Water Mitigation Plan and other ground water district members are seeking to mitigate under the 2015 Settlement Agreement Mitigation Plan. Instead of relying on one or two mitigation plans for all members, individual ground water districts are seeking to mitigate under different mitigation plans.

Deficiency Order at 2.

Although certain districts were attempting to mitigate under the 2009 Mitigation Plan based upon the proportionate share of storage provided as a "courtesy" in the Garrick Baxter email, others were relying upon their "alleged share" of the 50,000 acre-feet requirement in the

2016 Mitigation Plan. *See Deficiency Order* at 2-3. The Director rejected this novel "hybridization" approach and concluded that IGWA was required to either: 1) supply the entire predicted 2023 in-season demand shortfall under the 2009 Plan, which was 75,200 acre-feet; or 2) the entire 50,000 acre-feet under the 2015 Plan. *See id.* at 5 ("IGWA cannot pick and choose who gets the benefit of storage water if IGWA is not providing storage water amounts equal to the shortfall obligation"); at 7 ("While the 2015 Settlement Agreement Mitigation Plan allows for determining the proportionate share of the reduction obligation of the parties, it does not authorize the 50,000 acre-foot storage volume to be shared proportionately by the parties. To be in compliance with the plan, the entire 50,000 acre-feet must be provided").

Just a few days before the June 2023 hearing, IGWA submitted an *Amended Notice of Mitigation* purporting to mitigate the 2023 injury under the 2009 Plan with copies of storage water leases totaling 77,714 acre-feet. *See IGWA's Amended Notice of Mitigation* (June 1, 2023). Pursuant to the Director's prior order, IGWA would have been required to provide the entire 75,200 acre-feet, in which case A&B would have had no obligation in 2023. Accordingly, given the confusion created by IGWA and the various mitigation plans it was attempting to implement for the various ground water districts, it was not clear whether A&B had to mitigate at all that year, most notably at the time of hearing.[9] The issue concerning the sufficiency of IGWA's mitigation was ultimately never addressed in the context of a contested order as the Director issued the *Notice That Questions Concerning the Sufficiency of IGWA's Mitigation Notices are Moot* (July 20, 2023).

[9] Eventually IGWA supplied sufficient storage water to comply with the 50,000 acre-feet storage assignment required under the 2016 Mitigation Plan. *See* **Ex. C** to *Thompson Dec.*

Moreover, at the start of the June 2023 hearing the scope of Ms. Sukow's topics and testimony was described as follows:

> Q. [BY MR. WOOD] And you were aware that on May 5th, 2023, the Director issued a notice advising the parties of two topic areas that you might testify about today?
>
> A. [BY MS. SUKOW] Yes.
>
> Q. And those two topic areas are the following: the first is steady state modeling versus transient state modeling, simulations for the ESPA. And the second is calculations of curtailment priority dates for the Surface Water Coalition's delivery call. Does that sound correct?
>
> A. Yes.

June 2023 Hearing Tr. 38:16 – 39:1. [10]

With respect to the calculations performed, and how the predicted demand shortfall might be divided up between the districts, Ms. Sukow specifically explained the following at the June 2023 hearing:

> Q. [MR. BUDGE] And under this approach to allocating that predicted demand shortfall. Some ground water districts such as North Snake would have to provide more water as mitigation than the Coalition would receive from curtailment. And other ground water districts would have to provide less water as mitigation than the Coalition would receive from curtailment?
>
> A. [MS. SUKOW] I don't think that's true as far as the Department's concerned. IGWA's proportionate share is 63,645 acre-feet. And the Department, I don't think, has a say in how you decide to split that up. You asked us to provide a breakdown, and I did it by this method. And Garrick sent it to you as a courtesy. But we are not telling you that that's how you have to split up the proportionate share.
>
> Q. Yeah, and I appreciate that. And I don't actually even mean to be critical of the method. It's just one method; right? It's not the only method. And I just wanted to highlight under this method in the proportionate mitigation obligations don't match up with the transient modeled reach gains?

[10] *See* copy of June 2023 hearing transcript at *https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CV01-23-13238/CV01-23-13238-20230928-Settled-Agency-Hearing-Transcript-on-Appeal.pdf*

A. No, they do not.

* * *

Q. [MR. SIMPSON] I'm not sure if I fully appreciated the calculation you made. But my understanding is that your method that you utilized, and this was your proposed method, acknowledged the long-term impacts of each ground water district on the Blackfoot to Minidoka reach. And then once the percentage was calculated, then it was utilized in the calculation of the responsibility of each ground water district of the total for IGWA; is that correct?

A. Well, and again, that was provided as a courtesy, and the Department is not telling them, IGWA what each ground water districts responsibility is. But it is just an apportioning based on their long-term impacts.

June 2023 Hearing Tr. 86:17 – 87:12; 101:4-17.

In this context, the above testimony shows that IDWR's method for apportioning the mitigation obligation was not an issue that was actually litigated between various ground water users on the ESPA. It was obvious that IDWR was not making any formal decisions or ordering IGWA to use a certain method to apportion that obligation. Stated another way, although the ground water districts were divided at that time as to how each was going to mitigate in 2023, IDWR did not decide any contested issues concerning an apportionment methodology. How A&B's obligation, if any, would or would not be addressed in the context of this uncertainty was also not resolved.

As to the issue that was litigated and decided, the Director adopted the transient analysis in the *Fifth Methodology Order*, and following the June 2023 hearing, affirmed its use in the *Sixth Amended Methodology Order* as well. Contemporaneous with the issuance of the *Sixth Methodology Order* the Director issued the *Post-Hearing Order Regarding Fifth Amended Methodology Order* (July 19, 2023). As admitted by AFA, the Director did not decide any "proportionate share" methodology in that decision. *See* AFA Motion at 5.

With respect to conjunctive administration during the 2023 irrigation season A&B complied with the April 2023 mitigation obligation[11] and the in-season injury finding was later reduced to zero (0) acre-feet in the 2023 July As Applied Order. *See Order Revising April 2023 Forecast Supply and Amending Curtailment Order (Methodology Steps 5 & 6)* at 9 (July 19, 2023) ("there is no mid-season demand shortfall to the SWC members"). Consequently, A&B did not request any further hearings on the 2023 As Applied Orders. However, the conclusion of the 2023 irrigation season did not answer or foreclose the question of IDWR's apportionment of mitigation obligations going forward.

2024 ushered in even more uncertainty as the various Ground Water Districts filed several new mitigation plans[12] while at the same time attempting to mitigate under both the 2009 Plan and the 2016 Plan again. *See Final Order Regarding April 2024 Forecast Supply* at 5-6, n.8 *(Methodology Steps 1-3)* (Apr. 18, 2024) (Director noting the continued "uncertainty" regarding the status of the mitigation plans and confirming that under the 2009 Plan "IGWA's obligation is

[11] *See A&B Irrigation District's Notice of Communication to Water District 01 Watermaster* (May 5, 2023). Ultimately, the Director did not issue a curtailment order in 2023. *See Notice of Possible Curtailment of Ground Water Rights with Priority Dates Junior to December 30, 1953* (May 1, 2023) ("The Department scheduled a hearing for the parties to the As-Applied Order on June 6-10, 2023. After the hearing the Director will decide whether to issue a curtailment order").

[12] *See generally*, the various mitigation plans filed in late 2023 and early 2024: Madison GWD & Henry's Fork GWD (CM-MP-2023-001); Bonneville-Jefferson GWD (CM-MP-2023-002); Jefferson Clark GWD (CM-MP-2023-003); North Snake GWD (CM-MP-2023-004); Magic Valley GWD (CM-MP-2003-005); Bingham GWD (CM-MP-2024-001). The districts proposed to mitigate under a variety of actions and methods. North Snake and Magic Valley both proposed to mitigate for transient impacts. *See Petition for Approval of MVGWD Mitigation Plan* at 3 ("Mitigation provided by Petitioner under this plan may offset all or part of the volume of water the SWC would receive from curtailment of water rights held by Petitioner's patrons"); *Petition for Approval of NSGWD Mitigation Plan* at 3 ("Mitigation provided by Petitioner under this plan may offset all or part of the volume of water the SWC would receive from curtailment of water rights held by Petitioner's patrons"). Other districts similarly proposed to mitigate their "transient" irrigation season pumping impacts to the Near Blackfoot to Neeley reach as part of their new mitigation plans. *See Petition for Approval of Madison GWD and Henry's Fork GWD Storage Water Mitigation Plan for the Surface Water Coalition* at 3 (CM-MP-2023-001) (Dec. 18, 2023) ("Petitioners may utilize storage to offset all or part of the volume of water the SWC would receive from curtailment of water rights held by Petitioners' patrons"); *Petition for Approval of Jefferson Clark GWD Storage Water Mitigation Plan for the Surface Water Coalition* at 3 (CM-MP-2023-003) (Dec. 20, 2023) ("To provide mitigation under this plan, Petitioners will deliver or assign storage water to the SWC to offset the amount of water the SWC would receive from curtailment of water rights held by Petitioner's patrons").

74,100 acre-feet"). A&B provided notice of its ability to mitigate its share of the predicted in-season demand shortfall, and further advised:

> Finally, although the District [A&B] disagrees with and reserves all rights concerning the *Order* initially allowing IGWA to choose to mitigate under its 2009 Storage Water Mitigation Plan, if IGWA does establish that it has 74,100 acre-feet, then A&B will no longer have any obligation for the 2024 irrigation season.

A&B Irrigation District Letter to the Director (May 1, 2024).

For example, Magic Valley GWD and North Snake GWD filed a joint notice of compliance proposing to mitigate under the 2009 Plan. *See Joint Notice of Compliance* (May 2, 2024). The districts' joint notice identified the schism in IGWA that was occurring at the time: "This Joint Notice is submitted by MV and NS through undersigned counsel because of a current lack of consensus within IGWA's membership frustrating IGWA's ability to submit an entity-wide notice." *See id.* at 2. The districts further represented, that despite proposing to mitigate their proportionate share of the entire 74,200 acre-feet predicted injury in 2024:

> The districts' steady state-based commitments above shall not be construed as an admission or concession that steady state application of ESPAM 2.2 is the appropriate application of the model. Clearly, the Director has determined that transient model simulation/application is the appropriate method of ESPAM 2.2 deployment. . . . Under transient application of the model, MV's proportionate share of the April-predicted IDS would be 25 acre-feet, and NS's proportionate share would be negligible (0.1 acre-feet). Be that as it may, MV and NS are willing to collectively provide 15,590 acre-feet (as opposed to merely 24 acre-feet under transient modelling) for the 2024 irrigation season in a good faith effort to do what they can, the fairest they can in recognition of the lingering effects of legacy pumping.

Joint Notice of Compliance at 3 (May 2, 2024).

Other districts also proposed to mitigate under the 2009 Plan, AFA proposed to mitigate under the 2016 Plan, and certain districts opted to not participate under any approved mitigation plan. The Director summarized the confusing and contradictory filings as follows:

> At the status conference, the Director started by asking each participating ground water district to identify whether, in 2024, they plan to mitigate under IGWA's *2009 Storage Water Mitigation Plan* (CM-MP-2007-001) or IGWA's *2016 Settlement Mitigation Plan*. The Director asked this because many of the mitigation notices submitted by the ground water districts included vague, confusing, or contradictory statements regarding compliance with the approved mitigation plans. Bonneville-Jefferson, Magic Valley, and North Snake indicated that they had secured water for 2024 and would dedicate their secured water towards the mitigation requirements under the *2009 Storage Water Mitigation Plan*. Jefferson-Clark, Henry's Fork, and Madison indicated that they also had secured storage water and would dedicate their secured storage water towards required mitigation activities set forth in either the *2009 Storage Water Mitigation Plan* or the *2016 Settlement Mitigation Plan*. American Falls-Aberdeen indicated that it planned to mitigate under the *2016 Settlement Mitigation Plan* only. Bingham indicated it will not mitigate under any approved mitigation plan. Carey Valley did not participate in the status conference.

Amended Order Determining Deficiency in Notices of Secured Water at 3-4 (May 28, 2024) (CM-DC-2010-001); **Ex. D** to *Thompson Dec.*

Comparing the districts' various storage water leases to the predicted in-season demand shortfall, the Director further concluded:

> The above table shows that the ground water districts have indicated that they have secured 32,876 acre-feet, which is less than the full shortfall obligation of 74,100 acre-feet. . . . The Department has calculated what the revised curtailment date would be if these ground water districts can show, to the satisfaction of the Director, that they have secured 32,876 acre-feet of water. <u>The revised curtailment date for all ground water users would be February 16, 1970.</u>

Id. at 5 (emphasis added); **Ex. D** to *Thompson Dec*.

With that understanding at the end of May 2024, A&B's only water rights subject to curtailment were its enlargement water rights with an effective priority date of April 12, 1994 (enlargement rights). A&B had no way of knowing whether the districts would ultimately secure all 74,100 acre-feet thus eliminating A&B's obligation completely. However, A&B relied upon the Director's above representation and submitted a follow up *Notice of Mitigation Water*. *See Letter from A&B Irrigation District to Director Mat Weaver* (May 30, 2024). A&B submitted a copy of its executed lease for 62 acre-feet to cover its proportionate share of the predicted in-

season demand shortfall in 2024. *See id.* A&B further "reserved all rights" concerning its notice of mitigation and its right to request a hearing pursuant to I.C. § 42-1701A(3). *See id.* at 2.

The Director then issued his *Final Order Curtailing Ground Water Rights Junior to March 31, 1954* (May 30, 2024). That order prompted additional districts to change their position and attempt to comply with the *2016 Settlement Mitigation Plan* for the 2024 irrigation season. *See Joint Notice of Compliance* at 2 (June 5, 2024) ("In response to the Director's Curtailment Order, the Districts [Magic Valley and North Snake] provide notice that they intend to comply with the 2016 Plan for the 2024 irrigation season only").

Eventually, the Surface Water Coalition, all Ground Water Districts, and IGWA reached an interim stipulation for 2024 whereby all districts agreed to comply with the 2016 Plan for the 2024 irrigation season. *See Joint Motion for Order Approving 2024 Stipulation* (June 20, 2024). The Director approved the parties' stipulation to comply with the 2016 Plan. *See Order Approving 2024 Stipulation as Compliance with Approved Mitigation Plan* (June 20, 2024).

The Director later revised the predicted in-season demand shortfall down to 6,800 acre-feet in July. *See Order Revising April 2024 Forecast Supply and Amending Curtailment Order (Methodology Steps 5 & 6)* (July 17, 2024). The Director concluded that "continued curtailment of ground water rights beyond mid-July is unwarranted at this time." *See id.* at 11. Consequently, at that time A&B had no in-season obligation and no reason to challenge the Director's 2024 as-applied orders or any proportionate share methodology that had been used.[13]

[13] In response to the Director's 2024 Step 9 Order and predicted carryover storage shortfall of 44,900 acre-feet, A&B confirmed that it intended to continue to curtail its enlargement water rights (2,063 acres) for the 2025 irrigation season that were subject to the curtailment order. *See Final Order Curtailing Ground Water Rights Junior to January 25, 1970* (December 17, 2024). The Director kept those water rights on the curtailment list and did not require A&B to secure or assign any storage water. *See id.* at 4; *see also*, *Order Revising April 2025 Forecast Supply and Continuing May 16, 2025 Curtailment Order* at 1 *(Methodology Steps 5 & 6)* (July 10, 2025) ("While the SWC's storage allocation did not fill this year, because no water users secured water in 2024 to fulfill this carryover shortfall, there is no volume of water to be made available to the SWC under Step 5").

With the above context it was obvious that the Director's apportionment of any mitigation obligation was not the subject of any prior hearing and had not been resolved through any final order. A&B's 1948 water right had not been implicated in any curtailment orders and the scope of its mitigation obligation was uncertain and constantly changing in the face of the Ground Water Districts' efforts to use a myriad of mitigation plans that may have covered A&B's obligation completely. The misdirection approach left water users uncertain as to what IDWR would finally approve for purposes of mitigation obligations in these years.

Further, the Director's fifth and sixth methodology orders were subject to two petitions for judicial review filed in 2023, wherein the petitioners were asking the district court to set aside those orders in total. *See Idaho Ground Water Appropriators, Inc.'s Opening Brief* at 45 (Fourth Jud. Dist., Ada County Dist. Ct., Case No. CV01-23-13173)[14] (Dec. 8, 2023); *Cities' Opening Brief on Judicial Review, SWC Post-Hearing Order, Fifth Methodology* at 49 (Fourth Jud. Dist., Ada County Dist. Ct., Case No. CV01-23-13238 (Dec. 21, 2023).[15]

The uncertainty and implementation of the various mitigation plans, the pending appeals, and status of the Director' "transient" use of the model were all valid reasons to not pursue additional litigation of any mitigation apportionment methods at the time. Where this question remains unresolved it is important for IDWR to finally address it with a fully developed administrative record. This proceeding provides that forum.

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[14] The district court entered a *Memorandum Decision and Order* on IGWA's appeal on May 31, 2024. IGWA's petition for rehearing of that decision is presently stayed. *See Order Granting Stipulated Motion for Stay*. Documents in this case are available at: https://idwr.idaho.gov/legal-actions/district-court-actions/igwa-v-idwr-cv01-23-13173/.

[15] The Cities specifically challenged the Director's transient model simulation for identifying a curtailment date. *See Cities' Op. Br.* at 43-45. The district court entered a *Memorandum Decision and Order* on the Cities' appeal on May 31, 2024. The Cities appealed the decision to the Idaho Supreme Court and oral argument was recently heard on October 6, 2025. The complete list of documents does not appear to be uploaded to IDWR's website. Certain documents in this case are available at https://idwr.idaho.gov/legal-actions/district-court-actions/city-of-idaho-falls-v-idwr/

STANDARD OF REVIEW

IDWR's Rules of Procedure authorize the filing of motions for summary judgment. Rule 220.03. Such motions are governed by I.R.C.P. 56, except that the rule's time procedure set forth in subsection (b) does not apply. *See id.*

Summary judgment requires the movant to show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *See Martin v. Thelma V. Garrett Living Trust*, 170 Idaho 1, 5, 506 P.3d 237, 241 (2022). The burden of proving the absence of material facts is on the moving party and the Department must liberally construe facts in the existing record in favor of the nonmoving party, and draw all reasonable inferences from the record in favor of the nonmoving party. *See id.* When an action is tried before an agency without a jury (in this case the Hearing Officer), the Department can rule upon summary judgment despite the possibility of conflicting inferences arising from undisputed evidentiary facts. *See Nettleton v. Canyon Outdoor Media, LLC*, 163 Idaho 70, 73, 408 P.3d 68, 71 (2017).

Summary judgment is not appropriate in a case where there are disputed issues of material fact. *See American Land Title Co. v. Isaak*, 105 Idaho 600, 601, 671 P.2d 1063, 1-64 (1983) ("It is axiomatic that summary judgment is improperly granted where any genuine issue of material fact remains unresolved"). In this case the parties are scheduled to put on technical evidence related to the Department's apportionment of the mitigation obligations identified in the April and July 2025 As Applied Orders. Initial expert reports were filed last month, rebuttal expert reports are due by December 19th, and the agency staff memorandum is due by December 30th. IGWA has failed to show that the contested case should be dismissed on summary judgment grounds. As set forth below, the Hearing Officer should deny the motion accordingly.

ARGUMENT

I. AFA's Request to Vacate the Hearing and IGWA's Motion for Summary Judgment on Res Judicata Grounds Should be Denied.

AFA alleges the Director erred in granting A&B's requests for hearing on the two 2025 As Applied Orders and that the January 2026 hearing should be vacated. *See* AFA Motion at 4-6. IGWA similarly seeks summary judgment and argues that A&B should be barred from raising its issues on res judicata grounds. *See* IGWA Motion at 6-8.

In general, AFA alleges that the June 2023 hearing on the *Fifth Methodology Order* and the *April 2023 As Applied Order* already addressed A&B's issues and that the doctrine of res judicata should prevent A&B's request for hearing on the two 2025 As Applied Orders. *See id.* IGWA makes a similar argument and claims that an "evidentiary hearing was held on issues raised by A&B and others" in June 2023. *See* IGWA Motion at 7. To the contrary, the Director correctly granted A&B's present requests for hearing, and technical and legal issues regarding IDWR's application of the CM Rules and apportionment of mitigation obligations to affected junior ground water rights should be finally decided on a complete agency record for purposes of certainty and proper administration of approved mitigation plans. In short, res judicata does not bar the present contested case as the mitigation apportionment issue has not been previously decided and A&B's 1948 groundwater right has never been subject to a curtailment order in this delivery call.

Section 42-1701A(3) provides: "any person aggrieved by any action of the director, including any decision, determination, order or other action, . . . who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action." A&B's requests for hearing concern two As Applied Orders issued in 2025. The Director granted these timely

requests for hearing, consolidated the matters, and initiated a formal contested case and appointed a hearing officer. *See Order Granting A&B Irrigation District's Requests for Hearing et al.* (Sept. 3, 2025).

Importantly for purposes of ruling on AFA's and IGWA's motions, A&B's water right 36-2080 has never been subject to curtailment and IDWR has never apportioned a mitigation requirement to that water right until July 2025. Both the Director and Jennifer Sukow confirmed this fact. First, in a July memorandum to Governor Little, Director Weaver described this unique fact relative to the delivery call:

> This action may affect up to 900 water rights, although the final number is still being confirmed. Notably, this will mark the first time water rights with priority dates earlier than 1955 have been subject to curtailment under the SWC delivery call.

Director Weaver July 22, 2025 Memo to Governor Little (emphasis added); **Ex. E** to *Thompson Dec.*

At her deposition taken on October 22, 2025, Ms. Sukow also testified:

> Q. [BY MR. THOMPSON] Do you know if A&B has been required to mitigate for its 1948 priority groundwater right prior to this order?
>
> A. [BY MS. SUKOW] Not that I know of.

J. Sukow Depo. Tr. 70:21-24; **Ex. F** to *Thompson Dec.*

AFA does not dispute A&B's "aggrieved person" status, but argues that the June 2023 hearing precludes the present contested case. AFA argues that A&B should be barred from contesting certain issues that were not previously decided "under principles of res judicata." AFA Motion at 5-6. Although AFA does not address the elements of res judicata, the doctrine is not satisfied regardless if AFA is advocating for either issue or claim preclusion. AFA mistakenly claims that "all six of the issues A&B presented in its 2025 requests were litigated in the June 2023 hearing or are not moot." *Id.* at 6.

IGWA claims that the elements of res judicata are satisfied on the basis that "(1) A&B had a full and fair opportunity to litigate the issue in response to the April 2016 As-Applied Order, the April 2023 As-Applied Order, and the April 2024 As-Applied Order; (2) the issue decided in the prior As-Applied Orders is identical to the issue raised by A&B in the present action; (3) the issue sought to be precluded was actually decided in the prior As-Applied Orders; (4) there was a final judgment on the merits in the prior As-Applied Orders; and (5) A&B was a party to the prior As-Applied Orders." IGWA Motion at 8.

Both AFA and IGWA miss the mark regarding prior IDWR proceedings and final agency orders as to what was actually decided. Furthermore, AFA and IGWA appear to argue that information related to how IDWR makes technical decisions is foreclosed from ever being submitted in response to an As Applied Order as part of the annual conjunctive administration of the SWC delivery call.

First, res judicata encompasses both issue preclusion and claim preclusion. *Byrd v. Idaho State Bd. of Land Commissioners*, 169 Idaho 922, 931, 505 P.3d 708, 717 (2022). The Idaho Supreme Court has confirmed that res judicata can apply to administrative proceedings. *See id.* In *Byrd*, the Court concluded that collateral estoppel did not apply because there was "no record demonstrating any litigation of the parties' littoral rights, much less ownership of the shoreline beyond the iron pins." 160 Idaho at 932, 505 P.3d at 718. Although the applicants had previously received an encroachment permit, their "initial permit issued without a hearing and with only minimal procedures was not a final adjudication of their littoral rights and ownership." *Id.*

Furthermore, "res judicata can apply within the same case to bar relitigation of those issues that were previously decided and are the subject of a final judgment." *Doe I v. John Doe*

(2024-23), 566 P.3d 409, 420 (Idaho 2025) (citing *State v. Wolfe*, 158 Idaho 55, 62, 343 P.3d 497, 504 (2015)) (emphasis added). The key point is that an issue must be actually decided for res judicata to apply. The Idaho Supreme Court has found that res judicata does not bar litigation of issues that were not ripe for adjudication in the prior action. *See Duthie v. Lewiston Gun Club*, 104 Idaho 751, 754, 663 P.2d 287, 290 (1983). In this case A&B's senior water right was never at issue in any prior As Applied Order, hence there was no facts to address what was required for mitigation. *See id.* ("The 'sameness' of a cause of action for purposes of application of the doctrine of res judicata is determined by examining the operative facts underlying the two lawsuits").

The test for res judicata requires a "final judgment on the merits," which is generally defined as "an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties." *Snap! Mobile, Inc. v. Vertical Raise, LLC*, 173 Idaho 499, 522, 544 P.3d 714, 737 (2024), *reh'g denied* (Mar. 28, 2024).

> Issue preclusion is found where:
>
> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Id. (emphasis added).

Claim preclusion occurs where a claim could have been brought in the previous action, regardless of whether it was actually brought, where: "(1) the original action ended in final judgment on the merits, (2) the present claim involves the same parties as the original transaction,

and (3) the present claim arises out of the same transaction or series of transactions as the original action." *Elsaesser v. Riverside Farms, Inc.*, 170 Idaho 502, 508, 513 P.3d 438, 444 (2022).

As highlighted above, an issue is not subject to res judicata if it was not actually decided in a final judgment on the merits. *See Snap! Mobile, Inc.*, 173 Idaho at 522, 544 P.3d at 737. Nowhere in any of the Director's prior As-Applied Orders or the methodology orders does the agency explain or address the contested issue of apportioning the mitigation obligation amongst groundwater users. Further, the Director used a steady-state analysis for identifying a curtailment date from 2016 through 2022. The Director also found that A&B did not have to mitigate for its groundwater rights that had been converted to a surface water supply. In addition, the oldest priority for junior ground water rights affected under that method was June 14, 1977, approximately 30 years junior to A&B's most senior ground water right 36-2080.

Unlike the examples offered by AFA and IGWA, the issue of apportioning the mitigation obligation has not been previously heard and decided by the Department.[16] As such, the element of actually deciding the issue through a final judgment for res judicata is not met in this case. In addition, it is clear that the issue of how IDWR apportions the mitigation obligation to satisfy a predicted in-season demand shortfall was not heard at the June 2023 hearing as the Director limited Jennifer Sukow's testimony to the issue of modeling simulations for determining a

[16] AFA points to the Director's *Order Denying Cities' Motion for Clarification and Reconsideration* (Sept. 25, 2023) as a reason to deny A&B's present requests for hearing. *See* AFA Motion at 6, n. 4. However, the Cities' four issues relating to the SWC's water use were all litigated and decided by the Director following the June 2023 hearing. *Compare Order Denying Cities' Motion* (Sept. 25, 2023) at 1-2 (listing four issues) with *Post-Hearing Order Regarding Fifth Amended Methodology Order* at 17-23 (July 19, 2023) (addressing IGWA's and Cities' claims regarding SWC efficiency, irrigated acres, supplemental ground water use). IGWA similarly argues that its example from the 2016 mitigation plan case should apply here as well. *See* IGWA Motion at 7. However, in that proceeding the Director concluded IGWA failed to request a hearing on the *2022 Compliance Order* as required by section 42-1701A(3), and that its attempt to raise its "baseline issue" eight months later, including after the hearing held before Hearing Officer Roger Burdick held in March 2024, was untimely. *See Order Denying IGWA's Motion to Vacate or Amend 2022 Compliance Order* at 6 (CM-MP-2016-001) (May 2, 2024) ("IGWA failed to timely raise the baseline calculation example"). As such the above references are distinguishable and not applicable to the present contested case. The Hearing Officer should reject AFA's and IGWA's arguments accordingly.

curtailment date. Similar to the applicants in *Byrd*, where an agency does not answer a disputed issue in a prior administrative action, collateral estoppel does not apply to preclude a future hearing on the issue. *See* 160 Idaho at 932, 505 P.3d at 718 ("the Department was correct to permit Coffey's objection and conduct a hearing on the dispute").

Finally, from 2023 through 2024 the Ground Water Districts filed numerous mitigation plans and attempted to mitigate through a "hybrid" approach as to previously approved plans. Various districts were proposing to mitigate with a "transient" approach while others were attempting to use the 2009 Storage Plan, which mitigation would have covered all groundwater users, including A&B. This state of mitigation uncertainty clouded what the Department was accepting and approving and what mitigation obligation A&B finally had in those years, if any. Viewed in this context, it is clear that res judicata cannot apply to bar the present contested case addressing A&B's requests for hearing on the 2025 As Applied Orders.

Moreover, due process requires a hearing prior to curtailing a junior groundwater right for the first time, in this case A&B's 1948 water right 36-2080. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815, 252 P.3d 71, 96 (2011) ("Under these circumstances, the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for hearing"). For these reasons the Hearing Officer should deny AFA's and IGWA's request to vacate and/or dismiss this case on res judicata grounds.

II. A&B's Requested Hearing on the Apportionment Issue is Not Moot.

AFA further claims that issue no. 3 in the July 24, 2025 request for hearing is "moot" because the Director approved an interim stipulation for the 2025 irrigation season between A&B and the Coalition. *See* AFA Motion at 6. The Director approved the stipulation and concluded that "A&B does not need to establish that they can mitigate for its proportionate share

of the predicted IDS" for purposes of the 2025 irrigation season. *See Order Revising July 2025 Forecast Supply (Methodology Steps 7-8)* at 12, n. 7 (Sept. 11, 2025). However, the Director had previously granted A&B's requests for hearing on the April and July As Applied Orders.[17] the issue is not "moot" as the Director recently found that A&B has a mitigation obligation concerning the reasonable carryover shortfall. *See Final Order Establishing Reasonable Carryover (Methodology Step 9)* at 5, n. 10 (November 21, 2025); *see also*, *Final Order Curtailing Ground Water Rights Junior to August 15, 1952* (December 8, 2025).[18] How IDWR apportions mitigation obligations in the context of the SWC delivery call is an issue that has not been previously decided and is likely to arise again in future As Applied Orders. Developing a full administrative record on this issue in the "public interest" and allows parties to exhaust administrative remedies prior to any petitions for judicial review.

The issue is particularly relevant as additional areas have been added to the defined ESPA Area of Common Ground Water Supply effective November 1, 2025, and additional tributary basin areas will likely be added later.[19] *See* Idaho Code § 42-233c; *see also*, *Order*

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[17] AFA cites a prior denial of IGWA's petition for review as a basis for the Hearing Officer to conclude the present case is "moot." *See* AFA Motion at 6, n. 7. IGWA had challenged the Director's requirement for IGWA to pay administrative fees to Water District 01 as part of its storage water leases. IGWA was attempting to mitigate under its 2009 Plan early in 2023, but eventually abandoned that theory when it decided to mitigate under the 2016 Plan later that summer. *See* **Ex. C** to *Thompson Dec.* In an exercise of discretion the Director denied IGWA' petition for reconsideration and concluded that "the issue is not likely to evade judicial review" and "there is no substantial interest in having the issue decided now." *See Order Denying IGWA's Petition for Review* at 2. By contrast, there is a "substantial public interest" reason for addressing A&B's issue now as how the Department should apportion a mitigation obligation is a "live" issue with respect the SWC call, and it will arise every time an As Applied Order finds material injury. *See Final Order Establishing Reasonable Carryover (Methodology Step 9)* at 5, n. 10 (November 21, 2025).

[18] A&B requested a hearing on the Step 9 Order and requested the Director to "stay" any formal proceedings pending the resolution of this proceeding. *See A&B Irrigation District's Request for Hearing / Evidence of Ability to Mitigate / Request for Stay & Informal Proceedings* at 3 (Dec. 2, 2025) ("As opposed to having the same issues addressed in multiple contested cases where the results of the prior proceeding and any final order may impact the calculations and proportionate share of the reasonable carryover shortfall assigned to A&B, and assuming A&B's request for hearing is granted, the District would request the Director to stay any formal proceedings").

[19] The Director has initiated the process to expand the ESPA ACGWS in the American Falls, Big Lost, Little Lost, Portneuf, and Raft River Tributary Basins. *See* https://idwr.idaho.gov/legal-actions/administrative-actions/

Regarding Mid-Season Change to Area of Common Ground Water Supply for the Eastern Snake Plain Aquifer; Third Order Amending Curtailment List (June 28, 2024); **Ex. G** to *Thompson Dec.*

With respect to finding a case "moot," the Idaho Supreme Court has commented that "[a] case is considered moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Vanrenselaar v. Batres*, 575 P.3d 866, 885 (Idaho 2025) (citations and internal quotation marks omitted). A&B has a "legally cognizable interest in the outcome" of this proceeding as the Department's mitigation apportionment decision has varied between a few hundred acre-feet to over 5,000 acre-feet this past July. Whereas the SWC and A&B stipulated to an assignment of storage this past summer, the issue is still "live" in the context of future As Applied Orders, including the recently issued 2025 Step 9 Order. Even if the 2025 irrigation season obligation is considered "moot," the Hearing Officer can grant one of the recognized exceptions to allow this case to proceed to an evidentiary hearing.

The Idaho Supreme Court has acknowledged that, even when a case is deemed moot, there are discrete exceptions to overcome mootness:

> This Court has recognized three exceptions to the mootness doctrine: (1) when there is the possibility of collateral legal consequences imposed on the person raising the issue; (2) when the challenged conduct is likely to evade judicial review and thus is capable of repetition; and (3) when an otherwise moot issue raises concerns of substantial public interest.

In re Guardianship of Doe, 157 Idaho 750, 754, 339 P.3d 1154, 1158 (2014) (citations and internal quotation marks omitted).

The *Collateral Legal Consequences* exception is straightforward: the party raising the otherwise-moot issue must show "the possibility of collateral legal consequences" that would flow from the issue. *In re Guardianship of Doe*, 157 Idaho at 754, 339 P.3d at 1158. One of the

few illustrative examples of this exception[20] is found in *Snap! Mobile, Inc. v. Vertical Raise, LLC*, 173 Idaho 499, 544 P.3d 714 (2024), *reh'g denied* (Mar. 28, 2024). In *Snap!*, defendant was subject to an 18-month permanent injunction that (in sum) broadly prohibited defendant from conducting a wide array of business activities. Defendant appealed, arguing the permanent injunction was overbroad. By the time of appeal, the injunction had already expired. Despite being moot, the Idaho Supreme Court addressed the merits of defendant's injunction argument. The court reasoned that defendant's injunction challenge fell within the *collateral legal consequences* exception because defendant was at risk of contempt for possible violations of the injunction. Thus, a judicial determination of the injunction's lawfulness would have collateral legal consequences for defendant.

Here, the apportionment of A&B's mitigation obligation will have collateral legal consequences for A&B with respect to existing (i.e. 2025 Step 9 Order) and future As Applied Orders and injury determinations. Moreover, understanding IDWR's methodology and calculations as it applies amongst junior groundwater users is an important administrative matter that should be decided for purposes of future application, particularly in the context of multiple mitigation plans and their implementation.

Next, for the *capable of repetition yet evading review* exception to apply, the following circumstances must simultaneously exist: "(1) the challenged action is, in its duration, too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *State v. John Doe* (2022-04), 172 Idaho 386, 392, 533 P.3d 295, 301 (Ct. App. 2023). Here A&B is already subject to another pending decision regarding the apportionment of a mitigation obligation (2025 Step 9

[20] Referring only to examples in the civil context. Most *collateral legal consequences* case involve criminal matters like parole or double jeopardy.

Order). *See also*, *Final Order Curtailing Ground Water Rights Junior to August 15, 1952* (December 8, 2025).

Given the hydrologic conditions experienced in 2025, it is reasonable to expect that a future predicted in-season shortfall will trigger a curtailment date affecting A&B's senior water right 36-2080 again. For example, prior As Applied Orders issued in 2021 and 2022 identified predicted in-season demand shortfalls ranging between 132,100 acre-feet and 170,000 acre-feet. Short water years are certain to occur in the future, it is not a matter of "if" but "when." For that reason, it is "reasonable" for A&B to expect that it will be subject to the same Department apportionment decision related to the mitigation obligation and that the "capable of repetition yet evading review" exception to the mootness doctrine applies.

III. IGWA's "Law of the Case" Argument Does not Apply and Should be Denied.

IGWA also argues that the "law of the case" doctrine precludes A&B from raising the issues identified in its requests for hearing on the two 2025 As Applied Orders. *See* IGWA Motion at 8. IGWA points to no "subsequent appeal" that would apply to an "earlier appeal" to show how the doctrine might apply in this proceeding. On its face IGWA's motion plainly fails the summary judgment standard.

Instead, IGWA only cites to a prior argument raised by the Coalition in the petition for judicial review case that is currently stayed before the Ada County District Court (Case No. CV01-23-13173). *See* IGWA Motion at 9, n. 2. The argument advanced by the Coalition in that appeal related to IGWA's defenses of "futile call" and "maximum beneficial use," defenses that IGWA raised time and time again and the Department had previously rejected.[21] Stated another

[21] *See Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* at 19, 26 (Apr. 29, 2008) ("Junior water pumping caused material injury to surface water irrigators affecting natural flow and storage rights . . . 5. The Surface Water Coalition made the showing that its members had licensed or decreed water rights and that

way, IGWA alleged that conjunctive administration was precluded altogether based on those defenses. Whereas IGWA attempted to re-raise those defenses in the appeal of the Director's *Sixth Methodology Order*, the Coalition rightfully argued such defenses should be rejected, "again." *See generally*, *IGWA's Opening Br.* at 39-44 (arguments regarding "futile call" and "maximum use" defenses). The district court agreed and affirmed the Director's determination that the delivery call was not futile. *See Memorandum Decision* at 24-26.

Unlike IGWA's alleged defenses, A&B's issues on the apportionment of a mitigation obligation have not been previously decided by the Department or by any court on judicial review. Accordingly, IGWA's "law of the case" argument should be denied.

IV. IGWA's "Quasi-Estoppel" Argument Does not Apply and Should be Denied.

Finally, IGWA turns to an equitable argument and claims that A&B should be estopped from challenging how the Department apportions the mitigation obligation based on the Ground Water Districts' *2024 Stipulated Mitigation Plan*. *See* IGWA Motion at 9-10; *see Gomez v. Hurtado*, 174 Idaho 1002, 1013, 554 P.3d 53, 64 (2024) ("Quasi-estoppel is an equitable remedy"). IGWA claims that because its ground water district members applied a "steady state" modeling analysis to apportion their 75,000 acre-feet (up to 82,500 acre-feet) storage water mitigation obligation, then A&B should also be bound to that analysis for purposes of the present contested case proceeding and its mitigation obligation.

Quasi-estoppel requires the following:

> (1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.

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material injury was occurring."); *see also*, *A&B Irr. Dist. v. IDWR*, 155 Idaho 640, 653, 315 P.3d 828, 841 (2013) (affirming IDWR's use of a "baseline methodology" in the SWC delivery call).

Gomez, 174 Idaho at 1014, 554 P.3d at 65.

The Supreme Court further found that "in order to state a claim for … quasi-estoppel, a plaintiff must at least allege, among other things, a promise or representation by the party to be estopped." *Id.* IGWA's motion fails to prove the above elements.

First, contrary to IGWA's argument, A&B did not agree "that steady-state modeling is the appropriate method for allocating storage water mitigation obligations among groundwater users." *See* IGWA Motion at 9. The 2024 Stipulated Plan had absolutely nothing to do with A&B's groundwater rights and how IDWR would apportion any future mitigation obligation relative to those rights. A&B participated in the stipulation as a member of the "Surface Water Coalition" and the mitigation plan only protected the participating Ground Water Districts. *See Joint Motion for Order Approving 2024 Stipulated Mitigation Plan*, **Ex. H** to *Thompson Dec.* The joint motion plainly stated that it was submitted "to provide safe harbor to groundwater rights held by patrons of the Ground Water Districts and other entities representing groundwater users that participate in and comply with the Plan." *See Joint Motion* at 3. The 2024 Plan was not submitted for A&B's groundwater rights and does not prejudge how IDWR reviews A&B's mitigation plan or evaluates its mitigation obligations. Therefore, IGWA has failed to show that A&B's present position is something different than its original position.

Next, IGWA cannot show that A&B gained some advantage or that the Ground Water Districts were induced to change their original position. While the Ground Water Districts chose to divide up their stipulated storage water obligation based upon a steady-state analysis, that stipulated quantity and formula has no bearing on IDWR's decisions in a contested case or A&B's right to challenge how IDWR apportioned a future mitigation obligation (i.e. as was done with the July As Applied Order regarding A&B's 1948 groundwater right 36-2080). Moreover,

IGWA can point to no "advantage" that A&B gained through the 2024 Stipulated Plan, other than to argue without any supporting evidence that "[w]ithout that provision, the ground water districts would not have agreed to the 2024 Plan." *See* IGWA Motion at 9. The Ground Water Districts have an approved mitigation plan, they are not subject to curtailment, hence they can show no "disadvantage" by operation of the 2024 Plan.

Finally, the Director's approval of the 2024 Plan did not decide any contested storage water apportionment issue. Instead, the Director generally recognized the new mitigation plan was based upon an agreement of the parties and that it included various activities that the ground water users had to implement to receive safe harbor. *See Amended Final Order Approving Stipulated Plan* at 5 (CM-MP-2024-003) (Feb. 7, 2025). The Director did not decide any contested issues or standards, and recognized his ability to consider, as provided by the CM Rules, "'[w]hether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even through such plan may not otherwise be fully in compliance with these provisions.' IDAPA 37.03.11.043.03(o)." *See id.*

Finally, IGWA resorts to hyperbole in the hopes that its claim will sway the Hearing Officer to grant its motion. A&B's present requests for hearing are not some nefarious "bad faith" effort or "indirect attack on the 2024 Plan."[22] Whereas the Ground Water Districts have an approved mitigation plan and have received safe harbor from the SWC delivery call for the past two years, IGWA can point to no suffered "disadvantage" or "detriment" based upon A&B's present position in this contested case.

[22] IGWA is a not even a party to the 2024 Stipulated Plan and therefore has no basis to argue its interpretation or enforcement for its benefit. *See e.g. American West Enterprises, Inc. v. CNH, LLC*, 155 Idaho 746, 752-53, 316 P.3d 662, 668-69 (2013) ("The third party must show that the contract was made primarily for his benefit, and that it is not sufficient that he be a mere incidental beneficiary. Further, the contract itself must express an intent to benefit the third party").

In short, the equitable doctrine of quasi-estoppel has no application in this case and the Hearing Officer should deny IGWA's motion accordingly.

CONCLUSION

A&B's requests for hearing are properly before the Hearing Officer and should proceed to a full hearing on the merits as scheduled in January. As explained above AFA's and IGWA's attempts to vacate and/or dismiss this proceeding are misplaced and should be denied.

DATED this 9th day of December, 2025.

PARSONS BEHLE & LATIMER

Travis L. Thompson

Attorneys for A&B Irrigation District

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2025, I served a true and correct copy of the foregoing *A&B Irrigation District's Consolidated Response* on the following by the method indicated:

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