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 Canal Company*

**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  
 Docket No. CM-MP-2016-001

**SURFACE WATER COALITION’S  
 OPPOSITION TO BONNEVILLE-  
 JEFFERSON GROUND WATER  
 DISTRICT’S MOTION TO  
 INTERVENE / MOTION TO STRIKE  
 RESPONSE**

IN THE MATTER OF IGWA’S  
 SETTLEMENT AGREEMENT  
 MITIGATION PLAN

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley  
 Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal  
 Company, and Twin Falls Canal Company (collectively hereafter referred to as the “Surface

Water Coalition,” “Coalition,” or “SWC”), by and through their counsel of record, and pursuant to IDAPA 37.01.01.354 and .220, hereby oppose Bonneville-Jefferson Ground Water District’s (“Bonneville”) *Motion to Intervene*. SWC further moves to strike Bonneville’s *Response in Opposition to SWC’s Motion for Summary Judgment* (“*SJ Response*”). This opposition and motion is supported by the documents and prior orders filed in this case.

### **Introduction**

Throughout this contested case and its related proceedings, dating back to 2010, Bonneville has been a party and participated as a member of the Idaho Ground Water Appropriators, Inc. (“IGWA” or the “Districts”), represented by the law firm of Racine Olson, PLLP. IGWA is an umbrella organization that represents the interests of the nine ground water districts that signed the IGWA-SWC Settlement Agreement and are subject to the Final Order Approving Stipulated Mitigation Plan, as amended, dated May 2, 2016 (“Final Order”): Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Henry’s Fork Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District. *See IGWA’s Response to Surface Water Coalition’s Notice of Steering Committee Impasse* (August 3, 2022) at 1. None of the ground water districts, including Bonneville, appealed the Director’s Final Order.

In the summer of 2022, the Coalition notified IDWR that the Steering Committee was at an impasse on the question of the Districts’ 2021 performance under the Final Order and Stipulated Mitigation Plan. *See SWC Notice of Steering Committee Impasse / Request for Status Conference* (July 21, 2022). The Districts filed a response and did not dispute the committee’s impasse on the question of the Districts’ 2021 performance. *See IGWA’s Response to Surface*

*Water Coalition's Notice of Steering Committee Impasse* (August 3, 2022). The Director held a status conference on August 5, 2022, and then took official notice of the Districts' 2021 performance report and supporting spreadsheets. *See Notice of Intent et al.* (August 18, 2022). The Director issued the *Final Order Regarding Compliance with Approved Mitigation Plan* on September 8, 2022. IGWA filed a *Petition for Reconsideration and Request for Hearing* on September 22, 2022. The Director issued an order granting the request for hearing on October 13, 2022.

On November 10, 2022, the Director held the prehearing conference in this matter. The parties served initial discovery requests in early December. On December 21, 2022, SWC filed its *Motion for Summary Judgment*, arguing that the Mitigation Plan and Final Order are unambiguous and that the Director can resolve this pending case as a matter of law. As such, there is no need for any evidentiary hearing in this matter and IGWA's petition should be dismissed as a matter of law.

In response, on January 4, 2023, IGWA filed its *Response in Opposition to SWC's Motion for Summary Judgment*. Later that same day, and for the first time in this proceeding, Bonneville independently filed its *Motion to Intervene, SJ Response, and Substitution of Counsel*.<sup>1</sup> By these filings, Bonneville seeks independent intervenor/party status in this contested case. For the reasons discussed herein: (1) Bonneville's *Motion to Intervene* is contrary to the criteria in IDWR's rules and should be denied; (2) Bonneville's *Substitution of Counsel* is incomplete and is therefore without effect; and therefore, (3) Bonneville's *SJ Response* should be stricken from the record.

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<sup>1</sup> Counsel for the SWC received IGWA's response via email at 4:23 p.m. and Bonneville's unauthorized filing via email at 4:40 p.m.

## Argument

### **I. Bonneville’s *Motion to Intervene* is inadequate and should be denied.**

Intervenors are permitted to participate in a contested case pursuant to IDWR Rules of Procedure 350 to 354. IDAPA 37.01.01.155. “A person who is not already a party to a contested case and who has a direct and substantial interest in the proceeding may petition” to intervene. IDAPA 37.01.01.350 (emphasis added). The petition to intervene must state the direct and substantial interest of the potential intervenor, must be timely made, must not unduly broaden the issues, and the potential intervenor’s interests must not be adequately represented by existing parties. IDAPA 37.01.01.351-.353.

Bonneville’s *Motion to Intervene* does not satisfy the requirements of Rules 350 to 354. As a threshold concern, Bonneville is not eligible to be an intervenor because Bonneville is currently a party to this contested case and is represented by IGWA. Bonneville has been a member of IGWA throughout the pendency of this contested case starting back in 2016 for purposes of the Stipulated Mitigation Plan, even longer for the delivery call case. This is recognized by Bonneville, which seeks to substitute new counsel. If Bonneville was not a party to the proceedings, it would have no need to substitute counsel—Bonneville’s counsel would need only appear and request intervention.

Additionally, the *Motion to Intervene* fails to allege that Bonneville’s interests are not adequately represented by existing parties. Even if they had, that position would be untenable. As IGWA has stated, it represents the interests of its members, including Bonneville and has so in the Coalition delivery call for well over a decade. Moreover, IGWA has specifically represented Bonneville in this mitigation plan case for the past six (6) years, from the initial filing of the Stipulated Mitigation Plan and entry of the Final Order through the recent request

for hearing. Moreover, Bonneville’s January 4, 2023 motion is untimely because the prehearing conference in this matter was held nearly two months ago on November 10, 2022. *See* IDAPA 37.01.01.352 (“Petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, or by the date of the initial prehearing conference, whichever is earlier”) (emphasis added). Allowing Bonneville to intervene at this stage of the case, just weeks before the hearing is scheduled to be held would prejudice the Coalition. Notably, the existing parties have already served discovery requests and engaged in motion practice. Allowing Bonneville to separately intervene at this point would pose additional unwarranted litigation burdens and expenses on the SWC. The Director should prohibit this type of eleventh hour litigation tactic.

Furthermore, Bonneville’s inclusion as an intervenor would unduly broaden the issues in this contested case. Bonneville seeks independent intervenor status “to preserve and not waive certain legal arguments and defenses not raised in IGWA’s Response brief.” *Petition to Intervene* at 1-2. Those legal arguments and defenses are presented in Bonneville’s unauthorized *SJ Response*.<sup>2</sup> Bonneville is attempting to frame this action as a contract action and doesn’t address the fact that a Final Order was entered in this action over six years ago. Bonneville’s asserted arguments include a claim for unjust enrichment, and defenses for legal impracticability, unclean hands, and an absence of damages, all issues that would expand the scope of this proceeding and that are beyond the scope of IGWA’s original request for hearing and response to the SWC’s motion for summary judgment.

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<sup>2</sup> Bonneville does not have independent party status to file any response beyond what was already filed by IGWA. In the event the Director determines that Bonneville will be allowed to participate separate and apart from IGWA, participation of Bonneville must be limited to the issues in the proceeding at the time Bonneville is allowed to proceed independently. If the new issues raised by Bonneville are allowed to be part of the proceeding, SWC reserves the right to file a reply addressing those separate arguments.

The Coalition's summary judgment motion addresses the legal reasons an evidentiary hearing on the Director's *Final Order Regarding Compliance with Approved Mitigation Plan* is unwarranted. SWC argues, in short, that the terms of the Agreement and Stipulated Mitigation Plan between IGWA and the Coalition, and the Director's Final Order approving the same are unambiguous and fully contained within the four corners of the documents. As such, there is no legal basis to consider extraneous information and therefore no need for an evidentiary hearing as a matter of Idaho law. Bonneville's claims and defenses, in addition to being meritless,<sup>3</sup> are issues that unduly broaden the scope of the contested case beyond the specific Mitigation Plan terms and requirements that the parties have heretofore been concerned in this contested case.

In sum, Bonneville is already a party to this contested case represented through IGWA and is therefore ineligible to petition to intervene by IDWR's rules of procedure. Moreover, Bonneville's interests are adequately protected by the existing parties, namely IGWA, and Bonneville does not allege that its interests are not adequately represented. In addition, Bonneville states that its sole purpose in seeking intervention is to expand the issues before the Director as set forth in its brief. Moreover, Bonneville's motion is untimely and at this stage in the proceeding, Bonneville's inclusion as an intervenor would unduly broaden the issues in this matter to the prejudice of the Coalition. For all of these reasons, Bonneville's *Motion to Intervene* should be denied.

**II. Bonneville's *Substitution of Counsel* is incomplete.**

Bonneville's *Substitution of Counsel* states that "Olsen Taggart PLLC, [] hereby substitutes as counsel on behalf of Intervenor, Bonneville-Jefferson Ground Water District." It is signed only by the substituting counsel. While a party's representative may be changed by notice

to the agency and all parties, “[p]ersons representing a party in a contested case before the agency who wish to withdraw their representation must immediately file with the agency a notice of withdrawal of representation.” IDAPA 37.01.01.204 (emphasis added). Here, Bonneville, via IGWA, is represented by Racine Olson, PLLP. Counsel for IGWA, representing Bonneville as part of IGWA and the other ground water districts, filed a response to the Coalition’s motion on January 4, 2023. There was no indication at that point that Bonneville would attempt to change attorneys and raise additional issues. Indeed, no notice of withdrawal has been filed by Mr. Budge and Ms. Patterson, and there is nothing filed by Bonneville or IGWA stating that Bonneville is no longer a member of IGWA, therefore Olsen Taggart cannot substitute as counsel pursuant to IDWR’s own rules.

### **III. Bonneville’s *SJ Response* should be struck.**

Motions for summary judgment before IDWR are governed by Idaho Rule of Civil Procedure 56 (a-f). IDAPA 37.01.01.220.3. As noted, Bonneville is already a party to this action as a member of IGWA. On January 4, 2023, IGWA filed its response opposing SWC’s motion for summary judgement. IGWA represents Bonneville and its interests. Bonneville had no legal basis to submit a separate additional response through counsel that was not properly substituted. Further, neither IDWR’s procedural rules nor the Idaho Rules of Civil Procedure allow a party to submit multiple independent responses to a party’s motion. As such, Bonneville’s *SJ Response* should be struck as duplicative and/or moot.

Assuming *arguendo* that Bonneville is not a party to this action as a member of IGWA, then Bonneville would remain a non-party to this contested case as they have not been granted intervenor status. Bonneville’s interests are adequately represented in this case, and its *Motion to Intervene* is untimely and unduly broadens the scope of the contested case. As such, Bonneville

should not be granted intervenor status and would not have standing to file any response or objection to SWC’s summary judgment motion. Bonneville cannot properly respond until it is granted intervenor status—which it should not be granted for the reasons discussed *supra*.

In either event, Bonneville’s *SJ Response* should be struck. If Bonneville is a party through IGWA, Bonneville’s response is duplicative and moot. If the district is a non-party seeking intervenor status, Bonneville’s response is not authorized until the Director issues an order granting the district separate, and apparently “new” party status. Either way the *SJ Response* is improper and should be stricken at this time. As such, the Coalition moves the Director to strike Bonneville’s *SJ Response*.

**Conclusion**

For the reasons set forth herein, the Coalition: (1) opposes Bonneville’s request for intervenor status and requests the Director DENY Bonneville’s *Motion to Intervene*; (2) challenges the sufficiency of Bonneville’s substitution of counsel and requests the Director disregard Bonneville’s *Substitution of Counsel*; and, (3) requests the Director strike Bonneville’s *SJ Response*.

DATED this 9th day of January, 2023.

**BARKER ROSHOLT & SIMPSON LLP**



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Travis L. Thompson

*Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, NSCC and TFCC*

**FLETCHER LAW OFFICE**



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W. Kent Fletcher FOR

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



## CERTIFICATE OF SERVICE

I hereby certify that on this 9<sup>th</sup> day of January, 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

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