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DEPARTMENT OF
WATER RESOURCES

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**BEFORE THE DEPARTMENT OF WATER RESOURCES
 OF THE STATE OF IDAHO**

IN THE MATTER OF THE CITY OF IDAHO)
 FALLS MITIGATION PLAN FOR THE)
 SURFACE WATER COALITION CALL)

Docket No.: CM-MP-2015-005

**SURFACE WATER COALITION'S
 PETITION TO INTERVENE**

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)

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, the "Surface Water Coalition," "Coalition" or "SWC"), by
 and through their undersigned attorneys of record, hereby petition the Idaho Department of
 Water Resources for an order granting intervention in the above-captioned proceeding

concerning the City of Idaho Falls' ("Idaho Falls") proposed Rule 43 mitigation plan. The Coalition's petition is filed pursuant to Department Rules of Procedure 350 to 354 (IDAPA 37.01.01) and is supported by the *Affidavit of Travis L. Thompson* filed together herewith.

For the reasons set for the below the Department should grant the Coalition's intervention in this matter.

BACKGROUND

The Surface Water Coalition filed its water delivery call in January 2005. The administrative proceeding, currently captioned CM-DC-2010-001, contains the information and seminal orders regarding the Coalition's call and conjunctive administration of hydraulically-connected junior priority ground water rights. *See also, A&B Irr. Dist. v. Spackman*, 155 Idaho 640 (2013).

After several years of litigation before the agency and Idaho's judiciary, the Coalition recently entered into a historic settlement agreement with participating groundwater users in the Idaho Ground Water Appropriators, Inc. ("IGWA") and several ground water districts. The agreement provides a framework for stabilization and enhancement of groundwater levels across the Eastern Snake Plain Aquifer ("ESPA"). The Coalition has also participated in negotiations with several other junior ground water users, including Southwest Irrigation District, the City of Pocatello, and the Coalition of Cities. These discussions are ongoing and will hopefully reach resolution in the near term. Although Idaho Falls and other cities may ultimately reach a stipulated resolution with the Coalition, no formal agreement has been reached to date.¹

On October 27, 2015 Coalition attorney Travis Thompson participated in a meeting and conference call with several attorneys for various cities, including attorney Rob Harris on behalf

¹ The Coalition is filing the present petition to protect its procedural rights in the contested case. The filing should not be misconstrued as to the Coalition's continued negotiations with the City of Idaho Falls and others concerning mitigation and aquifer management plans.

of Idaho Falls. *See Thompson Aff.* On that call Mr. Harris represented that he had filed or would be filing a mitigation plan on behalf of Idaho Falls in response to the Coalition delivery call. *See id.* Mr. Thompson requested Mr. Harris to stay processing the mitigation plan while negotiations with the various cities continued, so as to avoid expenses involved with litigation, including protest fees for the Coalition members. *See id.* Mr. Harris was receptive to the request and represented that he would contact IDWR to make the request. *See id.* Based on Mr. Harris' representation, it was the understanding of counsel that any mitigation plan filed by Idaho Falls would not proceed for formal processing before IDWR at that time. *See id.*

On October 19, 2015 Idaho Falls filed its Rule 43 mitigation plan with IDWR. Despite the plan's caption, Mr. Harris did not serve any member of the Coalition or their respective counsel with the plan. *See Thompson Aff.* Further, even after the conference call with Mr. Thompson on October 27, 2015, Mr. Harris never provided the Coalition with a copy of the plan by electronic mail or otherwise. *See id.* IDWR sent Mr. Harris a letter on October 29, 2015 advising of the legal notice it was prepared to submit to four regional newspapers. Apparently Mr. Harris failed to advise IDWR to not process the mitigation plan as discussed and failed to relay this information to the Coalition counsel, despite discussing the very issue two days prior.

Notice of the mitigation plan was published in four regional newspapers on November 5th and 12th, 2015. The protest deadline was then set for November 23, 2015. The Coalition and counsel did not see the legal notices and consequently did not file a protest to the plan.

On November 30, 2015, counsel for the Coalition reviewed the Department's website and noticed that a protest to the Idaho Falls mitigation plan had been filed by the New Sweden Irrigation District. *See Thompson Aff.* Mr. Thompson contacted Deborah Gibson at IDWR's state office by email and asked whether notice of the plan had been published yet and if so when

was the date of publication. *See Thompson Aff.*, Ex. 1. Ms. Gibson responded that “nothing has been scheduled yet” and that she would forward the request to the Director and Garrick Baxter for their response. *Id.*, Ex. 1. Thereafter IDWR did not provide any further response to Mr. Thompson. *See id.*

On December 16, 2015, counsel for the Coalition again reviewed the Department’s website and noticed for the first time the legal notices for the four regional newspapers had been posted. *See id.* Based upon counsel’s prior review, this was the first time that notice of the plan was made public by IDWR on its website. *See id.* Mr. Thompson immediately called Mr. Harris and sent an email asking if Idaho Falls would stipulate to the Coalition’s intervention in the proceeding. Mr. Harris did not the return the call but did respond by email on December 17, 2015. Mr. Harris inquired about whether IDWR sent the Coalition notice and indicated the City may oppose the petition to intervene. *See Thompson Aff.* Mr. Harris also referenced the continued discussions between the cities and the Coalition and that Idaho Falls may participate in a broader plan at some point. Mr. Harris did not want to address the Coalition’s petition for intervention. In sum, Idaho Falls did not definitively indicate whether the city would or would not oppose a petition the Coalition’s petition to intervene.

Consequently, the Coalition is filing the present petition seeking intervention in the contested case over Idaho Falls’ mitigation plan.

ARGUMENT

Department Rules of Procedure 350 to 354 govern intervention in administrative proceedings. The Rules establish the following elements for intervention:

- State the name and address of the proposed intervenor (Rule 351);
- State the “direct and substantial interest of the potential intervenor” (Rule 351);

- Be timely, including that the Petition be filed within 14 days of the hearing or the prehearing conference (Rule 352); and
- Not “unduly broaden the issue” (Rule 343).

As detailed below, the Coalition’s petition meets this standard and intervention should be granted.

I. Name and Address of the Proposed Intervenors.

The members of the Surface Water Coalition are: 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. Any communications with the Coalition should be conducted through their respective counsel, identified above.

II. The Coalition has a “Direct and Substantial Interest” in the Mitigation Plan.

The caption of Idaho Falls’ mitigation plan is telling as to the Coalition’s “direct and substantial interest” in this proceeding. Indeed, the caption specifically notes that the mitigation plan is filed for the very purpose of providing mitigation in response to the Coalition’s water delivery call. Although some mitigation plans may be filed generally without mention of a particular delivery call, it is undisputed that Idaho Falls filed its plan specifically in response to the Surface Water Coalition call.

The Coalition holds private property right interests, or decreed senior water rights, that stand to be directly and materially affected by the outcome of this contested case. Whereas pumping under Idaho Falls’ junior priority rights may be injuring the Coalition’s senior surface water rights, it is obvious the Coalition has a “direct and substantial interest” in the terms and conditions of the mitigation plan, including whether it should even be approved in the first place.

Indeed, the Coalition has suffered depleted water supplies for years, notably in the form of reduced reach gains to the Near Blackfoot to Minidoka reach of the Snake River. Whether and how Idaho Falls can mitigate for its injurious pumping is a question that the Coalition should be allowed to intervene and participate in.

Moreover, Idaho Falls has proposed a number of undefined and unprecedented actions related to its mitigation plan. Notably, the city seeks “mitigation credit” for wastewater treatment discharges that have been part of the natural flow distributed by the Water District 01 Watermaster for decades. Further, Idaho Falls seeks authority to deliver water under rights held by the New Sweden Irrigation District, presumably over New Sweden’s objection (given its protest). In light of these novel legal theories that may prejudice the Coalition’s senior water rights, the Coalition has a “direct and substantial interest” in this proceeding.

Further, the Coalition has a constitutional right to due process to participate and be heard on Idaho Falls’ mitigation plan. *See Bradbury v. Judicial Council*, 136 Idaho 63, 72 (2001) (“The due process clause of the Fourteenth Amendment ‘prohibits deprivation of life, liberty, or property without ‘fundamental fairness’ through governmental conduct that offends the community’s sense of justice, decency and fair play’”). It is obvious the Department should afford senior surface water right holders the right to participate and be heard in contested cases on mitigation plans that would affect their property right interests. *See Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91 (1999) (procedural due process requires the opportunity to be heard at a meaningful time and in a meaningful manner).

Moreover, the fact that a protest was not filed should not preclude the Coalition from participating in this case. Indeed, the facts show that counsel for Idaho Falls did not serve the plan on the Coalition and further represented that he would advise IDWR to stay processing the

mitigation plan. The Department did not notify the Coalition that the plan was filed or noticed. Moreover, the Coalition was not aware that the plan had been published for notice until after the protest deadline passed. *See Thompson Aff.* The Department should take such unique circumstances into account in this matter. *See e.g., Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 127 (2007) (“Due process is not a concept to be rigidly applied, but is a flexible concept calling for such procedural protections as are warranted by the particular situation”); *Smith v. State*, 146 Idaho 822, 840 (2009) (“A Kafkaesque chain of secrecy is not what the Due Process Clause contemplates”).

Regardless of the circumstances regarding the mitigation plan’s filing and its notice, it is undisputed that the Coalition has a “direct and substantial interest” in being allowed to participate in this contested case. As such, the Coalition should be entitled to intervene in this contested case.

III. The Coalition’s Petition is Timely.

The Department’s Rules of Procedure require that a petition to intervene be filed no later than 14 days before the hearing or pre-hearing conference, whichever is first. Rule 352. The Coalition filed this petition immediately after becoming aware that the protest deadline had passed in November. Further, no pre-hearing conference or hearing has been scheduled. Since the case is in the initial stages the Coalition’s petition is timely.

Moreover, granting this Petition will not cause any delay to the ongoing proceedings or any prejudice to Idaho Falls. The Coalition represents that it will abide by any schedule set by the Department in this matter.

IV. Intervention Will Not Unduly Broaden the Issues.

Finally, the Coalition's involvement in these proceedings will not unduly broaden the issues. Again, the case is in the initial stages as only the mitigation plan and one protest have been filed. No discovery has commenced, no orders have been issued by the Director, and no substantive or procedural issues have been litigated and decided. The Coalition has a right to participate on the proposed mitigation actions, including resolving any conditions or terms related to the same. The Coalition's participation will not unduly broaden any issues.

CONCLUSION

The Coalition has a direct and substantial interest in the resolution of the Idaho Falls mitigation plan. As such, since the motion is timely and the Coalition will not broaden the issues before the Department, the Coalition should be allowed to intervene in these proceedings. The Coalition requests oral argument on this petition.

Dated this 23rd day of December, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of December, 2015, the above and foregoing document was served on the following via first class mail, postage prepaid:

Director Gary Spackman
Idaho Department of Water Resources
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Boise, Idaho 83720-0098

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☐ Hand Delivery
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