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Department of Water Resources
Eastern Region

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Attorneys for the City of Idaho Falls

**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-MP-2016-001

**CITY OF IDAHO FALLS PROTEST TO
SURFACE WATER COALITION'S AND
IGWA'S STIPULATED MITIGATION
PLAN AND REQUEST FOR ORDER**

IN THE MATTER OF IGWA'S
SETTLEMENT AGREEMENT
MITIGATION PLAN

The City of Idaho Falls (the “City”), an Idaho municipal corporation, by and through its above-identified counsel, hereby submits this *Protest to the Surface Water Coalition’s and IGWA’s Stipulated Mitigation Plan and Request for Order*. The *Surface Water Coalition’s and IGWA’s Stipulated Mitigation Plan and Request for Order* (the “SWC/IGWA Plan”) was filed with the Idaho Department of Water Resources (“IDWR” or “Department”) on March 9, 2016, and has a protest deadline of on or before April 4, 2016. This protest is filed pursuant to the provisions of Rule 43 of the Idaho Department of Water Resources’ *Rules for Conjunctive Management of Surface and Ground Water Resources* found at IDAPA¹ 37.03.11 (hereinafter, the “CM Rules”), IDWR procedural rule 250 (IDAPA 37.01.01.250), and other applicable law.

The City in no way opposes or protests the mitigation-related contents of the agreement negotiated between IGWA and the SWC entitled *Settlement Agreement Entered Into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc.* (hereinafter, the “SWC-IGWA Agreement”). It appears that the *SWC-IGWA Agreement* was negotiated in good faith between the parties thereto to address issues specific to them. The City has no interest in injecting itself into a contract to which it was not a party, and applauds the parties to the *SWC-IGWA Agreement* for arriving at a written agreement.

However, the City is not a member of Idaho Ground Water Appropriators, Inc. (“IGWA”)²

¹ “IDAPA” is an acronym for rules promulgated pursuant to the Idaho Administrative Procedure Act (Chapter 52 of Title 67 of the Idaho Code). The IDAPA administrative rules can be accessed at <http://adminrules.idaho.gov/rules/current/index.html>

² References to IGWA herein incorporate its member ground water districts (North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water

or one of its member ground water districts, and therefore, did not participate in the negotiations of the *SWC-IGWA Agreement*. As a result, the City is not entitled to safe harbor under paragraph 5 of the agreement, and, under paragraph 6 of the agreement, would be considered a non-participant subject to priority administration under the Department's most recent methodology order unless the City pursues and receives approval for a mitigation plan under the CM Rules. Accordingly, the City has submitted its own mitigation plan, which has been consolidated with two other plans submitted by sister municipalities under Docket Nos. CM-MP-2015-001, CM-MP-2015-004, and CM-MP-2015-005. The City has therefore proceeded to mitigate for its ground water use independent of IGWA in order for the City to address possible curtailment resulting from the Surface Water Coalition (the "Coalition") water call.

Given the independent nature of the City's mitigation plan and the SWC/IGWA Plan, the City is concerned that certain provisions of the SWC/IGWA Plan recently submitted appear to extend beyond simply mitigating to the Coalition and therefore, extend beyond the plain language of the *SWC-IGWA Agreement*. These provisions are unrelated to mitigation under the CM Rules and potentially implicate, bind, or otherwise involve the City. These provisions should not be included or addressed in a final order approving the SWC/IGWA Plan. Therefore, the initial bases for the City's protest are as follows:

1. IGWA and the Coalition request that the Director require under the SWC/IGWA Plan that other individual mitigation plans (including the City's) should be approved if such plans "provide[] adequate mitigation to help achieve the groundwater level goal and benchmarks set forth in the SWC-IGWA Settlement Agreement." SWC/IGWA Plan at 4. This provision

District, and Jefferson Clark Ground Water District).

appears to request an order from the Director to bind the City to the goals, benchmarks, and/or other provisions of the *SWC-IGWA Agreement* despite the City's non-party status (lack of privity) to that contractual agreement, and therefore, makes the goals, benchmarks, and/or other provisions binding on the City. IGWA's and the Coalition's attempts to do so are inconsistent with Department precedent in the recently-approved Southwest and Goose Creek Irrigation District 2016 mitigation plan, where the Director ordered the following:

7. The Mitigation plan requires numerous on-going activities, such as monitoring, reporting and verification of data. The parties to the Mitigation Plan should be responsible for these activities.

8. Covenants 7 and 8 of the Mitigation Plan include reference to certain hydrologic goals. **The goals are applicable only to the parties to the Mitigation Plan.**

Final Order Approving Mitigation Plan for 2016, In the Matter of Southwest and Goose Creek Irrigation Districts Mitigation Plan for the Surface Water Coalition Delivery Call, Docket No. CM-MP-2010-01, March 29, 2016, at 3 (emphasis added). While the City believes that aquifer enhancement activities such as those contained in the *SWC-IGWA Agreement* are positive actions to be undertaken, the City was not privy to the information that led to the decision to implement the goals and benchmarks under the SWC/IGWA Plan, and therefore, cannot agree to be bound by such goals or benchmarks that it had no hand in negotiating. This is particularly critical in that the City is clearly designated as a non-participant under the *SWC-IGWA Agreement* and is not entitled to its protections. Just as the City has no intention of binding IGWA as a party to the provisions of the City's independent mitigation plan, the City should not be bound as a party to the terms of the SWC/IGWA Plan.

2. IGWA and the Coalition request that the Director do more than approve the

SWC/IGWA Plan under the CM Rules, but also request that the Director take action under Idaho Code § 42-233b to designate the Eastern Snake Plain Aquifer (“ESPA”) as a ground water management area without directly saying so. The SWC/IGWA Plan requests that the Director “[t]ake the necessary management actions to address declining ESPA groundwater levels, water supply and sustainability issues in order that the benefits contemplated in the SWC-IGWA Settlement Agreement are realized.” SWC/IGWA Plan at 4. It is unclear what the phrase “take the necessary management actions” means because there is no citation to statute, administrative rule, or other law in this statement. However, to the extent this refers to, or implicates in any way, designation of the ESPA as a ground water management area, the City believes that a CMR 43 mitigation plan administrative proceeding is not the appropriate forum to designate a ground water management area for the ESPA or to even begin the process of attempting to do so. To the extent the above-quoted provision requests that the Director designate a ground water management area for the ESPA or to even begin the process of attempting to do so, the City requests that the Director deny inclusion of this provision into a final order approving the Plan and otherwise not designate the ESPA as a ground water management area without commencing a separate administrative proceeding for that purpose.

3. For such other and further reasons as may be discovered or offered at the hearing on this matter relating to the above items.


REQUEST FOR RELIEF

Wherefore, the City requests that the Director approve the SWC/IGWA Plan as to IGWA and the Coalition only, including a provision in the final order approving said plan that the goals, benchmarks, and/or other provisions should be “applicable only to the parties to the [SWC/IGWA

Plan],” and not include or implicate the City in the SWC/IGWA Plan. This is because the City is a non-party to the *SWC-IGWA Agreement* (and accordingly receives no safe harbor) and is proceeding to seek approval for its own independent mitigation plan under the CM Rules.

Further, the City requests that the Director not designate the ESPA as a ground water management area without commencing a separate administrative proceeding for that purpose. The City in no way opposes or protests the actual mitigation-related contents of the SWC/IGWA Plan and the associated *SWC-IGWA Agreement*, and desires that the Director approve the SWC/IGWA Plan as to IGWA and the SWC only for these mitigation-related measures, but not include language similar to or referencing paragraph 14 of the SWC/IGWA Plan and subsection (c) of the request (prayer for relief) found on page 4 of the SWC/IGWA Plan.

DATED this 4th day of April, 2016.


for Randall D. Fife
CITY OF IDAHO FALLS


Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on this 4th day of April 2016, I served a true and correct copy of *City of Idaho Falls Protest to Surface Water Coalition's and IGWA's Stipulated Mitigation Plan* and Request for Order on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered as defined by Rule 5(b), I.R.C.P.

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