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DEPARTMENT OF
WATER RESOURCES

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STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

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
IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN	**BINGHAM GROUND WATER DISTRICT'S POST-HEARING BRIEF**

Bingham Ground Water District (BGWD), by and through counsel, submits the following post-hearing brief for the hearing held March 14-15, on the Directors 2022 Compliance Order, issued August 2, 2023.

ARGUMENT

1. Groundwater District are Entitled to Credit from "Equivalent" Recharge Authorized by the Settlement Agreement.

The Surface Water Coalition suggests that there is some sort of legal barrier blocking any benefits of recharge performed prior to 2022. This claim seems to be based completely on the director's decision that averaging is not allowed to calculate compliance with required reductions outlined in the 2015 settlement agreement because the agreement "requires IGWA to conserve 240,000 ac-ft each and every year." (Exhibit 511 pg. 14.) Based on this interpretation, the director found that the mitigation plan does not authorize "surplus & deficit accounting", and conservation must be limited to actual reduction in a given year. It is uncontested that the settlement agreement allows "equivalent private recharge activity" as a substitute for reduction. (Exhibit 500 pg. 2. § 3.a.ii.) Unlike section 3.a.i of the settlement agreement requiring all reductions to be "annual", Section 3.a.ii does not have any guidance regarding when and how recharge may be used in place of reduction, only that it must be "equivalent". Id.

The concept of modeled impacts was first presented by SWC in their Expert Report as a possible remedy. (Ex. 1, pg. 6.) Modeled impacts of recharge show how recharge efforts manifests in the reach-gain from year to year as explained in SWC's expert report. (Exhibit 1. Pg.6; Contor, Tr. Vol. II, 97:25-101:22.) Modeling quantifies "equivalent recharge activity" as authorized by the settlement agreement. Modeling to determine equivalent recharge is much different than the surplus & deficit accounting (or averaging) disallowed by the director. Under a surplus & deficit accounting system, 56,000 a/f of excess recharge performed in 2018 would be the equivalent of a 56,000 a/f of reduction in 2022, assuming that no years in between were deficient, and used up that excess recharge. However, the uncontested evidence and testimony shows that the actual modeled benefits of that 56,000 a/f of excess recharge in 2018 is the equivalent of roughly 1600 a/f of conservation in 2022. (id.) In this case, the equivalent reduction in 2022 is less than three percent (3%) of the recharge performed in 2018, but it is still equivalent

recharge authorized by the settlement agreement. (id.) The equivalent reductions manifest in 2022, and are consistent with the Directors order that reductions must be "each and every year". (Exhibit 511 pg. 14.)

In modeling equivalent recharge, only recharge that is above and beyond any years required reduction (excess recharge) should be modeled for equivalent reductions in the future. This assures that recharge is not being counted twice. Even though modeled equivalent reductions are only a fraction of actual recharge, IGWA performed enough recharge in years prior 2022 to offset any reduction deficiency. (Sigstedt, Tr. Vol. I, 139:14-140:4; Ex. 143, p. 6, Fig. 2; Colvin, Tr. Vol. II, 122:14-123:7.) SWC has received a benefit from excess recharge. (Sigstedt, Tr. Vol. 1, 140:14-18; Colvin, Tr. Vol. II, 124:7-17.) Excess recharge must be given its "equivalent" reductions in 2022 as authorized by the settlement agreement. When this is done, there is no deficit.

2. The Director's August 2, 2023, Compliance Order Must be Updated with Information that was Missing.

The hearing officer determined that the First Addendum to IGWA's 2022 compliance report is irrelevant because the doctrine of *res judicata* prevents IGWA from challenging the 2022 Compliance Order. This determination is incorrect because the Director specifically acknowledged that this information was missing in his August 2, 2023 Order. (Exhibit 512 at pg. 9 n. 6.) However, that information wasn't crucial because the Director found that no curtailment was necessary. If the Director had found that a curtailment was necessary, the proper course would be for the parties to supply the information needed by the Director to make this determination. The First Addendum is exactly the information the Director needs to determine what remedy, if any, is needed.

Further, the question regarding specific terms of the agreement, and how the baseline should be used were being discussed and decided in the District Court until recently. The need to amendment the 2022 compliance report became necessary when the District Court's ruling questioned the terms of the agreement. The addendum also became necessary and when the hearing officer ruled on summary judgment that the Director erred by failing to prescribe actions, if any, for an alleged breach. The Director's *Final Order Regarding IGWA'S 2022 Mitigation Plan Compliance* ("Amended Compliance Order") issued August 2, 2023 does not prescribing any action, aside from the fact that no curtailment was necessary, was that "[t]he parties have failed to provide the Director with sufficient information to make this determination *at this time*." (Exhibit 512 at pg. 9 n. 6. emphasis added) This suggests that if a determination is to be made, then the Director must have more information at a later time. The information needed to inform the Director for any possible action is contained in the First Addendum filed by IGWA. Not only is this addendum relevant and not bared by *res judicata*, but it is the information that the director has previously relied upon in similar decisions. Upon finding breach in 2021, the Director relied upon information contained in the mitigation report for 2021. (See *Amended Final Order Regarding Compliance with Approved Mitigation Plan* ("Amended Compliance Order") Ex 511 pg. 10.)

Using the information contained in the First Addendum, the Director must find that no actions are required to cure the breach, and no curtailment is necessary.

3. Even Without the First Addendum, the Director has the Discretion not to Order a Remedy of Curtailment.

The hearing officer ruled on summary judgment that the Director "erred" by failing to impose a remedy or curtailment for the alleged 2022 breach. The Director has discretion

regarding enforcement, and is not bound by anything in the settlement agreement. In fact, the Director specifically reserved this discretion in his order accepting the settlement agreement. It states, "While the Department will exert its best efforts to support the activities of IGWA and the SWC, approval of the Second Addendum does not obligate the Department to undertake any particular action." (Ex. 508, p. 5.)

The Director did not just ignore any breach. Instead, the Director found that certain districts would not have safe harbor under the settlement agreement. It is clear that if the methodology order resulted in a curtailment, and these groundwater districts were not otherwise mitigating, they would face curtailment. The fact that there is not curtailment does not mean that SWC is entitled to some other compensation or damage. The settlement is designed to give ground water users safe harbor. This is really the only benefit of the settlement agreement for ground water users. If they don't do what the agreement says, they don't get safe harbor. That is the case here. As a result of the breach, the director removed the one benefit groundwater users receive from the 2015 mitigation plan. Just because there was no out of priority curtailment at the time, does not mean the director must come up with additional actions to punish groundwater users. The Director saw that no curtailment was warranted. Nothing in the settlement agreement forces him to do any more than what he did.

4. The Director has no Authority to Issue a Curtailment Other Than Out-of-Priority Curtailment.

Curtailment outside CM Rule 40.05 is not only unauthorized by any authority, but would be incredibly reckless and overly punitive. CM Rule 40.05 states:

> Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such approved plan or the plan fails to mitigate the material injury resulting from diversion and use of water by holders of junior-priority water rights, the watermaster will notify the Director who will

> immediately issue cease and desist orders and direct the watermaster to terminate the **out-of-priority** use of ground water rights otherwise benefiting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights.

The Director correctly found that because SWC members would not suffer a demand shortfall, there were no "our-of-priority" pumpers, thus no curtailment is warranted. Because Conjunctive Management rules only allow curtailment of "out-of-priority" pumpers would also be illegal.

Uncontested testimony also stated that many groundwater users within each district complied with the mitigation plan, and their Districts actions. (Stoddard, Tr. Vol. II, 166:17-169:2.) What metric could the Director even use to decide who would be curtailed? Is it suggested that all members of the identified ground water districts would be curtailed completely? What justification would there be for such an action? If not completely, then who would be curtailed? Absent out-of-priority curtailment, there is not methodology, rational, justification, or legal authority to curtail a valid water right. Shutting off a valid in-priority water right would violate a groundwater users substantive rights. Nothing has ever put them on notice that such a curtailment could ever happen. As CM Rule 40.05 clearly limits curtailment to out-of-priority pumping, it is upon the Department to cite any authority authorizing them to conduct in-priority curtailment. Ground water users contend there is none.

Further, nothing in the settlement suggests that groundwater pumpers submitted themselves to such an absolute punishment. Furthermore, as the ground water districts do not hold any water rights themselves, they would not have the power or authority to enter into any agreement on behalf of its members that would subject them to such a punitive action beyond statutory authorized curtailment. The Director reserved his discretion related to the enforcement of the

settlement agreement, but even if he hadn't, he could not act above and beyond any statutory authority.

5. If a Remedy is Prescribed, Such a Remedy Should be Limited to the Actual Shortfall Identified in the Directors Order.

It is uncontested that prior to 2021, IGWA had not been in breach, nor had any action claiming breach been initiated. This is because IGWA had met its reduction obligations each year, despite the fact that some districts through the years may not have met their individual pumping. (Ex. 518, Ex. 530.) If the required reduction is completed, SWC does not have a claim of breach.

If the Director, *arguendo*, decides that prior excess recharge did not result in equivalent reduction in 2022, and that the First Amendment to the 2022 compliance report does not contain relevant information, and that he has no discretion in this matter, and must find a remedy, then such a remedy should be limited to the actual breach of the agreement as identified in the Directors Order. The actual number of 38,734 a/f is found in table 2 and Finding of Fact & Conclusions of Law number 11. (Ex. 512 pg. 8.) SWC suggests that the shortfall should be 57,637 a/f, however, this number is only found in Table 3, and seems to be offered for illustrative purposes in the Director's order, but not referenced or contained in the writings of the opinion. (id.) This approach is also supported by the fact that IGWA's compliance obligations have been counted as a whole in past years. To do otherwise would grant a windfall in favor of SWC above and beyond what was required by the settlement agreement.

RESPECTFULLY SUBMITTED this 8th day of April, 2024.

/s/ *Dylan Anderson*
Dylan Anderson

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2024, I served the foregoing document on the persons below via email at the address shown:

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