Thomas J. Budge (ISB# 7465)
Elisheva M. Patterson (ISB#11746)
RACINE OLSON, PLLP
201 E. Center St. / P.O. Box 1391
Pocatello, Idaho 83204
(208) 232-6101 – phone
(208) 232-6109 – fax
tj@racineolson.com
elisheva@racineolson.com

Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)

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	**IGWA'S REPLY BRIEF IN SUPPORT OF MOTION TO VACATE OR AMEND 2022 COMPLIANCE ORDER**

Idaho Ground Water Appropriators, Inc. ("IGWA"), by and through counsel, submits this brief in reply to the *Surface Water Coalition's Motion to Strike or Deny IGWA's Motion to Vacate or Amend 2022 Compliance Order* ("SWC Response") filed April 16, 2024, in this matter. IGWA offers two comments in reply.

I. IGWA's Motion is not barred by the doctrine of *res judicata*.

First, the Surface Water Coalition ("SWC") argues that *IGWA's Motion to Vacate or Amend 2022 Compliance Order* ("IGWA's Motion") is a collateral attack on the 2022 Compliance Order because it was not filed within 14 days after the order was issued. (SWC

Resp., 2.) In other words, the SWC argues that the doctrine of *res judicata* bars the Director from considering the effect of the three-year baseline adopted by the ground water districts.

The term *res judicata* refers to "[a]n issue that has been definitively settled by judicial decision." Black's Law Dictionary, 2d Pocket Ed., 2001, p. 608. It may be asserted as an affirmative defense to prevent "the same parties from litigating a second lawsuit on the same claim." *Id*. The doctrine includes "claim preclusion" and "issue preclusion."

For issue preclusion to bar litigation of an issue, five factors are required:

(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.

Ticor Title Co. v. Stanion, 144 Idaho 119, 124 (2007) (emphasis added).

For claim preclusion to bar litigation of a claim, there are three requirements: "(1) same parties; (2) same claim; and (3) final judgment." *Id*.

Importantly, the doctrine of *res judicata* does not bar litigation of issues that were not ripe for adjudication in the prior action. *Duthie v. Lewiston Gun Club*, 104 Idaho 751, 754 (1983). "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." *Id*. (quoting *Houser v. Southern Idaho Pipe & Steel, Inc*., 103 Idaho 441, 446 (1982)). "Even though two actions may arise out of the same operative facts between the same parties … certain matters may be ripe for trial while consideration of others would be premature." *Id*. (quoting *Heaney v. Bd. of Trustees of Garden Valley Sch. Dist. No. 71*, 98 Idaho 900, 903 (1978)). The fundamental question is whether the issue "should have been litigated in the first suit." *In re SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532*, 163 Idaho 144, 152 (quoting *Maravilla v. J.R. Simplot Co*., 161 Idaho 455, 459 (2016)).

The 2022 Compliance Order determined the extent of compliance with the IGWA-SWC Settlement Agreement *based on the five-year baseline* in use from 2016-2021. The three-year baseline was not adopted until February 24, 2024—more than six months after the

2022 Compliance Order was issued. The effect of the three-year baseline was neither considered nor decided in the 2022 Compliance Order. Therefore, it cannot be said that the effect of the three-year baseline "should" have been adjudicated by the Director in the 2022 Compliance Order.

IGWA's Motion is not a request for reconsideration based on the facts that informed the 2022 Compliance Order. It does not challenge the Director's ruling that, under a five-year baseline, four ground water districts did not satisfy their respective groundwater conservation obligations in 2022. Rather, IGWA's Motion was filed because the 2022 Compliance Order is no longer effective since it is predicated on an obsolete baseline. The adoption of a three-year baseline has rendered the 2022 Compliance Order moot. Thus, IGWA's Motion is akin to a motion to set aside a judgment under I.R.C.P. 60(b), as argued on page 6 of IGWA's Motion, as opposed to a motion for reconsideration.

For these reasons, the Director is not barred by the doctrine of *res judicata* from now considering the effect of the new three-year baseline on the 2022 Compliance Order.

II. The SWC's selective arguments concerning the doctrine of *res judicata* are incoherent.

In July of 2021, the SWC initiated the first of several contested cases involving interpretation of the IGWA-SWC Settlement Agreement, including the present case. All of this litigation stems from the fact that the Settlement Agreement does not define how to calculate each ground water district's proportionate share of 240,000 acre-feet, or the baseline from which groundwater conservation is measured, or the method by which groundwater conservation is quantified.

From 2016-2021, IGWA used a five-year baseline, even though it is not prescribed by the terms of the Settlement Agreement. The SWC argues that a five-year baseline is now mandatory since it "was created by IGWA and has been applied since 2017." (SWC Resp., 3.) This is the exact opposite argument the SWC made with respect to the method by which each district's proportionate share of 240,000 acre-feet is calculated, and whether averaging may be used to measure compliance therewith. And it is directly counter to the SWC's prior position that the Settlement Agreement is unambiguous. On those issues, the SWC has argued that IGWA's actual practices from 2016-2021 have no bearing.

The SWC cannot have it both ways. If the method IGWA actually used to measure compliance from 2016-2021 is not binding, then the ground water districts are free to change from a five-year baseline to a three-year baseline.

The Director has already ruled that the method IGWA used from 2016-2021 to calculate each district's proportionate share of 240,000 acre-feet is not binding, and the method IGWA used from 2016-2021 to quantify groundwater conservation during that period, which includes the use of averaging, is not binding. The Director cannot now rule that the five-year baseline used from 2016-2021 is somehow binding.

Because the Settlement Agreement does not prescribe a three-year baseline, and based on the Director's prior rulings that IGWA's compliance with the Settlement Agreement is based on the compliance method it adopts, the Director must accept the three-year baseline adopted in February of 2024.

Therefore, IGWA respectfully requests that the Director grant *IGWA's Motion to Vacate or Amend the 2022 Compliance Order* for the reason that the ground water districts' adoption of a three-year baseline for 2022 renders moot the basis for that order.

RESPECTFULLY SUBMITTED this 25th day of April, 2024.

RACINE OLSON, PLLP

By: _____
Thomas J. Budge
Attorneys for IGWA

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2024, I served the foregoing document on the persons below via email at the address shown:

Thomas J. Budge

Hon. Roger S. Burdick, Hearing Officer Sarah Tschohl, Paralegal Idaho Department of Water Resources 322 E. Front St. Boise, ID 83720-0098	roburd47@gmail.com sarah.tschohl@idwr.idaho.gov file@idwr.idaho.gov
Garrick Baxter Idaho Department of Water Resources 322 E Front St. Boise, ID 83720-0098	garrick.baxter@idwr.idaho.gov
Dylan Anderson DYLAN ANDERSON LAW PO Box 35 Rexburg, Idaho 83440	dylan@dylanandersonlaw.com
Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC 1449 E 17th St, Ste A PO Box 3005 Idaho Falls, ID 83403	sjohns@olsentaggart.com nolsen@olsentaggart.com staggart@olsentaggart.com
John K. Simpson Travis L. Thompson Abigail R. Bitzenburg MARTEN LAW P. O. Box 63 Twin Falls, ID 83303-0063	tthompson@martenlaw.com jsimpson@martenlaw.com abitzenburg@martenlaw.com jnielsen@martenlaw.com
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	wkf@pmt.org

Sarah A Klahn Maximilian C. Bricker SOMACH SIMMONS & DUNN 2033 11th Street, Ste 5 Boulder, Co 80302	sklahn@somachlaw.com mbricker@somachlaw.com vfrancisco@somachlaw.com

Courtesy Copies to:

Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83 702	cbromley@mchughbromley.com cmchugh@mchughbromley.com
Robert E. Williams WILLIAMS, MESERVY, & LOTHSPEICH, LLP P.O. Box 168 Jerome, ID 83338	rewilliams@wmlattys.com
Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405	rharris@holdenlegal.com
Michael A. Kirkham City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83402	mkirkham@idahofallsidaho.gov
Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83205	rdiehl@pocatello.us
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202	david.gehlert@usdoj.gov
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234	mhoward@usbr.gov

Tony Olenichak IDWR-Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402	Tony.Olenichak@idwr.idaho.gov
Corey Skinner IDWR-Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033	corey.skinner@idwr.idaho.gov
William A. Parsons PARSONS, LOVELAND, SHIRLEY & LINDSTROM, LLP P.O. Box 910 Burley, ID 83318	wparsons@magicvalley.law