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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-MP-2016-001

**SURFACE WATER COALITION'S
RESPONSE TO AMERICAN-FALLS
ABERDEEN GROUND WATER
DISTRICT'S MOTION FOR
RECONSIDERATION**

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 (hereafter collectively referred to as "Surface Water
Coalition" "SWC" or "Coalition"), by and through counsel of record, and hereby submits this

response in support of the *Motion for Reconsideration of Order Determining Deficiency in Notices of Secured Water* (“AFA Motion”) filed by the American Falls-Aberdeen Ground Water District on May 17, 2024.

ARGUMENT

I. The 2016 Plan Storage Timing is Not Tied to the 2024 Steps 1-3 Order.

The Coalition agrees that the timing of storage procurement and delivery under the 2016 Plan is not tied to the 2024 Steps 1-3 Order and the May 2nd deadline set by the Director regarding notice of mitigation to meet the predicted injury to TFCC (i.e. 74,200 acre-feet). The 2016 Plan and Order requires “IGWA”¹, which is shorthand for the nine signatory ground water districts, to provide “50,000 ac-ft of storage water through private lease(s) of water from the Upper Snake Reservoir system, delivered to SWC 21 days after the date of allocation . . .” *See Settlement Agreement* at 2, ¶ 3.b.i. The Upper Snake storage system is still refilling hence the date of allocation has yet to occur. Accordingly, AFA is under no obligation to deliver any storage water to the SWC at this time. Further, the Coalition agrees with Hearing Officer Burdick’s recent order on summary judgment describing when compliance with the 2016 Plan is evaluated. *See Order on Motions for Partial Summary Judgment* at 7 (Mar. 12, 2024). Finally, where the Director previously stated that pursuant to the 2016 Plan that “IGWA does not need to establish that it can mitigate its proportionate share of the predicted IDS,” it makes no sense to single out AFA and make that district show that it can. *See 2024 Steps 1-4 Order* at 5-6, n. 8. After all, AFA is a signatory district part of “IGWA” as defined by the *Settlement Agreement*.

¹ The 2016 Plan Agreement notes that it is between “participating members of the Surface Water Coalition and participating members of the Idaho Ground Water Appropriators, Inc.” *Settlement Agreement* at 1. The term IGWA is defined in footnote 2 of the Agreement and identifies the nine ground water districts (including Fremont-Madison Irrigation District which now includes the Henry’s Fork and Madison Ground Water Districts) and others (that did not sign the agreement). *See id.*

II. Apportionment of 50,000 Acre-Feet Storage Delivery.

Although the signatory districts are responsible for determining the apportionment of the 50,000 acre-feet, and it is the Coalition’s understanding that they previously apportioned this obligation from 2016-2023, the Coalition takes no position on how that number should be divided. However, the Coalition believes it would be fundamentally unfair to order AFA, the only district to represent that it will comply with the 2016 Plan in 2024, to shoulder the burden of that entire amount while the remaining Districts have refused to comply with that Plan and instead seek “safe harbor” pursuant to the 2009 Plan that has been effectively superseded and rescinded as found by Hearing Officer Burdick. *See Order on Motions for Partial Summary Judgment* (March 12, 2024). The Coalition agrees with AFA’s and the Hearing Officer’s position that the 2009 Plan has been superseded and rescinded by the 2016 Plan and that the remaining ground water districts cannot mix and match mitigation plans to suit their particular desires in a given year. Stated another way, the remaining Districts cannot ignore the Director’s orders regarding the 2016 Plan and continue to receive “safe harbor” for the 2024 irrigation season.

Allowing some of the ground water districts to seek safe harbor pursuant to the 2009 Plan has led to chaos and is contrary to the aquifer recovery goals of the 2016 Plan as ordered by the Department.² It would be prejudicial and inequitable to give the other Districts safe harbor and hold AFA to a different standard when AFA is the only district seeking to comply with the 2016 Plan today. Moreover, the 2016 Plan is the only plan that will stabilize and reverse the trend of declining ESPA water levels which was designated as a groundwater management area in 2016. *See* 2016 Idaho Senate Concurrent Resolution 135.

² The Coalition reserves all rights concerning the Director’s ultimate decision to allow ground water districts to mitigate under the 2009 plan. If necessary, the Coalition may seek additional administrative and judicial relief to ensure compliance with the 2016 Plan during the 2024 irrigation season.

The 2016 Plan and Second Addendum provide for “adaptive management”³ which historically has provided the parties with an opportunity to address issues and compliance prior to proceeding to the Director for further decisions (i.e. 2021/2022 breach of annual conservation obligation). Pursuant to the adaptive management provision the Coalition does not oppose the Director ordering an apportionment of the annual 50,000 acre-feet storage water mitigation obligation. AFA has proposed an apportionment amount and the Coalition does not take a position on what the apportionment quantity should be. However, if the Director apportions the 50,000 acre-feet between the ground water districts and AFA delivers its proportionate share of the 50,000 acre-feet within 21 days from the date of allocation as approved by the Director, the Coalition would not assert a breach of the 2016 Plan against AFA or any other ground water district that is otherwise in compliance with the 2016 Plan and is not currently in breach. The Coalition expects the entire 50,000 acre-feet to be delivered by the Districts per the 2016 Plan. If the Director orders an apportionment and AFA is the only district to supply storage, then the remaining districts will be in breach of the 2016 Plan if they do not comply with the 2016 Plan and the Director’s orders.

CONCLUSION

The Coalition supports AFA’s motion for reconsideration accordingly.

DATED this 17th of May, 2024

MARTEN LAW LLP



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NSCC, and TFCC*

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³ “The intent of the Adaptive Management Provision is to provide a forum for the Parties to resolve implementation issues without a party seeking an enforcement order from the Department or a district court.” *Second Addendum* at 4, ¶ 2.d.i.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2024, I served a true and correct copy of the foregoing *Surface Water Coalition’s Response to American Falls-Aberdeen Ground Water District’s Motion for Reconsideration* on the following by the method indicated:

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