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

IN THE MATTER OF THE MITIGATION  
PLAN FILED BY THE CITY OF  
POCATELLO

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IN THE MATTER OF THE MITIGATION  
PLAN FILED BY THE COALITION OF  
CITIES

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

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Docket Nos. CM-MP-2015-001, CM-MP-  
2015-004, CM-MP-2015-005

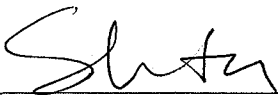
**JOINT MOTION FOR ORDER  
ENTERING SETTLEMENT BETWEEN  
POCATELLO, COALITION OF CITIES,  
IDAHO FALLS AND SURFACE WATER  
COALITION**

COMES NOW, City of Pocatello (“Pocatello”), a municipal corporation of Idaho, and the Cities of Bliss, Carey, Delco, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell, all municipal corporations of Idaho (collectively, “Coalition of Cities”), the City of Idaho Falls (“Idaho Falls”), and A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the “Surface Water Coalition”) (altogether collectively referred to hereinafter as “Parties”) and jointly move the Director for an Order approving the attached settlement for the time period described below.

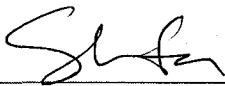
1. The Parties are all either applicants or protestants in the captioned mitigation plans.
2. The Parties have negotiated an interim resolution of their differences regarding the captioned mitigation plans.
3. The Interim Mitigation Agreement, attached hereto as Exhibit A, reflects the substance of the settlement between the Parties.
4. The Parties ask for the Director to enter an Order approving this Interim Mitigation Agreement to be effective for the time period specified in the Agreement, which provides that the Agreement is effective until December 31, 2016.
5. If at any time the Parties desire to extend or renew the effective date(s) of this Interim Mitigation Agreement, they will jointly seek such an Order from the Director.

Respectfully submitted this 15<sup>th</sup> day of March, 2016.


CITY OF POCATELLO ATTORNEY'S  
OFFICE

By   
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LLP  
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By   
Robert E. Williams

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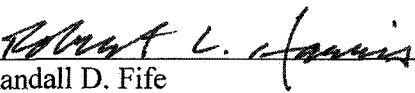
By   
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By   
Chris M. Bromley

By   
Mitra M. Pemberton

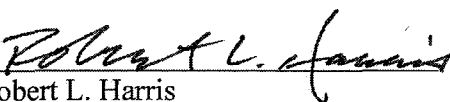
CITY OF IDAHO FALLS ATTORNEY'S  
OFFICE

By   
for Randall D. Fife

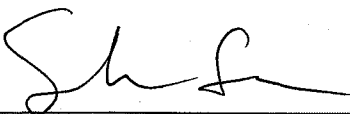
FLETCHER LAW OFFICE  
Attorney for Minidoka Irrigation District and  
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Burley Irrigation District, Milner Irrigation  
District, North Side Canal Company, and Twin  
Falls Canal Company

By   
John K. Simpson  
Travis L. Thompson  
Paul L. Arrington

## CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2016, I caused to be served a true and correct copy of the foregoing **Joint Motion for Order Entering Settlement Between Pocatello, Coalition of Cities, Idaho Falls and Surface Water Coalition in Docket Nos. CM-MP-2015-001, CM-MP-2015-004, and CM-MP-2015-005** upon the following by the method indicated:

  
\_\_\_\_\_  
Sarah Klahn, White & Jankowski, LLP

Gary Spackman Idaho Department of Water Resources Main Office P.O. Box 83720 322 E Front St Boise ID 83720-0098 gary.spackman@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Facsimile 208-287-6700 <input checked="" type="checkbox"/> Email
Garrick L. Baxter Deputy Attorney General – IDWR P.O. Box 83720 322 E Front St Boise ID 83720-0098 garrick.baxter@idwr.idaho.gov kimi.white@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Facsimile 208-287-6700 <input checked="" type="checkbox"/> Email
Jerry R. Rigby Rigby Andrus & Rigby Law, PLLC Attorneys at Law 25 North Second East Rexburg, ID 83440 jrigby@rex-law.com	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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Robert E. Williams, ISB No. 1693 Williams, Meservy & Lothspeich LLP P.O. Box 168 Jerome, ID 83338 rewilliams@cableone.net	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Chris M. Bromley, ISB No. 6530 McHugh Bromley, PLLC 380 S. 4th St., Ste 103 Boise, ID 83702 cbromley@mchughbromley.com	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Robert L. Harris, ISB No. 7018 Holden, Kidwell, Hahn & Crapo, P.L.L.C. P.O. Box 50130 1000 Riverwalk Drive, Suite 200 Idaho Falls, ID 83405 (208) 523-0620 (208) 523-9518 (Fax) rharris@holdenlegal.com	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

## **INTERIM MITIGATION AGREEMENT**

This Interim Mitigation Agreement (“Agreement”) is entered into by and between the City of Pocatello (“Pocatello”), a municipal corporation of Idaho, and the Cities of Bliss, Carey, Delco, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell, all municipal corporations of Idaho (collectively, “Coalition of Cities”), and the City of Idaho Falls (collectively, “Cities”), and A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (hereinafter collectively referred to as “Surface Water Coalition” or “SWC”) (together hereinafter referred to collectively as “Parties”).

### **RECITALS**

WHEREAS, the Surface Water Coalition has a pending delivery call, Docket No. CM-DC-2010-001 (“SWC Delivery Call”); and

WHEREAS, certain of the Cities’ water rights are subject to potential curtailment by the SWC Delivery Call; and

WHEREAS, the Cities individually filed Rule 43 Mitigation Plans with the Idaho Department of Water Resources (“Department”) in 2015 in Docket Nos. CM-MP-2015-001, CM-MP-2015-004, and CM-MP-2015-005 (collectively, “Mitigation Plans”); and

WHEREAS, the SWC protested the plans or filed for intervention in order to maintain its position and standing before the Department with respect to the Mitigation Plans; and

WHEREAS, the Parties have had several meetings and have exchanged information in an effort to resolve SWC’s protests to the Cities’ Mitigation Plans without a formal hearing; and

WHEREAS, by this Agreement SWC agrees to accept the mitigation activities described herein as mitigation on an interim basis for any injury, if any, identified in an order issued by the Department in Docket No. CM-DC-2010-001, caused by the Cities’ pumping; and

WHEREAS, the Parties seek to implement a one (1) year interim agreement to resolve the pending SWC Delivery Call as a first step toward resolving SWC’s protests and obtain the Department’s approval of this Agreement for the SWC Delivery Call for 2016; and

WHEREAS, the SWC, as it deems necessary in its discretion, agrees to assist the Cities in seeking approval of this Agreement from the Department and to support the Cities’ positions in any appeal for judicial review that may be necessary; and

WHEREAS, Pocatello has a spaceholder repayment contract with the U.S. Bureau of Reclamation (“Reclamation”) which is not affected in any way by this Agreement and the Mitigation Plans;

The Parties hereby stipulate and agree:

## COVENANTS

NOW THEREFORE, in consideration of the recitals, the mutual covenants, representations and warranties contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **Mitigation Agreement.** The Parties agree that delivery of the mitigation actions described below in paragraph 2 shall mitigate for any of the Cities' injury to the SWC's water rights, and that the Cities' water rights shall not be subject to curtailment during the term of this Agreement. The SWC expressly agrees that the compensation to be provided under this plan shall constitute full mitigation for any injury in 2016 associated with the Cities' ground water pumping.
2. **Mitigation Actions.** The Parties agree that the Cities will provide the following mitigation water and activities for the benefit of the Surface Water Coalition in 2016:
  - a. **Storage Water.** The Cities will acquire and instruct the Watermaster to deliver 2,600 acre-feet of water to the storage accounts selected by the SWC within twenty-one (21) days of Water District 01's "date of allocation" for purposes of storage fill in the Upper Snake River Reservoir system above Milner Dam, because 2600 acre-feet is the amount resulting from consumptive pumping estimated to be attributable to the ESPA Cities junior to 1982. The Parties have stipulated to delivery of 2600 acre-feet to resolve their differences for 2016, and agree that delivery of this water will mitigate injury to the SWC caused by the pumping under junior ground water rights by all municipal corporations with wells that are located within the current boundary of the ESPA Area of Common Ground Water Supply, as defined in Rule 50 of the Rules for Conjunctive Management of Surface and Ground Water Resources ("CMR") (IDAPA 37.03.11.50) as of February 25, 2016. This includes the pumping by Pocatello, Idaho Falls, and the Coalition of Cities, as well as pumping by any other municipal corporation that may become a participant pursuant to paragraph 6 of this Agreement. The storage water may be supplied from, without limitation, Pocatello's or Idaho Falls' (through its Palisades Water Users, Inc. shares) storage space in Palisades Reservoir or the Water District 01 Rental Pool(s). The SWC shall inform the Cities and the Water District 01 Watermaster as to how the storage water will be assigned as between members of the SWC. The Parties agree to cooperate and coordinate with the Water District 01 Watermaster in order to satisfy these terms.
  - b. **Recharge Activities.** The Parties agree that the Coalition of Cities and Surface Water Coalition cooperated last fall and performed recharge activities that are estimated to benefit the Near Blackfoot to Neeley and Neeley to Minidoka Reaches of the Snake River in the amount of 515 acre-feet of water during the 2016 irrigation season. The Parties recognize that this recharge benefits the SWC's water rights and provides additional mitigation under this Agreement.

3. Mitigation Plan Agreement. The Parties agree that this Agreement shall constitute an agreement on an acceptable mitigation plan as identified in CMR 43.03.o and 43.03.c (IDAPA 37.03.11 et seq.).
4. Other Compensation. An injured senior can agree to accept alternative mitigation in lieu of receiving a junior's exact replacement water obligation. *Memorandum Decision and Order* at 9 n.4, CV-2015-172, Sept. 8, 2015. Accordingly, the Parties agree as follows:
  - a. The Parties agree that the amount of water provided pursuant to paragraph 2 of this Agreement may be more water or less water than the Cities would have to provide to the SWC to mitigate for its injury in 2016. The Parties agree that this Agreement will provide certainty regarding the amount of mitigation water to be provided to the SWC in 2016. The Parties agree the water provided under this Agreement is for mitigation in 2016 only.
  - b. The Parties further agree that this Agreement will benefit the SWC by providing mitigation water earlier in the irrigation season than the Cities would otherwise be required to provide it pursuant to the Department's Third Amended Methodology Order, and that this early delivery of mitigation water enhances flexibility with regard to SWC's water management decisions.
  - c. The Parties agree that the benefits described in paragraphs 4.a. and 4.b., along with avoiding extended litigation over the Cities' Mitigation Plans is "other appropriate compensation" pursuant to CMR 43.03.c.
5. Portion of Mitigation Obligation Attributable to the Cities. As an element of stipulation and settlement, the Parties agree that the mitigation actions in paragraph 2 of this Agreement may provide less mitigation than the amount of the Cities' injury to the SWC in 2016. The Parties agree that any remaining unmitigated injury associated with the diversion of ground water under the Cities' junior priority water rights shall not be transferred or imposed upon other junior ground water users. The Parties also agree that if the amount of water provided pursuant to paragraph 2 of this Agreement is in excess of the amount necessary to mitigate for the Cities' injury for 2016, the excess mitigation amount shall nevertheless be provided to the SWC and shall not be transferred to the benefit of other junior ground water users unless specifically identified in this Agreement and agreed to by the Parties.
6. Participating Cities. As of the effective date of this Agreement, the Cities are the only municipal corporations participating in this Agreement. However, the Parties agree that other municipalities who pump ground water from the ESPA Area of Common Ground Water Supply, as defined in CMR 50 as of February 25, 2016, may become participants in the Mitigation Plans at a later date pursuant to CMR 43.03.m. Participation of other municipalities shall be at the sole discretion of the Cities and shall not increase the amount of mitigation water in paragraph 2. The Parties agree that upon approval of participation by the Cities, the Cities will provide notice to the Department and the SWC of other municipalities participating in the Mitigation Plans, and said municipalities shall be protected from curtailment pursuant to the terms of this Agreement.




7. Term/Stay of Contested Case. The term of this Agreement is from March 15, 2016 to December 31, 2016. The Parties agree to seek approval of this Agreement and stipulate to entry of an order staying the contested cases on the Cities' Mitigation Plans during the term of this Agreement. The Parties shall request the Department enter an order in each proceeding and stay any further action on the motion to consolidate, including requiring the SWC to respond to the same.
8. Implementation of Agreement. The Parties agree to take all actions each deems necessary to ensure this Agreement is implemented, including filing necessary documents with the Department for approval, and by providing supporting affidavits or testimony in any proceeding as necessary. The Parties further agree to jointly support and/or defend the implementation of this Agreement, including an appeal pertaining to implementation or approval of the Agreement.
9. Long-Term Mitigation Agreement. The Parties agree to continue to meet and attempt to reach a long-term mitigation agreement regarding the Cities' Mitigation Plans before December 31, 2016.
10. Issues Reserved. This Agreement shall resolve the issues addressed in the Cities' Mitigation Plans for 2016. The Parties reserve all rights and retain their respective positions with respect to any issues that arise in the SWC Delivery Call, the Cities' Mitigation Plans, other delivery calls, and mitigation plans filed by other parties, appeals, or other litigation. Further, this Agreement shall not affect the Parties' positions with respect to enforcement or implementation of Pocatello's spaceholder repayment contract with Reclamation, and Pocatello's obligation, if any, under that contract.
11. Representations. The Parties have the full legal right, power and authority to enter into and perform this Agreement.
12. Attorneys' Fees. In any suit, action or appeal therefrom, to enforce this Agreement or any term or provision hereof, or to interpret this Agreement, the prevailing party shall be entitled to recover all its costs reasonably incurred therein (and on appeal), including reasonable attorneys' fees.
13. Duty of Good Faith. The Parties to this Agreement agree to perform and execute this Agreement in accordance with the highest standards of good faith, honesty in fact, and fair dealing. Accordingly, the Parties agree to cooperate fully and execute any and all supplemental documents and take any and all additional actions which may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.
14. Entire Agreement. This is the entire agreement of the Parties with respect to matters covered hereby and supersedes all prior agreements between them, written or oral. This Agreement may be modified only in writing, signed by the Parties.
15. Counterparts. This Agreement may be executed in any number of counterparts for the convenience of the Parties.
16. Idaho Law. This Agreement shall be governed by the laws of the State of Idaho.

17. Severability. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision hereof.
18. Binding Contract. This Agreement shall be binding upon and inure to the benefit of the heirs, personal representatives, administrators, successors, and assigns of the Parties.
19. No Precedent. This Agreement is intended to be an interim agreement amongst the Parties for the time period described above. The Agreement was negotiated without a trial and is the result of substantial discussions, negotiations, and compromises by, between, and among the Parties. It is specifically understood and agreed to by the Parties that acquiescence to the stipulated terms of this Agreement does not give rise to any argument, claim, defense, or theory of waiver, bar, merger, res judicata, estoppel, or laches in any judicial or administrative matter.
20. Effective Date. The Effective Date of this Agreement shall be March 15, 2016.

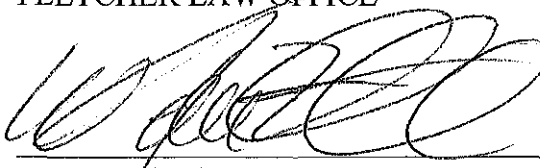
WITNESS WHEREOF, the undersigned have duly executed this Agreement.

WHITE & JANKOWSKI, LLP

  
\_\_\_\_\_  
Sarah A. Klahn  
Attorney for the City of Pocatello

8-15-16  
Date

FLETCHER LAW OFFICE



3-15-16

W. Kent Fletcher

Date

Attorney for Minidoka Irrigation District and  
American Falls Reservoir District No. 2

BARKER ROSHOLT & SIMPSON LLP

 3/19/16  
\_\_\_\_\_  
John K. Simpson Date  
Travis L. Thompson  
Paul L. Arrington  
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Burley Irrigation District, Milner Irrigation  
District, North Side Canal Company, and Twin  
Falls Canal Company

HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

Robert L. Harris  
Robert L. Harris Date *March 15, 2016*  
Attorney for the City of Idaho Falls

WILLIAMS, MESERVY & LOTHSPREICH LLP

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Robert E. Williams

Date

Attorney for the Coalition of Cities

MCHUGH BROMLEY, PLLC

 3/15/16

Chris M. Bromley

Date

Attorney for the Coalition of Cities