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DEPARTMENT OF  
WATER RESOURCES

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**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-2023-001

**CITY OF POCATELLO’S PROTEST**

IN THE MATTER OF MADISON GROUND  
WATER DISTRICT AND HENRY’S FORK  
GROUND WATER DISTRICT’S  
MITIGATION PLAN FOR THE SURFACE  
WATER COALITION

COMES NOW City of Pocatello (“Pocatello”), by and through its undersigned counsel,  
and hereby files this *Protest* to the *Petition for Approval of Madison Ground Water District and  
Henry’s Fork Ground Water District’s Mitigation Plan for the Surface Water Coalition*  
 (“Petition”) dated December 18, 2023, pursuant to IDAPA 37.01.01.210 and IDAPA  
37.03.11.043.02.

The initial bases for Pocatello’s *Protest* are as follows:

1. Pocatello is a party to the *Coalition of Cities, City of Idaho Falls, and City of Pocatello  
Joint Mitigation Plan* dated February 25, 2019 (“Cities’ Mitigation Plan”), which was

approved by the Director's *Final Order Approving Stipulated Mitigation Plan* dated April 9, 2019. See IDWR Docket No. CM-MP-2019-001.

2. The aquifer recovery obligations of the parties to the *Cities' Mitigation Plan* are tied to Idaho Ground Water Appropriators, Inc.'s ("IGWA") compliance with the "IGWA-SWC Settlement Agreement" dated June 30, 2015, which was adopted as a mitigation plan under the Director's *Final Order Approving Stipulated Mitigation Plan* dated May 2, 2016 ("2016 Mitigation Plan").<sup>1</sup>
3. If IGWA breaches its obligation under paragraph 3.e. of its *2016 Mitigation Plan*, the Cities' collective obligation under the *Cities Mitigation Plan* increases from 7,650 AF to 9,640 AF/year. See *Cities Mitigation Plan* at 12 (Ex. 1 at 4, ¶ 4.B.1.).
4. The *2016 Mitigation Plan* is an existing legal obligation to which IGWA members are bound, and which has not been terminated.
5. Madison Ground Water District ("MGWD") and Henry's Fork Ground Water District ("HFGWD"), as members of IGWA, are parties to the *2016 Mitigation Plan*.
6. Pocatello protests the *Petition* to the extent MGWD's and HFGWD's intention is to replace, or otherwise provide an alternative to complying with the terms of, the *2016 Mitigation Plan*. If MGWD and HFGWD is permitted to mitigate and receive safe harbor pursuant to the proposed mitigation plan regardless of IGWA's compliance with the terms of the *2016 Mitigation Plan*, then MGWD and HFGWD has no incentive to do its proportionate part for IGWA to meet its obligations under paragraph 3.e.
7. Pocatello's rights will be substantially prejudiced if MGWD and HFGWD mitigates

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<sup>1</sup> The parties subsequently filed *Surface Water Coalition's and IGWA's Stipulated Amended Mitigation Plan and Request for Order* dated February 7, 2017, which was approved by the Director through a *Final Order Approving Amendment to Stipulated Mitigation* dated May 9, 2017. For purposes of this *Protest*, Pocatello will refer to the mitigation plan, even as amended, as "2016 Mitigation Plan."

under the proposed plan because its own mitigation obligations are likely to increase due to the failure of IGWA members, including MGWD and HFGWD, to comply with the terms of the *2016 Mitigation Plan*.

8. The question of whether a ground water user can cure breach of an existing mitigation plan by complying with an alternative mitigation plan is currently at issue in other matters before the Department, including the 2022 Breach Case (IDWR Docket No. CM-MP-2016-001). Litigating the same issue in multiple active matters runs the risk of different outcomes and is a waste of agency and litigants' resources.
9. Because the *Petition* raises issues being litigated elsewhere, the Department should issue an order setting a scheduling conference in this matter, to be held 90 days after a final, unappealable order has been entered in the other matter(s) regarding the effect of multiple mitigation plans.

This *Protest* is continuing in nature and Pocatello reserves the right to raise additional and specific technical or legal issues related to the actual substantive resolution of this *Petition* when and if the time comes.

Respectfully submitted this 5<sup>th</sup> day of February 2024.

**SOMACH SIMMONS & DUNN, P.C.**



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5<sup>th</sup> day of February 2024, I caused a true and correct copy of the foregoing document to be filed and served on the persons below via email:

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