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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-2023-002

**CITY OF POCATELLO’S PROTEST**

IN THE MATTER OF BONNEVILLE-  
JEFFERSON 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 Bonneville-Jefferson Ground Water District’s Mitigation Plan for the Surface Water Coalition* (“Petition”) dated December 19, 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. Bonneville-Jefferson Ground Water District ("BJGWD"), as a member of IGWA, is a party to the *2016 Mitigation Plan*.
6. Pocatello protests the *Petition* to the extent BJGWD's intention is to replace, or otherwise provide an alternative to complying with the terms of, the *2016 Mitigation Plan*.<sup>2</sup> If BJGWD 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 BJGWD 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 BJGWD mitigates under the

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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."

<sup>2</sup> This seems the likely intention, given BJGWD's positions in other active matters before the Department or on judicial review. See IDWR Docket No. CM-MP-2016-001; *IGWA v. IDWR*, Case No. CV01-23-07893 (4th Dist. Ct., Ada County).

proposed plan because its own mitigation obligations are likely to increase due to the failure of IGWA members, including BJDWD, 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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*Attorneys for City of Pocatello*

**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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