

Sarah A. Klahn, ISB #7928
Maximilian C. Bricker, ISB #12283
SOMACH SIMMONS & DUNN, P.C.
1155 Canyon Blvd., Suite 110
Boulder, CO 80302
sklahn@somachlaw.com
mbricker@somachlaw.com
Attorneys for City of Pocatello

RECEIVED

Feb 05, 2024

DEPARTMENT OF
WATER RESOURCES

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-2023-004

CITY OF POCATELLO'S PROTEST

IN THE MATTER OF NORTH SNAKE
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 North Snake Ground Water District's Mitigation Plan for the Surface Water Coalition* ("Petition") dated December 20, 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").¹
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. North Snake Ground Water District ("NSGWD"), as a member of IGWA, is a party to the *2016 Mitigation Plan*.
6. Pocatello protests the *Petition* to the extent NSGWD's intention is to replace, or otherwise provide an alternative to complying with the terms of, the *2016 Mitigation Plan*. If NSGWD 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 NSGWD 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 NSGWD mitigates under the proposed plan because its own mitigation obligations are likely to increase due to the

¹ 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."

failure of IGWA members, including NSGWD, 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 5th day of February 2024.

SOMACH SIMMONS & DUNN, P.C.



Sarah A. Klahn, ISB #7928
Maximilian C. Bricker, ISB #12283
Attorneys for City of Pocatello

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th 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:

<p>Mathew Weaver, Director Garrick Baxter, Deputy Attorney General Sarah Tschohl IDAHO DEPT. OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098</p>	<p>file@idwr.idaho.gov mathew.weaver@idwr.idaho.gov garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov file@idwr.idaho.gov</p>
<p>Dylan Anderson DYLAN ANDERSON LAW P.O. Box 35 Rexburg, Idaho 83440</p>	<p>dylan@dylanandersonlaw.com</p>
<p>Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC 1449 E 17th St, Ste A P.O. Box 3005 Idaho Falls, Idaho 83403</p>	<p>sjohns@olsentaggart.com nolsen@olsentaggart.com staggart@olsentaggart.com</p>
<p>John K. Simpson Travis L. Thompson Marten Law LLP P.O. Box 2139 Boise, Idaho 83701-2139 Travis L. Thompson Marten Law LLP 163 Second Ave. W. P.O. Box 63 Twin Falls, Idaho 83303-0063</p>	<p>jsimpson@martenlaw.com tthompson@martenlaw.com jnielsen@martenlaw.com</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318</p>	<p>wkf@pmt.org</p>
<p>Kathleen Marion Carr US DEPT. INTERIOR 960 Broadway Ste 400 Boise, ID 83706</p>	<p>kathleenmarion.carr@sol.doi.gov</p>

<p>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</p>	<p>david.gehlert@usdoj.gov</p>
<p>Matt Howard US BUREAU OF RECLAMATION 1150 N Curtis Road Boise, ID 83706-1234</p>	<p>mhoward@usbr.gov</p>
<p>Sarah A Klahn Maximilian C. Bricker SOMACH SIMMONS & DUNN 2033 11th Street, Ste 5 Boulder, Co 80302</p>	<p>sklahn@somachlaw.com mbricker@somachlaw.com vfrancisco@somachlaw.com</p>
<p>Rich Diehl CITY OF POCATELLO P.O. Box 4169 Pocatello, ID 83205</p>	<p>rdiehl@pocatello.us</p>
<p>Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83 702</p>	<p>cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>
<p>Robert E. Williams WILLIAMS, MESERVY, & LOTHSPREICH, LLP P.O. Box 168 Jerome, ID 83338</p>	<p>rewilliams@wmlattys.com</p>
<p>Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405</p>	<p>rharris@holdenlegal.com</p>
<p>Randall D. Fife City Attorney CITY OF IDAHO FALLS P.O. Box 50220 Idaho Falls, ID 83405</p>	<p>rfife@idahofallsidaho.gov</p>

William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318	wparsons@pmt.org
Thomas J. Budge Elisheva M. Patterson RACINE OLSON, PLLP 201 E. Center St. / P.O. Box 1391 Pocatello, Idaho 83204	tj@racineolson.com elisheva@racineolson.com



Sarah A. Klahn, ISB #7928