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DEPARTMENT OF
WATER RESOURCES

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

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-2024-001

CITY OF POCATELLO’S PROTEST

IN THE MATTER OF BINGHAM 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 Bingham Ground Water District’s Mitigation Plan for the Surface Water Coalition* (“Petition”) dated January 2, 2024, 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. Bingham Ground Water District ("BGWD"), as a member of IGWA, is a party to the *2016 Mitigation Plan*.
6. Pocatello protests the *Petition* to the extent BGWD's intention is to replace, or otherwise provide an alternative to complying with the terms of, the *2016 Mitigation Plan*.² If BGWD 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 BGWD 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 BGWD mitigates under the proposed plan because its own mitigation obligations are likely to increase due to the failure of

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."

² This seems the likely intention, given BGWD'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).

IGWA members, including BGWD, 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:

Mathew Weaver, Director Garrick Baxter, Deputy Attorney General IDAHO DEPT. OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098	file@idwr.idaho.gov mathew.weaver@idwr.idaho.gov garrick.baxter@idwr.idaho.gov
John K. Simpson 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	jsimpson@martenlaw.com tthompson@martenlaw.com
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	wkf@pmt.org
Kathleen Marion Carr US DEPT. INTERIOR 960 Broadway Ste 400 Boise, ID 83706	kathleenmarion.carr@sol.doi.gov
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	david.gehlert@usdoj.gov

<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, & LOTHSPEICH, 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>
<p>William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318</p>	<p>wparsons@pmt.org</p>

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