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STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE MITIGATION
PLAN FILED BY FALLS IRRIGATION
DISTRICT FOR THE DISTRIBUTION OF
WATER TO WATER RIGHTS HELD BY
THE SURFACE WATER COALITION

Docket No. CM-MP-2024-002

**IGWA’S BRIEF IN OPPOSITION TO
JOINT MOTION TO APPROVE
STIPULATION REGARDING FALLS
IRRIGATION DISTRICT’S RULE 43
MITIGATION**

Idaho Ground Water Appropriators, Inc. (“IGWA”), through counsel, submits this brief pursuant to rule 220.02.b of the rules of procedure of the Idaho Department of Water Resources (the “Department”) in opposition to the *Joint Motion to Approve Stipulation Regarding Falls Irrigation District’s Rule 43 Mitigation* filed August 28, 2025 (“Joint Motion”) by Falls Irrigation District (“FID”) and the Surface Water Coalition (the “SWC”). This brief is supported by the *Declaration of Jaxon Higgs* filed herewith.

Argument

As explained below, the Joint Motion should be summarily denied because it fails to comply with the Department’s rules of procedure. If the hearing officer declines to deny the Joint Motion for that reason, and if he elects to treat the Joint Motion as a motion for approval of a stipulated mitigation plan under rule 43 of the Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”), it should be summarily denied because the Stipulation has not been signed by all parties to the case. If the hearing officer elects to consider the merits

of the Joint Motion, he should review it under the summary judgment standard, and it should be denied for failure to meet that standard.

1. The Joint Motion should be denied because it fails to comply with the Department’s rules of procedure.

The Department’s rules of procedure define a “motion” as “a request to the agency to take an action in a contested case.” (IDAPA 37.01.01.220.01.) A motion must “fully state ... [t]he provision of statute, rule, order, or other controlling law upon which it is based.” (IDAPA 37.01.01.300.02.)

The Joint Motion requests that the Department “approve the Stipulation for Falls’ mitigation plan.” (Joint Mot., p. 4.) But it fails to cite any statute, rule, or controlling law upon which it is based. It is entirely devoid of any citation to statute, rule, or controlling law.

Since the Stipulation was filed in the FID mitigation plan case, it may be intended to reflect a stipulated mitigation plan under rule 43.03.o of the CM Rules. However, unlike other stipulated mitigation plans entered into by the SWC, the Stipulation does not reference CM Rule 43.03.o or identify itself as a stipulated mitigated plan.¹ Nor does the Joint Motion seek approval of the Stipulation as a stipulated mitigation plan under CM Rule 43.03.o.

Without citations to statute, rule, or controlling law, the hearing officer and the parties are left to speculate as to the legal basis for the Joint Motion and its intended purpose and effect. This obviously handicaps the ability of IGWA to effectively respond to the Joint Motion.

Therefore, the hearing officer should summarily deny the Joint Motion for failure to comply with the Department’s rules of procedure. If the hearing officer denies the Joint Motion for this reason, he need not address the remaining arguments in this brief.

¹ See IDWR Docket No. CM-MP-2010-01 (Joint Motion for Approval of Mitigation Agreement, Jan. 4, 2018, p. 2 (motion filed “pursuant to the provisions of Conjunctive Management Rule 43 and other applicable law.”); IDWR Docket No. CM-MP-2019-001 (Coalition of Cities, City of Idaho Falls, and City of Pocatello Joint Mitigation Plan, Feb. 25, 2019, p. 2 (mitigation plan “filed consistent with CM Rule 43.03.o and is supported by the attached *Settlement Agreement (“Agreement”) Between The Surface Water Coalition, Participating Members of the Idaho Ground Water Users Appropriators, Inc. and Signatory Cities.*”); IDWR Docket No. CM-MP-2016-001 (Surface Water Coalition’s and IGWA’s Stipulated Mitigation Plan and Request for Order, Mar. 9, 2016, p. 2 (the SWC and IGWA “hereby stipulate and move the Director to enter the proposed *Order Approving IGWA’s Mitigation Plan* attached hereto as Exhibit A under Rule 43 of the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources.”); and IDWR Docket No. CM-MP-2024-003 (Joint Motion for Order Approving 2024 Stipulated Mitigation Plan, p. 2 (the SWC and Ground Water Districts “jointly move the director pursuant to ... rule 43 of the Rules of Conjunctive Management of Surface and Ground Water Resources for an order approving the 2024 Stipulated Mitigation Plan.”). IGWA requests that the hearing officer take official notice of these records pursuant to rule 602 of the Department’s rules of procedure.

2. The Joint Motion should be denied because the Stipulation has not been signed by all parties to the case.

This case originated with FID’s petition for approval of its mitigation plan under CM Rule 43. (Falls Irrigation District’s Rule 43 Mitigation Plan, May 7, 2024.) Under the CM Rules, a mitigation plan is processed “under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights.” (CM Rule 43.02.) Per Idaho Code § 42-222, when a protest is filed “it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon.”

“All hearings required by law to be held before the director of the department of water resources shall be conducted in accordance with the provisions of chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the director.” Idaho Code § 42-1701A(1). Chapter 52, title 67, Idaho Code, is the Idaho Administrative Procedure Act (“APA”). It provides two avenues for resolving a contested case: informal disposition or a contested hearing.

Informal disposition means resolution “by alternative dispute resolution, negotiation, stipulation, agreed settlement, or consent order.” Idaho Code § 67-5241(2). In other words, informal disposition requires mutual agreement of all parties.

If the case is not resolved by mutual agreement, a hearing must be held in accordance with Idaho Code § 67-5242, evidence must be taken in accordance with Idaho Code § 67-5251, and an order must be issued in accordance with Idaho Code §§ 67-5243 through 67-5246.

The Stipulation was executed by FID and the SWC, without first being presented to IGWA for consideration, and it has not been signed by IGWA. Therefore, the Department must hold a hearing and consider all evidence before determining whether it should be approved as a mitigation plan under CM Rule 43.

Since the Department cannot approve the Stipulation at this juncture, the Joint Motion should be summarily denied. If the hearing officer denies the Joint Motion for this reason, he need not consider the remaining arguments in this brief.

3. The Joint Motion should be denied because it fails to meet the legal standard for summary judgment.

If the hearing officer elects to consider the merits of the Joint Motion without first holding a hearing, it must be evaluated as a motion for summary judgment in accordance with rule 56 of the Idaho Rules of Civil Procedure. (IDAPA 37.01.01.220.03.)

A motion for summary judgment may be granted when the pleadings, depositions, and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56. The moving party bears the burden of proving the absence of genuine issues of fact, and that it is entitled to judgment as a matter of law. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416, 420 (1996). The non-moving party is entitled to the benefit of all reasonable inferences that can be drawn from evidentiary facts. *Ambrose by & ex rel. Ambrose v. Buhl Joint Sch. Dist. #412*, 126 Idaho 581, 584, 887 P.2d 1088 (Ct.App. 1994). When ruling on a motion for summary judgment, the Department must determine whether the evidence, when construed in the light most favorable to the non-moving party, presents a genuine issue of material fact or shows that the moving party is not entitled to judgment as a matter of law. *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009). “[A] motion for summary judgment should be denied if the pleadings, admissions, depositions, and affidavits raise any question of credibility of witnesses or weight of the evidence.” *Nield v. Pocatello Health Servs.*, 156 Idaho 802, 332, P.3d 714 (2014).

As explained below, summary judgment should be denied because (1) the Joint Motion is not supported by evidence in the record, (2) granting mitigation credit for incidental recharge and wastewater is contrary to Idaho law, (3) the Stipulation does not actually mitigate the impact of FID’s groundwater pumping, (4) the Stipulation lacks sufficient detail to evaluate compliance with the factors prescribed in CM Rule 43.03, (5) other water rights will be injured if the Stipulation is approved as a mitigation plan, and (6) there are genuine issues of material fact.

3.1 The Joint Motion is not supported by evidence in the record.

Under Department rules of procedure, motions should be supported by affidavit. (IDAPA 37.01.01.220.02.) The Joint Motion makes numerous factual assertions, but none of them are supported by affidavit. The Joint Motion fails the summary judgment standard because it is not supported by evidence in the record. Therefore, it should be denied.

3.2 Allowing mitigation credit for incidental recharge and wastewater is contrary to Idaho law.

The Stipulation proposes to offset the impact of FID’s groundwater pumping by claiming mitigation credit for “total booster waste return flow,” “total canal waste return flow,” “total canal loss,” and “groundwater loss (85% estimated irrigation efficiency).” (Stipulation, p. 3.)

These categories represent water that leaves FID's canal system via incidental recharge and waste water.

The Idaho Supreme Court defines "waste water" as "(1) water purposely discharged from the project works because of operation of necessities, (2) water leading from ditches and other works, and (3) excess water flowing from irrigated lands, either on the surface or seeping under it." *A&B Irr. Dist. v. Aberdeen-Am. Falls Ground Water Dist.*, 141 Idaho 746, 751, 118 P.3d 78, 83 (2005) (quoting *In re SRBA*, Case No. 39546 (2003)). Incidental recharge is water that leaks out the bottom of an irrigation canal. For the purpose of this brief, the term "waste water" includes incidental recharge.

Under the prior appropriation doctrine, a water user is only entitled to use as much water as is necessary to accomplish their authorized beneficial use, and any surplus must be returned to the public water supply for use by others. While a water user has the right to recapture and reuse water, reclaimed water must be applied to the same beneficial use and on the same lands as the original water right. *A&B*, 141 Idaho at 752, 926 P.2d at 84 (quoting *Reynolds Irrigation Dist. v. Sproat*, 70 Idaho 214, 222, 214 P.2s 880, 883 (1950)). Allowing the use of waste water for a purpose outside the original appropriation is an enlargement in use and is not permitted. *Id.* A new water right must be obtained to appropriate waste water. *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927). With respect to incidental recharge specifically, Idaho Code § 42-234(5) provides that "incidental recharge may not be used as the basis for claim of a separate or expanded water right."

Accordingly, FID cannot legally claim mitigation credit for waste water that leaves its canal system. FID's water rights have "irrigation" as their beneficial use, not "mitigation."² Allowing FID to use its waste water for mitigation purposes would result in an enlargement in use of FID's water rights.

The waste water that leaves FID's system is already being used by downstream water rights. For example, some of FID's waste water discharges into Little Creek, and there are at

² FID's water rights are documented in the public records of the Department. IGWA requests that the hearing officer take official notice of these records pursuant to rule 602 of the Department's rules of procedure.

least three water rights that have as their source Little Creek (water right nos. 29-10450, 29-10445, and 29-10448).³ Most of FID’s waste water is currently being used by the SWC.

If FID were to receive mitigation credit for its waste water, that precedent would upend water delivery within Idaho. Other canal companies would want to follow suit and claim mitigation credit for their waste water, or leverage their waste water in other ways. If the Stipulation is approved as a mitigation plan, it will ultimately cause a net decrease in reach gains available to satisfy the SWC’s water rights, doing more harm than good.

3.3 The Stipulation lacks sufficient detail for the Director to evaluate its compliance with the factors prescribed in CM Rule 43.03.

CM Rule 43.01 requires mitigation plans to include “[s]uch information as will allow the Director to evaluate the factors set forth in Rule Subsection 43.03.” The list of factors in CM Rule 43.03 is non-exhaustive—it lists factors the Director “may” consider. *Id.* Ultimately, the Director must determine “whether a proposed mitigation plan will prevent injury to senior rights.” *Id.*

Factor o allows a stipulated mitigation plan to be approved even if it is not “fully in compliance” with the rest of the factors prescribed in CM Rule 43.03. That does not mean, however, that a stipulated mitigation plan can be approved without sufficient information to assure that the plan “will prevent injury to senior rights.” While a stipulated plan may deviate from the prescribed factors, it must still “prevent injury to senior rights.”

The mitigation plans of IGWA’s member ground water districts, Southwest Irrigation District, and the Coalition of Cities include detailed rules for measuring and documenting groundwater use, the process for delivering storage water, annual reporting requirements, and enforcement procedures.⁴ The Stipulation contains none of that.

Even if the computation in the Stipulation did in fact prevent injury to the SWC from FID’s groundwater use—which it does not—the lack of any detail about measurement, reporting, and

³ Water right numbers 29-10450, 29-10445 and 29-10448 are documented in the public records of the Department. IGWA requests that the hearing officer take official notice of these records pursuant to rule 602 of the Department’s rules of procedure.

⁴ These mitigation plans are maintained by the Department in Docket Nos. CM-MP-2024-003 (Ground Water Districts’ mitigation plan), CM-MP-2019-001 (Coalition of Cities mitigation plan), and CM-DC-2010-001 (SWID’s mitigation plan). IGWA requests that the hearing officer take official notice of these records pursuant to rule 602 of the Department’s rules of procedure.

enforcement makes it impossible for the Department and other water users to determine whether the plan is actually being complied with.

The dearth of detail in the Stipulation compared to the stipulated mitigation plans of the ground water districts, Southwest Irrigation District, and the Coalition of Cities gives outsiders the impression that the Stipulation reflects insider trading.

In any case, the Joint Motion should be denied because the Stipulation lacks sufficient detail for the Director to determine whether it will prevent injury to senior rights.

3.4 The mitigation proposal in the Stipulation does not actually mitigate the effects of groundwater use by FID.

FID diverts approximately 7,400 acre-feet of groundwater from the ESPA annually on average. (Higgs Decl.) The ESPA groundwater model predicts that 75 percent of this volume (approximately 5,550 acre-feet) accrues to the Near Blackfoot to Minidoka Reach of the Snake River at steady state. *Id.* If FID were to stop pumping groundwater, an additional 5,550 acre-feet of water would accrue to the SWC.

The Stipulation requires nothing of FID. It allows FID to continue business with usual, pumping as much groundwater as it has historically, doing nothing to offset the impact of its pumping on the ESPA or Snake River reach gains.

Meanwhile, all other ESPA groundwater users are required to make substantial sacrifices to mitigate the effects of their groundwater pumping on the SWC by reducing the amount of groundwater they divert, renting and delivering storage water to the SWC, and investing in managed aquifer recharge.⁵

FID is getting a sweetheart deal.

Water right administration involves state action, and the Fourteenth Amendment to the U.S. Constitution requires the Department to ensure that water users receive “equal protection of the laws.” While different mitigation plans may allow different forms of mitigation, mitigation obligations must be comparable among similarly situated groundwater users. The SWC does not have the liberty to pick and choose its favorites by imposing more strict mitigation obligations on some juniors than others.

⁵ See *Amended Final Order Approving Stipulated Mitigation Plan*, Docket No. CM-MP-2024-003 (Feb. 7, 2025) and *Final Order Approving Mitigation Plan*, Docket No. CM-MP-2019-001 (Apr. 9, 2019).

FID argues that its congressional history entitles it to special treatment, yet conjunctive management did not even exist when FID's project was developed. Moreover, excusing FID from mitigating the impact of its pumping effectively exempts it from priority administration. Congress has no authority, of course, to exempt FID from the prior appropriation doctrine. Moreover, it would be unconscionable to allow FID to divert groundwater without restriction while other groundwater rights, many of which are located within and around FID's service area, are required to provide actual mitigation or be curtailed.

Therefore, the Joint Motion should be denied because it does not actually mitigate the effects of FID's groundwater use on the water supplies of the SWC.

3.5 Other groundwater rights that divert from the ESPA will be injured if the Stipulation is approved as a mitigation plan.

Since the Stipulation does not require FID to actually conserve groundwater or otherwise mitigate the impacts of its pumping on the ESPA or on Snake River reach gains, the effect of its pumping will ultimately be borne by other groundwater users, some of whom have water rights that are senior in priority to FID's groundwater rights. Under section 6.1 of the 2024 Stipulated Mitigation Plan between the ground water districts and the SWC, the amount of storage the districts must deliver to the SWC is tied directly to reach gains in the Near Blackfoot-to-Minidoka reach of the Snake River. Currently, the districts are required to provide 75,000 acre-feet of storage. If reach gains drop below the 2023 level, the districts' mitigation obligation will increase to 82,500 acre-feet.⁶

The Coalition of Cities also bear greater risk if FID is excused from actually mitigating the impacts of its groundwater use. Under their stipulated mitigation plan with the SWC their mitigation obligation may increase if the obligation of the ground water districts increases.⁷

Therefore, the Joint Motion should be denied because excusing FID from mitigating the impacts of its groundwater use shifts the burden of their groundwater use to other groundwater users who bear greater risk of increased mitigation obligations and, as a result, greater risk of having their water rights curtailed.

⁶ See *Joint Motion for Order Approving 2024 Stipulated Mitigation Plan*, IDWR Docket No. CM-MP-2014-003 (Nov. 19, 2024). IGWA requests that the hearing officer take official notice of these records pursuant to rule 602 of the Department's rules of procedure.

⁷ See *Coalition of Cities, City of Idaho Falls, and City of Pocatello Joint Mitigation Plan*, IDWR Docket No. CM-MP-2019-001 (Feb. 25, 2019).

3.6 There are genuine issues of material fact.

The Stipulation should be denied because it is procedurally improper, factually unsupported, and legally impermissible, as discussed above. Should the hearing officer decline to deny the Joint Motion for those reasons, he should deny it because there are genuine issues of material fact concerning the effect and ramifications of the mitigation actions proposed by the Stipulation.

Conclusion

For the foregoing reasons, IGWA respectfully requests that the Joint Motion be denied.

RESPECTFULLY SUBMITTED this 11th day of September, 2025.

RACINE OLSON, PLLP

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2025, I cause the foregoing document to be served on the persons below via the method below:


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