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DEPARTMENT OF
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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

**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

Exempt from filing fees, I.C. § 67-2301

**COALITION OF CITIES' PETITION
FOR INTERVENTION,
MEMORANDUM IN SUPPORT AND
REQUEST FOR REPUBLICATION**

COMES NOW the cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (collectively the "Coalition of Cities"), by and through counsel McHugh Bromley, PLLC, and pursuant to IDAPA 37.01.01.350 and Rule 43 of the Idaho Department of Water Resources' ("IDWR" or "Department") Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 ("CM Rules") and Rule 154 of IDWR's Rules of Procedure, IDAPA 37.01.01, hereby file this *Petition for Intervention, Memorandum in Support, and Request for Republication*, ("Petition").

The Coalition of Cities requests that the Idaho Department of Water Resources ("Department") republish notice of the *Stipulation* dated June 10, 2025 ("*Stipulated Mitigation*

Plan”), and the *Joint Motion to Approve Stipulation Regarding Falls Irrigation District’s Rule 43 Mitigation*, filed on August 28, 2025 (“*Joint Motion*”). The *Joint Motion* added an additional mitigation activity – return flow credit – that is materially different from the original *Falls Irrigation Districts’ Rule 43 Mitigation Plan* (“*Mitigation Plan*”) that Falls Irrigation District (“FID”) filed with the Department on May 7, 2024. Notice of the *Mitigation Plan* was published twice, with the last *Amended Notice of Mitigation Plan Submitted by Falls Irrigation District in Response to the Surface Water Coalition Water Delivery Call* being published on June 7, 2024 (the “Amended Notice”).

PETITION FOR INTERVENTION

The Department’s Rules of Procedure provide: “A person who is not already a party to a contested case and who has a direct and substantial interest in the proceeding may petition for an order granting intervention as a party to the contested case.” IDAPA 37.01.01.350 (Rule 350).

ARGUMENT

1. The Coalition of Cities is Entitled to Intervene as a Matter of Right

Rule 353 states that motions to intervene should be granted if the motion is (1) timely filed, (2) shows a direct and substantial interest in any part of the subject matter of a contested case, and (3) does not unduly broaden the issues. IDAPA 37.01.01.353.

When a petition to intervene is filed after the date of the initial prehearing conference, it is considered late, with the petitioner required to state good cause for delay. Rule 352. Rule 353.02 provides that the Hearing Officer may grant or conditionally grant late petitions to intervene for good cause shown and if intervention will not disrupt the proceeding or prejudice the existing parties.

Rule 51 states that the rules of Chapter 37 are to be “liberally construed to ensure just, speedy and economical determination of all issues presented to the agency.” IDAPA 37.01.01.51. The Idaho Supreme Court has directed that rules providing for intervention should be given liberal construction. *See City of Boise v. Ada County (In re Facilities & Equip. Provided by the City of Boise)*, 147 Idaho 794, 803, 215 P.3d 514, 523 (2009)

A. There Is Good Cause Why the Motion is Un-Timely

The Coalition of Cities has good cause for the delay in filing this petition. When the original *Mitigation Plan* was filed on May 7, 2024, and published twice, the plan proposed several actions that FID would affirmatively take to physically offset the impacts of its groundwater pumping. *See Amended Notice* (“FID proposes five ways to mitigate injury to the SWC members.”). At no point in any of the publications did FID seek credit for its return flows.

The Coalition of Cities did not become fully aware of the contents of the *Joint Motion* and *Stipulated Mitigation Plan* until September 15, 2025, when counsel for IGWA sent an email to another client of undersigned counsel that mitigation for FID will now simply come in the form of return flows. Undersigned counsel was then out-of-state until the following Monday. The request for return flow mitigation credit is a material change from the original *Mitigation Plan*. As soon as she was able, counsel took it upon herself to understand the proceedings and then advised her clients accordingly. Therefore, as soon as it was practical after receiving client consent, this *Petition* was prepared.

The *Petition* is filed and served roughly three weeks after counsel was made aware of FID’s new method of mitigation for return flow credit. Given that undersigned counsel must first investigate and then make recommendations to its clients that consist of 14 cities, the *Petition* was drafted, filed and served as quickly as possible.

B. Interests are Part of the Subject Matter

The Coalition of Cities has an interest that is part of the subject matter of the pending action. Courts have defined an “interest” for purposes of Rule 24(a) as a “significant protectable interest.” *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). This action is about what actions may be considered mitigation, can additional mitigation actions that were not previously published be considered through a settlement and will the settlement have any impact on the Cities’ interests in protecting its water rights and its mitigation.

Thus, Coalition of Cities has a right to participate in any proceedings that could affect their ability to protect their real property rights, meaning the Coalition of Cities has a “direct and substantial” as well as a “significant and protectable” interest in this action.

C. Interest Will or May be Affected by the Outcome

The Coalition of Cities will be significantly prejudiced if they are not represented in this matter, with the Coalition of Cities having a direct and substantial interest in the subject matter in this proceeding for several reasons:

1. The members of the Coalition of Cities all have ground water rights that need to be protected by mitigation;
2. Many of the Coalition of Cities’ members currently return water to the river and this practice will continue into the future or may become necessary for other members in the future, and the treatment, examination and use of said return flows as mitigation is critical for the cities to plan for their future; and
3. Recovery of the aquifer is in their best interest to eliminate future curtailment risk.

D. Other Parties Do Not Adequately Represent the Coalition of Cities' Interests

IGWA does not adequately represent the Coalition of Cities' interests. None of the Coalition of Cities' member's municipal water rights are included in the Ground Water Districts and their water rights are protected by a separate mitigation plan.

E. Granting Intervention Will Not Broaden the Issues

The Coalition of Cities will not unduly broaden the issues as the questions surrounding the *Stipulated Mitigation Plan* are already at issue in the hearing. Granting this *Petition* will not disrupt the proceedings or prejudice the existing parties because the *Joint Motion* is not agreed to by all parties and IGWA has filed an objection as a protestant to the *Mitigation Plan*. Furthermore, the *Joint Motion* has not yet been acted upon and, to date, mostly procedural hearings have been held and no discovery or substantive hearings have occurred.

As set forth above, Coalition of Cities meet all of the requirements under both IDWR's administrative rules and the Idaho Rules of Civil Procedure.

2. Alternatively, Coalition of Cities Meets The Permissive Intervention Standards

In the event the Hearing Officer denies intervention by right, the Coalition of Cities alternatively requests permissive intervention under IDWR's administrative rules, where "deviation from these rules" is permitted when "compliance with them is ... not in the public interest" and IRCP 24(b)(1) which provides that permissible intervention is allowed when the motion is timely and there is a conditional right under an Idaho statute or if the party has a claim or defense that shares a common question of law or fact.

While the Coalition of Cities has a direct interest in the subject matter of the litigation, Rule 51 allows a permissive grant of intervention when the public interest would be impacted

and IRCP 24(b) does not require such an interest. *See Herzog v. City of Pocatello*, 82 Idaho at 509 (1960) (citing *Securities & Exchange Commission v. United States Realty & Imp. Co.*, 310 U.S. 434, 60 S.Ct.1044). Permissive intervention only requires that a claim or defense have a question of law or fact in common with the matter *See* IRCP 24(b)(1)(B). Thus, even if the Hearing Officer should find that Coalition of Cities does not meet intervention as of right, allowing them to intervene is in the public interest as mitigation credit for return flows is a novel theory that should be adequately probed by all water users.

Based on the foregoing, the Coalition of Cities has a direct and substantial interest in the subject matter in this proceeding, will not unduly broaden the issues, are not adequately represented by existing parties, and has provided good cause for the delay in filing this *Petition to Intervene*; thus, the Hearing Officer should grant the Coalition of Cities' intervention. *See* Rule 353.02.

REQUEST FOR REPUBLICATION

In addition, the Coalition of Cities hereby join in American Falls Aberdeen Ground Water District's request that the *Stipulated Mitigation Plan* be republished to include the new mitigation activity of credit for existing return flows that was not previously included in the published notice; thereby providing the Coalition of Cities an opportunity to protest and become a party. Republication should be ordered because the original published notice did not include use of FID's return flows as part of the five, enumerated mitigation activities. Adding a new activity, that was never noticed, does not meet the due process requirements under IDAPA 37.03.11.043.02 as contemplated in Idaho Code Section 42-222.

CONCLUSION

Based on the foregoing, the Coalition of Cities requests that the Hearing Officer grant the *Petition* and/or that the *Stipulated Mitigation Plan* be republished.

DATED this 7th day of October, 2025.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of October 2025, 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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