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

CM-MP-2024-002

**FALLS IRRIGATION DISTRICT'S
RESPONSE TO PETITION TO
INTERVENE**

COMES NOW, FALLS IRRIGATION DISTRICT (“Falls” or “District”), by and through its counsel of record, IdaH20, PLLC, and submits this response to the *Petition to Intervene* filed by American Falls Aberdeen Gound Water District (“AFA” or “Petitioner”) in the above captioned matter.

I. STANDARD OF REVIEW

A person who is not already a party to a contested case may petition for an order granting intervention as a party. IDAPA 37.01.01.350. A timely filed petition to intervene must make two showings. *First*, the proposed intervenor must show a “direct and substantial interest in any part of the subject matter of a contested case.” IDAPA 37.01.01.353.01. *Second*, the proposed intervenor must show that its intervention will “not unduly broaden the issues.” *Id.* Only if the proposed intervenor can make both showings can the Department grant a motion to intervene, which may be subject to reasonable conditions. *Id.* Further, if an intervenor applicant’s interests are adequately represented by existing parties, intervention should not be granted. *Id.*

II. BACKGROUND

Falls filed a mitigation plan on May 7, 2024. On August 28, 2025, Falls and SWC filed a joint motion for approval of a Stipulated Agreement/mitigation plan (“SWC Stipulation”) intended to provide safe harbor to Falls’ junior groundwater pumping under the identified junior groundwater rights so long as certain conditions are met. These conditions did not modify Falls’ proposed actions but simply identify when certain additional actions would be taken. AFA now seeks to intervene in this case nearly sixteen (16) months after the mitigation plan was filed, and nearly two (2) months after the SWC Stipulation was filed and after numerous status conferences have been held. Those status conferences addressed the fact that Falls was in discussion with SWC, the senior water right holder and injured party regarding mitigation. Further, AFA is already represented in this matter by the lone protestant, IGWA who filed a timely protest following publication and participated in those status conferences.

AFA’s Petition contains twenty paragraphs asserting the bases for intervention. Falls disputes these paragraphs but specifically responds in the following argument.

III. ARGUMENT

The Department should deny AFA’s Motion to Intervene because: (1) AFA has not shown a direct and substantial interest in this proceeding, and (2) AFA’s intervention will unduly broaden the issues covered in this proceeding.

A. AFA has no direct or substantial interest in this proceeding.

AFA has no direct or substantial interest in this proceeding. AFA vaguely alleges that “If FID is not required to provide storage water to the SWC..., then the remainder of AFA’s patrons will shoulder an even larger mitigation burden.” *See* Petition at 3. Further, it makes the same allegation later in the Petition, “The remainder of AFA’s patrons stand to bear an even larger

burden if FID (a fellow AFA patron) can obtain protection from curtailment without participating in the 2024 Plan as a patron of AFA or taking any affirmative action to physically offset its impacts to the Near Blackfoot-Minidoka Reach.” *Id.* at 4. Apparently, AFA believes that the only path to mitigation is through the 2024 Stipulated Plan that AFA is a party to, or the actions contained in the 2024 Plan.

Evaluation of a Mitigation Plan is limited to the criteria identified in Rule 43 and in this particular situation, Rule 43(o). “Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.” IDAPA 37 .03.11.043.03(o). AFA fails to provide any documentation as to how individual AFA patrons’ obligations will change should Falls no longer participate in the 2024 Stipulated Plan. Interestingly, Falls was not a participant in AFA for mitigation purposes when the 2024 Stipulated Plan was entered into. Hence, at that time there was no expectation of Falls’ participation as a member of AFA. In fact, Falls had by then filed its own mitigation plan. Clearly, AFA’s allegations of a “direct and substantial interest” are speculative. Speculation about future “impact” does not satisfy the rule’s criteria to intervene in the present contested case.

Further, Falls and SWC recognize that the Director may reduce the Methodology injury determination that is attributable to Falls’ junior groundwater diversions. Such a determination should not be placed on the shoulders of another mitigation plan where such plan is tied to the methodology determination.

Moreover, AFA’s petition is not timely. This Petition was filed well after a motion for approval of the SWC Stipulation between the senior water right holder, SWC and a junior ground water user, Falls setting forth Falls’ obligation was reached and filed with the hearing

officer. If approved, the Falls' Plan would set forth Falls' on-going obligation, recognizing that no other junior water rights would be impacted through the incorporation of the Plan into the methodology determinations. It is that methodology which defines junior water right holders' injury to the senior. Absent separate mitigation plans approved by the Director, that injury determination sets the bar for administration.

The conjunctive management rules allow for the filing of individual/separate mitigation plans for approval. *See CMR 42.02*. ("The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan." IDAPA 37.03.11.042.02). Each plan may or may not fully address the impact caused by the out-of-priority diversion of a junior. "Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions." IDAPA 37.03.11.043.03(o). Such determination is part of the negotiations between the senior and junior water right holders. However, if the parties agree to terms, those terms should be honored. Here, SWC stipulates that the actions and conditions offered are sufficient to mitigate for any material injury caused by Falls' consumptive use so long as the provisions of the stipulated plan are being implemented.

AFA argues that it has a direct and substantial interest in Falls' mitigation plan because without Falls' continued participation in the 2024 Stipulated Plan as a member of AFA, other patrons of AFA will be subject to additional storage requirements.

Falls was not a member of AFA when that plan was negotiated and agreed to by AFA and other ground water districts. Hence, AFA patrons had no expectation at the time of

agreement that Falls would or would not be a participant. That would at best be speculation; certainly not a direct interest.

Falls' mitigation plan solely addresses Falls' actions and obligations. That is pursuant to the SWC Stipulation, if Falls fails to continue to return flows in excess of its consumptive use, it will deliver storage water to SWC. This further delineation of when storage delivery is required, is consistent with the storage delivery action identified in Falls' Rule 43 plan that was filed on May 7, 2024.

What AFA is requesting is that this hearing officer determine how each and every individual mitigation plan operates in relationship with other plans that have been approved. Such determinations have been rejected as the basis for intervention in a contested case. AFA's generalized allegation that its interests in a separate mitigation plan may be impacted is not enough to establish a direct and substantial interest. *In the Matter of IGWA's Settlement Agreement Mitigation Plan*, Order Denying Cities' Petition to Intervene, Dkt. No. CM-MP-2016-001 (Jan 4, 2024), the hearing officer concluded that a coalition of cities and the City of Pocatello failed to demonstrate a direct and substantial interest. The order stated:

This contested case proceeding addresses issues regarding IGWA's 2022 noncompliance with the IGWA 2016 Mitigation Plan. It has no direct link to the Cities' separate mitigation plan with the SWC. While the Cities may be required to increase their obligation under the mitigation plan, they have failed to show that such a result is a direct outcome of this proceeding.

Order at 3.

B. AFA's intervention unduly broadens the issues.

AFA's intervention will unduly broaden the issues. AFA's intervention would require the Department to evaluate AFA's participation in the 2024 Stipulated Plan and all other mitigation plans to determine whether those agreements adequately represented their individual impact on the water supply of the senior water right holder. Clearly, such review is outside the

scope of the Department's review in this proceeding.

C. AFA's Motion for Republication Lacks Merit.

AFA finally requests that if the Petition to Intervene is denied, then the Department should republish the mitigation plan. Such request is without merit as a review of the plan reveals that Falls originally proposed as an action the delivery of storage water directly to SWC if required under the Plan or IDWR order, i.e. the methodology order. The stipulation entered into between Falls and SWC simply identifies when storage water delivery would be required. That is when ground water consumptive use exceeds irrigation return flows.

IV. CONCLUSION

AFA's effort to create an interest in the stipulation entered into between Falls and SWC based upon the fact that they belong to a separate mitigation plan fails to satisfy the criteria for either intervention or republication. AFA's Petition should be denied.

DATED this 8th day of October, 2025.

IdaH20, PLLC

/s/ John K. Simpson

John K. Simpson

Attorney for Falls Irrigation District

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2025, the above and foregoing **FALLS IRRIGATION DISTRICT’S RESPONSE TO PETITION TO INTERVENE** was sent to the following by the method indicated:

<p>Gerald F. Schroeder Garrick Baxter IDAHO DEPARTMENT OF WATER RESOURCES</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email: gerald_23107@msn.com garrick.baxter@idwr.idaho.gov file@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov</p>
<p>Sarah A. Klahn Maximilian C. Bricker SOMACH SIMMONS & DUNN, P.C.</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email: sklahn@somachlaw.com mbricker@somachlaw.com</p>
<p>Travis Thompson Norm Semanko Abby Bitzenburg PARSONS BEHLE & LATIMER</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email: tthompson@parsonsbehle.com nsemanko@parsonsbehle.com abitzenburg@parsonsbehle.com jnielsen@parsonsbehle.com</p>
<p>Thomas J. Budge Elisheva M. Patterson RACINE OLSON, PLLP</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email: tj@racineolson.com elisheva@racineolson.com</p>

/s/ John K. Simpson

John K. Simpson