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DEPARTMENT OF
WATER RESOURCES

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STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE MITIGATION
AND CURTAILMENT PLAN OF JERRY D.
BINGHAM AND VALERIE H. BINGHAM
FOR WATER RIGHT NOS. 35-12226, 35-
2202B, 35-2205E, 35-2266, 35-2269G, AND
35-2183D

Docket No. CM-MP-2025-003

IGWA’S PETITION TO INTERVENE

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, hereby petitions the Director under Rules 350 through 354 of the Rules of Procedure of the Idaho Department of Water Resources (IDWR) to intervene in *In the Matter of the Mitigation and Curtailment Plan* (“Bingham Mitigation Plan”) filed August 19, 2025, in this matter.

On September 23, 2025, IGWA submitted its Notice of Protest against the Bingham Mitigation Plan. It has since come to IGWA’s attention that IGWA’s Notice of Protest may have been filed after the protest deadline.

Importantly, the petitioner, Jerry D. Bingham and Valerie H. Bingham, did not serve the Bingham Mitigation Plan on IGWA even though IGWA is a party to the Surface Water Coalition (SWC) delivery call, IDWR Docket No. CM-DC-2010-001, under which the Bingham Mitigation Plan proposes to provide mitigation.

It is IGWA’s practice to monitor mitigation plan filings posted to IDWR’s website at <https://idwr.idaho.gov/legal-actions/mitigation-plan-actions/>. At the time IGWA filed its Notice of Protest, the webpage and docket number dedicated to the Bingham Mitigation Plan (<https://idwr.idaho.gov/legal-actions/mitigation-plan-actions/SWC/bingham/>) did not contain a notice of publication of the Bingham Mitigation Plan or otherwise report a publication date or protest deadline. Therefore, IGWA assumed IDWR had not yet published notice of the Plan, and that IGWA’s Notice of Protest was being submitted in advance of the protest deadline. IGWA subsequently discovered that IDWR had published notice with a protest deadline of September 22, 2025.

Rule 351 of the Rules of Procedure of IDWR allow intervention by any person who “claim[s] a directive substantial interest in the proceeding.”¹ A petition is timely if it is filed “at least fourteen (14) days before the date set for formal hearing, or by the date of the prehearing conference, whichever is earlier.”² “If a timely filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions, unless the applicant’s interest is adequately represented by existing parties.”³ As explained below, IGWA should be granted intervention under this standard.

1. This petition is timely.

The pleadings posted to the IDWR website in these matters indicate that a date has not been set for a formal hearing or prehearing conference. Therefore, this petition is timely filed.

2. IGWA has a direct and substantial interest in these matters.

The Bingham Mitigation Plan proposes to provide mitigation in the SWC delivery call case, Docket No. CM-DC-2010-001, which IGWA is a party. IGWA has participated in all IDWR proceedings related to the SWC delivery call since 2005 when the call was made. IGWA’s member ground water districts currently provide mitigation to the SWC under Docket No. CM-MP-2024-003 (“2024 Plan”). IGWA has a direct and substantial interest in the Bingham Mitigation Plan because, if it is approved, it will affect the mitigation obligations owed by IGWA’s member ground water districts.

The Bingham Mitigation Plan proposes to mitigate for the out-of-priority diversion and use of groundwater under six water rights: water right nos. 35-12226, 35-2202B, 35-2205E, 35-2266, 35-2269G and 35-2183D.⁴ It proposes to mitigate for the out-of-priority use of water under water right no. 35-12226 by ceasing irrigation under that right. (Bingham Mit. Plan, p. 2, ¶ C.1.) IGWA does not object to this component of the Bingham Mitigation Plan. IGWA’s objection pertains to the proposed mitigation of the remaining five water rights, referred to collectively herein as the “Remaining Rights.”

The Bingham Mitigation Plan proposes to mitigate for the out-of-priority diversion and use of groundwater under the Remaining Rights by “turning off this water on each Sunday,” which the Bingham Mitigation Plan asserts represents a “14.2% reduction in water usage” (one out of seven days is 14.2%). *Id.* at ¶¶ C.2-C.6. The Bingham Mitigation Plan additionally proposes to mitigate for the out-of-priority diversion and use of groundwater under the Remaining Rights by voluntarily diverting less water than is authorized under the Remaining Rights. *Id.* at ¶¶ D-D.f.

IGWA has a direct and substantial interest in the proposed mitigation for the Remaining Rights for two reasons. First, it does not correspond with mitigation obligations under the

¹ IDAPA 37.01.01.350.

² IDAPA 37.01.01.352.

³ IDAPA 37.01.01.353.

⁴ The case caption in the Bingham Mitigation Plan mistakenly refers to water right no. 35-2186D. The correct water right number is 35-2183D, as set forth in paragraph C.6 of the Bingham Mitigation Plan.

Methodology Order.⁵ Under the Methodology Order, curtailment dates and mitigation obligations adjust from year to year based on water supply and weather conditions. In the absence of an agreement under CM Rule 43.03.o, mitigation plans must “provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source.” (CM Rule 43.03.b.) The Bingham Mitigation Plan does not do this.

Second, the groundwater conservation proposed by the Bingham Mitigation Plan appears to be fictitious. The proposal to not irrigate on Sundays does not provide real groundwater savings if it does not represent a reduction in historic groundwater use. Likewise, the proposal to divert less than the maximum volume authorized under their water rights does not provide real groundwater savings if it does not represent a reduction in historic groundwater use.

Under Idaho law, the diversion volume element of a water right defines the maximum authorized volume that may be diverted *when needed*. “It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes.” *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073, 1079 (1915); see also *Mountain Home Irr. Dist. v. Duffy*, 79 Idaho 435, 442, 319 P.2d 965, 968 (1957) (“It must be remembered that the policy of the law of this state is to secure the maximum use and benefit of its water resources”), *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960) (“The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources”), *State v. Hagerman Water Right Owners (“Basin-Wide Issue 10”)*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997) (“The governmental function in enacting . . . the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing maximum use and benefit of our natural water resources”), and *Rangen, Inc. v. IDWR*, 160 Idaho 119, 131, 369 P.3d 897, 909 (2016) (“As we recently stated in *Clear Springs*, the policy of securing the maximum use and benefit, and least wasteful use of Idaho’s water resources, has long been the policy in Idaho.”). Accordingly, “[a] prior appropriator is only entitled to the water to the extent that he has use for it *when economically and reasonably used*.” *Goodrich*, 27 Idaho at 44, 147 P. at 1079 (italics added). “[N]o person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation.” *Id.* This principle is captured in the CM Rules which require consideration of whether both the senior and the junior user are “using water efficiently and without waste.” (CM Rule 40.03.)

The Bingham Mitigation Plan claims to offset the depletive effect of groundwater use under the Remaining Rights by diverting less than the maximum authorized volume, but this does not represent real savings because the Bingham’s crops do not need the maximum volume to be grown to maturity. Indeed, few if any groundwater irrigators in southern Idaho ever actually need or use the maximum volume authorized under their groundwater rights. By offering to not irrigate on Sundays and divert less than the maximum authorized volume, the Bingham Mitigation Plan allows them to continue using just as much groundwater as they have historically, making no real sacrifice to mitigate material injury to the SWC, and doing nothing to offset the depletive effect of their groundwater withdrawals as required by CM Rule 43.03.b.

⁵ The SWC delivery call is currently governed by the Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover (“Methodology Order”) entered July 19, 2023, in IDWR Docket No. CM-DC-2010-001.

The failure to provide real mitigation that actually offsets the impacts of groundwater use by the Bingham's will directly affect the mitigation obligations of IGWA's member districts. Under the 2024 Plan, the mitigation obligations of IGWA's member districts will increase if Snake River reach gains decline. Since the Bingham Mitigation Plan does not actually offset the impact of the Bingham's groundwater use, it will cause an unmitigated decline in Snake River reach gains, thereby increasing the risk that mitigation obligations of IGWA's members will increase. In other words, since the Bingham Mitigation Plan does not require the Bingham's to actually conserve groundwater or otherwise mitigate the impacts of their out-of-priority groundwater use, the depletive effect of their groundwater use will ultimately be borne by IGWA's members and other groundwater users, some of whom have water rights that are senior in priority to the Bingham's water rights.

3. IGWA's participation will not unduly broaden the issues.

IGWA presently seeks intervention in these matters to enable IGWA to effectively represent the interests of its member ground water districts who do not separately participate in this matter. IGWA's participation will not insert new issues into these matters, nor broaden the issues that exist by rule under CM Rule 43. IGWA's interests in this matter are encompassed by issues that are part of this proceeding under CM Rule 43.03.

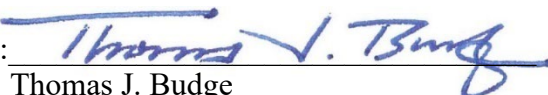
4. IGWA's interests are not adequately represented by existing parties.

Two of IGWA's member ground water districts, Carey Valley Ground Water District and American Falls-Aberdeen Ground Water District, have filed notices of protest in this proceeding. Neither of these ground water districts represent the interests of all of IGWA's member districts, including Bingham Ground Water District, in which the Bingham's Remaining Rights are located. Therefore, IGWA's interests are not adequately represented by existing parties.

For the foregoing reasons, IGWA respectfully requests intervention in this case.

DATED this 29th day of September, 2025.

RACINE OLSON, PLLP

By: 
Thomas J. Budge
Attorneys for IGWA

CERTIFICATE OF MAILING

I certify that on this 29th day of September, 2025, the foregoing document was served on the following persons in the manner indicated.


Signature of person mailing form

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