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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE MITIGATION
PLAN FILED BY THE CITY OF
POCATELLO

IN THE MATTER OF THE MITIGATION
PLAN FILED BY THE COALITION OF
CITIES

IN THE MATTER OF THE CITY OF
IDAHO FALLS MITIGATION PLAN FOR
THE SURFACE WATER COALITION
CALL

Docket Nos. CM-MP-2015-001, CM-MP-
2015-004, CM-MP-2015-005

**CITIES' RESPONSE TO IGWA'S
PETITION TO INTERVENE**

The Coalition of Cities, the City of Pocatello, and the City of Idaho Falls (collectively "Cities"), by and through their above-identified counsel, submit this Response to Idaho Ground Water Appropriators, Inc.'s ("IGWA") *Petition to Intervene* ("Petition"), dated February 18, 2016.

According to IGWA's Petition, it has a direct and substantial interest in the captioned matter because it reached a settlement with the Surface Water Coalition ("SWC") in 2015 regarding the SWC Delivery Call. Petition at 2. However, IGWA has yet to file a mitigation plan with the Idaho Department of Water Resources ("Department") based on that settlement or to otherwise seek to obtain Department approval to operate its junior ground water rights as a condition of entry of the settlement. Nonetheless, IGWA claims that the Cities' mitigation plans "may have direct or indirect impacts on the mitigation activities conducted by IGWA and its members," and while it does not anticipate "protesting" the Cities' mitigation plans, its

interests must be protected. *Id.* However, as discussed below, IGWA does not have an interest affected by the Cities' mitigation plans.

In 2015, IGWA and the SWC filed a *Stipulation and Joint Motion Regarding April As Applied Order and Third Methodology Order* on May 8, 2015 ("Stipulation and Joint Motion"). The Stipulation and Joint Motion was filed concurrently in the SWC Delivery Call (Docket No. CM-DC-2010-001) and in IGWA's previously approved Mitigation Plan (Docket No. CM-MP-2009-007). The Stipulation and Joint Motion state that the parties had agreed on a term sheet and would reach a long term settlement by July 1, 2015. *Id.* at 3. To date, no final settlement has been filed with the Department. While no settlement agreement was attached to its Petition, based on the facts asserted by IGWA, it is presumed that IGWA's forthcoming mitigation plan will be a stipulated plan based on its settlement.

While the Petition lacks detail regarding how mitigation provided to the Cities "could potentially affect the mitigation provided to the SWC by IGWA," the Petition implies that the amount of water that IGWA owes to the SWC under their settlement agreement may be affected by the Cities' mitigation plans. Petition at 2. However, as a matter of law and fact, this is an impossible outcome. First, as stated by IGWA in its Petition, it has already entered a final settlement with the SWC outlining the mitigation measures it will take in exchange for providing safe harbor to its member ground water districts. Presumably IGWA intends to comply with its obligations under that settlement, and it provides no explanation to support its allegation that the Cities' mitigation plans could affect said settlement.

Second, as a matter of law, approval of a mitigation plan "cannot transfer or impose upon [another] junior any portion of the total mitigation obligation attributable to the stipulating

junior's diversion." *Memorandum Decision and Order* at 8, Case No. CV-2015-172 (Sept. 8, 2015). The Court went on to state:

Mitigation in the context of conjunctive management permits a junior, who is causing injury to a senior by way of his diversion, to take an action to offset that injury in order to continue his water use. Essential to this concept is that an **offending junior is only responsible for mitigating that portion of the senior's material injury attributable to his offending diversion.** . . . Considerations of equity to other junior users are irrelevant. The same principle applies to a stipulated mitigation plan so long as that portion of the total mitigation obligation attributable to the stipulating junior's diversion is not transferred to, or imposed upon, any other non-stipulating junior.

Id. at 10–11 (emphasis added, internal note and citation omitted). The Cities' mitigation plans only seek to mitigate for the impacts caused by the Cities' diversion of ground water under its junior-priority rights and are not tied to IGWA's mitigation plan (or settlement) in any way. For these reasons, IGWA does not have a direct and substantial interest in this matter and intervention should be denied. IDAPA 37.01.01.353. *See, e.g., Order on Petitions to Intervene and Denying Motion for Summary Judgment; Renewed Request for Information; and Request for Briefs*, In the Matter of the Request for Administration in Water District 120 (Apr. 6, 2005) (order denying Idaho Power's intervention because it did not demonstrate a direct and substantial interest in the proceeding).

Additionally, if the Director were to assume for the sake of argument that there is indeed a question of how much mitigation water IGWA owes under its settlement agreement, that matter should be addressed in IGWA's own forthcoming mitigation plan—not the Cities' mitigation plans. To expect the Director to determine IGWA's mitigation obligation in the context of the Cities' mitigation plans would be to unduly broaden the issues to be litigated outside of those fairly encompassed by this matter. IDAPA 37.01.01.353. For this additional reason, intervention should be denied.

Finally, the Director should reject IGWA’s argument that intervention is proper because none of the Cities “represent ground water users generally.” Petition at 3. IGWA offers no explanation of how the Cities’ mitigation plans, which will allow operation of the Cities’ ground water rights, implicates an entity such as IGWA, which represents a large number of irrigators who divert under their own rights. If IGWA is allowed to inject its unrelated issues associated with its own settlement and forthcoming mitigation plan into this proceeding, IGWA could interfere with efforts by the Cities and the SWC to resolve their differences in a stipulated mitigation plan.¹

IGWA has failed to establish the necessary elements to warrant intervention, and its Petition should be denied.

¹As an alternative to IGWA’s participation as a party in this matter, it could participate as a “public witness” pursuant to Rule 355 of the Department’s Rules of Procedure. *See, e.g., Order Denying Idaho Power’s Petition for Hearing*, In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of the SWC (July 22, 2005) (decision providing that Idaho Power could participate as a public witness in decision to deny petition to intervene).

Respectfully submitted this 24th day of February, 2016.

CITY OF POCA TELLO ATTORNEY'S
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By 
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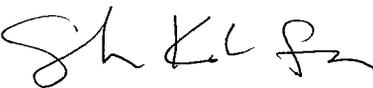
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 2016, I caused to be served a true and correct copy of the foregoing **Cities' Response to IGWA's Petition to Intervene in Docket Nos. CM-MP-2015-001, CM-MP-2015-004, and CM-MP-2015-005** upon the following by the method indicated:



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