

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

IN THE MATTER OF THE SECOND
MITIGATION PLAN FILED BY THE
COALITION OF CITIES FOR THE
DISTRIBUTION OF WATER TO WATER
RIGHT NOS. 36-02551, 36-07694 & 36-
15501, IN THE NAME OF RANGEN, INC.

CM-MP-2014-007
CM-DC-2011-004
CM-DC-2014-004

**FINAL ORDER CONDITIONALLY
APPROVING CITIES SECOND
MITIGATION PLAN**

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-02551
& 36-07694 (RANGEN, INC.)

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS.
36-00134B, 36-00135A, AND 36-15501
(RANGEN, INC.)

FINDINGS OF FACT

1. On January 29, 2014, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued the *Final Order Regarding Rangen, Inc’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“Curtailment Order”). The Curtailment Order recognizes that holders of junior-priority ground water rights may avoid curtailment if they participate in a mitigation plan which provides “simulated steady state benefits of 9.1 cfs to Curren Tunnel [sometimes referred to as the “Martin-Curren Tunnel”] or direct flow of 9.1 cfs to [Rangen, Inc. (“Rangen”).” *Curtailment Order* at 42. The Curtailment Order explains that mitigation provided by direct flow to Rangen “may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year.” *Id.* The Curtailment Order did not establish the starting and ending dates for each year of the five year “phase-in” period.

2. On April 11, 2014, the Director issued the *Order Approving In Part and Rejecting In Part IGWA’s Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* (“Amended Curtailment Order”). The Amended Curtailment Order

established a starting date of April 1 and an ending date of March 31 for each year of the five year “phase-in” period. The first year of the mitigation “phase-in” was April 1, 2014 through March 31, 2015.

3. On June 20, 2014, the Director issued an *Order Approving IGWA’s Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order* (“Second Amended Curtailment Order”). The Second Amended Curtailment Order approved mitigation required by the Curtailment Order through January 18, 2015. *Second Amended Curtailment Order* at 18. The Second Amended Curtailment Order also stated that water rights bearing priority dates junior or equal to August 12, 1973, would be curtailed on January 19, 2015, if further mitigation was not provided by junior ground water right holders. *Id.*

4. On October 29, 2014, the Director issued an *Order Approving IGWA’s Fourth Mitigation Plan* (“Fourth Mitigation Plan Order”). The Fourth Mitigation Plan Order again established that the ground water right holders junior to August 12, 1973, must provide mitigation by January 19, 2015, or they will be curtailed. *Fourth Mitigation Plan Order* at 21.

5. Rangen has appealed orders approving the first, second, and fourth mitigation plans. Rangen has consistently argued that the Director’s orders have not supplied mitigation water to Rangen in the time of need. On December 3, 2014, the Fifth Judicial District Court, in and for the County of Twin Falls, issued its *Memorandum Decision and Order on Petition for Judicial Review* (“Memorandum Decision”) in CV 2014-2446, the appeal of the first mitigation plan. The district court reversed and remanded the Director’s approval of the Amended Curtailment Order on two grounds: (1) the Director could only approve mitigation for aquifer enhancement activities that have already happened, or future aquifer enhancement activities that are compulsory, not voluntary, and (2) for direct delivery of mitigation water, the Director cannot recognize mitigation during periods of time when water is not physically delivered to the holder of the senior water right. The district court implicitly affirmed that the benefits of the aquifer recharge should be modeled, and the modeled benefits should be credited to the junior ground water right holder as mitigation to the senior water right holder. The Court stated “[t]he benefits of [aquifer enhancement activities] accrue . . . on an annual time period, and so it reasonable to grant . . . year-round mitigation credit for those activities.” *Memorandum Decision* at 14. This statement assumes the aquifer recharge activities and the associated modeled accrual of mitigation credit happen over an annual period similar to the annual period of time that mitigation is required.

6. On November 20, 2014, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone and Wendell (collectively referred to as the “Coalition of Cities” or “Cities”) filed *Coalition of Cities Second Mitigation Plan* (“Cities’ Second Mitigation Plan”) with the Director. The Cities hold water rights junior in priority to water rights of Rangen, and therefore subject to curtailment pursuant to orders of the Director in the above captioned delivery call proceedings. *Cities’ Second Mitigation Plan* at 2.

7. The Cities' Second Mitigation Plan states the Coalition of Cities entered into an agreement with Rangen to undertake a pilot managed recharge program. The Cities' Second Mitigation Plan proposes delivery of 1,500 acre feet of storage water held by Clear Springs Foods ("Clear Springs") through the American Falls Reservoir District No. 2 ("AFRD2") delivery and conveyance system to an approved managed recharge site for a term commencing on the date of the Second Mitigation Plan through March 31, 2016. *Cities' Second Mitigation Plan* at 2-3. A copy of the Memorandum Agreement between the Coalition of Cities, Clear Springs, and Rangen is attached as Exhibit 2 of the Second Mitigation Plan.¹

8. The recharge site near Gooding is the "preferred location." Surface water will be delivered to the Gooding site for recharge unless necessary approvals cannot be obtained. *Cities' Second Mitigation Plan* at 3. Subsequent to the submission of the plan to the Department, the Coalition of Cities received approval from the Idaho Department of Environmental Quality ("IDEQ") for recharge at the Gooding recharge site. Letter from Brian Reed, Technical Engineer for IDEQ, to Rob Williams, attorney for the Coalition of Cities, *Re: Ground Water Monitoring Plan for the City Coalition Use of the City of Gooding Recharge Site, Gooding County* (Dec. 5, 2014). The Coalition of Cities also received approval from the United States Bureau of Land Management ("BLM") to use the Gooding recharge site. Letter from Codie Martin, BLM Field Manager, to Rob Williams, attorney for the Coalition of Cities (Dec. 12, 2014).

9. Recharge is scheduled to begin "as soon as possible, continuing through the winter, to the extent AFRD2 and the requisite storage volume authorize such activity." *Cities' Second Mitigation Plan* at 4. Recharge has not started but is expected to begin in late February or early March.

10. The Cities' Second Mitigation Plan will not deliver mitigation water to Rangen by January 19, 2015. At best, the mitigation water will only be delivered to the recharge site for approximately one month of the first year in which mitigation was required.

11. The ESPA ground water model predicts that the Curren Tunnel, the source for Rangen's water rights, will accrue little or no benefit from the recharge activities during the approximate one month time period between the beginning of the recharge and March 31, the end of the first year of mitigation. The delivery of the recharge water will have contributed no water to mitigate for depletions caused by the Cities' pumping during the 11 months (approximately) of the first mitigation year (April 1, 2014 through March 31, 2015) when mitigation was required.

12. The Gooding recharge site is located within the Eastern Snake Plain Aquifer Model's area of common ground water supply. The Coalition of Cities' "[d]elivery of surface water through the AFRD2 delivery and conveyance system will result in recharge to the aquifer in

¹ The Memorandum Agreement also states the parties shall seek approval from the Idaho Water Resource Board ("IWRB") for permission to use the IWRB recharge water right at the Gooding recharge site. Approval of the Second Mitigation Plan does not authorize the use of the IWRB's recharge water right nor does it authorize mitigation credit for the use of the IWRB's recharge water right.

two ways: 1) from seepage or conveyance lost through the canal itself; and 2) seepage from the Recharge Site and surrounding area.” *Cities’ Second Mitigation Plan* at 4.

13. The Cities’ Second Mitigation Plan states: “Rangen stipulates to the Mitigation Plan with the Cities, agreeing that the Plan shall be deemed to mitigate the Cities’ out-of-priority ground water pumping in CM-DC-2011-004 and CM-DC-2014-004 for the term of the mitigation plan.” *Cities’ Second Mitigation Plan* at 4.

14. Notice of the Cities’ Second Mitigation Plan was published in the Idaho Mountain Express and the Mountain Home News beginning on December 3, 2014, and ending on December 10, 2014. It was also advertised in the Time News beginning on December 4, 2014, and ending on December 11, 2014. The deadline to file protests to the Cities’ Second Mitigation Plan was December 22, 2014. No protests were filed with the Department on or before the deadline.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

2. Idaho Code § 42-1805(8) provides the Director with authority to "promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department."

3. Idaho Code § 42-603 grants the Director authority to adopt rules governing water distribution. In accordance with chapter 52, title 67, Idaho Code, the Department adopted rules regarding the conjunctive management of surface and ground water effective October 7, 1994. CM Rule 0.² The CM Rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against junior-priority ground water rights in an area having a common ground water supply. CM Rule 1.

4. CM Rule 42.02 states: "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

² The term "CM Rule" refers to Idaho's *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

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."

5. CM Rule 43.01 sets forth the criteria for submission of a mitigation plan to the Director. The Cities' Second Mitigation Plan satisfies the criteria of CM Rule 43.01.

6. CM Rule 43.03 establishes multiple factors that **may** be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights:

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.

b. Whether the mitigation plan will 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. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan.

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal.

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors.

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use.

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan.

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan.

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury.

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply.

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan.

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies.

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.

7. Delivery and use of the mitigation water complies with Idaho law.

8. During the first year when mitigation is required (April 1, 2014 through March 31, 2015), the mitigation plan **does not** “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 . . .” If delivered during late February and March of 2015, the mitigation plan **will** provide replacement water at the time and place required for the April 1, 2015 through March 31, 2016 “phase-in” year.

9. The “mitigation plan is based upon computer simulations and calculations” of the Eastern Snake Plain Aquifer Model.

10. Rangen has accepted, by agreement, the Cities’ Second Mitigation Plan as mitigation for depletions to Rangen’s water supply from Curren Tunnel.

11. The Cities' Second Mitigation Plan requires numerous activities, such as upgrades to diversion works, payment of wheeling fees, monitoring, and verification of data. The parties to the Cities' Second Mitigation Plan should be responsible for these activities, not the Department.

12. It is ironic and inconsistent for Rangen to stipulate to a mitigation plan that will not provide mitigation water in the time of need. Approval of the Cities' Second Mitigation Plan would allow the Coalition of Cities to avoid curtailment on January 19, 2015, without providing timely mitigation. At the same time other junior ground water users may be curtailed despite efforts to provide mitigation according to the order approving the Fourth Mitigation Plan.³

13. The agreement by Rangen to accept the Cities' Second Mitigation Plan is not grounds to justify the mitigation plan's non-delivery of replacement water to Rangen during the first "phase-in" year.

14. After reviewing the Cities' Second Mitigation Plan, the CM Rules, and the proceedings herein, the Cities' Second Mitigation Plan should be conditionally approved. If the mitigation water recharges the aquifer in late February or March of 2015, mitigation will be recognized at the earlier of: (a) the date the modeled transient benefits of the recharge activities to the Curren Tunnel equal the modeled depletions to the Curren Tunnel caused by the Cities' diversions, or (b) April 1, 2015, the beginning of the next mitigation "phase-in" year as established in previous orders.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

The Coalition of Cities' Second Mitigation Plan is APPROVED upon conditions. The parties to the Cities' Second Mitigation Plan agreement are responsible for activities required as part of the mitigation plan, such as upgrades to diversion works, payment of wheeling fees, monitoring and verification of data.

IT IS FURTHER ORDERED that mitigation will not be recognized until the earlier of: (a) the date when the modeled transient benefits of the recharge activities to the Curren Tunnel equal the modeled depletions to the Curren Tunnel caused by the Cities' diversions, or (b) April 1, 2015, the beginning of the next mitigation "phase-in" year as established in previous orders. The Cities will be subject to existing curtailment orders until either of these conditions are satisfied.

³ In a surface water delivery call, the holder of a senior water right cannot agree to allow one junior water right holder to divert water that would have satisfied the senior right while continuing to call for water against the other junior users. The junior user could only divert and avoid curtailment if the quantity of water diverted by the junior right holder is replaced/delivered to the senior water right holder. In this case, the Cities holding junior priority water rights will have provided no mitigation from April 1, 2014 until late February or early March, 2015. Any modeled benefits of recharge to Rangen from late February or early March, 2015 to April 1, 2015 will be miniscule, at best, and were not quantified by the mitigation plan.

IT IS FURTHER ORDERED that the Cities' Second Mitigation Plan shall be in effect until March 31, 2016, unless the period of the mitigation plan is amended in writing by the Director.

Dated this 16th day of January, 2015.

A handwritten signature in cursive script, reading "Gary Spackman", written in black ink. The signature is positioned above a horizontal line.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of January, 2015, the above and foregoing document was served on the following by providing a copy of the *FINAL ORDER APPROVING CITIES SECOND MITIGATION PLAN* in the manner selected:

ROBERT E WILLIAMS (x) U.S. Mail, Postage Prepaid
WILLIAMS MERSERVY & LOTHSPREICH LLP () Facsimile
153 EAST MAIN STREET (x) E-mail
PO BOX 168
JEROME ID 83338
rewilliams@cableone.net

CANDICE MCHUGH (x) U.S. Mail, Postage Prepaid
CHRIS M BROMLEY () Facsimile
MCHUGH BROMLEY PLLC (x) E-mail
380 S 4TH STREET STE 103
BOISE ID 83702
cmchugh@mchughbromley.com
cbromley@mchughbromley.com

J JUSTIN MAY (x) U.S. Mail, Postage Prepaid
MAY BROWNING & MAY PLLC () Facsimile
1419 W WASHINGTON (x) E-mail
BOISE ID 83702-5039
jmay@maybrowning.com

ROBYN BRODY (x) U.S. Mail, Postage Prepaid
BRODY LAW OFFICE PLLC () Facsimile
PO BOX 554 (x) E-mail
RUPERT ID 83350-0554
robynbrody@hotmail.com

FRITZ X HAEMMERLE (x) U.S. Mail, Postage Prepaid
HAEMMERLE HAEMMERLE () Facsimile
PO BOX 1800 (x) E-mail
HAILEY ID 83333-1800
fxh@haemlaw.com

RANDALL C BUDGE (x) U.S. Mail, Postage Prepaid
THOMAS J BUDGE () Facsimile
RACINE OLSON NYE BUDGE & BAILEY (x) E-mail
PO BOX 1391
POCATELLO ID 83204-1391
rcb@racinelaw.net
tjb@racinelaw.net

SARAH KLAHN
MITRA PEMBERTON
WHITE & JANKOWSKI
511 16TH STREET STE 500
DENVER CO 80202
sarahk@whitejankowski.com
mitrap@whitejankowski.com

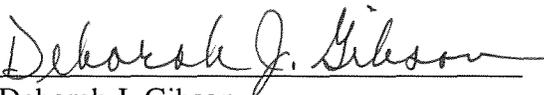
U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

JERRY R RIGBY
RIGBY ANDRUS & RIGBY
25 NORTH SECOND EAST
REXBURG ID 83440
jrigby@rex-law.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

JOHN K SIMPSON
TRAVIS L THOMPSON
PAUL L ARRINGTON
BARKER ROSHOLT & SIMPSON LLP
195 RIVER VISTA PL STE 204
TWIN FALLS ID 83301-3029
jks@idahowaters.com
tlt@idahowaters.com
pla@idahowaters.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail


Deborah J. Gibson
Administrative Assistant to the Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.