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DEPARTMENT OF
WATER RESOURCES

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**BEFORE THE DEPARTMENT OF WATER RESOURCES
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-2014-004
CM-MP-2014-007
CM-DC-2011-004
CM-DC-2014-004**

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

**COALITION OF CITIES' REQUEST
FOR HEARING ON FIRST AND
SECOND MITIGATION PLANS
AND REQUEST FOR STAY OF
CURTAILMENT**

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

The Coalition of Cities ("Cities"), by and through its attorneys of record, Candice M. McHugh, of the firm McHugh Bromley, PLLC, request an expedited hearing on the Cities' First Mitigation Plan, an expedited hearing on the Cities' Second Mitigation Plan, and an immediate stay of curtailment of the Cities' junior-priority groundwater rights.

I. REQUEST FOR EXPEDITED HEARING ON CITIES' MITIGATION PLANS

On April 25, 2014, the Cities filed a *CM Rule 43 Mitigation Plan for Managed Recharge and Other Aquifer Enhancement Activities* ("First Mitigation Plan"). Because the Director of the Idaho Department of Water Resources ("Director" or "IDWR") stayed curtailment under his prior orders to allow the Idaho Ground Water Appropriators, Inc. ("IGWA") to pursue hearings on IGWA's various mitigation plans, the Cities did not request a hearing on its First Mitigation Plan. However, as the January 19, 2015 curtailment deadline became closer, and through settlement negotiations with Rangen, Inc. ("Rangen"), the Cities filed, on November 20, 2014, the *Coalition of Cities Second Mitigation Plan* ("Second Mitigation Plan") pursuant to a stipulation with Rangen under CM Rule 43.03.o. The Second Mitigation Plan was published and no protests were received.

On January 16, 2015, the Director issued his *Final Order Conditionally Approving Cities Second Mitigation Plan* ("Final Order Regarding Cities Second Mitigation Plan"). The Final Order concludes, "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" *Final Order Regarding Cities Second Mitigation Plan* at 7. Therefore, the Cities junior-priority groundwater pumping will be curtailed on January 19, 2015.

Because hearings have not been held, the Cities request an expedited hearing on the First Mitigation Plan and an expedited hearing on the Second Mitigation Plan.

II. REQUEST FOR STAY

The Cities hereby petition the Director, pursuant to IDAPA 37.01.01.780, to stay implementation of curtailment under his *Order Approving IGWA's Second Mitigation Plan*;

Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order (June 20, 2014) (“Second Amended Curtailment Order”). The Second Amended Curtailment Order approved mitigation required by the *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (January 29, 2014) (“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.*

The Director has authority to stay an order pursuant to IDAPA 37.01.01.780, which states “Any party or person affected by an order may petition the agency to stay any order, whether interlocutory or final. Interlocutory or final orders may be stayed by the judiciary according to statute.” This rule does not specify a particular standard for granting a stay. However, the Idaho Administrative Procedure Act provides that an agency “may grant, or the reviewing court may order, a stay upon appropriate terms.” Idaho Rule of Civil Procedure 84(m) similarly provides that “an agency may grant . . . a stay upon appropriate terms.” Petitions for stay are generally decided based on principles of equity.

The following factors are often considered: (1) the likelihood the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

The Director should stay curtailment of the Cities’ junior-priority groundwater rights until a hearing on both of its mitigation plans has been held because: (1) without having held hearings, due process warrants consideration of the Cities’ First Mitigation Plan and Second

Mitigation Plan; (2) Rangen, the senior-priority water right holder, stipulated to the Cities' Second Mitigation Plan, evidencing Rangen's consent with the benefit it will receive from mitigation, not the benefit it will receive from curtailment; (3) no protests were filed to the Cities' Second Mitigation Plan, evidencing the fact that curtailment is an inappropriate remedy; (4) once a hearing is held and the record is considered, the Cities' First Mitigation Plan and/or Second Mitigation Plan are likely to be approved, as they primarily propose recharge activities that have routinely been approved by IDWR; (5) unlike irrigators, who do not use water during the winter months, the Cities, as water year-round users of water, who are required to provide sufficient and safe water to their residents, will suffer severe, irreparable harm if the stay is not granted; (6) benefit to Rangen under the Cities' mitigation plans will occur sooner than the benefit that will accrue to Rangen if curtailment is ordered; (7) granting the stay is in the public interest because Cities provide water to its residents on a year-round basis and are a hub of activity; and (8) principles of equity warrant a stay in this proceeding.

A. Due Process Requires A Stay

The CM Rules allow for junior-priority users are entitled to submit mitigation plans in order to avoid curtailment. CM Rule 43. As such, principles of due process require adequate time to submit, obtain approval of, and implement a mitigation plan before curtailment occurs. In the Clear Springs Foods and Blue Lakes Trout delivery call case, District Court Judge John Melanson held that while Idaho Code § 42-607 does not expressly require a hearing before undertaking curtailment, "because water rights are property rights, a due process argument can be made that notice and a hearing are indeed required before curtailment of such rights by a watermaster" *Clear Springs Foods Inc. v. Idaho Dept. of Water Res., Order on Petitions for Judicial Review*, Gooding County Case No. 2008-444 (June 19, 2009) at 44. Other junior-

priority ground water users have been granted stays in these proceedings when they are diligently pursuing remedies afforded by law. *See Final Order Re: Motion for Stay of Order of Curtailment (Little Sky Farms)*, CM-DC-2011-004 (July 16, 2014); *Order Granting IGWA's Petition to Stay Curtailment*, CM-DC-2011-004 (February 21, 2014).

B. The Mitigation Plans Will Likely Be Approved

The mitigation activities in the First Mitigation Plan and Second Mitigation Plan are primarily recharge. Recharge activities are routinely approved by IDWR and will likely be approved here.

C. The Cities Will Suffer Irreparable Harm And Granting A Stay Is In The Public Interest

The Cities are required to provide sufficient and safe water to their residents. In some cases, the Cities that will be curtailed by the Director will have no water available to divert or will have such a small amount available that it will be unable to operate the delivery system. Thus, the Cities will suffer irreparable harm if the curtailment is not stayed until after a hearing on the Cities' First Mitigation Plan and Second Mitigation Plan is complete.

D. Rangen Stipulated To The Second Mitigation Plan And The Mitigation Activities Will Provide Quicker Benefit To Rangen Than Curtailment

The benefits of curtailment of municipal pumping on senior-priority water rights was not considered in ESPAM 2.1 curtailment runs. The depletive amount that will accrue to the Martin-Curren Tunnel based on pumping under the Cities' junior-priority water rights is hardly measureable. As such, the harm suffered by Rangen from out-of-priority pumping by the Cities is effectively non-existent, and the benefit to Rangen by curtailing the Cities' junior-priority groundwater rights will be delayed and very small. The benefit of recharge will greatly exceed the depletive amount under the Cities' junior-priority water rights and will benefit Rangen more


quickly than curtailment, even if recharge does not occur until late February or early March. *See Affidavit of Christian Petrich in Support of Coalition of Cities' Petition for Reconsideration and/or Final Order Conditionally Approving Cities' Second Mitigation Plan and Request for Stay.*

III. CONCLUSION

Based on the foregoing, the Cities request an expedited hearing on its First Mitigation Plan, an expedited hearing on its Second Mitigation Plan, and an immediate stay of curtailment.

Submitted this 16th day of January, 2015.

MCHUGH BROMLEY, PLLC



Candice M. McHugh
Attorneys for Coalition of Cities

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of January, 2015, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

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