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DEPT OF WATER RESOURCES
SOUTHERN REGION

*Attorneys for Thousand Springs Water Users
Association, Inc. & Robert & Susan Gisler*

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

IN THE MATTER OF THE MITIGATION
PLAN FILED BY THE IDAHO GROUND
WATER APPROPRIATORS FOR THE
DISTRIBUTION OF WATER TO WATER
RIGHT NOS. 36-02551 AND 36-07694
IN THE NAME OF RANGEN, INC.

Docket No. CM-MP-2014-05

**JOINT MOTION TO DISMISS IGWA'S
AMENDED THIRD MITIGATION PLAN**

COMES NOW, Thousand Springs Water Users Association, Inc. and Robert & Susan Gisler ("Protestants") and hereby move the Director for an Order dismissing the *Amended Third Mitigation Plan and Request for Hearing* (the "*Third Plan*"), filed by the Idaho Ground Water Appropriates, Inc. ("IGWA") in the above matter. This matter should be dismissed because the Director has approved the *Second Mitigation Plan* and there is no need to force water users into the cost and expense of challenging this *Third Mitigation Plan*. In the alternative, the Director should stay all proceedings on the *Third Mitigation Plan* until IGWA aborts the *Second Mitigation Plan*.

COURSE OF PROCEEDINGS

I. IGWA's *Second Mitigation Plan*.

On March 10, 2014, IGWA filed the *Second Mitigation Plan & Request for Hearing*. That plans was protested by several water users including Rangen, Inc, Buckeye Farms, Inc., Big Bend Irrigation & Mining Company, Ltd., Salmon Falls Lands & Livestock Company and Big Bend Trout, Inc. That matter proceeded with expert reports prepared, discovery submitted, several

depositions conducted and a three day hearing held in early June. All in all, significant money was expended by all parties in advancing, defending and challenging the *Second Mitigation Plan*.

On June 20, 2014, the Director issued the *Order Approving IGWA's Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order*. Among other things, the Director recognized that the *Second Mitigation Plan* "will provide the quantity of water required by the Curtailment Order." *2nd Plan Order* at 16. The Director further concluded:

Given Rangen's opposition to the Second Mitigation Plan, IGWA is entitled to know prior to starting construction whether Rangen will refuse the replacement water. While the engineering plans submitted by IGWA at the proceeding were not final, the engineering plans are of sufficient quality to allow Rangen to evaluate the proposal. Within twenty-one days from the date of this order, Rangen must state, in writing, whether it will accept the water delivered through the Tucker Springs Pipeline.

Id. at 17. The *Second Mitigation Plan* must be implemented no later than January 19, 2015. *Id.* at 18.

Of note, there was considerable argument regarding IGWA's commitment to the *Second Mitigation Plan*. In fact, Rangen sought for the admission of certain documents which addressed this commitment. Ultimately, admission was denied. However, the relative commitments of the primary parties to the *Second Mitigation Plan* remained an issue.

On July 8, 2014, Rangen submitted its *Notice of Acceptance of Delivery of Water Under IGWA's Second Mitigation Plan*, wherein Rangen notified the Director that it would accept delivery of water pursuant to the previously approved *Second Mitigation Plan*.

II. IGWA's Third Mitigation Plan.

On May 29, 2014, IGWA filed its *Third Mitigation Plan & Request for Hearing*. That plan proposes several additional options for mitigation of the material injury to Rangen's senior water right. Approximately 14 protests were filed to the *Third Mitigation Plan*, which includes protestants to IGWA's *Second Mitigation Plan*.

ARGUMENT

Developing, defending and challenging a mitigation plan is an expensive and time consuming process. It involves discovery, retention of experts to review and develop reports, depositions, trial preparations and motion briefing and arguing. Importantly, for mitigation plan proceedings, this process is significantly shortened. For example, the *Second Mitigation Plan* proceeded from initial status conference on April 30, 2014 to hearing on June 4, 5 and 6 – a span of only 35 days! In short, the mitigation plan process is a taxing process on all participants.

It is anticipated that this same time crunch and expense will be associated with the proceedings on the *Third Mitigation Plan*. This plan, however, involves significantly more Protestants challenging the plan. These Protestants will be required to participate, in the proceedings, including expounding discovery, participating in depositions and retaining experts. Some Protestants have hired legal counsel to help navigate through the proceedings. The time and expense to all involved will be significant.

There is no reason for this time and expense. IGWA has an approved mitigation plan that, according to the Director, “will provide the quantity of water required by the Curtailment Order.” *2nd Plan Order* at 16. Rangen has accepted the *Second Mitigation Plan*. *Supra*.

Confusingly, although the Director placed the burden on Rangen to “accept” the *Second Mitigation Plan* or face a cancellation of mitigation obligations, no such obligation was placed on IGWA. Indeed, IGWA was not required to commit to the *Second Mitigation Plan* in any respect. Rather, it forced Protestants, including Rangen and Buckeye Farms (each Protestants here) to challenge the *Second Mitigation Plan* – even though it may never be implemented.

Now, IGWA has filed a *Third Mitigation Plan* – which will only lead to more time and money being spent by all involved. This process of forcing the injured water users to accept a plan or void any curtailment obligation, without placing any similar burden on IGWA prejudices the

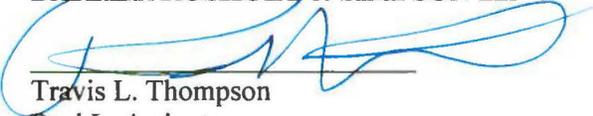
water users of the Hagerman Valley who are forced to continually monitor and defend against a litany of mitigation plans advanced by IGWA that may never even be developed. Furthermore, it is unclear what IGWA intends with all of these Mitigation plans – particularly in light of the Hagerman concept. As such, the Protestants are forced to protest in order to protect their property rights.

The process advanced by IGWA is nothing more than mitigation speculation. The *Second Mitigation Plan* has been approved by the Director and accepted by Rangen. Why, therefore, should any Protestant be under the obligation to expend more time and money defending or challenging yet another proposed plan? The only conclusion that can be drawn from this process is that IGWA’s mitigation plans have been filed for speculative purposes or has not been pursued in good faith. *C.f.* I.C. § 42-203A. While shortness of time may have been a basis for filings in February or March following the initial curtailment order, such basis no longer exists. IGWA has had months to consider its actions and should have an obligation to identify its actions with specificity, rather than continuing to hold the Hagerman Valley hostage.

Accordingly, the Director should dismiss IGWA’s *Third Mitigation Plan* since the approved *Second Mitigation Plan* “will provide the quantity of water required by the Curtailment Order.” *2nd Plan Order* at 16. In the alternative, the Director should stay all proceedings on the *Third Mitigation Plan* until IGWA either commits to or abandons the *Second Mitigation Plan*.

DATED this 15th day of July, 2014.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson
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*Attorneys for Thousand Springs Water Users’
Association, Inc. & Robert & Susan Gisler*

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2014, I served a copy of the foregoing

MOTION TO DISMISS IGWA'S AMENDED THIRD MITIGATION PLAN, to be served

upon the following by the indicated method:

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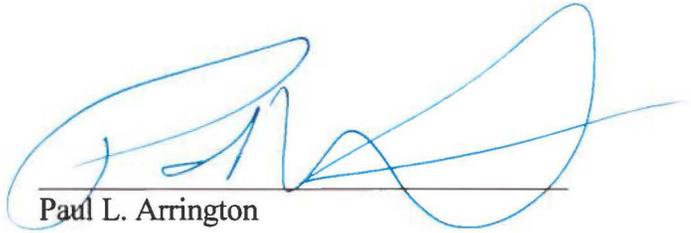
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