

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

CITIES OF BLISS, BURLEY, CAREY, DECLO,
DIETRICH, GOODING, HAZELTON,
HEYBURN, JEROME, PAUL, RICHFIELD,
RUPERT SHOSHONE, AND WENDELL,

Petitioners,

vs.

GARY SPACKMAN in his capacity as Director of
the Idaho Department of Water Resources, and
THE IDAHO DEPARTMENT OF WATER
RESOURCES

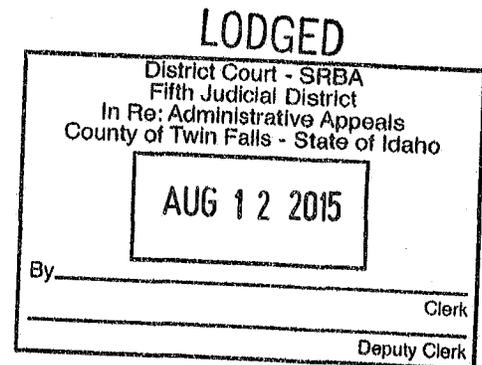
Respondents,

RANGEN, INC.,

Intervenor

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

Case No. CV-2015-172



INTERVENOR RANGEN, INC.'S REPLY BRIEF

On Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT1

III. CONCLUSION3

TABLE OF AUTHORITIES

Regulations

CM Rule 43.03.b.....	2
CM Rule 43.03.c.....	4
CM Rule 43.03.o.....	4

I. INTRODUCTION

This Intervenor's Reply Brief is filed in response to arguments raised in the IDWR Respondents' Brief filed by Idaho Department of Water Resources and Gary Spackman, in his capacity as Director of IDWR.

II. ARGUMENT

IDWR argues that the conditional approval of the Cities' Second Mitigation Plan should be approved as an exercise of discretion. "The Director recognized the language of CM Rule 43.03 rule [sic] is discretionary, concluding that CM Rule 43 'establishes multiple factors may be considered.'" *IDWR Respondents' Brief*, p. 11 (emphasis in original). As the *IDWR Response Brief* makes clear, however, rather than exercise discretion in this particular case, the Director has created a bright line rule that no subset of ground water users may negotiate a mitigation plan with a senior water user that has filed a call unless that negotiation resolves the mitigation obligation of all ground water users. IDWR candidly set out the bright line rule applied by the Director in its brief:

The Director determined that the Cities' Second Mitigation Plan should not be approved as a stipulated plan for "other appropriate compensation" under CM rule 43.03 because it did not address "the entire mitigation obligation of the ground water users" but rather "carv[ed] out special consideration for one group of junior users."

* * * *

In short, if a senior surface water right holder calls for delivery of water against holders of junior ground water rights, and the juniors water right holders will not provide mitigation to the senior water right holder by the deadlines established by the Director, then the senior water right holder may not designate which non-mitigating junior water right holders will or will not be curtailed.

IDWR Respondents' Brief, p. 11-12.

IDWR distinguished a 2009 Department order approving a mitigation plan that similarly did not provide sufficient water but rather “other appropriate compensation.” The sole basis for distinguishing that 2009 order was that it did not involve the mitigation obligation of just a subset of junior users. According to IDWR:

In that order, the Director accepted a mitigation plan based on an agreement between Clear Springs Foods and IGWA that called for monetary compensation instead of water. In that case, the mitigation plan addressed the entire mitigation obligation of the ground water users.

IDWR Respondents' Brief, p. 12.

Such a bright line rule is contrary to the Conjunctive Management Rules, exceeds the Director's authority, and is an abuse of discretion. The Director's refusal to apply the same factors to a mitigation plan submitted by a subset of ground water users is similarly contrary to the Conjunctive Management Rules, exceeds the Director's authority, and is an abuse of discretion.

Rangen understands that there could be some concern that approving a mitigation plan based upon agreed “other appropriate compensation” in some circumstances could result in other ground water users bearing the burden of mitigating for the settling junior's depletions. That concern is not justification, however, for the bright line rule the Director created in this case. Each mitigation plan should be reviewed on its own merits. The Cities' Second Mitigation Plan certainly does not implicate the Director's concern. As IDWR acknowledges, “[t]here is no dispute the Cities' junior diversions actually depleted the flows available to Rangen at the Curren Tunnel.” *IDWR Respondent's Brief, p. 3.* Yet, “municipal water use was not included as part of the curtailment simulations using ESPAM 2.1 to quantify the specific mitigation obligation in the curtailment order because municipal use is a very small component of water use within the Eastern Snake Plain Aquifer (‘ESPA’).” *Id.* This means that the mitigation obligation in the Director's

Curtailment Order for junior ground water users collectively does not include any amount of water to mitigate for the impact from the Cities' junior ground water pumping.¹

III. CONCLUSION

For the reasons specified above, Rangen respectfully requests that the Director's decision to conditionally approve the Cities' Second Mitigation Plan be reversed and remanded.

DATED this 12th day of August, 2015.

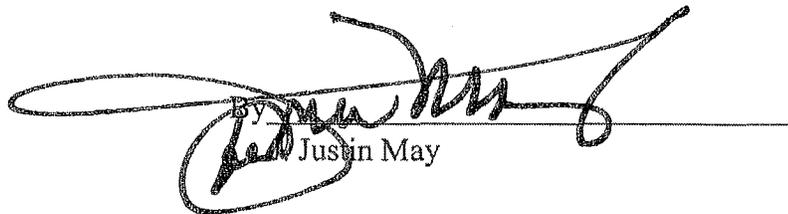
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Justin May

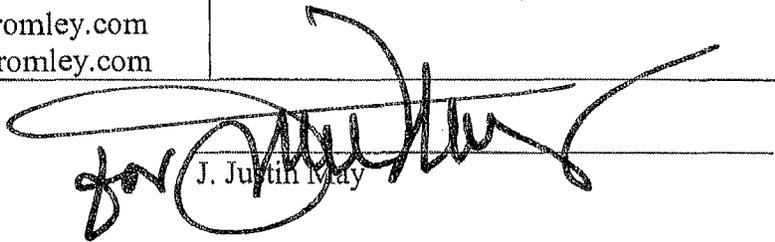
¹ In the case of a mitigation plan filed by a single junior groundwater user or a subset of junior ground water users whose impact was included in the curtailment simulations, this concern could be addressed by simply reducing the collective mitigation obligation by the impact of the juniors filing the mitigation plan. The ground water model and curtailment simulation tools are capable of making such a calculation. In fact, for the purpose of evaluating the Cities' Second Mitigation Plan, the Department used those tools to calculate the separate impact of the Cities' pumping.

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 12th day of August, 2015 I caused a true and correct copy of the foregoing document to be served by the method indicated upon the following:

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