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

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-
02551 AND 36-07694

(RANGEN, INC.)

CM-DC-2011-004

**COALITION OF CITIES MOTION FOR
STAY OF CURTAILMENT AND
MOTION FOR ORDER SHORTENING
TIME FOR RESPONSE TO CITIES'
MOTION FOR STAY**

COME NOW the cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, and Wendell ("Cities") by and through their counsel and, pursuant to IDAPA 37.01.01.780, Idaho Code § 67-5274, I.R.C.P. 84(m), and case law, hereby move the Director to stay of the enforcement of the Idaho Department of Water Resources' (IDWR) April 11, 2014 *Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order*

**COALITION OF CITIES MOTION FOR STAY OF CURTAILMENT AND MOTION FOR ORDER
SHORTENING TIME FOR RESPONSE TO CITIES' MOTION FOR STAY**

(“April Curtailment Order”), which orders that groundwater rights with priority dates on or junior to July 1, 1983 shall be curtailed on May 5, 2014. The Cities’ further move the Director to shorten time to three (3) business days for responses to the *Motion for Stay*.

I. REQUEST FOR STAY

The Fifth Judicial District has previously held that notice and a hearing should be allowed before curtailment of junior-priority water rights in response to a finding of material injury by the Director in a conjunctive management delivery call. “[B]ecause 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 under Idaho Code § 42-607 even absent an expressed requirement for a hearing within the statute itself.” *Order on Petitions for Judicial Review*, Fifth Jud. Dist. Gooding County, p. 44 (Case No. 2008-444, June 19, 2009). Consistent with this prior holding, and until the Director issues a final order in response to the Cities’ CM Rule 43 Mitigation Plan that is subject to judicial review, the Cities’ hereby seek a stay of curtailment for their junior-priority ground water rights that are listed in Attachment A to April Curtailment Order, and which are set forth in detail the Coalition of Cities’ CM Rule 43 Mitigation Plan filed contemporaneously herewith.

The Director has authority to stay a final order pursuant to the Department’s rules of procedure:

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. The agency may stay any interlocutory or final order on its own motion.

IDAPA 37.01.01.780.

The authority to stay a final order is also reflected in Idaho Code § 67-5274 and I.R.C.P. 84(m), which provide that an “agency may grant, or the reviewing court may order, a stay upon appropriate terms.” As reflected in IDWR’s February 21, 2014 *Order Granting IGWA’s Petition to Stay Curtailment* (“Order Granting Stay”), the three factors by which IDWR has most recently judged a request for stay are as follows:

- The likelihood the moving party will prevail on appeal or in another pending proceeding;
- Whether denial of the stay will result in irreparable harm to the moving party; and
- Whether granting the stay will cause irreparable harm to the respondent.

Order Granting Stay at 3.

A. The Cities will likely prevail in their mitigation plan

The Cities have filed a CM Rule 43 Mitigation Plan that will limit the volume pumped under certain cities’ water rights to volumes authorized under water rights that are senior to July 1, 1983. For those cities that rely solely on groundwater rights junior to July 1, 1983, the Cities will provide up to 1.0 cfs of water for managed recharge at the Sandy Ponds area, starting on or before June 1, 2014. According to the Cities’ CM Rule 43 Mitigation Plan, delivery of up to 1.0 cfs to the Sandy Ponds area is estimated to provide 0.04 cfs to Rangen in 2014. The Cities will likely prevail in their mitigation plan because, consistent with the CM Rules, the “simulations and calculations” upon which the Cities have relied are “accepted and appropriate,” and will replace their “depletive effect of ground water withdrawal” at the Rangen model cell; thereby providing water “at the time and place required by” Rangen in this first year of curtailment. CM Rule 43.03.b.

B. Denying the stay will result in irreparable harm to the Cities

Each of the individual cities provides water to a mix of residential, commercial, and industrial users. Each of the individual cities also strive to provide stable communities and reasonable economic growth opportunities. Idaho Code § 50-302(1) requires cities within the state of Idaho, in pertinent part, to: “make all such ordinances, bylaws, rules, regulations and resolutions not inconsistent with the laws of the state of Idaho as may be expedient . . . to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry.” The curtailment of the Cities’ water rights junior to July 1, 1983 would severely restrict the Cities’ ability to carry out their statutory mandate. Some individual cities would have no ability to provide water to commercial and industrial users who provide substantial employment to their citizens, and who purchase large amounts of local farm products, goods, and services. Those firms would likely not be able to continue their business operations. All Cities would experience instability and uncertainty because reliable water supplies are key to the viability of communities and the lives of its citizens. Pending economic development plans and opportunities would be put on hold or lost. The harm that would be experienced by the Cities would be immediate, substantial, and not subject to remediation.

C. Granting the stay will not cause irreparable harm to Rangen

As the Director has previously found, granting the Cities’ request for stay will not result in irreparable harm to Rangen:

Granting the stay will not result in irreparable harm to Rangen. As recognized by the Idaho Supreme Court in *Clear Springs*, ground water pumping does not cause a sudden loss of water discharge from springs. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815, 252 P.3d 71, 96 (2011). The reduction in flows from the springs in the Thousand Springs area has been gradual and immediate

curtailment will not quickly restore the Curren Tunnel spring flows. The effects of curtailment will take years to be fully realized. *Final Order* at 42.

Order Granting Stay at 4.

The facts now are no different than when the *Order Granting Stay* was issued. The impact of curtailment on the Cities will be immediate, whereas the benefit to Rangen from curtailment of the Cities will not be quickly realized.

II. REQUEST OF ORDER SHORTENING TIME FOR RESPONSE

Since the April Curtailment Order, and even before then, the Cities have been in the process of organizing to protect their interests. This is no simple tasks when multiple cities are involved with several different local lawyers, each with their own city councils, public works directors, internal meeting, and authorization processes. However, to that end, the Cities have formed a Coalition to protect its members' water rights, have passed necessary resolutions to hire engineers, lead counsel, associated with water rights counsel, and have gathered and provided years of data and information to support its Rule 43 Mitigation Plan in order to provide sufficient detail to allow the Director to evaluate its efficacy and therefore issue this stay.

This effort has taken weeks rather than days and counsel for the Cities are aware of the impending curtailment date of May 5, 2014. Therefore, the Cities request that the time to respond to this motion for stay be reduce to three business days as counsel has been in ongoing discussions with counsel for Rangen regarding the Cities' efforts. (Or, Rangen has consented to a stay as to the Cities' junior water rights.)

III. REQUEST FOR RELIEF

The Cities hereby request that:

1. IDWR immediately issue an order granting the Cities' *Request for Order Shortening Time* to April 30, 2014.
2. IDWR issue an order granting the Cities a stay of curtailment as to their junior water rights until a final decision has been made on its CM Rule 43 Mitigation Plan and judicial review of that decision has been completed.
3. For such other and further relief as the Director may determine is reasonable and necessary to enable the Cities to mitigate for any material injury to Rangen.

RESPECTFULLY SUBMITTED.

DATED this 25th day of April, 2014.

Williams, Meservy & Lothspeich, LLP



ROBERT E. WILLIAMS

McHugh Bromley, PLLC



CANDICE M. MCHUGH



CHRIS M. BROMLEY

CERTIFICATE OF SERVICE

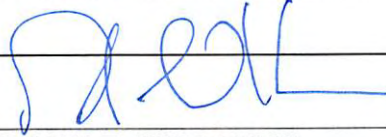
I HEREBY CERTIFY That on this 25th day of April, 2014, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

Director Gary Spackman IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720 deborah.gibson@idwr.idaho.gov	<input checked="" type="checkbox"/> Via US Mail, Postage Paid <input type="checkbox"/> Via Facsimile - <input type="checkbox"/> Hand-Delivered - Court Folder <input type="checkbox"/> Other _____
Deputy Attorney General Attn: Garrick L. Baxter IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720-0098 Fax: 208-287-6700 garrick.baxter@idwr.idaho.gov kimi.white@idwr.idaho.gov	<input checked="" type="checkbox"/> Via US Mail, Postage Paid <input type="checkbox"/> Via Facsimile - <input type="checkbox"/> Hand-Delivered - Court Folder <input type="checkbox"/> Other _____
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Robyn M. Brody ATTORNEY AT LAW PO Box 554 Rupert, ID 83350 Fax: (208) 434-2780 robynbrody@hotmail.com	<input checked="" type="checkbox"/> Via US Mail, Postage Paid <input type="checkbox"/> Via Facsimile - <input type="checkbox"/> Hand-Delivered - Court Folder <input type="checkbox"/> Other _____
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