

FEB 04 2015

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-2014-007
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' PETITION
POST-HEARING BRIEF**

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 undersigned attorneys of record,

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POST-HEARING BRIEF**

The Coalition of Cities ("Cities"), by and through its undersigned attorneys of record,

hereby files this *Post-Hearing Brief* with the Director of the Idaho Department of Water Resources (“Director” or “IDWR”), following the January 30, 2015 hearing on the Cities’ *Second Mitigation Plan* (“Mitigation Plan”).

I. FACTUAL AND PROCEDURAL BACKGROUND

The sequence of events that led to the filing of the Cities’ Mitigation Plan is important to understand. The Cities have been diligent in quantifying, and developing a plan to mitigate for out-of-priority diversions. As members of IGWA, the Cities have been protected from curtailment by the stays issued by the Director, as well as the most recent stay issued by Judge Wildman. Based on the stay issued by Judge Wildman, the starting time to simulate the benefits of curtailment to Rangen is February 7, 2015. Furthermore, as explained at the hearing by Dr. Christian Petrich, the Cities’ out-of-priority groundwater pumping, beginning on February 8, 2015, is fully mitigated before March 31, 2015, the end of the first year of the Director’s phased-in curtailment. Ex. 100 at i.

A. January 29, 2014 – IDWR’s Curtailment Order

On December 13, 2011, Rangen, Inc. (“Rangen”) filed a *Petition* for delivery call, seeking curtailment for water right nos. 36-02551 (July 13, 1962; 48.54 cfs) and 36-07694 (April 12, 1977; 26.0 cfs). On January 29, 2014, the Director found material injury to Rangen, issuing his *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“Curtailment Order”). In the Curtailment Order, the Director ordered curtailment of ground water rights junior to Rangen’s water right no. 36-02551 (July 13, 1962). The Curtailment Order concluded that curtailment of ground water rights “for irrigation” within the Eastern Snake Plain Aquifer Model (“ESPAM”) 2.1 would result in 17.9 cfs at the Rangen model cell, at steady state. *Curtailment Order* at 23. When junior-priority ground water

rights outside the area of common ground water supply were removed, the benefit of curtailment became 16.9 cfs. *Id.* at 24. When junior-priority ground water rights east of the Great Rift were removed, the benefit of curtailment became 14.4 cfs. *Id.* at 28. Because only 63% of the water curtailed would emanate from the Curren Tunnel, the benefit of curtailment was computed as 9.1 cfs. *Id.*

Even though ESPAM curtailment simulations run by IDWR only included curtailment of irrigation water rights, the Curtailment Order applied to, “all consumptive ground water rights, including agricultural, commercial, industrial, and municipal uses, but excluding ground water rights for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(11), pursuant to IDAPA 37.03.11.020.11.” *Id.* at 42 (emphasis added). Each member of the Coalition of Cities was included in “Attachment C” of the Curtailment Order; thereby notifying “the holders of the identified ground water rights that their rights are subject to curtailment in accordance with the terms of this order.” *Id.* at 42. Mitigation was to be phased in over a five year period: “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 Cities were informed by letter on February 28, 2014 that “curtailment of [their] consumptive ground water rights [would begin] at 12:01 a.m. on March 14, 2014, unless notified by the Department that the order of curtailment has been modified or rescinded as to their water rights.”¹ Emphasis added. This February 28, 2014 letter also stated that “[n]on-consumptive uses and culinary in-house uses of water are not

¹ http://www.idwr.idaho.gov/news/curtailment/2014/02Feb/RangenCurtailOrd_NoticeWD130and140_020414.pdf. At the hearing, the Director took notice of all the letters sent by IDWR to holders of junior-priority ground water rights subject to curtailment in the Rangen delivery call. Tr. 68:12-25. The links cited to in this brief are only those letters that counsel has been able to identify on the IDWR website.

subject to curtailment” *Supra* at footnote 1.

B. February 11, 2014 – IGWA’s First Mitigation Plan

On February 11, 2014, approximately one month before the Director’s curtailment date, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed a *Mitigation Plan and Request for Hearing* (“IGWA’s First Mitigation Plan”), proposing, among other things, credit for aquifer enhancement activities (conversions, dry-ups, and recharge), and what became known as the “Morris Exchange.”

C. February 21, 2014 – IDWR’s First Stay Of Curtailment

On February 21, 2014, the Director issued his first order granting a stay of curtailment to IGWA members: “Given that IGWA has submitted a mitigation plan, which appears on its face to satisfy the criteria for a mitigation plan pursuant to the Conjunctive Management Rules and the requirements of the Director’s curtailment order, and because of the disproportional harm to IGWA members when compared with the harm to Rangen if a temporary stay is granted, the Director will approve a temporary stay pending a decision on the mitigation plan.” *Order Granting IGWA’s Petition to Stay Curtailment* (“Order Granting First Stay”) at 5 (emphasis added). Letters were sent to holders of junior-priority groundwater users notifying them of the stay.² According to the letter, “**The stay does NOT apply to holders of ground water rights junior to July 13, 1962, who are not members of IGWA or who are not non-member participants in IGWA’s mitigation plan.** Curtailment will be enforced as of March 14, 2014, for affected ground water rights junior to July 13, 1962, which are not participating in a mitigation plan.” *Supra* at footnote 2 (emphasis in original).

² http://www.idwr.idaho.gov/news/curtailment/2014/02Feb/Notice%20of%20Stay-Rangen_WD140_022814final.pdf

D. February 28, 2014 – Cities’ Request To Intervene And The Director’s Denial

On February 28, 2014, the Cities filed a *Petition for Intervention on Behalf of the Idaho Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell*. The Cities sought “to participate in this action which directly relates to their water use and will allow the Cities to propose a mitigation plan tailored to the unique circumstances of the Cities and the municipal water rights they own. The scope of the Order, the unique aspects of municipal water rights compared to other types of water rights, including irrigation water rights, and the lack of the Cities’ direct participation in the proceedings to date constitute good cause for the untimely filing of the Petition” *Petition for Intervention on Behalf of the Idaho Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell* at 5.

E. March 10, 2014 – IDWR’s Denial Of The Cities’ Petition To Intervene

On March 10, 2014, the Director denied the Cities’ request, “The Cities have not demonstrated good cause or any other reason to grant the untimely Petition as there is nothing for the Cities to further participate in before the Department with respect to this proceeding.” *Order Denying Idaho Cities’ Petition for Intervention* at 2.

F. March 10, 2014 – IGWA’s Second Mitigation Plan and Request for Stay

On March 10, 2014, *IGWA filed its Second Mitigation Plan and Request for Hearing (Tucker Springs)* (IGWA’s Tucker Springs Plan). A hearing was held on IGWA’s Tucker Springs Plan on June 4-5, 2014.

G. April 11, 2014 – IDWR’s Order Approving IGWA’s First Mitigation Plan And Amended Curtailment Order

On April 11, 2014, the Director issued his *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 granted mitigation credit to IGWA for its aquifer enhancement activities and Morris Exchange. The combined credit ordered was 2.8 cfs, which was 0.60 cfs less than the 3.4 cfs ordered in the first year of the five-year phased in curtailment. Because of this, the Director lifted his February 21, 2014, stay of curtailment, and beginning “on or before May 5, 2014,” ordered curtailment of ground water rights “junior or equal in priority to October 13, 1978, listed in Attachment A to this order” *Amended Curtailment Order* at 20. Alternatively, if Mr. Morris agreed to cease diverting 0.3 cfs from the Curren Tunnel, the Director would revise the priority date for curtailment from October 13, 1978 to “July 1, 1983 . . . listed in Attachment A to this order” *Id.* at 21-22. Consistent with the Curtailment Order, the Cities’ water rights were included in Attachment A and ordered to curtail. Notices of the curtailment were sent to owners of junior-priority ground water rights.³

H. April 25, 2014 – Coalition Of Cities’ First Mitigation Plan

On April 25, 2014, the Cities filed its *CM Rule 43 Mitigation Plan for Managed Recharge and Other Aquifer Enhancement Activities* (“Cities’ First Mitigation Plan”). The Cities’ First Mitigation Plan proposed limiting Cities’ pumping to their authorized senior volumes and to conduct managed recharge in 2014 at the Sandy Ponds and immediate surrounding area. Ex.152 at 2. On May 27, 2014, protests to the Cities’ First Mitigation Plan were filed by Rangen (Ex. 153) and the Lower Snake River Aquifer Recharge District.

³ http://www.idwr.idaho.gov/news/curtailment/2014/04Apr/Notice%20of%20Curtailment%20Rangen_WD130_042114v4.pdf;
http://www.idwr.idaho.gov/news/curtailment/2014/04Apr/Notice%20of%20Curtailment%20Rangen_WD140_042214.pdf

I. April 28, 2014 – IDWR’s Second Stay Of Curtailment

On April 28, 2014, the Director issued his *Order Granting IGWA’s Second Petition to Stay Curtailment* (“Order Granting Second Stay”) in which he stated curtailment of junior-priority ground water rights before “significant irrigation” occurred warranted a stay because “IGWA’s Second Mitigation Plan has been published and a pre-hearing status conference is scheduled for April 30, 2014. . . . The plan is conceptually viable, and given the disparity in impact to the ground water users if curtailment is enforced versus the impact to Rangen if curtailment is stayed, the ground water users should have an opportunity to present evidence at an expedited hearing for their second mitigation plan.” *Order Granting Second Stay* at 4. Notice of the stay was sent to the Cities, explaining that, as members of IGWA, curtailment was stayed to their junior-priority water rights: **“The stay does NOT apply to holders of ground water rights junior to July 13, 1962, who are not members of IGW, or who are not non-member participants in IGWA’s mitigation plan.”**⁴ Emphasis in original.

J. June 20, 2014 – IDWR’s Order Approving IGWA’s Second Mitigation Plan, Order Lifting Stay, And Second Amended Curtailment Order

On June 20, 2014, the Director issued his *Order Approving IGWA’s Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order (Tucker Springs)* (“Second Curtailment Order”), in which he concluded the Morris Exchange “will provide mitigation up to January 19, 2015 [therefore] the stay issued April 28, 2014, is lifted.” *Second Curtailment Order* at 18. If IGWA’s Tucker Springs project did not provide water to Rangen “on or before January 19, 2015,” the Director would curtail “users of ground water

⁴ http://www.idwr.idaho.gov/news/curtailment/2014/05May/Notice%20of%20Stay-Rangen_WD130_042914.pdf;
http://www.idwr.idaho.gov/news/curtailment/2014/05May/Notice%20of%20Stay-Rangen_WD140_042914.pdf

holding consumptive water rights bearing priority dates junior to August 12, 1973, listed in Attachment C to this order” *Id.* The Cities’ junior-priority water rights were listed in Attachment C.

K. August 27, 2014 – IDWR’s Order Approving IGWA’s Fourth Mitigation Plan (Magic Springs)

On August 27, 2014, IGWA filed its *Fourth Mitigation Plan and Request for Hearing*, seeking to provide direct delivery of water to Rangen from Magic Springs. On October 29, 2014, the Director issued his *Order Approving IGWA’s Fourth Mitigation Plan* (“Order Approving Fourth Mitigation Plan”). In the Order Approving IGWA’s Fourth Mitigation Plan, the Director “recognized mitigation credit for the Morris Exchange” was not set to expire until January 18, 2015. *Order Approving Fourth Mitigation Plan* at 3. If additional mitigation water was not provided to Rangen by January 19, 2015, the Director ordered curtailment of “users of ground water holding consumptive water rights bearing priority dates junior to August 12, 1973, listed in Attachment A to this order” *Id.* at 21. The Cities’ post-August 12, 1973 ground water rights were listed in Attachment A.

L. October 31, 2014 – Rangen’s Motion To Determine Morris Exchange

On October 31, 2014, Rangen filed its *Motion to Determine Morris Exchange Water Credit and Enforce Curtailment* (“Motion to Determine Morris Exchange”) alleging, based on actual data, that the “Morris Exchange Water Credit was fully utilized on October 2, 2014 rather than January 18, 2015 as predicted in the Second Mitigation Plan Order.” *Motion to Determine Morris Exchange* at 8.

M. November 20, 2014 – Coalition Of Cities’ Second Mitigation Plan

On November 20, 2014, the Coalition of Cities filed its *Second Mitigation Plan*, which proposed diversion of 1,500 acre-feet for managed recharge at the Gooding Recharge site, and was stipulated to by Rangen.

Notice of the Cities’ Second Mitigation Plan was published in the Idaho Mountain Express on December 3 and December 10, 2014, with the *Affidavit of Publication Idaho Mountain Express* filed with IDWR on December 10, 2014. Notice of the Cities’ Second Mitigation Plan was published in the Times-News on December 4 and December 11, 2014, with the *Affidavit of Publication Times-News* filed with IDWR on December 11, 2014. Notice of the Cities’ Second Mitigation Plan was published in the Mountain Home News on December 3 and December 4, 2014, with the *Affidavit of Publication Mountain Home News* filed with IDWR on December 12, 2014. No protests were filed to the Cities’ Second Mitigation Plan.

N. November 21, 2014 – IDWR’s Order Granting Motion To Determine Morris Exchange And Second Amended Curtailment Order

On November 21, 2014, the Director issued his *Order Granting Rangen’s Motion to Determine Morris Exchange Water Credit; Second Amended Curtailment Order* (“Second Amended Curtailment Order”). In the Second Amended Curtailment Order, the Director agreed with Rangen that the Morris Exchange credit expired on October 1, 2014: “There is no mitigation credit for the time period from October 2, 2014 through January 18, 2015. The shortfall between the predicted and actual Morris Exchange Agreement credit is the equivalent to 476 acre-feet (2.2 cfs for 109 days).” *Second Amended Curtailment Order* at 3.

However, instead of ordering immediate curtailment, the Director stayed curtailment until January 19, 2015: “This delay in curtailment is reasonable because instantaneous curtailment will not immediately increase water supplies to Rangen. The flow from the Martin-Curren

Tunnel has been gradually declining over a number of years. Curtailment will not quickly restore the tunnel flows.” *Id.* Therefore, “On or before January 19, 2015, users of ground water holding consumptive water rights bearing priority dates junior to August 12, 1973, listed in Attachment A to this order . . . shall curtail/refrain from diversion and use of ground water pursuant to those water rights unless notified by the Department that the order of curtailment has been modified or rescinded as to their water rights.” *Id.* The Cities’ junior-priority ground water rights were listed in Attachment A.

O. January 16, 2015 – IDWR’s Order Conditionally Approving Coalition Of Cities’ Second Mitigation Plan And Proceedings Thereunder

On Friday, January 16, 2015, shortly before noon, the Director issued his *Final Order Conditionally Approving Cities Second Mitigation Plan* (“Order Conditionally Approving Cities’ Second Mitigation Plan”). The Director found that “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.’” *Order Conditionally Approving Cities’ Second Mitigation Plan* at 6. The Director stated that the first year that mitigation is required runs from April 1, 2014 through March 31, 2015. *Id.* The Director also found that Rangen “has accepted, by agreement the Cities’ Second Mitigation Plan as mitigation for depletions to Rangen’s water supply from the Curren Tunnel.” *Id.* However, the Director found that Rangen’s acceptance of 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.” *Id.* at 7. The Director found, however, that he would recognize mitigation “at the earlier of (a) the date the modeled transient benefits of the recharge activities to the Curren Tunnel equal the model depletions to the Current 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.” *Id.*

On January 16, 2015, shortly before 5:00 p.m., the Cities' filed its *Request for Hearing on First and Second Mitigation Plans and Request for Stay of Curtailment*. On Saturday, January 17, 2015, the Director issued his *Order Denying Request for Stay of Curtailment; Granting Request for Hearing*.

On January 20, 2015, the Director sent a letter to holders of junior-priority groundwater rights, informing them that the stay of curtailment for IGWA members had expired: “**The Department confirmed that IGWA has not implemented its approved mitigation plan. You must, therefore, immediately curtail or refrain from any further diversion of ground water**”⁵ Emphasis in original.

Also on January 20, 2015, the Cities and Rangen filed a *Joint Request for Pre-Trial Conference*. On January 21, 2015, the Director acted on the request and issued a *Notice of Pre-Hearing Conference*, setting a hearing for the following day. At the pre-hearing conference, counsel for the Cities orally requested reconsideration of the Director's denial of the Cities' request for stay, and for the Director to stay curtailment until after a hearing had been held on the Cities' Second Mitigation Plan and a decision issued. The Director orally denied the Cities' reconsideration.

On January 23, 2015, the parties received the *Department Staff Memorandum*, explaining the Director's technical basis for conclusions made in his Order Conditionally Approving Cities' Second Mitigation Plan.

P. January 22, 2015 – SRBA Court's Order Granting Stay

On January 22, 2015, Judge Wildman granted a request for stay filed by IGWA. In his *Order Granting Motion to Stay Curtailment*, CV-2015-237 (Fifth Jud. Dist., Jan. 22, 2015).

⁵ http://www.idwr.idaho.gov/files/legal/curtailment/20150120_Rangen_Curtailment_Notice.pdf

Judge Wildman stayed curtailment under the Director's Second Amended Curtailment Order. Curtailment of junior-priority ground water rights is stayed until February 7, 2015. *Id.*; *see also Order Denying Motion for Reconsideration*, CV-2015-237 (Fifth Jud. Dist., Jan. 29, 2015).

II. ARGUMENT

A. The Only Cities Subject To Curtailment Are Carey, Heyburn, And Richfield

The Cities and IDWR agree only three of the Coalition cities that “had average annual diversion volumes exceeding the annual volume authorized by water rights senior to July 13, 1962”. Ex. 157 at 4. These three cities are Carey, Heyburn and Richfield. *Id.*; Ex. 100 at 2.

B. Juniors And Seniors Can Enter Into Stipulated Mitigation Plans

In the Final Order, the Director declined to give effect to Rangen's agreement with the Cities to enter into the Second Mitigation Plan: “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.” *Order Conditionally Approving Cities' Second Mitigation Plan* at 7. Setting aside the question of timing, and whether the Cities' Second Mitigation Plan replaces the Cities' depletions before the benefits of curtailment would be realized by Rangen, the Final Order went too far in dismissing the agreed upon components of the Second Mitigation Plan. The CM Rules do not limit the Director to the approval of mitigation plans that only “provide mitigation water in the time of need.” *Id.*

The CM Rules are facially constitutional, *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 154 P.3d 433 (2007), and expressly allow the Director to approve a mitigation plan entered into between a senior-priority water user and a junior-priority ground water user, even if the mitigation plan does not involve water:

Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following:

....

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.

....

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.

CM Rule 43.03 (emphasis added).

While CM Rule 43.03.o has not been analyzed in detail, CM Rule 43.03.c has been examined by the Director. The Director’s analysis of CM Rule 43.03.c is on point with the circumstances in this case, and can serve as an alternative basis to approve the Cities’ Second Mitigation Plan. In the *Final Order Accepting Ground Water Districts’ Withdrawal of Amended Mitigation Plan, Denying Motion to Strike, Denying Second Mitigation Plan and Amended Second Mitigation Plan in Part; and Notice of Curtailment* (March 5, 2009) (“Order Denying IGWA’s Fish or Money Mitigation Plan”), the Director was asked by IGWA to approve a CM Rule 43.0.c mitigation plan that would provide Clear Springs Foods, Inc. (“Clear Springs”) replacement fish or money, in lieu of curtailment. IGWA’s request was premised on the Director ordering “other appropriate compensation” (replacement fish and/or money) over the protest of Clear Springs. In analyzing CM Rule 43.03.o, the Director concluded it would be inappropriate for IDWR to order “other appropriate compensation” over the protest of the senior-priority water user. However, the plan would have been approvable had an agreement been struck between IGWA and Clear Springs:

The phrase “other appropriate compensation” was included in CM Rule 43.03.c for narrow purposes. . . . Another reason is to allow the Director to approve mutually agreed upon forms of mitigation, such as monetary compensation. Had the Ground Water Districts and Clear Springs agreed that monetary compensation was an appropriate form of compensation, the Director could have approved the entirety of the Second Mitigation Plan; however, they have not and that portion of the Plan must be denied in the absence of an agreement presented.

. . . .

Clear Springs correctly asserts that it and the Ground Water Districts could still “negotiate an agreeable form of mitigation for the material injury ... [and] the Director could approve a non-water mitigation plan so long as the parties agreed to its terms.” *Clear Springs Foods, Inc.’s Briefing on the Director’s Authority to Approve a Mitigation Plan for Monetary Compensation* at 23.

Order on Petition for Judicial Review, Case Nos. CV 2009-00241 & 2009-00270, pp. 14-15 (Fifth Jud. Dist., Dec. 4, 2009) (emphasis added) citing *Order Denying IGWA’s Fish or Money Mitigation Plan*.

On judicial review, IGWA challenged the Director’s denial of its mitigation plan; the district court upheld the Director’s interpretation of CM Rule 43.03.c:

The Director’s interpretation of the meaning and application of the phrase “*or other appropriate compensation*” is not only sound but is also entitled to deference. *Simplot v. Idaho State Tax Comm’n*, 120 Idaho 849, 820 P.2d 1206 (1991) (agency’s interpretation of its rules is entitled to deference).

. . . .

The Court also concludes that the Director’s construction of the language is reasonable and consistent with the law. This Court’s independent review reaches the same result. Any interpretation authorizing the Director to compel the acceptance of monetary compensation or other compensation in lieu of water, except for purposes of providing access to water, replacement water or by agreement, would not only result in the Director exceeding his authority but would also result in an unconstitutional application of the CMR.

. . . .

Perhaps IDWR summarized it best:

To read the phrase ‘other appropriate compensation as broadly as the Ground Water Districts would allow a junior

to circumvent the doctrine of priority of right, Idaho Const. Art XV, § 3 by purchasing his or her way out of curtailment. ... By reading CM Rule 43.03.c narrowly, it may be construed constitutionally by allowing monetary compensation only when it will result in water or access to water for the senior, absent mutual agreement. A narrow reading of CM Rule 43.03.c that allows it to comport with the requirements of Idaho law does not result in what the Ground Water Districts describe as an ‘all or nothing’ approach to water mitigation.

Respondent’s Brief at 17.

Order on Petition for Judicial Review, Case Nos. CV 2009-00241 & 2009-00270, pp. 15-18 (Fifth Jud. Dist., Dec. 4, 2009) (emphasis added).

Unlike IGWA in the *Order Denying IGWA’s Fish or Money Mitigation Plan*, the Cities are not attempting “to compel” approval of the Second Mitigation Plan over Rangen’s protest. To the contrary, and as explained by Dr. Petrich at hearing, Rangen’s protest to the Cities’ First Mitigation Plan led to development of the Cities’ Second Mitigation Plan. Tr. 26:2-24. The Cities and Rangen worked cooperatively, negotiated, and reached a mutually-satisfactory agreement to develop the Gooding Recharge Site as mitigation for the Second Plan. *Id.* All forms of agreement that were established by the Director in the *Order Denying IGWA’s Fish or Money Mitigation Plan*, and affirmed by the district court in its December 4, 2009 *Order on Petition for Judicial Review*, are present in this case.

Furthermore as the evidence at the hearing showed, Rangen will receive more water than it would have otherwise received through curtailment. Therefore, this is not a non-water mitigation plan, or “a sweetheart deal.” The proposed recharge provides a first-year simulated average benefit at the Curren Tunnel that is approximately six times greater than the first-year simulated average impacts from out-of-priority pumping. Ex. 100 at i; Ex. 113; Ex. 116. This is because the location of the Gooding Recharge Site is much closer to the Curren Tunnel than are

the locations of the junior pumping by the cities of Carey, Heyburn and Richfield. Again, the location of the Gooding Recharge Site was part of the bargained for consideration present in the Second Mitigation Plan.

An agreement between the senior-priority water user and the junior-priority water user that provides more water than expected from curtailment, during each year of the term of the agreement, and in a location that is more desirable by the senior-priority user, meets the requirements under CM Rule 43.03.c and CM Rule 43.03.o. Approval of the Second Mitigation Plan will give meaning to CM Rule 43.03.c and CM Rule 43.03.o.

C. Municipal Use Includes Domestic In-Home Culinary Uses That Are Exempt From Curtailment

Municipal purpose of use is defined as “water for residential, commercial, industrial, irrigation of park and open space, and related purposes” I.C. § 42-202B(6). Dr. Petrich estimated the portion of the Cities’ municipal pumping under out-of-priority water rights . Ex. 100 at 4. In this delivery call, and other conjunctive management delivery calls, IDWR has exempted domestic groundwater rights and in-home culinary uses from curtailment. Ex. 100 at 29-31.⁶

Dr. Petrich, while acknowledging that the in-home culinary uses are nearly fully consumptive in some cities (e.g., those using land-application and/or evaporative ponds as a wastewater disposal method), assumed that indoor domestic uses “are not vulnerable to curtailment” because in-home-culinary water use was excluded from curtailment under the current and past orders. Ex. 100 at 5; Tr. 98:11-25; Tr. 99:1-25; *supra* footnote 1. Dr. Petrich estimated the amount of “consumptive use” by subtracting the “non-consumptive” (or “exempt-

⁶ There is disparate treatment between non-curtailment of domestic groundwater wells and curtailment of the domestic component of municipal groundwater water rights.

from-curtailment” amount), and, in the case of Richfield, reported pumping for industrial uses, from total municipal pumping. Ex. 100 at 5-7; Tr. 95:6-25; Tr. 96:1-16.

Based on this approach, Dr. Petrich concluded consumptive use under out-of-priority rights (i.e., the amount vulnerable to curtailment) was approximately 62 acre-feet per year in Carey (Ex. 107), 251 acre-feet per year in Heyburn (Ex. 108), and 708 acre-feet per year in Richfield (Ex. 109). As evidenced by Exhibit 143, the benefit of the recharge proposed by the Cities’ Second Mitigation Plan quickly exceeds the out-of-priority impacts from the three cities’ water rights that represented their “consumptive,” or non-exempt uses.

D. Because The Cities Are IGWA Members, February 7, 2015 Is The Starting Point For Timing Of The Cities’ Mitigation Plan

In determining the timing and benefit of curtailment and recharge, the IDWR Staff Memorandum used April 1, 2014 as the curtailment starting date. Ex. 157 at 5. Based on an April 1, 2015 starting date, the Staff Memorandum concluded, “the benefits of recharge will not offset the impact of the Cities’ junior pumping during the first year.” *Id.* at 7. Agreeing that April 1, 2014 was the correct starting point, the Director’s Order Conditionally Approving Cities’ Second Mitigation Plan concluded, “The Cities will be subject to existing curtailment orders until either of these conditions are satisfied.” *Order Conditionally Approving Cities’ Second Mitigation Plan* at 7. The starting date used in the Staff Memorandum, and relied upon in the Order Conditionally Approving Cities’ Second Mitigation Plan, is not supported by law.

As stated above in the *Factual and Procedural Background*, a finding of material injury was entered by the Director on January 29, 2014; however, curtailment was not ordered to begin until March 14, 2015. *Curtailment Order* at 42. On February 21, 2014, in response to IGWA’s First Mitigation Plan, the Director stayed curtailment, pending a hearing and decision. *Order Granting First Stay*. The stay was explicit to “IGWA members . . .” *Id.* at 5 (emphasis added).

IDWR letters sent to owners of junior-priority groundwater rights were consistent with the Order: “**The stay does NOT apply to holders of ground water rights junior to July 13, 1962, who are not members of IGWA or who are not non-member participants in IGWA’s mitigation plan.**” *Supra* at footnote 2 (emphasis in original). As established at the hearing, the Cities are IGWA members.

On April 11, 2014, the Director rescinded the February 21, 2014 stay, found a mitigation credit existed for aquifer enhancements and the Morris Exchange, but nonetheless ordered curtailment to “begin on or before May 5, 2014” *Amended Curtailment Order* at 20. Shortly thereafter, on April 28, 2014, and in response to IGWA’s Second Mitigation Plan, the Director entered his second stay, to provide “ground water users . . . an opportunity to present evidence at an expedited hearing for their second mitigation plan.” *Order Granting Second Stay* at 4. Again, letters sent to the Cities by IDWR informed the Cities that, as “**members of IGWA,**” the stay applied to the Cities’ water rights. *Supra* at footnote 4 (emphasis in original).

On June 20, 2014, the Director approved IGWA’s Second Mitigation Plan, found the Morris Exchange “will provide mitigation credit up to January 19, 2105 [therefore] the stay issued April 28, 2014, is lifted.” *Second Amended Curtailment Order* at 18. Curtailment was ordered to occur “on or before January 19, 2015.” *Id.*

On November 21, 2014, the Director, based on a motion filed by Rangen, revised his calculation of the Morris Exchange, finding that the mitigation credit expired on October 1, 2014. *Second Amended Curtailment Order*. However, the Director ordered that curtailment would not occur until January 19, 2015: “This delay in curtailment is reasonable because instantaneous curtailment will not immediately increase water supplies to Rangen. The flow from the Martin-Curren Tunnel has been gradually declining over a number of years.

Curtailment will not quickly restore the tunnel flows.” *Id.* at 3.

After an unsuccessful request for stay of curtailment before the Director, *Order Denying IGWA’s Motion to Vacate Curtailment Order* (January 23, 2015), IGWA obtained a stay in front of Judge Wildman. *Order Granting Motion to Stay Curtailment; Order Denying Motion for Reconsideration*. The stay entered by Judge Wildman will expire on February 7, 2015.

As such, there is no basis in law for the Staff Memorandum and the Order Conditionally Approving Cities’ Second Mitigation Plan to conclude that April 1, 2014 is the starting point for evaluating the Cities’ Second Mitigation Plan. As members of IGWA, the Cities have been protected by the Director’s original stay, the Director’s subsequent stays, IGWA’s mitigation plans, and the stay entered by Judge Wildman. Furthermore, the Cities were expressly told by letters from IDWR that, as members of IGWA, the stays applied to them and their junior-priority groundwater rights were not to be curtailed. Therefore, as a matter of law, the starting point for examining the Cities’ out-of-priority pumping is February 7, 2015; the expiration of Judge Wildman’s stay of curtailment.

E. The Cities’ Second Mitigation Plan Must Be Approved Because Recharge In The First Year Of The Phased-In Period Provides More Water To Rangen Than Curtailment

Notwithstanding the fact that Rangen has agreed to the Cities’ Mitigation Plan, the evidence shows that recharge provides more water to Rangen than curtailment under the Cities’ junior-priority pumping. Because February 7, 2015 is the legally operative starting date for examining the benefits of curtailment to Rangen in the first year of the phased-in period of curtailment, Dr. Petrich used February 7, 2015, as his starting date for simulating curtailment. Tr. 63:11-21; Ex. 141; Ex. 142. While the Cities can begin recharge as soon as February 15, 2105, Ex. 159, Dr. Petrich chose February 18, 2015, as his starting date for simulating the benefits of recharge, Tr. 63: 11-14; Ex. 141; Ex. 142. Exhibits 141 and 142 show, in the first

year of the phased-in curtailment, the simulated benefit of curtailment is greatly outpaced by the benefit of recharge. Ex. 141; Ex. 142. The same is also true for the second year of the phased-in curtailment. *Id.* Because the benefits of recharge are greater than the benefits of curtailment, the Cities' Second Mitigation Plan should be approved in the first year of the phased-in period of curtailment.

F. Approval of the Cities' Second Mitigation Plan Is Consistent With The District Court's Recent Decision Regarding Mitigation

In the District Court's *Memorandum Decision and Order on Petition for Judicial Review*, CV 2014-2446 (Fifth Jud. Dist., Dec. 3, 2014), regarding the Director's May 16, 2014 *Amended Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order*, Judge Wildman took exception with the Director's approval of IGWA's proposed future mitigation in the form of voluntary conversions from groundwater to surface water. The reason for Judge Wildman's disagreement was that IGWA's mitigation plan did not provide Rangen with an appropriate safeguard or contingency provision to protect Rangen in the event that the voluntary conversions did not occur: "[N]either the Director nor Rangen has any mechanism to compel compliance with the Director's assumption that mitigation conversion will occur into the future." *Memorandum Decision and Order on Petition for Judicial Review* at 9. Thus, the Court reasoned, the CM Rules require a contingency provision in order to "assure the protection of Rangen's rights in the event that the source of mitigation water (i.e., water accrued to Rangen from ground to surface conversions) become unavailable." *Id.* at 10. In the case of the voluntary conversions, the Director was only going to address any deficiency from the conversions (or lack thereof) in the following irrigation season which the Court found would "not ensure the protection of Rangen's senior water rights as required by the CM Rules, and as such prejudice and diminish Rangen's substantial rights."

Id.

However, in this case, unlike the question before the District Court in the case involving IGWA's mitigation in the form of voluntary conversions, Rangen has agreed, through contract, to the Second Mitigation Plan, which proposes recharge at the Gooding Recharge Site.

Therefore, Rangen is voluntarily assuming the risk to its senior water rights that the rights may not be fully mitigated under the terms of the agreement, in exchange for the more likely result which is more water at its facility, at a recharge site it helped identify, in a quicker time frame than could be expected from curtailment of the Cities' junior-priority water rights. Ex. 141 and Ex. 142.⁷ The District Court did not hold that the Director was precluded from ever approving future mitigation activities; in fact, the District Court specifically held that the Director "has the discretion to approve a mitigation plan based on future activities" so long as the mitigation plan includes a contingency provision that assures the protection of the senior-priority right.

Memorandum Decision and Order on Petition for Judicial Review at 5. In this case, Rangen's agreement to the Cities' future activity provides sufficient basis to approve the Cities' recharge activity, especially in light of the evidence that shows Rangen will receive six times the benefit from the recharge, more quickly, than it would from the curtailment of the Cities' junior-priority water rights.

⁷ In addition, because the curtailment runs that set forth the mitigation obligation of the juniors did not consider municipal pumping, any mitigation benefit Rangen receives is over and above the ordered obligation from juniors. Tr. 60:22 - 62:4. As a matter of fact and law, the Director's order sets the mitigation obligation to Rangen at 9.1 cfs. While not included in the 9.1 cfs, the Cities' water rights have been included in every curtailment list. Thus, if the Cities provide mitigation that greatly exceeds their impact, Rangen is receiving a benefit above what the IDWR requires to satisfy its curtailment orders. Ex. 100 at 10.

III. CONCLUSION

Based on the foregoing, and because it complies with the CM Rules, the Cities' Second Mitigation Plan should be approved in full.

Submitted this 4th day of February, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of February, 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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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 type="checkbox"/> US Mail, Postage Paid <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand-Delivered <input checked="" type="checkbox"/> Electronic Mail
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