

FILED-DISTRICT COURT

CASE # \_\_\_\_\_

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**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.

CASE NO. CV -2015-172

Fee Category L.3 - \$221

**NOTICE OF APPEAL AND PETITION  
FOR JUDICIAL REVIEW OF FINAL  
AGENCY ACTION; PETITION FOR  
STAY**

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.

IN THE MATTER OF DISTRIBUTION OF  
WATER TO WATER RIGHT NOS. 36-  
02551 & 36-07674 (RANGEN, INC.)

IN THE MATTER OF DISTRIBUTION OF  
WATER TO RANGEN, INC'S WATER  
RIGHT NOS. 36-15501, 36-135B, AND 36-  
135A (RANGEN, INC.)

COME NOW, Petitioners, the cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (collectively hereafter referred to as the "Cities"), by and through their undersigned counsel, and hereby file this Petition seeking judicial review of a final agency action by the Idaho Department of Water Resources ("IDWR" or "Department").

#### **STATEMENT OF THE CASE**

1. This is a civil action pursuant to Idaho Code §§ 67-5270 and 67-5279 seeking judicial review of the *Order Confirming Final Order Conditionally Approving Cities Second Mitigation Plan* ("Final Order"), issued by the Director of the Idaho Department of Water Resources, Gary Spackman, ("Director") on February 13, 2015.

2. On January 29, 2014, in response to a conjunctive management delivery call filed by Rangen, Inc., the Director issued a *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order"). The Curtailment Order found Rangen was materially injured and phased-in curtailment over a period of five years. On April 11, 2014, the Director issued an *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 set forth a starting date of April 1 and an ending date of March 31 for each year of the five year

phase-in period of the curtailment. On June 20, 2014, the Director issued an *Order Approving IGWA's Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order*, approving mitigation through January 18, 2015, and amending the priority date for curtailment date of water rights from July 13, 1962 to August 12, 1973.

3. On November 20, 2014, the Cities filed a *Coalition of Cities Second Mitigation Plan* ("Second Mitigation Plan"), which was premised on recharge. The Second Mitigation Plan was stipulated to by Rangen: "Rangen stipulates to the Mitigation Plan with the Cities, agreeing that the Plan shall be deemed to mitigate the Cities' out-of-priority ground water pumping in CM-DC-2011-004 and CM-DC-20140004 . . . ."

4. The Cities' Second Mitigation Plan was published with a protest deadline of December 22, 2014. No protests were filed with IDWR.

5. On January 16, 2015, shortly before Noon, the Director issued his *Final Order Conditionally Approving Cities Second Mitigation Plan*. While the Final Order approved the Cities' ability to recharge, the Final Order disagreed that Cities' Second Mitigation Plan, which was expressly stipulated to by Rangen, would provide water to Rangen during the time and place required by Rangen.

6. The Director did not grant an administrative hearing prior to issuing the Final Order.

7. On January 16, 2015, shortly before 5:00 p.m., the Cities filed with the Director the *Coalition of Cities' Petition for Reconsideration and/or Clarification of the Final Order Conditionally Approving Cities' Second Mitigation Plan and Request for Stay* ("Petition"). In the Petition, the Cities sought reconsideration of certain findings of fact and conclusions of law made by the Director in the *Final Order Conditionally Approving Cities Second Mitigation*

*Plan*; the Cities sought to stay curtailment of junior-priority groundwater rights that were subject to curtailment on January 19, 2015; and the Cities sought a hearing before the Director.

8. 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 . . . .”**<sup>1</sup> Emphasis in original.

9. On January 20, 2015, the Cities and Rangen filed a *Joint Request for Pre-Trial Conference*.

10. 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’ requested reconsideration.

11. On January 23, 2015, the Director issued a *Notice of Hearing* on the Cities’ Second Mitigation Plan, setting the hearing for January 30, 2015.

12. On January 30, 2015, the Director held a hearing on the Cities’ Second Mitigation Plan.

13. On February 13, 2015, the Director issued his Final Order, which is the subject of this *Notice of Appeal and Petition for Judicial Review of Final Agency Action*.

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<sup>1</sup> [http://www.idwr.idaho.gov/files/legal/curtailment/20150120\\_Rangen\\_Curtailment\\_Notice.pdf](http://www.idwr.idaho.gov/files/legal/curtailment/20150120_Rangen_Curtailment_Notice.pdf)

## JURISDICTION AND VENUE

14. This petition is authorized by Idaho Code §§ 67-5270 and 67-5279.

15. This Court has jurisdiction over this action pursuant to Idaho Code § 67-5272.

16. Venue lies in this Court pursuant to Idaho Code § 67-5272 because many of the Cities that make up the Coalition of Cities are located in, and do business in Minidoka County. The cities of Rupert, Heyburn, and Paul are located in Minidoka County.

17. Pursuant to the Idaho Supreme Court's *Administrative Order* issued on December 9, 2009 "all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District." The SRBA Court's procedures instruct the clerk of the district court in which the petition is filed to issue a *Notice of Reassignment*. The Cities have attached a copy of the SRBA Court's *Notice of Reassignment* form for the convenience of the clerk.

18. The Director's February 13, 2015 *Order Confirming Final Order Conditionally Approving Cities Second Mitigation Plan* is a final agency action subject to judicial review pursuant to Idaho Code § 67-5270(3).

## PARTIES

19. Petitioner, City of Bliss is an incorporated city, located in Gooding County, and provides water to its residents.

20. Petitioner, City of Burley, is an incorporated city, located in Cassia and Minidoka county, and provides water to its residents.

21. Petitioner, City of Carey, is an incorporated city, located in Blaine County, and provides water to its residents.

22. Petitioner, City of Declo, is an incorporated city, located in Cassia County, and provides water to its residents.

23. Petitioner, City of Dietrich, is an incorporated city, located in Lincoln County, and provides water to its residents.

24. Petitioner, City of Gooding, is an incorporated city, located in Gooding County, and provides water to its residents.

25. Petitioner, City of Hazelton, is an incorporated city, located in Jerome County, and provides water to its residents.

26. Petitioner, City of Heyburn, is an incorporated city, located in Minidoka County, and provides water to its residents.

27. Petitioner, City of Jerome, is an incorporated city, located in Jerome County, and provides water to its residents.

28. Petitioner, City of Paul, is an incorporated city, located in Minidoka County, and provides water to its residents.

29. Petitioner, City of Richfield, is an incorporated city, located in Lincoln County, and provides water to its residents.

30. Petitioner, City of Rupert, is an incorporated city, located in Minidoka County, and provides water to its residents.

31. Petitioner, City of Shoshone, is an incorporated city, located in Lincoln County, and provides water to its residents.

32. Petitioner, City of Wendell, is an incorporated city, located in Gooding County, and provides water to its residents.

33. Respondent, Gary Spackman is the Director of the Idaho Department of Water

Resources, and a resident of Ada County.

34. Respondent, Idaho Department of Water Resources, is an executive department existing under the laws of the state of Idaho pursuant to Idaho Code §42- 1701, *et seq.*, with its state office located at 322 E. Front St., Boise, Ada County, Idaho.

**STATEMENT OF INITIAL ISSUES**

35. The Petitioners intend to assert the following issues on judicial review:
- a. Whether the Director's *Order Confirming Final Order Conditionally Approving Cities Second Mitigation Plan* is supported by substantial evidence?
  - b. Whether the Director erred by including the Cities in the curtailment lists when the Cities' depletions were not included in the quantification of material injury?
  - c. Whether the Director mischaracterized this Court's analysis in its *Memorandum Decision and Order on Petition for Judicial Review*, CV-2014-2446 (Fifth Jud. Dist., Dec. 3, 2014), by extending its rationale regarding "soft conversions" to the mitigation plan entered into between the Cities and Rangen?
  - d. Whether the Director erred by not approving a mitigation plan that was entered into between the Cities and Rangen, and was not protested?
  - e. Whether the Director erred in his analysis of this Court's prior decision in *Order on Petitions for Judicial Review*, CV-2009-00241, CV-2009-00270 (Fifth Jud. Dist., Dec. 4, 2009)?
  - f. Whether the Director erred by not applying the Conjunctive Management

Rules' provisions that allow a calling senior-priority water user to enter into a mitigation plan with junior-priority water users, and allow those parties to enter into a mitigation plan for compensation or consideration other than providing replacement water to the injured party during time of need?

- g. Whether the Director erred by not allowing senior-priority and junior-priority water users to enter into a stipulated mitigation plan that provided the senior with more water than can be expected through curtailment because it did not adhere to the Director's timing of mitigation water from prior orders?
- h. Whether the Director erred by not allowing senior-priority and junior-priority water users to enter into a mitigation plan for other compensation or consideration that provided the senior with more water than can be expected through curtailment because it did not adhere to the Director's timing of mitigation water from prior orders?
- i. Whether the Director erred in his analysis of this Court's prior decision in *Order Granting Motion to Stay Curtailment*, CV-2015-237 (Fifth Jud. Dist., Jan. 22, 2015)?
- j. Whether the Director erred by ordering curtailment of the non-consumptive junior-priority municipal water rights that include domestic, in-home uses owned by the Cities, but not ordering curtailment of non-consumptive junior-priority domestic water rights owned by private parties?

36. Pursuant to I.R.C.P. 84(d)(5), the Coalition reserves the right to assert additional issues and/or clarify or further specify the issues for judicial review stated herein which become later discovered.



**AGENCY RECORD**

37. Judicial review is sought of the Director's February 13, 2015 *Order Confirming Final Order Conditionally Approving Cities Second Mitigation Plan*.

38. The Cities anticipate they can reach a stipulation regarding the agency record with the Respondents and the other parties, and will pay its necessary share of the fee for preparation of the record at such time.

39. A transcript of the hearing has been prepared and the fee has already been paid.

40. Service of this Petition for Judicial Review of Agency Action has been made on the Respondents as they existed at the time of the filing of this Petition.

Dated this 9<sup>th</sup> day of March, 2015.

Williams, Meservy & Lothspeich, LLP



ROBERT E. WILLIAMS

McHugh Bromley, PLLC

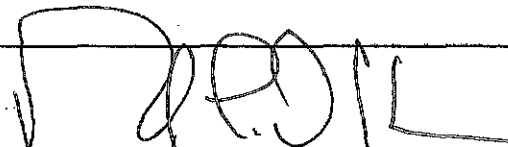


CHRIS M. BROMLEY

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10<sup>th</sup> day of March, 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:

Director Gary Spackman IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720 <a href="mailto:deborah.gibson@idwr.idaho.gov">mailto:deborah.gibson@idwr.idaho.gov</a>	<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 <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:kimi.white@idwr.idaho.gov">kimi.white@idwr.idaho.gov</a>	<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 _____
J. Justin May MAY BROWNING & MAY, PLLC 1419 W Washington Boise, ID 83702 Fax: (208) 342-7278 <a href="mailto:jmay@maybrowning.com">jmay@maybrowning.com</a>	<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 _____
Robyn M. Brody ATTORNEY AT LAW PO Box 554 Rupert, ID 83350 Fax: (208) 434-2780 <a href="mailto:robynbrody@hotmail.com">robynbrody@hotmail.com</a>	<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 _____
Fritz X. Haemmerle HAEMMERLE & HAEMMERLE, PLLC PO Box 1800 Hailey, ID 83333 Tel: (208) 578-0520 Fax: (208) 578-0564 <a href="mailto:fxh@haemlaw.com">fxh@haemlaw.com</a>	<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 _____

  
 ROBERT E. WILLIAMS