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,

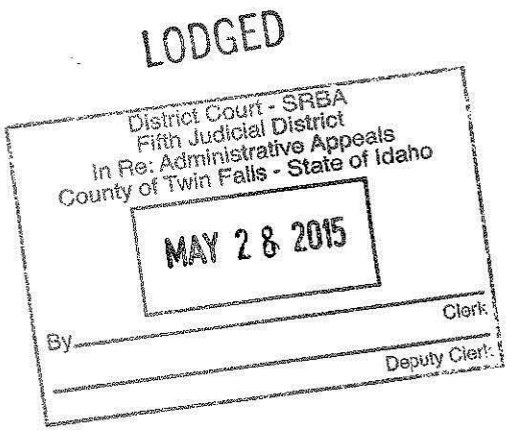
vs.

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

Respondents.

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



COALITION OF CITIES' OPENING BRIEF

On Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

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I. STATEMENT OF THE CASE

A core issue for this Court to consider is the limit of the Director's discretion to give no effect to the full terms of a stipulated CM Rule 43 mitigation plan. At issue in this case is the Coalition of Cities' ("Coalition" or "Cities")[1] *Second Mitigation Plan* ("Second Mitigation Plan," "Mitigation Plan," or "Plan") which was negotiated and entered into, in good faith, and an in effort to avoid litigation, between Rangen, Inc. ("Rangen") and the Cities. The Second Mitigation Plan was published in three newspapers of general circulation, with no protests filed by any water user. Despite what the Director may have concluded otherwise in his final order, other junior-priority ground water users were not left to assume the Cities' mitigation obligation. This is because the Cities provided actual mitigation to Rangen, and junior-priority municipal ground water rights were not included in the Director's curtailment scenarios, which computed Rangen's mitigation requirement.

The uncontradicted evidence in the record is the Second Mitigation Plan provides Rangen with water in addition to the 9.1 cfs that was ordered by the Director for mitigation. Therefore, all mitigation conferred upon Rangen by the Second Mitigation Plan were over and above any ordered mitigation. Not only did the Plan provide a mitigation benefit to Rangen that was over and above the mitigation ordered by the Director, the Plan provided Rangen more water than Rangen would have realized from curtailment of the Cities' junior-priority water rights. While the Director's authority to approve or deny a stipulated mitigation plan is discretionary, the Director's discretion should not allow him to disregard agreed upon mitigation that provides additional mitigation water to the senior user in a quicker timeframe than curtailment, and in a location that is more acceptable to the senior.

[1] Collectively, the Coalition of Cities is made up of the cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell.

The Cities therefore ask the Court to remand the Final Order to recognize the Cities' first year mitigation benefit to Rangen.

A. Background

This case stems from Rangen's conjunctive management delivery call filed with the Idaho Department of Water Resources (hereinafter "Director," "Department," or "IDWR") on December 13, 2011. *Memorandum Decision and Order on Petitions for Judicial Review*, CV-2014-1338, p. 2 (Fifth Jud. Dist. Oct. 24, 2014). In the January 29, 2014 *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order"), the Director found material injury to Rangen and ordered curtailment of junior-priority ground water rights. *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order"). *Id.* After a series of reductions, the Director concluded that steady state curtailment of junior-priority ground water rights for irrigation purposes would produce 9.1 cfs at the Martin-Curren Tunnel. R. at 28. Curtailment was phased-in over a period of five years: "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." R. at 42.

Despite not reviewing, considering, or modeling the impacts of municipal water rights, the Director applied the Curtailment Order to "all consumptive ground water rights, including agricultural, commercial, industrial, and municipal uses . . . ." R. at 42 (emphasis added). The Director then "exclud[ed] 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.* (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." R. at 42.

On February 14, 2014, shortly after the Curtailment Order was issued, and "because of the unanticipated scope of the Order," the Cities moved to intervene in the Rangen delivery call. *Petition for Limited Intervention* at 4.[2] Because of "the unique aspects of municipal water rights compared to other types of water rights, including irrigation rights, and the lack of the Cities' direct participation in the proceedings to date constitutes good cause for the untimely filing of the Petition . . . ." *Id.* at 5.

On March 26, 2014, the Director denied the Cities' request. *Order Denying Idaho Cities' Petition for Limited Intervention*, CM-DC-2011-004 (March 26, 2014).[3] Therefore, the present action is the first time the Cities have been able to directly address the issues associated with curtailment of municipal ground water rights.

B. Cities' First Mitigation Plan

Despite the uncontradicted fact that junior-priority ground water rights for municipal purposes were not examined by the Director in his Curtailment Order, and in order to avoid curtailment, the Cities filed its *CM Rule 43 Mitigation Plan for Managed Recharge and Other Aquifer Enhancement Activities* ("First Mitigation Plan"). Ex. 152. Recognizing the need to control their own mitigation future, the First Mitigation Plan was filed on April 25, 2014, approximately one month after the Director denied the Cities intervention in the Rangen delivery call. *Id.*

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[2] The *Petition for Limited Intervention* is included herein as Attachment A.
[3] The *Order Denying Idaho Cities' Petition for Limited Intervention* is included herein as Attachment B.

Using ESPAM 2.1, Dr. Christian Petrich, on behalf of the Coalition of Cities, found the total simulated depletions of all Coalition members' junior-priority ground water rights to be "no greater than 0.04 cfs." *Id.* at 5. However, because nearly all Coalition Cities have varied water right portfolios containing several water rights with different priority dates and rates of diversion, there were only a few Cities that relied solely on junior-priority ground water rights. *Id.* at 3. If only Coalition Cities that relied only on junior-priority pumping were considered, the impact to Rangen was 0.008 cfs. *Id.* at 5. In order to offset those Cities' depletions, the First Mitigation Plan proposed managed recharge in 2014 at the Sandy Ponds and immediate surrounding area ("Sandy Ponds") to mitigate for junior-priority municipal pumping. Ex. 152 at 2. Recharge was proposed to begin "on or before June 1, 2014 and continuing as long as necessary in 2014 to the Sandy Ponds Recharge Area." *Id.* at 2-3 (emphasis added).[4] The Cities would "deliver additional water to the Sandy Ponds Recharge Area if measurements show additional water is required." *Id.* at 3. If necessary, recharge would also occur "during the non-irrigation season." *Id.* at fn. 3. Using ESPAM 2.1, Dr. Petrich showed the simulated benefit that 1.0 cfs of recharge would result in a 0.04 cfs benefit to Rangen, *Id.* at 9; thus, offsetting any depletion caused by junior-priority ground water rights owed by the Cities.

The Cities filed the First Mitigation Plan, despite the fact that "the curtailment simulations used to determine the amount of consumptive use to be eliminated for a given benefit at the Rangen facility include only the elimination of agricultural irrigation uses." *Id.* at

[4] It is critical to understand that the Cities were prepared to begin recharge as early as June 1, 2014. As will be explained, below, instead of litigating the First Mitigation Plan over the protest of Rangen, the Cities entered into negotiations with Rangen, which resulted in the November 20, 2014 filing of the stipulated, Second Mitigation Plan. The Cities had no reason to believe the Director would hold the loss of time spent in good faith negotiations against the Cities when it came time to review the Second Mitigation Plan. Yet, that is precisely what happened. If the outcome in this case stands, it will result in a chilling effect on junior-priority ground water users reaching consensus mitigation with senior-priority water users. If the Director's existing outcome in this case withstands judicial scrutiny, junior-priority ground water users will be better off litigating their own mitigation plans, taking up the Director's valuable time in hearings, and further burdening this Court's docket on judicial review.

fn. 4. Moreover, "any curtailment of municipal rights – or mitigation in lieu of municipal curtailment – will provide a benefit to the Rangen facility over and above that which was calculated for the purposes of the Rangen orders." *Id.*

On May 27, 2014, Rangen filed its protest to the First Mitigation Plan. Ex. 153. Stated bases for Rangen's protest was use of Sandy Ponds as a recharge site, and the timing of mitigation. *Id.* at 2-4.

C. Cities' Second Mitigation Plan

After receiving the protest to the First Mitigation Plan, counsel and experts for the Cities began an extended dialogue with Rangen. Tr. p. 26, lns. 2-24. An outgrowth of months' long discussions was identification of a recharge site near Gooding, Idaho ("Gooding Recharge Site"). *Id.* From Rangen's perspective, the Gooding Recharge Site was better suited for mitigating Rangen's water rights than Sandy Ponds. *Id.* Based on negotiations with Rangen, the Coalition of Cities developed a mitigation plan that was premised on managed recharge at the Gooding Recharge Site. In addition to their efforts with Rangen, the Cities also diligently worked through approval processes with the United States Bureau of Land Management and the Idaho Department of Environmental Quality. R. at 345; R. at 354. The Second Mitigation Plan was filed with IDWR on November 20, 2014. R. at 259. The Second Mitigation Plan was filed approximately seven months after Rangen filed its protest to the Cities' First Mitigation Plan.

Because the Director did not quantify the depletive impacts to Rangen by junior-priority municipal ground water pumping in the Curtailment Order, the Second Mitigation Plan proposed to "recharge an as yet undetermined amount of water to mitigate for the Rangen call through March 31, 2016. The exact amount is unknown because the impact from cities' out of priority groundwater pumping was not included in the IDWR's calculation of impacts under the Rangen

calls . . . ." R. at 272. The Cities agreed to "recharg[e] up to 1500 acre-ft of storage water . . . at the Gooding Site. R. at 273.

Consistent with the negotiations that had taken place, the Second Mitigation Plan was submitted as:

> [A] stipulated mitigation plan, consistent with CM Rule 43.03.o. According to that Rule, the Director, "in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following . . . [w]hether the petitioners and respondents have entered into an agreement or an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions." CM Rule 43.03.o.

R. at 262 (emphasis added).

So there would be no confusion as to the stipulated nature of the Second Mitigation Plan, it was signed by counsel for the Cities, as well as by counsel for Rangen. R. at 263. The Second Mitigation Plan expressly stated, "By stipulation, Rangen agrees the Mitigation Plan shall be deemed to mitigate the Cities' out-of-priority ground water pumping . . . ." R. at 261 (emphasis added).

Notice of the 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. R. at 350-51. 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. R. at 352-53. 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. R. at 356.

Importantly, no protests were filed to the Cities' Second Mitigation Plan.

D. Final Order Conditionally Approving Cities Second Mitigation Plan

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"). R. at 357. 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 362 (emphasis in original). The Director stated that the first year that mitigation is required runs from April 1, 2014 through March 31, 2015. *Id.* The Director acknowledged Rangen "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 declared 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 363.

The Director stated 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.* The Director established this timing, despite the fact that Rangen specifically agreed to the timing of recharge water it would receive from the Cities' managed recharge at the Gooding Recharge Site. Ex. 259. Moreover, the Director criticized the good faith efforts that led to 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." *Id.*

E. Request for Hearing and Pre-Hearing Proceedings

On Friday, January 16, 2015, the Cities filed its *Petition for Reconsideration and/or Clarification of the Final Order Conditionally Approving Cities' Second Mitigation Plan and Request for Stay*, R. at 368; *Request for Hearing on First and Second Mitigation Plans and Request for Stay of Curtailment*, R. at 378; which was supported by the *Affidavit of Christian Petrich in Support of Coalition of Cities' Petition for Reconsideration and/or Clarification of the Final Order Conditionally Approving Cities' Second Mitigation Plan and Request for Stay*, R. at 373 ("Dr. Petrich Affidavit").

The Dr. Petrich Affidavit concluded that, while each of the Coalition Cities had wells junior to Rangen, the only cities that were unable to pump their needed volume under wells senior to Rangen were Carey, Heyburn, and Richfield. R. at 374. Regarding Carey, Heyburn, and Richfield, Dr. Petrich provided the Director with the following technical information to show the Second Mitigation Plan was not a "sweetheart" deal, and should be approved in its entirety:

> The depletive amount that will occur at the Curren Tunnel as a result of depletions by Coalition cities Carey, Heyburn, and Richfield . . . is 0.001 cfs (0.45 gpm) during the first year of pumping and 0.015 cfs (6.73 gpm) under steady-state conditions.
>
> The 1,500 acre-feet of recharge at the Gooding Recharge Site proposed for 2015 will exceed the aggregate depletive amount under the Coalition of Cities' junior water rights (approximately 836 AFA). The first-year benefit of recharge at the Gooding Recharge Site is simulated to be 0.006 cfs (2.69 gpm). The simulated recharge benefit is approximately **six times** the 0.001 cfs (0.45 gpm) first-year impact at the Rangen facility from Coalition cities' depletions . . . .
>
> The Gooding Recharge Site is substantially closer to the Rangen facility than the location of depletions at Carey, Heyburn, and Richfield. Proximity of the recharge site to the Rangen facility, and the recharge in excess of . . . Coalition depletions, means that the benefits of the Coalition cities' recharge will quickly exceed that of Coalition cities' depletions during the first year.

R. at 374 (emphasis added).

Regarding the treatment of municipal ground water rights in ESPAM 2.1:

> Groundwater withdrawals for cities and industrial areas are represented in the Eastern Snake Aquifer Model (ESPAM 2.1) calibration runs (IDWR, 2013). However, curtailment of municipal use was not simulated in the curtailment simulation made in preparation of the Rangen orders (Allan Wylie, personal communication, April 18, 2014 and July 18, 2014). Thus, any benefit accruing from either curtailment of municipal rights or mitigation in lieu of curtailment of municipal rights will provide benefits to the Rangen facility over and above those calculated by IDWR as necessary to satisfy the Rangen delivery call.

Id.

On Saturday, January 17, 2015, the Director denied the petition for reconsideration, R. at 386, granted the request for hearing, R. at 393, and denied the request for stay, *Id.*

On January 20, 2105, the Cities and Rangen filed a *Joint Request for Pre-Trial Conference*. R. at 400. 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. R. at 404. At the pre-hearing conference, counsel for the Cities verbally moved the Director to reconsider the Director's denial of the Cities' request for stay, asking the Director to stay curtailment until after a hearing had been held on the Cities' Second Mitigation Plan and a decision issued. The Director denied the Cities' reconsideration.

E. IDWR Staff Memorandum

Based on a request from the Director, IDWR technical staff reviewed the Second Mitigation Plan. R. at 414. On January 23, 2015, the parties received the *Department Staff Memorandum* ("IDWR Staff Memo") explaining the Director's technical belief for conclusions made in his Order Conditionally Approving Cities' Second Mitigation Plan. *Id.* The IDWR Staff Memo reached the following conclusions:

- Municipal ground water rights were not included in the Director's curtailment scenarios that resulted in a predicted benefit of 9.1 cfs at the Martin Curren Tunnel. R. at 415-16.

- The three Coalition Cities that were subject to curtailment were Carey, Richfield, and Heyburn. R. at 417.

- Using ESPAM 2.1, the depletive impact of Carey, Richfield, and Heyburn pumping at the Martin Curren Tunnel was 0.002 for the period April 2014 to March 2015. R. at 417. The depletive impact at the Martin Curren Tunnel for the period April 2015 to March 2015 was 0.008 cfs. *Id.*

- The simulated benefit of managed recharge of 1,500 acre-feet at the Gooding Recharge Site, between February 15, 2015 through March 6, 2015, was 0.00009 cfs at the Martin Curren Tunnel for the period April 2014 to March 2015. R. at 418. The benefit of recharge to the Martin Curren Tunnel for the period April 2015 to March 2016 was 0.018 cfs. *Id.*

Thus, the IDWR Staff Memo concluded, over a two-year period, the benefit of the Cities' recharge effort at the Gooding Recharge Site outpaced the benefit of curtailment. R. at 418-19.

F. Hearing on the Second Mitigation Plan and the Director's Order Confirming Final Order Conditionally Approving Cities Second Mitigation Plan

The hearing on the Cities' Second Mitigation Plan took place on January 30, 2015. On February 13, 2015, the Director issued his *Order Confirming Final Order Conditionally Approving Cities Second Mitigation Plan* ("Final Order), which effectively affirmed his January 16, 2015 Order Conditionally Approving Cities' Second Mitigation Plan. Despite model results showing otherwise, and despite the stipulated basis of the Plan, the Cities were given no mitigation benefit for the first year of the five-year phased-in curtailment.

II. ISSUES PRESENTED FOR REVIEW

The Coalition of Cities presents three issues for review:

A. Whether the Director erred by not approving the Cities' mitigation plan, which was stipulated to by Rangen, and not protested?

B. Whether the Director erred by not approving the Cities' mitigation plan as a plan

for other compensation?

C. Whether the Director erred by not approving the Cities' mitigation plan that provided Rangen with more water than would have accrued to Rangen from curtailment?

III. STANDARD OF REVIEW

The Final Order is to be reviewed under the Idaho Administrative Procedures Act. Idaho Code § 42-1701A(4). It must be affirmed unless the Court finds that the findings, inferences, conclusions, or decisions of the Director are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or,
> (e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3).

The Court's review of issues of disputed fact must be confined to the record, and the Court should not substitute its judgment for that of the Director as to the weight of the evidence on issues of fact. Idaho Code §§ 67-5277 and 67-5279(1). Unlike questions of fact, the court exercises free review over questions of law. *Vickers v. Lowe*, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011). The Court must also find that, as a result of the error, "substantial rights of the appellant have been prejudiced." *Id.* If the evidence in the record is conflicting, the court must sustain the agency action so long as it is based on substantial evidence in the record. *Barron v. Idaho Dep't of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). With respect to discretionary matters, courts defer to the agency decision unless the agency "acted without a reasonable basis in fact or law." *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 88, 175 P.3d 776, 777 (2007). If the agency's action is not affirmed, it should be set aside in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3).[5]

[5] It is possible IDWR will argue the issues raised in this matter are moot. An issue is not moot if it constitutes an "actual or justiciable controversy." *Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 281-82, 912 P.2d 644, 649-50 (1996). A "case becomes moot when the issues presented are no longer live or

IV. ARGUMENT

A. Whether The Director Erred By Not Approving The Cities' Mitigation Plan, Which Was Stipulated To By Rangen And Was Not Protested?

A core question in this case is defining the discretionary limits in the Director's review of an unprotested CM Rule 43.03 mitigation plan entered into between a senior-priority water user and a junior-priority ground water user. According to CM Rule 10.15, a "Mitigation Plan" is defined as follows:

> A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply.

CM Rule 10.15

CM Rule 43 states:

> 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:
>
> . . . .
>
> 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).[6]

While CM Rule 43.03 uses the permissive "may," the Director's discretion in approving

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the parties lack a legally cognizable interest in the outcome." *Bradshaw v. State*, 120 Idaho 429, 432, 816 P.2d 986, 989 (1991). The court cannot "hear and resolve an issue that presents no justiciable controversy and a judicial determination will have no practical effect on the outcome." *Idaho Sch. for Equal Educ. Opportunity* at 281, 912 P.2d at 649. If the issue before the court is "capable of repetition, yet evading review," an exception to the mootness doctrine exists. *State v. Hyde*, 140 Idaho 679, 682, 99 P.3d 1069, 1072 (2004); *see also Roe v. Wade*, 410 U.S. 113, 125 (1973). While not conceding the question of mootness, the issues herein fall within the mootness exception, and should be decided by the Court.

[6] 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).

mitigation plans is not unbounded. "In determining whether an agency abused its discretion . . . we 'must determine whether the agency perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason.'" *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 812, 252 P.3d 71, 93 (2011). This Court has previously found the Director abused his discretion in its review of CM Rule 43 mitigation plans. *See Memorandum Decision and Order on Petition for Judicial Review*, Case No. 2014-2446 (Fifth Jud. Dist. Dec. 3, 2014) (abuse of discretion in the Rangen delivery call to approve a mitigation plan for "soft conversions" and grant a year-round mitigation credit for the "Morris exchange"); *Order on Petition for Judicial Review*, Case No. 2008-551 (Fifth Jud. Dist. July 24, 2009) (abuse of discretion in the Surface Water Coalition delivery call to allow a "wait and see" approach to mitigation without adequate protection to senior-priority water right holders); *Order on Petition for Judicial Review*, Case No. 2008-444 (Fifth Jud. Dist. June 19, 2009) (abuse of discretion in the Blue Lakes and Clear Springs delivery calls to approve replacement water plans without following CM Rule 43 procedural components).

As observed by this Court in 2009, "The CMR contemplate that the Director will take into account whether or not the plan will satisfy the senior priority water rights, and only approve such a plan if it accomplishes that goal, unless some other agreement can be reached between the Spring Users and the Ground Water Users." *Order on Petition for Judicial Review*, Case No. 2008-444, p. 54 (Fifth Jud. Dist. June 19, 2009) (emphasis added).

The Cities' Second Mitigation Plan is the type of plan this Court envisioned in 2009 – juniors and seniors getting together to reach acceptable mitigation that should be approvable by the Director. In an effort to avoid litigation, the Second Mitigation Plan was entered into

between Cities and Rangen. The Second Mitigation Plan was published in three newspapers of general circulation for review by any third parties, and not protested. Nevertheless, the Director declined to give the Cities' a mitigation benefit for first year of phased-in curtailment, asserting that simulated benefits of the recharge project would not fully replace the Cities' depletions:

> During the first year when mitigation is required (April 1, 2014 through March 31, 2015), the Cities Second 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 . . . ." If delivered during late February and March of 2015, the mitigation plan will provide replacement water at the time and place required for the April 1, 2015 through March 31, 2016 "phase-in" year.
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> . . . .
>
> 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.
>
> The agreement by Rangen to accept 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.

R. at 468 (**bold** in original) (emphasis added) (footnote omitted).

There are four issues the Cities' take with these conclusions.

1. The Second Mitigation Plan is Neither Ironic Nor Inconsistent

There is nothing "ironic" or "inconsistent" with the stipulation that led to the Second Mitigation Plan. In Rangen's protest to the Cities' First Mitigation Plan, Rangen took specific issue with the timing of mitigation: "[T]he Cities Mitigation Plan does not provide sufficient information to evaluate whether it will provide replacement water, at the time and place required by Rangen . . . ." Ex. 153 at 4. After the Cities' received Rangen's May 27, 2014 protest, which took specific issue with recharge at the Sandy Ponds Recharge Area, the Cities entered into months' long negotiations with Rangen to identify a recharge site, and develop a mitigation plan

that Rangen believed would provide better benefit to its senior-priority water rights. Tr. p. 26, lns. 2-24. The outcome of those discussions was the stipulated, Second Mitigation Plan, filed with the Director on November 20, 2014. R. at 259.

Unlike direct delivery of surface water for mitigation, the benefits of recharge can only be quantified by modeled simulation. For Rangen, recharge at the Sandy Ponds Recharge Area would not produce the mitigation benefit, nor at the appropriate time as compared to what Rangen believed would occur at the Gooding Recharge Site. By stipulating to the Second Mitigation Plan, Rangen specifically agreed to the timing of recharge, the volume of water that would be used for the recharge project, and the duration of the mitigation benefit. Other than criticizing the Cities for entering into a dialogue with Rangen, and despite the fact that the Second Mitigation Plan was expressly submitted as a stipulated mitigation plan, with real benefit to Rangen, the Director's Final Order contains no analysis of CM Rule 43.03.o. Failure to analyze CM Rule 43.03.o when presented with a stipulated mitigation plan constitutes an abuse of discretion.

2. Under the Director's Outcome, Junior- and Senior-Priority Water Users will be better off Litigating Mitigation Plans

The Director failed to consider that the Cities were prepared to recharge at the Sandy Ponds "on or before June 1, 2014 . . . ." Ex. 152 at 2. This is a critical consideration. The Cities had water available to recharge, and the simulated benefit of recharge mitigated the Cities' out-of-priority pumping. Ex. 152 at 9-10. Under the rationale in the Final Order, the Cities would have been better off litigating their First Mitigation Plan to assure a mitigation benefit for the first year of the phased-in curtailment. Instead, by negotiating with Rangen over a period of months, the Second Mitigation Plan was not filed until November 20, 2014, resulting in delay. The Cities felt they were proceeding in good faith, and reasonably relied on the language of CM

Rule 43.03.o. Yet the Final Order failed to analyze any of the context that led to the stipulation, and failed to give any meaning to CM Rule 43.03.o, effectively writing CM Rule 43.03.o out of the CM Rules.

If the outcome in this case stands, it will have a chilling effect on junior-priority ground water users entering into consensus-based mitigation plans with senior-priority water users. As recognized by this Court:

> One of the issues that has overshadowed the application of the CMR with respect to mitigation plans is ensuring a timely meaningful response to a delivery call so as to avoid injury to senior rights, while at the same time allowing holders of junior ground water rights the meaningful opportunity to submit and seek approval of a mitigation plan so as to avoid curtailment.

Memorandum Decision and Order on Petition for Judicial Review, Case No. 2010-3075, p. 14 (Fifth Jud. Dist. January 25, 2011) (emphasis added).

Rather than give meaning to CM Rule 43.03.o, the Director has given junior- and senior-priority water users no incentive to enter into mitigation plans that satisfy all of the requirements of the calling, and potentially injured party. Sadly, under the Director's narrow outcome, junior- and senior-priority water users will be better off taking their chances in litigation, than having the Director hold time spent in negotiations against them. This is not in keeping with good public policy and a reasoned interpretation of CM Rule 43.03.o:

> In construing statutes, the plain, obvious and rationale meaning is always to be preferred to any curious, narrow, hidden sense. When choosing between alternative constructions of a statute, courts should presume that the statute was not enacted to work a hardship or to effect an oppressive result. Consequences of a proposed interpretation can be considered when the statute is capable of more than one construction. Constructions that would render a statute productive of unnecessarily harsh consequences are to be avoided any ambiguity in a statute should be resolved in favor of a reasonable operation of law.
>
> Indeed, some courts have gone so far as to hold that in suits involving a public administrative agency the rules and regulations of such agency should be strictly construed against it. Any ambiguities contained therein should be resolved in favor of the adversary.

Higginson v. Westergard, 100 Idaho 687, 691, 604 P.2d 51, 55 (1979) (internal citations omitted) (emphasis added).

CM Rule 43.03.o was included in the CM Rules to serve an important purpose: to encourage junior- and senior-priority water users to get together and develop mitigation plans, even if the "plan may not otherwise be fully in compliance with these provisions." CM Rule 43.03.o. The Director's non-interpretation of CM Rule 43.03.o renders it meaningless, effectively writing it out of the CM Rules. The Director's decision promotes an "oppressive result." Consistent with *Higginson*, positive public policy, which encourages settlement, should be promoted.

3. The Second Mitigation Plan Provides Water to Rangen when Needed

According to the Final Order:

> During the first year when mitigation is required (April 1, 2014 through March 31, 2015), the Cities Second 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 . . . ." If delivered during late February and March of 2015, the mitigation plan will provide replacement water at the time and place required for the April 1, 2015 through March 31, 2016 "phase-in" year.
>
> . . . .
>
> 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.[3]

R. at 468 (**bold** in original) (emphasis added).

Footnote 3 on page 10 of the Final Order states as follows:

> In a surface water delivery call, the holder of a senior water right cannot agree to allow one junior water right holder to divert water that would have satisfied the senior right while continuing to call for water against the other junior users. The junior user could only divert and avoid curtailment if the quantity of water diverted by the junior right holder is replaced/delivered to the senior water right holder. In

> this case, the Cities holding junior priority water rights will have provided no mitigation from April 1, 2014 until late February or early March, 2015. Any modeled benefits of recharge to Rangen from late February or early March, 2015 to April 1, 2015 will be miniscule, at best, and were not quantified by the mitigation plan.

R. at 468 (emphasis added).

While the Final Order concludes otherwise, Rangen was fully mitigated until January 18, 2015, R. 460. ("The Director approved mitigation required by the Curtailment Order through January 18, 2015."). Water rights would be curtailed on January 19, 2015 "if further mitigation was not provided by junior ground water right holders." R. at 460-461. As members of IGWA, the Cities were protected from curtailment. R. at 460. This Court then stayed curtailment until February 7, 2015. *Order Granting Motion to Stay Curtailment*, CV-2015-237 (Fifth Jud. Dist., Jan. 22, 2015); s*ee also Order Denying Motion for Reconsideration*, CV-2015-237 (Fifth Jud. Dist., Jan. 29, 2015). Thus, as a matter of law, the Director could not order curtailment of the Cities until February 7, 2015. The Final Order ignores the fact that: (1) Rangen was fully mitigated as a matter of fact and law until February 7, 2015; (2) the Cities' junior-priority municipal ground water rights were not included in the Director's 9.1 cfs mitigation obligation owed to Rangen; (3) Rangen, by stipulating with the Cities, received more water than it would have expected from curtailment; and (4) the Second Mitigation Plan more than offsets the Cities' depletion under their junior-priority ground water rights, thereby providing water to Rangen in a quicker timeframe than curtailment.

4. The Director Increased the Mitigation Obligation

Lastly, by denying the Second Mitigation Plan, in part, the Director actually increased the 9.1 cfs mitigation obligation due to Rangen from junior-priority ground water users. As explained in the IDWR Staff Memorandum:

> The mitigation obligation specified in the January 29, 2014 curtailment order was determined by simulating curtailment of ground water irrigation junior to July 13, 1962 with ESPAM2.1 . . . water uses within municipalities were not included . . . because municipal use is a very small component of water use with the Eastern Snake Plain Aquifer (ESPA).

Exhibit 157 at 2.

The Curtailment Order found material injury to Rangen and determined the amount of water Rangen could expect from the curtailment is 9.1 cfs. R. at 42. In other words, junior-priority ground water users' depletion of the aquifer injures Rangen by decreasing its senior water supply by 9.1 cfs. That is the mitigation obligation. Yet, in denying the first year benefit of the Second Mitigation Plan, the Director increased the amount of water owed to Rangen, even if only by a small amount. According to the Final Order, "The Department did not calculate [in the Curtailment Order] additional depletions caused by diversion of ground water by the Cities or other industrial or commercial uses. As a result, the mitigation obligations of the ground water users were lower, by some small number, because the comprehensive depletionary effects of all diversions were not calculated." R. at 459. Because the Second Mitigation Plan provided Rangen with more water than was required in the Curtailment Order, it was an abuse of discretion for the Director to deny the Cities' first year mitigation benefit to Rangen.

For these reasons, the Cities' ask the Court to remand the Final Order, in part, to recognize the stipulated nature of the Second Mitigation Plan, and recognize the Cities' first year mitigation benefit to Rangen.

B. Whether The Director Erred By Not Approving The Cities' Mitigation Plan As A Plan For Other Compensation?

As an alternative basis, the Cities' asked the Director to review the Second Mitigation Plan as a mitigation plan for "other appropriate compensation . . . ." CM Rule 43.03.c; R. at 451. CM Rule 43.03.c allows the Director to consider, "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." CM Rule 43.03.c. (emphasis added).

In the Final Order, the Director rejected the Cities' alternative basis for approval. As stated in the Final Order:

> A 2009 Department order, cited by the Cities, accepting a mitigation plan based on an agreement between Clear Springs Foods and IGWA that called for monetary compensation instead of water, was recognition of mitigation that addressed the entire mitigation obligation of the ground water users. In contrast, in this instance, Rangen and the Cities are carving out special consideration for one group of junior users, and not the other junior users. The disparity could be reconciled if the Cities were timely mitigating. They are not. Furthermore, in 2009, the Director did not have the benefit of the subsequent court decisions requiring mitigation in both quantity and time of need.

R. at 467.[7]

The Director's analysis of CM Rule 43.03.c in the Final Order is inapposite with his prior analysis of the Rule. 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 43.03.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-

[7] As explained above, the stipulated nature of the Second Mitigation Plan provided that the Cities' were timely mitigating. As also explained above, the Director is factually mistaken that the Cities were not timely mitigating. The Cities' junior-priority municipal depletions have never been considered by the Director in his curtailment scenarios in the Rangen delivery call.

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. p. 26, lns. 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.* The amount of mitigation provided by the Second Mitigation Plan was over and above the mitigation obligation owed to Rangen in the Curtailment Order; yet the Director asked for more mitigation. 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. *Higginson* at 691, 604 P.2d at 55 ("Constructions that would render a statute productive of unnecessarily harsh consequences are to be avoided any ambiguity in a statute should be resolved in favor of a reasonable operation of law.").

Therefore, the Cities ask the Court to remand the Final Order, in part, to recognize the other compensation nature of the Second Mitigation Plan, and recognize the Cities' first year mitigation benefit to Rangen.

C. Whether The Director Erred By Not Approving The Cities' Mitigation Plan That Provided Rangen With More Water Than Would Have Accrued To Rangen From Curtailment?

The Second Mitigation Plan entered into between the Coalition of Cities and Rangen was not a "sweetheart deal," was not Rangen "cherry-picking" winners and losers, and was not a "smoke and mirrors" mitigation scheme that looked good on paper, but provided no water to Rangen. The Second Mitigation Plan proposed an actual recharge project that provided Rangen with actual benefit. Not only would recharge at the Gooding Recharge Site provide Rangen with benefit, the recharge effort was simulated to provide Rangen with six times more water than Rangen would receive from curtailment of the Cities' junior-priority ground water rights. Exhibit 100 at i.[8]

The Curtailment Order states, "holders of ground water rights affected by this Order may participate in a mitigation plan . . . the mitigation plan must provide simulated stead state benefits of 9.1 cfs to Curren Tunnel . . . ." R. at 42. If a junior-priority ground water right holder is not covered by an approved mitigation plan, then the junior right is subject to curtailment. *Id.* The Cities are holders of ground water rights affected by the Curtailment Order. R. at 60-61. As stated previously, this Court has recognized the importance of mitigation plans as part of the junior users' ability to protect their water rights as well as to avoid injury to senior water rights:

> One of the issues that has overshadowed the application of the CMR with respect to mitigation plans is ensuring a timely meaningful response to a delivery call so as to avoid injury to senior rights, while at the same time allowing holders of junior ground water rights the meaningful opportunity to submit and seek approval of a mitigation plan so as to avoid curtailment.

[8] The final analysis of the Cities' recharge effort at the Gooding Recharge Site is being developed.

Memorandum Decision and Order on Petition for Judicial Review, Case No. 2010-3075, p. 14 (Fifth Jud. Dist. January 25, 2011) (emphasis added).

In this case, and very shortly after the Curtailment Order was issued, the Cities filed their First Mitigation Plan for recharge at the Sandy Ponds. Ex. 152. Rangen protested the plan. Ex. 153. Over the course of several months, Rangen and Cities discussed options to mitigate the Cities' ground water rights, which ultimately ended in the stipulated, Second Mitigation Plan. R. at 259-301. Here, the parties agreed to a mitigation plan that would provide water to Rangen above and beyond what Rangen could expect from curtailment under the Curtailment Order, because the Cities' depletions to Rangen were not included in the curtailment or injury analysis. Ex. 157 at 2. "Thus, any benefits accruing from either curtailment of municipal rights or mitigation in lieu of curtailment of municipal rights will provide benefits to the Rangen facility over and above those calculated by IDWR as necessary to satisfy the Rangen delivery call." Ex. 100 at 10. Even the IDWR Staff Memorandum agreed the Rangen mitigation obligation only considered irrigation water rights: "[the mitigation obligation was] determined by simulating curtailment of groundwater irrigation junior to July 13, 1962 with the Enhanced Snake Plain Aquifer Model version 2.1 (ESPAM2.1)," Ex. 157 at 1, and any mitigation provided by the Cities would be more than Rangen could expect from curtailment. The IDWR Staff Memorandum also agreed that the Cities' proposed recharge would exceed the impact of the Cities' junior pumping: "However, as previously noted in this memorandum, the cumulative benefit of the recharge event is predicted to exceed the cumulative impact of the Cities' junior pumping during the first two years of mitigation (April 2014 through March 2016)" Ex. 157 at 7. "Comparison of predicted cumulative volumes from the two-year period between April 2014 and March 2016 indicates that the benefits of the 1,500 AF recharge event (12 AF) are expected

to exceed the impacts of the Cities' junior groundwater pumping (7 AF) during this two-year period." *Id.* at 5-6. Thus, the Cities mitigation plan provides not only a timely and meaningful response, but actually provides Rangen with more water than Rangen would have expected from the Cities, and in a more timely manner:

> The proposed recharge, scheduled to occur in late February and early March 2015, provides a simulated first-year benefit at the Rangen facility that is approximately six times greater than the first-year impacts from out-of-priority pumping. The benefit of the proposed recharge is simulated to arrive at the Rangen facility at approximately the same time as (or before) impacts from out-of-priority municipal pumping (assuming a curtailment date of February 7, 2015).

Exhibit 100 at i.

Therefore, the Director's rationale for rejecting the stipulated mitigation plan because it "**does not** provide water at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of the groundwater withdrawal" is contrary to the evidence in the record. R. 467-68 (emphasis in original). "An action is capricious if it was done without a rational basis. It is arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *In re Delivery call of A&B Irrigation Dist.*, 153 Idaho 500, 511, 284 P.3d 225, 236 (2012). The Director's conclusion to only approve the Cities' mitigation plan starting April 2015 is irrational, without basis and arbitrary and capricious. The Final Order should be reversed and remanded, in part, to recognize the Cities' first-year mitigation benefit to Rangen.

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V. CONCLUSION

Based on the foregoing, the Cities respectfully request that the Court reverse and remand the Final Order, in part, to recognize the Cities' first year mitigation benefit to Rangen.

Respectfully submitted this 28th day of May, 2015.

Chris M. Bromley
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of May, 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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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 PETITION FOR LIMITED INTERVENTION ON BEHALF OF THE IDAHO CITIES OF BLISS, BURLEY, CAREY, DECLO, DIETRICH, GOODING, HAZELTON, HEYBURN, JEROME, PAUL, RICHFIELD, RUPERT, SHOSHONE, AND WENDELL

TO THE IDAHO DEPARTMENT OF WATER RESOURCES AND ALL INTERESTED PARTIES:

The cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone and Wendell ("Cities") by and through their counsel as above noted, hereby petition to be granted status as Intervenors pursuant to the Rules of Procedure of the Idaho Department of Water Resources ("Rules of Procedure") Nos. 154, 156, and 350-354. Intervention in this delivery call action is sought for the limited purpose of supporting the Idaho Ground Water Appropriators, Inc.'s, *Petition to Stay Curtailment and Request for Expedited Decision*, dated February 11th, 2014.

STANDING TO FILE PETITION

On January 29th, 2014, the Director of the Idaho Department of Water Resources entered his "*Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962*" ("Order"). Each of the Cities has one or more water rights that will be subject to curtailment. Order, Pages 11-12. Although Cities are currently not named Respondents, because each of them owns a water right which is subject to curtailment under the

Order, they are "persons" within the meaning of Rules Nos. 005.17 and 350 of the Rules of Procedure which provide that:

Rule No. 005.17:

> "Person. Any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character. For purposes of electronic signature rules, a human being or any organization capable of signing a document, either legally or as a matter of fact."

Rule No. 350:

> "Persons not applicants or claimants or appellants, petitioners, complainants, protestants, or respondents to a proceeding who claim a direct and substantial interest in the proceeding may petition for an order from the presiding officer granting intervention to become a party, if a formal hearing is required by statute to be held in the proceeding."

BASIS FOR PETITION

Some of the Petitioners are members of the Idaho Groundwater Appropriators, Inc. ("IGWA"). Most of the Petitioners are not. Petitioners have not formally participated in the proceedings to date. Petitioners have determined to file the Petition because of the unanticipated scope of the Order, including the curtailment of substantial water rights of each of the Petitioners. As Intervenors, Petitioners also intend to concur in the request for stay of the Order filed by IGWA in its *Petition to Stay Curtailment and Request for Expedited Decision* dated February 11th, 2014. Petitioners further intend to propose a single mitigation plan for the Cities as a group, which will address the unique nature of municipal water rights held by the Cities, including but not limited to the amount of water used for domestic purposes which is not subject to curtailment under Rule 20.11 of the Idaho Department of Water Resources Rules for Conjunctive Management of Surface and Groundwater Resources ("CM Rules"). Because the Order directly relates to any mitigation plan(s) the Cities may propose, intervention in this action is warranted.

The Cities collectively provide groundwater to tens of thousands of residential customers, as well as commercial enterprises, industries, and food processors. Curtailment of water rights owned by the Cities per the Order will have immediate and prolonged deleterious economic and other effects on the Cities themselves and their water users. Curtailment of the water rights as proposed by the Order will also significantly impact the plans of the Cities for reasonably anticipated future needs for water.

COMPLIANCE WITH APPLICABLE RULES

Intervention is appropriate under Rule No. 352 of the Rules of Procedure in that nothing currently contemplated by the Petitioners will disrupt the proceedings, prejudice any existing party, or unduly broaden any of the current issues presented. Intervention will permit the Cities 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 rights, and the lack of the Cities' direct participation in the proceedings to date constitute good cause for the untimely filing of the Petition as required by Rule of Procedure No. 352. Finally, Petitioners have demonstrated a direct and substantial interest in this proceeding as required by Rule of Procedure No. 350.

JOINDER IN PETITION FOR STAY OF ORDER

Petitioners join in IGWA's *Petition to Stay Curtailment* filed on the 11th day of February, 2014, for all the reasons stated in that Petition. In addition to serving tens of thousands of individual residents, the Cities provide water to commercial, manufacturing, and processing entities who employ thousands of persons. The Order will disrupt the operation of those businesses and put thousands of jobs at risk. Immediate and irreparable harm to the Cities and the users of municipal water rights would unnecessarily result without a reasonable amount of time in which mitigation plans can be submitted and processed.

Most of the Petitioners were not aware of the entry of the Order until several days after its occurrence. The Cities intend to formally organize and consolidate their legal representation

at a meeting now set to be held Thursday, February 20th, 2014. Granting a stay will permit the Cities to formally organize as a single body and more efficiently represent the interests of the Petitioners. Unless a stay is granted the Cities would be denied that opportunity.

CONCLUSION

Because the names and addresses of the Petitioners have been stated, a direct and substantial interest of the Petitioners has been demonstrated, good cause for filing this Petition untimely has been shown, intervention will not unduly broaden the issues before the Department, and intervention will best allow Petitioners to address issues in the Order directed to them, this Petition should be granted.

RESPECTFULLY SUBMITTED.

DATED this 14th day of February, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 14 day of February, 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:

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ROBERT E. WILLIAMS

ATTACHMENT B

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	)	**CM-DC-2011-004**
	)	**ORDER DENYING IDAHO CITIES' PETITION FOR LIMITED INTERVENTION**
(RANGEN, INC.)	)	

BACKGROUND

On January 29, 2014, the Director ("Director") of the Idaho Department of Water Resources ("Department") issued the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order").

On February 14, 2014, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell ("Cities") filed their *Petition for Limited* Intervention ("Petition") seeking to intervene in the proceeding.

In response to the Cities' Petition, on February 19, 2014, Rangen, Inc. ("Rangen") filed its *Memorandum in Opposition to the Idaho Cities' Petition for Limited Intervention* and the *Affidavit of J. Justin May in Opposition to the Idaho Cities' Petition for Limited Intervention*.

ANALYSIS

As the Cities acknowledge, the Petition was untimely filed. Specifically, Rule of Procedure 352 provides that, to be considered timely, a petition to intervene must be: "[F]iled at least fourteen (14) days before the date set for formal hearing, or by the date of the prehearing conference, whichever is earlier, unless a different time is provided by order of notice." IDAPA 37.01.01.352. Rangen initiated the water call at issue in this case in 2011. The prehearing conference was held on January 19, 2012. The formal hearing on this matter took place in May 2013. The Cities did not file their Petition until February 14, 2014, well after the formal hearing on this matter.

However, Rule of Procedure 352 provides that "[t]he presiding officer may deny or conditionally grant petitions to intervene that are not timely filed for failure to state good cause

for untimely filing, to prevent disruption, prejudice to existing parties or undue broadening of the issues, or for other reasons." IDAPA 37.01.01.352. Even a timely-filed petition to intervene may be denied when the interests of the party seeking intervention are already adequately represented in the proceeding. IDAPA 37.01.01.353.

The Cities assert the Petition "is sought for the limited purpose of supporting the Idaho Ground Water Appropriators, Inc.'s, *Petition to Stay Curtailment and Request for Expedited Decision*, dated February 11th, 2014." *Petition* at 1. The Cities contend that "nothing currently contemplated by the Petitioners will disrupt the proceedings, prejudice any existing party, or unduly broaden any of the current issues presented." *Id.* at 5. The Cities argue:

> Intervention will permit the Cities 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 [Curtailment] Order, the unique aspects of municipal water rights compared to other types of water rights, including irrigation rights, and the lack of the Cities' direct participation in the proceedings to date constitute good cause for the untimely filing of the Petition as required by Rule of Procedure No. 352.

Id. at 5.

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. After the Director issued the Curtailment Order, the Idaho Ground Water Appropriators, Inc. ("IGWA") timely filed *IGWA 's Petition for Reconsideration* ("IGWA Petition"), Rangen timely filed *Rangen, Inc.'s Motion for Reconsideration and Clarification* ("Rangen Motion"), and the City of Pocatello ("Pocatello") timely filed *City of Pocatello's Motion to Reconsider* ("Pocatello Motion"). On March 4, 2014, the Director issued an *Order on Reconsideration* denying the IGWA Petition and Pocatello Motion and denying the Rangen Motion except for the request to clarify the basis for the amounts designated in the mitigation phase-in. Because the petitions for reconsideration have been denied, there are no further proceedings related to the Curtailment Order for the Cities to participate in.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

The Idaho Cities' Petition for Limited Intervention is DENIED.

DATED this 26th day of March, 2014.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of March, 2014, the above and foregoing document was served on the following by providing a copy in the manner selected:

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