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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 official capacity as Director of the
 Idaho Department of Water Resources, and THE IDAHO
 DEPARTMENT OF WATER RESOURCES,
 Respondents.

Case No. CV 2015-172

**IDAHO DAIRYMEN'S
 ASSOCIATION,
 INC.'S AMICUS
 CURIAE BRIEF**

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 RIGHT
 NOS. 36-02251 & 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.)

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I. INTRODUCTION

Pursuant to this Court's May 18, 2015 *ORDER ON PETITION TO APPEAR AS AMICUS CURIAE*, the Idaho Dairymen's Association, Inc. ("IDA") is submitting this amicus curiae brief to highlight procedural and factual issues contained within the record as they relate to issues identified in the *IDAHO DAIRYMEN'S ASSOCIATION'S PETITION TO APPEAR AS AMICUS CURIAE*.

The present amicus curiae brief is limited to the sole issue of whether or not the Director ("Director") of the Idaho Department of Water Resources ("IDWR") abused his discretion in rejecting an unprotested, stipulated mitigation plan in which a senior priority water right holder agreed to accept mitigation for a material injury caused by the depletion of ground water associated with the ground water pumping activities of the present Petitioners. Specifically, the Petitioners' hold multiple water rights which serve various municipalities throughout the Magic Valley. Some of these water rights are junior in priority to that of Rangen, Inc. ("Rangen"), and a portion of the junior priority water rights are subject to curtailment.

The IDA contends that when parties similarly situated to the present Petitioners and Rangen enter into a stipulated mitigation plan that provides a negotiated benefit to the senior priority water holder, the mitigation plan should be approved in whole by the Director.

A. Interest of The Amicus

The IDA is an Idaho nonprofit corporation duly existing and operating in the State of Idaho since July 5, 1944. Every dairy farmer, or dairy producer, in the State of Idaho is a member of the IDA.

The overarching purpose of the IDA is to develop and sustain an economically viable Idaho dairy industry and to promote dairy interests in the State of Idaho. The IDA regularly considers and acts upon problems and issues concerning the welfare of the Idaho dairy

industry. The IDA is authorized to perform all other acts as are necessary to give effect to the purposes of the IDA as may be authorized by law.

The IDA is also regularly, thoroughly and cooperatively involved at local, state, regional and federal levels to protect and promote the legislative, regulatory and legal interests of its members—the dairy farmers of Idaho. The foregoing often involves the IDA promoting and defending the interests of the Idaho dairy industry and Idaho dairy farmers in administrative and legal proceedings that may, or have the potential to, impact the dairy industry.

The members of IDA are water holders of groundwater and surface water rights with various priority dates. These water rights are essential in the daily operations of these family businesses. The end use of these water rights by dairy farmers is for watering cattle, cleaning milking equipment, cleaning dairy facilities, and irrigating crops.

The present appeal has drawn a considerable amount of interest from the membership of the IDA. The IDA and its membership have in the past and may in the future enter into stipulated mitigation pursuant to Idaho Administrative Procedures Act, Title 37, Title 03, Chapter 11, hereinafter referred to as the *Rules for Conjunctive Management of Surface and Ground Water Resources* or "CMR." The IDA contends that the provisions contained within the CMR provide for many opportunities to resolve water delivery calls through the use of stipulated mitigation plans.

The decision of the Director to deny the stipulated mitigation plan of Rangen and the present Petitioners puts future stipulated mitigation by the IDA and its membership at risk and subjects them unnecessarily to protracted administrative remedies and/or litigation.

II. BACKGROUND¹

The Director abused his discretion by not accepting the subject stipulated mitigation plan in whole, which provided mitigation to a senior water right holder at a time and place stipulated between the Parties. Furthermore, the mitigation which was to be provided for in the stipulated mitigation plan sought to provide mitigation in excess of the amounts of ground water depleted by the Petitioners junior priority water rights subject to curtailment.

The CMR allows for, and is designed to allow, similarly situated parties to enter into a mitigation plan upon whatever terms and conditions that they so desire. Neither the CMR, Idaho decisional case law, nor Idaho statute limits the types of mitigation that can be provided by a junior water right holder to satisfy the delivery call of a senior priority water right holder.

At the most basic level, Rangen as the senior priority water right holder sought the protection of its senior priority water right from material injury by junior priority water right holders. During the course of the proceedings, Rangen and the present Petitioners (junior priority water right holders) entered into negotiations which resulted in a proposed mitigation plan constructed in conformance with the CMR. The negotiations resulted in an equitable outcome for both parties and provided a true benefit to Rangen. As detailed in the record in this matter the benefit that was to be gained by Rangen was in excess of the junior priority water right holders out of priority depletion of ground water.

The Idaho state agency charged with regulating the distribution of water is IDWR. Regulation of distribution is conducted by and through the director of IDWR. In this capacity, the Director is responsible for adopting rules and regulations and carrying out the laws of the

¹ A summary of the present matter is provided in this section of IDA's Amicus Curiae Brief. The IDA hereby incorporates by reference the *Statement of the Case*, Section I, from the *Coalition of Cities Opening Brief*, filed on May 28, 2015. Additionally, the IDA hereby incorporates by reference the *Statement of the Case* from the Association of Idaho Cities and the City of Pocatello's *Amicus Brief*, filed on June 10, 2015.

State of Idaho in relation to "water from the streams, rivers, lakes, ground water and other natural water sources." IDAPA 37.03.11.000.

III. ARGUMENT

In the present instance a delivery call was made by Rangen, who is a senior priority water right holder to certain water rights of the Petitioners. The Petitioners recognize that their ground water pumping has caused a material injury to Rangen as a senior priority water right holder within the area having a common ground water supply. Therefore, the Petitioners and Rangen entered into protracted negotiations in which the Petitioners would mitigate the material injury to the senior priority water right holder by entering into a mitigation plan.

In relation to the present appeal, CMR 43 is the most pertinent section contained within the CMR. CMR 43 allows for the creation of a Mitigation Plan. CMR 43 identifies the form and procedures to be used when submitting a proposed mitigation plan before the Director of IDWR and further identifies factors that *may* be considered by the Director when determining whether or not the proposed plan will prevent injury to a senior priority water right by a junior priority water right.

CMR 43.03 specifically states that "*Factors to be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior water rights include, but are not limited to the following.*" The section goes on to identify fifteen different subsections which are factors that the Director *may* use in determining if the "mitigation plan will prevent injury to senior water rights." *Id.* None of the identified factors are mandatory nor is any one factor weighted above any other factor. Furthermore, it is well settled law within the State of Idaho that the use of "*may*" is a permissive term and not a mandatory requirement and denotes discretion. *Walborn v. Walborn*, 120 Idaho 494 (1991).

In the present matter the Director's order denying the proposed mitigation plan

relied extensively upon the interpretation of one permissive factor. The factor which the Director relied upon was CMR 43.03.b., which states:

Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdraw on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended droughts

The Director has used this specific provision to deny Rangen and the Petitioners' stipulated mitigation plan. The Director provides no legal or factual basis for this denial and as such has made a capricious and arbitrary decision constituting an abuse of his discretion as the Director of IDWR. The Idaho Supreme Court has reasoned that "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 (2012).

The Director's decision was capricious as he relied upon a permissive rule requiring the timing of the mitigation to be consistent with the mitigation of other junior priority users. However, there is no requirement contained within the CMR, Idaho decisional case law, nor Idaho statute which requires that all junior water right holders provide mitigation at the same time or even under the same terms and conditions. There is no rational basis for the Director's decision on this issue he merely denied the stipulated mitigation plan on the basis that it was not consistent with the other junior priority water right holders.

The Director's decision was arbitrary as he disregarded the stipulation of the parties. The Director's sole role in this matter is to ensure that a senior priority water right is not harmed by a junior priority water right. In this case Rangen, as the senior priority water holder,

demonstrated through stipulation to all interested parties that the mitigation contained within the mitigation plan resolved the material injury that they had been suffering due to the pumping activities of the junior priority water right holders. The stipulation was self-evident that Rangen believed they were being made whole by the recharge site in Gooding, Idaho. However, the Director took it upon himself to ignore this fact and not accept the mitigation plan in whole as the parties had desired. As such the Director abused his discretion.

The Director's interpretation of CMR 43.03.b. and his subsequent decision have placed any and all future stipulated mitigation plans in jeopardy as similarly situated parties will no longer be able to negotiate material terms of the proposed mitigation plan in good faith.

The Director's decision also flies in the face of CMR 43.03.o. which specifically states "*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.*" This last factor is explicit, it allows for the parties agree on an acceptable mitigation plan and furthermore the acceptable plan does not have to be in compliance with the other subsections. This again highlights the Director's abuse of discretion as he has made a decision which is contrary to the parties stipulated intent to resolve the matter through negotiation and mitigation.

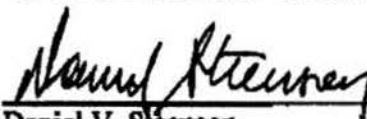
The IDA contends that without the ability to mitigate ground water and surface water delivery calls pursuant to the CMR, they and all other water users within the State of Idaho will be at a significant disadvantage in settling delivery calls in the future. Without the use of stipulated mitigation in any form that the parties desire it creates a situation where all water right holders within the State of Idaho will constantly be on the verge of curtailment when a delivery call is made.

IV. CONCLUSION

IDA contends that there is no legal basis for the Director to reject an unprotested, stipulated mitigation plan that was negotiated and accepted by a senior water right holder. Therefore, for the above stated reasons the IDA requests that this Court reverse and set aside the Director's final order in this matter.

Respectfully submitted this 11th day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 11th day of June, 2015 by the following method:

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