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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.

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

SURFACE WATER COALITION'S BRIEF IN SUPPORT OF PETITIONERS COALITION OF CITIES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

REGULATORY AUTHORITY

OTHER AUTHORITIES

COME NOW, American Falls Reservoir District #2, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (hereinafter "Surface Water Coalition" or "Coalition"), by and through their attorneys of record and hereby submit the following brief in support of the Petitioners *Coalition of Cities' Opening Brief* filed on June 1, 2015. The Coalition supports the Cities' argument set forth in Part IV.A and B. and takes no position as to the remaining issues addressed in the opening brief.

ARGUMENT

After decades of litigation, IDWR should encourage senior and junior water users to settle conjunctive administration disputes. The Coalition of Cities ("Cities") and Rangen, Inc. did just that in the Cities' stipulated Second Mitigation Plan. R. 259. Importantly, Rangen, the senior water right holder, stipulated to a mitigation plan, agreeing that the plan would be "deemed to mitigate the Cities' out-of-priority ground water pumping." R. 261.

Notwithstanding that agreement, the Director of the Idaho Department of Water Resources ("IDWR" or "Department") refused to fully approve the plan, denying it as to the timeframe of April 1, 2014 through March 31, 2015. R. 468. The Director concluded that the plan would not provide replacement water "at the time and place required" and that it would be "ironic and inconsistent" for Rangen to accept such mitigation as compared to what was happening with other junior ground water users (referred to in this brief as "Irrigators"). *Id.* The Director erred as a matter of law. Consequently, this Court should reverse and set aside that decision.

I. The Director's Refusal to Accept the Cities' Stipulated Mitigation Plan is Not Supported by Idaho Law.

The CM Rules specifically allow seniors and juniors to stipulate to mitigation for injury caused by out-of-priority pumping. Rule 43 specifically provides:

> c. Whether the mitigation plan provides replacement water supplies or other appropriate mitigation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed.
>
> * * *
>
> o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.

CM Rule 43.03 (emphasis added).

The above provisions clearly provide seniors and juniors with the opportunity to settle their conjunctive management disputes – even if the settlement "may not otherwise be fully in compliance with these provisions." CM Rule 43.03.o. The rules do not force a senior water user to accept full mitigation from a junior water user as a condition of settlement. The senior water user may take less water, or no water (i.e. monetary compensation). That is the nature of a settlement. *See e.g. Final Order Approving Mitigation Plan and Dismissing Delivery Call* (CM-DC-2014-001, Nov. 21, 2014) (Director accepting stipulation where three ground water districts agreed to pay money for injury to Aquarius Aquaculture, Inc.); *Final Order Approving Mitigation Plan and Dismissing Delivery Call* (CM-DC-2014-002, Feb. 25, 2015) (Director accepting stipulation where three ground water districts agreed to pay money for injury to Ark Fisheries, Inc.).

The Director attempted to justify his denial of the Cities' stipulated plan as follows:

> 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 and need.

R. 467.

> 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. 468, n.3.

The Director's reasons are flawed and not supported by Idaho law. First, the Director's administration analogy is misplaced. Further, the Director doesn't specify in his example what type of "juniors" he is talking about. The Director's example would be correct as to surface administration in the case of 3 users, a 1900 senior, a 1910 junior, and a 1920 junior. If the 1900 senior was short, the junior rights would have to be curtailed to fill his right. If the 1900 senior was short and he settled with the 1920 junior, it's true the 1920 junior could not divert and force a 1910 junior to curtail to satisfy the 1900 senior. In that example, juniors on the stream are in a constant state of regulation in times of scarcity. *See* I.C. § 42-607. In that sense, every water right has an automatic call against the next junior, and rights are routinely curtailed as the water supply drops.

However, conjunctive administration, as is taking place in the Rangen call, is "simply not the same." *See AFRD#2 v. IDWR*, 143 Idaho 862, 877 (2007) ("this case involves interconnected ground and surface water rights. The issues presented are simply not the same"). Indeed, the junior Irrigators affected by Rangen's delivery call do not have a call against the

Cities' junior ground water rights. There is no basis to claim that the Cities' rights should be curtailed to fill other ground water rights.

The Director wrongly concludes that rejection of the plan was necessary because "the Director did not have the benefit of the subsequent court decisions requiring mitigation in both quantity and time and need." R 467. The Director does not cite to the cases he claims require full mitigation in a settlement agreement. Indeed, there are none. Idaho courts have been clear that in administering water rights, senior water users must be provided their water and junior water users may not be permitted to injure senior diversions. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 811 (2011); *A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 654 (2013).

Contrary to the Director's statement, however, there is no case analyzing a stipulated mitigation agreement or mandating that the parties take only the water identified as injury – no more, no less. The Director does point to CM Rule 43.03.b, calling for the Director to consider whether a mitigation plan "will provide replacement water, at the time and place required by the senior-priority water right." R. 361-62. Yet, that provision does not allow the Director to reject a settlement agreement simply because the Director determines that it will not provide water at the time and place required. Indeed, the rules specifically provide that the parties may agree to terms that "may not otherwise be fully in compliance with these provisions." CM Rule 43.03.o. The Director completely overlooked this provision.

In essence, the Director is saying "it's not fair" that Rangen settled with the Cities but did not settle with the Irrigators. Yet, the rules do not require a senior to settle with <u>all</u> junior priority users causing injury. There is no "all or nothing" mandate for settling mitigation obligations. If a senior settles with one junior and not the others in conjunctive administration, that is acceptable under the law.

Settling with one junior user for less than the full amount of water does not mean that the remaining injury burden will shift to the non-settling junior users. For example, if ten juniors injured a senior water user by 10 acre-feet each, then the total mitigation obligation would be 100 acre-feet. If that senior water user then settled with one junior water user for 6 acre-feet, that would not impact the 90 acre-feet obligation remaining for the other nine juniors. However, the 4 acre-feet of unmitigated injury from the settling junior would simply remain as a shortage to the senior's water supply – a burden the senior agreed to take as a result of that settlement. Such a result is acceptable under the law.[1] Nothing in the CM Rules requires a complete settlement of the mitigation obligation.

Moreover, seniors routinely settle with a single or group of junior users, not the entire group causing material injury. In the Surface Water Coalition call, the Director accepted a stipulated mitigation plan between the Coalition and Southwest Irrigation District. *See Final Order Approving Mitigation Plan* (Docket No. CM-MP-2010-01, Nov. 25, 2013). In the Blue Lakes Trout Farm call the senior stipulated to the mitigation plan filed by A&B Irrigation District. *See Stipulation and Joint Motion for Approval of A&B Irrigation District's Rule 43 Mitigation Plan* (CM-MP-2009-02, Feb. 1, 2010). The Director ultimately approved A&B's plan for Blue Lakes. *See Final Order Approving Mitigation Plans (Blue Lakes Delivery Call)* (CM-MP-2009-02, May 7, 2010). The Director also approved a stipulated mitigation plan between Clear Springs Foods, Inc. and several Ground Water Districts (but not all junior ground water users in ESPA). *See Final Order Approving Mitigation Plan* (CM-MP-2009-04, Mar. 16, 2012). Finally, the Director approved stipulated mitigation plans for monetary compensation in other calls in the Hagerman Valley. *See Final Order Approving Mitigation Plan and Dismissing Delivery Call* (CM-DC-2014-001, Nov. 21, 2014) (Director accepting stipulation where three

[1] The result is also "fair" as it requires all juniors to mitigate for their own injury and obligation, not others' injuries.

ground water districts agreed to pay money for injury to Aquarius Aquaculture, Inc.); *Final Order Approving Mitigation Plan and Dismissing Delivery Call* (CM-DC-2014-002, Feb. 25, 2015) (Director accepting stipulation where three ground water districts agreed to pay money for injury to Ark Fisheries, Inc.).

In the Clear Springs case the Director acknowledged:

> 8. CM Rule 43.03 establishes the factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights. CM Rule 43.03.o states as follows: "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."
>
> 9. The Mitigation Plan is entered into between Clear Springs and the GWDs in accordance with CM Rule 43.03.o. *Mitigation Plan* at 2. The purpose of the Mitigation Plan is to fully and completely satisfy "all current and future water delivery calls, water right administration disputes, and challenges to mitigation plans." *Id.* . . .

Final Order Approving Mitigation Plan at 4 (CM-MP-2009-04, Mar. 16, 2012).

While the Director recognized CM Rule 43.03.o and the settlements in these prior cases, he refused the same in the matter between the Cities and Rangen. The Director's action is inconsistent with his prior actions, contrary to the rules, creates a disincentive to settlement of disputes in cases where multiple water users are involved, and constitutes an error of law that should be reversed and set aside. *See Mercy Med. Ctr. v. Ada County*, 146 Idaho 226 (2008) (the court is free to correct errors of law in an agency's decision).

The Coalition is rightly concerned about the Director's actions in this case, and the refusal to accept a settlement between a senior and junior user. Whereas the Coalition has previously entered into agreements (i.e. Southwest Irrigation District), and has negotiated and is presently negotiating agreements with other ground water users (i.e. City of Pocatello, Aberdeen-

American Falls Ground Water District, *et al.*[2]), the Department's erroneous denial of a stipulated plan creates uncertainty that the parties to a dispute may not be able to fashion a remedy agreeable to both.

The Director's erroneous decision in this case should be reversed to encourage settlement and to ensure seniors and juniors maintain the right to settle their disagreements in conjunctive administration. This is particularly the case where Idaho law encourages settlements between litigants. *See Aguirre v. Hamlin*, 80 Idaho 176, 180-81 (1958) ("Compromises and settlements are favored by the law and will be sustained if fairly made"). While the Director may not agree with the settlement entered into between the Cities and Rangen, that disagreement is not sufficient grounds to deny the mitigation plan.

CONCLUSION

The Director's action denying the Cities' stipulated plan is inconsistent with his prior actions concerning other stipulated plans and does not have a sound legal basis. Since the Cities provided mitigation for their injury to Rangen's senior right, and that mitigation was acceptable to the injured party, the Director had no basis to deny the stipulated plan.

Instead, the Director's appropriate action would be to adjust the mitigation required by the remaining Irrigators so that the remaining Irrigators did not have to mitigate for the injury caused by the Coalition of Cities. This takes into account the fact that the injury caused by the Cities was deemed mitigated by the injured senior water user.

In summary, the Coalition agrees with the Cities and requests the Court reverse and set aside the Director's final order in this case.

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[2] *See Order Approving Stipulation and Granting Joint Motion* (CM-DC-2010-001, CM-MP-2009-07, May 8, 2015).

Respectfully submitted this 11th day of June, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of June 2015, I served true and correct copies of the foregoing upon the following by the method indicated:

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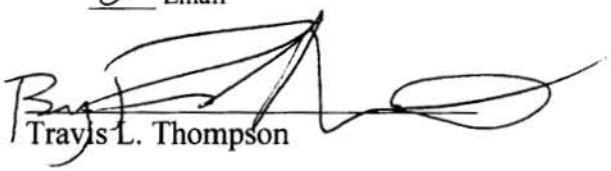

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