IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

CITIES OF BLISS, BURLEY, CAREY, DECLO, DIETRICH, GOODING, HAZELTON, HEYBURN, JEROME, PAUL, RICHFIELD, RUPERT, SHOSHONE, AND WENDELL, Petitioners, vs. GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondents.	**CASE NO. CV-2015-172**
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.	

COALITION OF CITIES' REPLY BRIEF

On Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

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I. INTRODUCTION

On May 28, 2015, the Coalition of Cities' ("Coalition" or "Cities")[1] filed its *Opening Brief*, asking the Court to reverse and remand the Director of the Idaho Department of Water Resources' ("Director" or "IDWR") *Order Confirming Final Order Conditionally Approving Cities Second Mitigation Plan* ("Final Order"), in which the Director effectively wrote Rule 43.03.c and Rule 43.03.o out of the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 *et seq.* ("CM Rules"). Unique to any proceeding in the history of the conjunctive management delivery calls and associated mitigation plan proceedings, junior- and senior-priority water users came together to support the Coalition in its effort to see meaning given to CM Rule 43.03.c and CM Rule 43.03.o. Briefs in support of the Coalition were filed by the Association of Idaho Cities ("AIC") and the City of Pocatello ("Pocatello"),[2] the Surface Water Coalition ("SWC"),[3] the Idaho Dairymen's Association, Inc. ("IDA"),[4] and Rangen, Inc. ("Rangen").[5] The presence of these diverse interests highlights the errors in the Final Order.[6]

On July 15, 2015, IDWR filed its *Respondent's Brief* ("IDWR Brief"), opposing the Coalition and the entities that support the ability for junior- and senior-priority water users to settle their differences through approval of stipulated mitigation plans. According to IDWR, "The [Final Order] establishes sideboards consistent with the prior appropriation doctrine for

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[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.
[2] The *Amicus Brief of the Association of Idaho Cities and the Ci of Pocatello* was filed on June 10, 2015 (hereinafter "AIC/Pocatello Brief").
[3] The *Surface Water Coalition's Brief in Support of Petitioners Coalition of Cities* was filed on June 11, 2015 (hereinafter "SWC Brief").
[4] The *Idaho Dairymen's Association, Inc.'s Amicus Curiae Brief* was filed on June 11, 2015 (hereinafter "IDA Brief").
[5] *Rangen, Inc.'s Intervenor Brief* was filed on June 11, 2015 (hereinafter "Rangen Brief").
[6] The arguments set forth in the AIC, Pocatello, SWC and IDA briefs are adopted by the Coalition under IAP Rule 35(g).

future stipulated mitigation plans, where the stipulated plan protects some juniors but not others . . ." *IDWR Brief* at 14. As will be discussed below, and as evidenced in the briefs filed in opposition to the Final Order, the Director provides no "sideboards" for consideration of stipulated mitigation plans and, despite IDWR's argument to the contrary, the arbitrary and capricious result discourages the filing of mitigation plans pursuant to CM Rule 43.03.c and/or CM Rule 43.03.o. *IDWR Brief* at 14 ("Arguments that the Director's decision . . . will 'chill' future negotiations and provide 'no incentive to enter into mitigation plans' are hyperbole."). The result of the Final Order is an erroneous reading of the CM Rules, Idaho law, and advances bad public policy for resolving conjunctive management disputes.

II. ARGUMENT

A. The Stipulated Nature Of The Second Mitigation Plan Has Always Been A Primary Focus Of This Proceeding

While IDWR relegates its analysis of CM Rule 43.03.c and CM Rule 43.03.o to the back-half of its response, the argument is front and center to the issues on review. IDWR claims the Coalition "alternatively argued that CM Rule 43.03.c and CM Rule 43.03.o require approval of the mitigation plan. . . . . The Cities now offer this argument as the centerpiece of their case in their appellate proceeding." *IDWR Brief* at 14. The stipulated nature of the Second Mitigation Plan has always been a primary argument, and was the reason the Plan was put together. R. 260 ("this Mitigation Plan is entered into between the Cities and Rangen by stipulation. CM Rule 43.03.o.") (emphasis added); R. 447-451 (Cities' *Post Hearing Brief* regarding stipulated nature of the Plan). As explained in the *Opening Brief*, the Cities pursued the Second Mitigation Plan only after Rangen's protest to the First Mitigation Plan. *Opening Brief* at 3-6. The effective difference between the plans was use of the Gooding recharge site over the Sandy Ponds recharge site. *Id.* Rangen stipulated to the Second Mitigation Plan so that the Cities would use a

recharge site that Rangen believed would provide better benefit to Rangen's source of supply. *Rangen Brief* at 5 ("The Cities' first mitigation plan proposed recharge at the Sandy Ponds. Rangen opposes recharge at the Sandy Ponds for a variety of reasons."); *Rangen Brief* at 4 ("Rangen's decision to agree to the Cities' Second Mitigation Plan was Rangen's decision to make. . . . . The purpose of the Memorandum Agreement is in part to study the efficacy of a recharge site referred to as the Gooding Recharge site which Rangen . . . believe[s] has promise for restoring aquifer levels and spring flows at the Curren Tunnel and other springs . . . .").

It was not until the Director denied the stipulated nature of the Plan, and focused solely on his interpretation of timing, R. 359 ("Cities entered into an agreement with Rangen to undertake a pilot managed recharge program. . . . . The Cities' Second Mitigation Plan will not deliver mitigation water to Rangen by January 19, 2015."); R. 414-420 (IDWR *Staff Memo*, focusing on timing), that the Cities were forced to address the issue, R. 452 (Cities' *Post-Hearing Brief* regarding timing). The issue of timing was expressly understood by Rangen: "Because the Cities' Second Mitigation Plan does not provide water sufficient to timely offset the impact of Coalition members' out-of-priority pumping, the mitigation plan could not have been approved over Rangen's objection. As explained below, Rangen's agreement to the Cities' Second Mitigation Plan is an important factual and legal consideration." *Rangen Brief* at 3.[7]

As acknowledged by all parties in this proceeding, the CM Rule 43 factors are permissive. The question of "tim[ing]" is among those permissive factors the Director "may" consider in his review of mitigation plans. CM Rule 43.03.b; CM Rule 43.03. There is no analysis by the Director as to why he chose to elevate the timing factor in CM Rule 43.03.b over

[7] Assuming the operative curtailment date was February 7, 2015, *Order Granting Motion to Stay Curtailment*, CV-2015-237 (Fifth Jud. Dist., Jan 22, 2015), the Coalition of Cities' junior-priority ground water rights were fully mitigated in the first year of the phased-in curtailment. Ex. 141; Tr. p. 63, lns. 22-25; p. 64, lns. 1-8.

the factors of "other appropriate compensation," CM Rule 43.03.c, and the presence of "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.o. IDWR has not asked for deference, *Pearl v. Board of Professional Discipline of Idaho State Bd. of Medicine*, 137 Idaho 107, 113, 44 P.3d 1162, 1168 (2002), nor should deference to the agency's interpretation of the CM Rules in this proceeding be given deference. The Director's interpretation of CM Rule 43.03.b, 43.03.c, and 43.03.o is unreasonable and should not stand. *Higginson v. Westergard*, 100 Idaho 687, 691, 604 P.2d 51, 55 (1979) ("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.").[8]

B. CM Rule 43.03.c and CM Rule 43.03.o Mitigation Plans Can Be Approved In A Way That Gives Meaning To The Intentions Of The Parties And The CM Rules

The *IDWR Response* is replete with statements that the Director did not approve the stipulated and other appropriate compensation nature of the Second Mitigation Plan because it treated ground water users differently:

> The Director determined that the Cities' Second Mitigation Plan should not be approved as a stipulated plan for "other appropriate compensation" under CM Rule 43.03 because it did not address "the entire mitigation obligation of the ground water users" but rather "carv[ed] out special consideration for one group of junior users."
>
> . . . .
>
> A stipulated mitigation plan that does not actually provide full mitigation in the form of the prescribed about of water delivered at the place and time of need warrants careful consideration. It is important to ensure that a stipulation not result in a situation where some juniors are curtailed but one is not, even though none of the juniors are actually providing timely mitigation in fact.

[8] The Director's failure to appropriately analyze and give any meaning to CM Rule 43.03.c and CM Rule 43.03.o prejudiced the Cities' substantial rights. *State v. Kalani-Keegan*, 155 Idaho 297, 301, 311 P.3d 309, 313 (Ct. App. 2013) (violation of a substantial right "in the fairness of the decision-making process and the outcome of the proceeding – namely, proper adjudication through application of correct legal standards which, upon violation, are prejudiced.").

. . . .

> Allowing a senior water right holder to favor certain junior water right holders over others when none are actually mitigating is contrary to priority administration. This also opens the door to favoritism in conjunctive management delivery calls.

IDWR Response at 11-12 (emphasis in original).

First, the emphasized statement that "none of the juniors are actually providing timely mitigation" is inapposite with the record. The Idaho Ground Water Appropriators, Inc. ("IGWA"), on behalf of its members, were providing mitigation to Rangen by the "Morris" credit. R. 461. While the amount of mitigation ascribed to the Morris credit was ultimately reduced, mitigation was being provided to Rangen. If a basis for the Director's Final Order was that "none" of the juniors were providing mitigation to Rangen, then the Final Order cannot stand, as it is not supported by fact. Idaho Code § 67-5279(d).

Second, just like the Final Order, the IDWR Response provides no citation in law to support the Director's position that, in order to approve a mitigation plan based on stipulation or other compensation, the mitigation plan cannot "protect[] some juniors but not others." *IDWR Response* at 14. The Cities and Rangen conceived a mitigation plan that provides Rangen with water at the time and place Rangen believed was most beneficial. There is nothing in the record to indicate that Rangen was "picking and choosing" winners and losers, that a "sweetheart" deal was formulated to prevent the Cities from being curtailed. What is in the record is evidence of extensive bargained for consideration, over the course of many months, that lead to a mitigation plan that was acceptable to Rangen, and provided it with real benefit. *Rangen Brief* at 4 ("Rangen's decision to agree to the Cities' Second Mitigation Plan was Rangen's decision to make. The Director should not have second-guessed that decision. Having said that, it was neither ironic nor inconsistent for Rangen to support the Plan and the Director's findings to the

contrary are not justified. . . . . The purpose of the Memorandum Agreement is in part to study the efficacy of a recharge site referred to as the Gooding Recharge site which Rangen . . . believe[s] has promise for restoring aquifer levels and spring flows at the Curren Tunnel and other springs. . . . . As part of the Agreement, the Cities have agreed to pay the majority of the costs for the conveyance, engineering, and construction . . . ."). Because of the "obvious public policy favoring amicable settlement of litigation, . . . agreements accomplishing this result will be disregarded only for the strongest reasons." *Lomas & Nettleton Co. v. Tiger Enterprises, Inc.* 99, Idaho 539, 542, 585 P.2d 949, 952 (1978); *see* CM Rule 10.12 (CM Rules incorporate all aspects of "Idaho Law."). By failing to provide citation or authority for its argument, IDWR has provided no reason to override "the obvious public policy" of encouraging settlement.

Lastly, no junior-priority ground water right is the same, which supports why mitigation plans for other compensation and stipulation were included in the CM Rules. While every ground water right listed in a curtailment order is junior, no one right impacts the senior in the same way. Based on point of diversion, place of use, purpose of use, and season of use, each right will have a different rate of consumption, a different return flow (or none at all), and a different modeled impact. *See American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 877, 154 P.3d 433, 448 (2007) ("When water is withdrawn from an aquifer . . . the impact elsewhere in the basin or in a hydrologically connected stream is typically much slower.") Under the Director's rationale of fairness, if a handful of juniors and the senior are able to sit down and craft solutions, their ability to work through problems is not welcomed. "The Director determined that the Cities' Second Mitigation Plan should not be approved . . . because it did not address 'the entire mitigation obligation of the ground water users' but rather 'carved out special consideration for one group of junior users." *IDWR Response* at 11. A

logical outgrowth of this rationale would lead to the conclusion that if only a handful of recalcitrant juniors could not reach an agreement on acceptable mitigation, then all juniors must be curtailed, even if they had reached mitigation agreements. That is not a fair result.

While the prior appropriation doctrine has been characterized as "harsh," it is a doctrine rooted in fairness. *American Falls* at 869, 154 P.3d at 440. Contrary to the arguments of IDWR, the prior appropriation doctrine supports the outcome that mitigation does not have to be an all or nothing, zero-sum game, whereby mitigation is only allowed if all juniors are protected from curtailment.[9] A fundamental tenet of the prior appropriation doctrine is preventing injury to seniors, as well as juniors. *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 41, 147 P. 1073, 1078 (1915). Idaho law favors the optimum use of water resources in the public interest. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011); *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977); *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960). Provided injury is avoided, fairness is achieved. These principles support the ability for individual juniors (or a group of juniors) to craft mitigation solutions with the materially injured senior. Therefore, under a conjunctive management curtailment order, as long as an agreement between the materially injured senior and a junior (or group of juniors) does not injure the remaining juniors by increasing the mitigation obligation, fairness is achieved. *Goodrich* at 41, 147 P. 1078 (When a senior user sought to change his point of

[9] The only "sideboard" that IDWR advances for CM Rule 43.03.c and CM Rule 43.03.o mitigation plans is that they protect all juniors. *IDWR Response* at 14 ("The Director's order establishes sideboards consistent with the prior appropriation doctrine for future stipulated mitigation plans, where the stipulated plan protects some juniors, but not others.") It is unclear how a mitigation plan could ever protect every junior-priority ground water user. While there are ground water districts across the Eastern Snake Plain, only "ground water irrigators" are required to be "members." Idaho Code § 42-5214(1). Year-round pumpers, like cities, dairies, and industry (referred to as "nonirrigators" in Chapter 52, Title 42, Idaho Code) do not have to join ground water districts. Idaho Code §§ 42-5214(2), -5214(3). Therefore, even ground water districts cannot mitigate for every junior-priority ground water right in an area of common ground water supply. As such, there is no vehicle in Idaho law to support the Director's theory.

diversion or amend an existing permit, "the junior appropriator had a vested right in the continuance of the conditions that existed on the stream at and subsequent to the time they made their appropriation, unless the change can be made without injury to such right."); *see also SWC Brief* at 5 ("Settling with one junior for less than the full amount of water does not mean that the remaining injury burden will shift to the non-settling, junior users. . . . . [T]he 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.").[10]

For purposes of illustration, it can be demonstrated how the Cities' Second Mitigation Plan should have been approved by the Director, in a manner that gave meaning to the CM Rules, and was fair to all junior-priority ground water users. According to IDWR, the first year of the phased-in curtailment began on April 1, 2014. R. 415.[11] The first year benefit to Rangen under the five-year phased-in curtailment was 3.4 cfs, 5.2 cfs in the second year, 6.0 cfs in the third year, 6.6 cfs in the fourth year, and 9.1 cfs in the fifth year. R. 414. According to Dr. Petrich, "The simulated aggregate impact of . . . out-of-priority Coalition pumping is 0.001 cfs (0.45 gpm) during year 1 . . . ." Ex. 100 at 9. IDWR acknowledged, "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)." R. 420. When simulated recharge began in February 2015, Dr. Petrich opined, "the first-year recharge benefit

[10] Indeed, this type of scenario has been examined by the Director and deemed appropriate. *See Order in the Matter of Distribution of Water to Water Right Nos. 36-02356A, 36-07210, and 36-07427 [Blue Lakes Trout Farm, Inc.]* (May 19, 2005) (agreement between senior and junior was not additive to the material injury obligation to all junior-priority ground water users).

[11] By making this statement, the Cities do not waive the argument that February 7, 2015 was the operative date for determining the Cities' mitigation requirement to Rangen, and do not waive the argument that the Cities were fully mitigated, as a matter of fact, by recharge at the Gooding recharge site in the first year of the phased-in curtailment. Furthermore, the Cities do not waive the argument that the Director increased the mitigation obligation to Rangen by requiring the Cities to provide mitigation in excess of the 9.1 cfs material injury.

to the Curren Tunnel (an average of 0.006 cfs, or 2.69 gpm) is approximately 6 times greater than the simulated 0.001 cfs (0.45 gpm) average first-year impact . . . ." Ex. 100 at 10.

Therefore, the issue before the Director was how to reconcile the CM Rules by giving meaning to the intentions of the parties to the Second Mitigation, yet assure fairness to other junior-priority ground water users. Recognizing that the Second Mitigation Plan provided Rangen with actual water, at a site that Rangen deemed beneficial, and expressly stipulated to the timing, the Director understood the intentions of the parties. The Director also had the technical information before him to understand that the Cities' depletions to Rangen were 0.001 cfs in the first year of the phased-in curtailment, but that by the second year, the Cities' recharge effort would benefit Rangen six times greater than curtailment. With this knowledge, the Director should have reduced the total first year mitigation obligation from 3.4 cfs to 3.399 cfs, as Rangen expressly agreed to the first year reduction (in return for a recharge site of its choosing, with a second year benefit six times greater than curtailment) when it entered into the Second Mitigation Plan. Moreover, by stipulating with the Cities, the mandatory "contingency provision[]" in the CM Rule 43.03.c is satisfied. *In the Matter of Distribution of Water to Various Water Rights*, 155 Idaho 640, 654, 315 P.3d 828, 842 (2013).

Approving the stipulated and other appropriate compensation nature of the Second Mitigation Plan would have given meaning to the CM Rules, the intentions of the parties, and resulted in fair treatment of other junior-priority ground water users. "Compromises and settlements are favored by the law and will be sustained if fairly made." *Aguirre v. Hamlin*, 80 Idaho 176, 180-81, 327 P.2d 349, 351 (1958).

C. IDWR Misses The Outcome Of The "Fish Or Money" Case

The Cities asked the Director to treat the Second Mitigation as a CM Rule 43.03.c plan

for "other compensation," R. 448, and that the Second Mitigation Plan was consistent with the Director's prior analysis of CM Rule 43.03.c in what is informally referred to as the Ground Water Districts' ("GWD") "Fish or Money Plan." *See Opening Brief* at 19-22. In the Final Order, the Director gave no analysis of the Cities' legal argument, or the Fish or Money Plan, other than dismissing the comparison out-of-hand, because "the Director did not have the benefit of the subsequent decisions requiring mitigation in both quantity and time and need." R. 467. As correctly pointed out by the SWC, "The Director does not cite to the cases . . . [because] there are none. . . . . [T]here is no case analyzing a stipulated mitigation agreement or mandating that the parties take only the water identified as injury – no more, no less." *SWC Brief* at 4.

The *IDWR Response* attempted to support the Director's decision by distinguishing a case the Cities brought to the Director's attention, which was a decision regarding IDWR's analysis and application of CM Rule 43.03.c. *Opening Brief* at 20. Like the Final Order, the *IDWR Response* tried to distinguish the case, but it is now clear that IDWR was not aware of what was actually decided, and what the Cities were asking the Director to reconcile.[12] The *IDWR Response* stated, "while the Cities relied on a 2009 Department order regarding a mitigation plan for 'other appropriate compensation,' R. 467, that order is distinguishable. In that order, the Director accepted a mitigation plan based on an agreement between Clear Springs Foods and IGWA that called for monetary compensation instead of water." *IDWR Response* at 12

[12] It is apparent that both IDWR and the Director did not understand which Department order and decision on judicial review the Cities were discussing. Both the *IDWR Response* and the Final Order reach the same incorrect conclusion that the GWD's effort to force monetary compensation on Clear Springs was accepted. *Compare IDWR Response* ("the Director accepted a mitigation plan based on an agreement between Clear Springs Foods and IGWA that called for monetary compensations instead of water.") *and* Final Order, R. 467 ("accepting a mitigation plan based on an agreement between Clear Springs Foods and IGWA that called for monetary compensation instead of water . . . .") *with Order on Petition for Judicial Review*, Case No. CV-2009-00241 & 2009-00270, p. 13 (Fifth Jud. Dist. Dec 4, 2009) ("The Director did not Err in Denying Portions of the Ground Water Users' *Second Mitigation Plan* providing for monetary compensation or delivery of fish.") (emphasis added). Therefore, the Director's analysis in the Final Order of the Fish or Money Plan is not supportable and must be reversed.

(emphasis added).

As the Court is aware, and as was discussed in the Cities' Opening Brief, the Fish or Money Plan was premised on the GWD's argument that the Director could force Clear Springs Foods, Inc. to accept money or replacement fish in lieu of water. *Opening Brief* at 20-22 (discussing *Order on Petition for Judicial Review*, Case Nos. CV-2009-00241 & 2009-00270 (Fifth Jud. Dist. Dec 4, 2009)). The Director refused, and this Court affirmed, stating that monetary compensation could only be approved if there was an agreement between the parties. *Id.* What is critical to understand from the Fish or Money Plan is the Director and the Court agreed that negotiated, mutual consideration of agreeable mitigation would lead to an approvable CM Rule 43 plan. *Id.*

Indeed, and as pointed out by the SWC, the Director has been accepting negotiated, mutually agreed upon CM Rule 43.03.c mitigation plans on behalf of the GWDs, yet was unwilling, without any articulated analysis as to why he would not accept the CM Rule 43.03.c basis of the Cities' Second Mitigation Plan. *SWC Brief* at 5-6 ("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 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.)." Failure to provide any analysis of CM Rule 43.03.c, and the Fish or Money Plan, is arbitrary, capricious, and supports the Court reversing and remanding the Final Order.

D. The Legally Operative Start Date For The Cities' Second Mitigation Plan Was February 7, 2015

In regard to the timing of the Cities' Second Mitigation Plan, IDWR states that the Cities are incorrect in their legal argument that they were protected from curtailment until February 7, 2015. "The Cities argued to the Director that the 'legally operative starting date for examining the benefits of curtailment to Rangen in the first year' is February 7, 2015 . . . and argue to this Court that 'Rangen was fully mitigated until January 18, 2015.'" *IDWR Response* at 6. IDWR's understanding is incorrect. As this Court is aware, members of IGWA were protected from curtailment by this Court's *Order Granting Motion to Stay Curtailment*, CV-2015-237 (Fifth Jud. Dist., Jan. 22, 2015). There, the Court stayed curtailment until February 7, 2015: "IGWA shall complete the Magic Springs mitigation project and deliver water to Rangen per the Director's specifications . . . and deliver 7.81 cfs as mitigation to Rangen to make up for the delay on or before February 7, 2015." *Order Granting Motion to Stay Curtailment* at 2.[13] As members of IGWA, R. 460, the Cities were protected from curtailment until that date.

Because February 7, 2015, is the legally operative starting date for examining the benefits of curtailment to Rangen in the first year of the phased-in period of curtailment, the Cities' expert used February 7, 2015, as his starting date for simulating curtailment. Tr. 63:11-21; Ex. 141; Ex. 142. While the Cities were authorized to begin recharge as of February 15, 2105, Ex. 159, Dr. Petrich chose February 18, 2015, as his starting date for simulating the benefits of recharge, Tr. 63: 11-14; Ex. 141; Ex. 142. Exhibits 141 and 142 clearly show, in the first year of the phased-in curtailment, the simulated benefit of curtailment is greatly outpaced by the benefit of recharge. Ex. 141; Ex. 142. The same is also true for the second year of the phased-in

[13] IDWR argues it is not possible for junior-priority ground water users to make up a mitigation obligation by delivering "extra mitigation water . . . ." *IDWR Response* at 7. This Court's *Order Granting Motion to Stay Curtailment* shows otherwise.

curtailment. *Id.* Therefore, both legally and factually the Cities were mitigated in the first year of the phased-in period of curtailment.[14]

III. 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. Mitigation in the first year occurred as a matter of fact, because the starting date for curtailment began on February 7, 2015. Mitigation in the first year occurred as a matter of law, because the Second Mitigation Plan was entered into between the Cities and Rangen, consistent with CM Rule 43.03.c and CM Rule 43.03.o. The Director's reading of the CM Rules and Idaho law is erroneous and should be reversed.

Respectfully submitted this 10th day of August, 2015.

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[14] While IDWR's theory of an October 2014 starting date of curtailment may not have affected junior-priority irrigators, the Cities (and Dairymen), who rely on year-round pumping of ground water, were subject to curtailment during the winter months. As such, the Cities' real property water rights were affected, violating their substantial rights. *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 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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