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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 REPLY BRIEF

IN THE MATTER OF DISTRIBUTION OF WATER TO 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.)

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 reply brief in support of their opening brief filed in this matter.

The Coalition's reply specifically addresses certain points raised by Respondents Director Gary Spackman and the Idaho Department of Water Resources ("IDWR" or "Department") in the *Respondents' Brief* filed on July 15, 2015 ("*IDWR Br.*"). For the reasons described below the Court should grant the relief requested by the Coalition of Cities ("Cities") and reverse and set aside the Director's decision.

ARGUMENT

The Respondents claim conditional approval of the Cities' *Second Mitigation Plan* was a justified use of the Director's discretion under the CM Rules. *IDWR Br.* at 10. The Respondents further argue that the Director's decision was appropriate because Rangen cannot "designate" which juniors get curtailed and that water right administration cannot be based upon "favoritism." *Id.* at 12. In essence, the Respondents didn't like the result of the stipulated plan.

IDWR and the Director mischaracterize the facts and effect of the stipulated mitigation plan. Indeed, no junior user was curtailed in response to Rangen's delivery call (despite the Director's efforts to curtail certain groundwater users, notably not irrigators, during the winter of 2014-15). Moreover, Rangen and the Cities stipulated to a plan whereby the Cities would provide additional mitigation water, above and beyond the Cities' calculated injury to Rangen's senior water rights. *See Cities' Opening Br.* at 25 ("The proposed recharge . . . 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.") (emphasis in original). As such, the Director abused any discretion by refusing a stipulated plan that was consistent with the CM Rules. In sum, the Respondents' arguments are without merit and should be rejected.

I. The Director's "Special Consideration" Reason Does Not Justify his Erroneous Decision.

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 Respondents give no effect to these provisions in their response.

Instead, the Respondents claim that CM Rule 43.03.o is only applicable depending upon the "juniors" involved.[1] Moreover, the Respondents wrongly justify the Director's decision in this case on the theory that a senior cannot only settle with some juniors or show "favoritism" in conjunctive management delivery calls. *IDWR Br.* at 11-12. The Respondents' flawed reasoning is set forth as follows:

> 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.

IDWR Br. at 11 (emphasis in original).

The Respondents' argument is nonsensical. Essentially, the agency claims that if a senior does not receive the required water then he or she can only stipulate to an untimely mitigation plan on the condition that the plan involves all junior priority groundwater users. Idaho law, including the CM Rules, makes no such requirement.

If a senior water user enters into a stipulated mitigation plan with a single junior user that is the senior's choice. The Director cannot interfere with such agreements on the basis that he believes it isn't "fair" to other juniors. Rangen's settlement with the Cities allowed the Cities to mitigate their injury. As long as the injury inflicted by the Cities was deducted from the total mitigation obligation of other juniors (which it wasn't even calculated in the first place) then there was no rational reason to refuse the settlement. Stated another way, each junior ground water user stands on his or her own accord as against the senior. An individual mitigation plan is not dependent upon the outcome of administration as to other junior water users. Moreover, this is not about a case of the senior designating which non-mitigating junior water right holders "will or will not be curtailed." *IDWR Br.* at 12. Again, no juniors were actually curtailed in this

[1] It's worth asking what the agency's response would have been had the "Irrigators" not the "Cities" submitted the stipulated plan for approval.

matter. Every junior right holder has the ability to mitigate his or her own water use. *See* CM Rule 43. Nothing requires an "all or nothing" approach in mitigation. Accordingly, if a single user, or in this case a group of cities, enter into a stipulation to mitigate their use with a senior, the approval of that agreement is not contingent upon the outcome of administration as to the remaining junior users.

In sum, the Director cannot legally refuse the stipulated mitigation plan on the grounds that he doesn't think it is "fair" to other juniors. As long as the stipulation complies with Idaho law and does not increase the other juniors' obligation to the senior, the Director must accept the stipulated plan. As evidenced by the Director's actions in other cases where stipulated plans have been approved, despite not all juniors being party to such settlements (*see Coalition Opening Br.* at 5), the Director had no legal basis to refuse the agreement presented here. The Court should reverse the agency accordingly.

CONCLUSION

The Director's refusal to accept the stipulated mitigation plan between Rangen and the Coalition of Cities is in error. The decision does not comply with CM Rule 43 and instead purports to give the Director unfettered discretion in deciding what's "fair" when it comes to analyzing individual mitigation plans. The Coalition agrees with the Cities and requests the Court reverse and set aside the Director's final order in this case.

Respectfully submitted this 12th day of August, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of August 2015, I served true and correct copies of the foregoing upon the following by the method indicated:

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