**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA**

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| CITIES OF BLISS, BURLEY, CAREY, DECLO, DIETRICH, GOODING, HAZELTON, HEYBURN, JEROME, PAUL, RICHFIELD, RUPERT, SHOSHONE, and WENDELL,<br><br>Petitioners,<br><br>vs.<br><br>GARY SPACKMAN in his capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES,<br><br>Respondents,<br><br>and<br><br>RANGEN, INC.,<br><br>Intervenor.<br><br>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<br><br>**MEMORANDUM DECISION AND ORDER** |

## I.

## STATEMENT OF THE CASE

### A. Nature of the case.

This case originated when the Petitioners (hereinafter, "the Cities") filed a *Petition* seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department"). The order under review is the Director's *Order Confirming Final Order Conditionally Approving Cities Second Mitigation Plan* ("*Final Order*") issued on February 13, 2015. The *Final Order* conditionally approves a mitigation plan submitted by the Cities in response to a delivery call made by Rangen, Inc. ("Rangen"). The Cities assert that the *Final Order* is contrary to law in several respects and request that this Court set it aside and remand for further proceedings.

### B. Course of proceedings and statement of facts.

On December 13, 2011, Rangen filed a *Petition for Delivery Call* with the Department. It alleged Rangen is short water under two senior rights due to junior ground water use. The Director issued a curtailment order concluding that Rangen's rights are being materially injured. R., pp.1-104. The order provided for the curtailment of certain ground water rights, including those for municipal use, that divert from the Eastern Snake Plain Aquifer ("ESPA") with priority dates junior to July 13, 1962. *Id.* at 42. The Director instructed, however, that affected juniors could avoid curtailment if they proposed and had approved a mitigation plan that provided Rangen with phased-in mitigation over a five-year period as follows: 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. *Id.* The time period associated with the first year began April 1, 2014 and ended March 31, 2015. *Id.* at 357-358 & 460. Thereafter, the second year commenced April 1, 2015, and so on and so forth. *Id.*

The Cities are holders of junior ground water rights for municipal use and received notices of curtailment. *Id.* at 42, 170, 228-29, 312. They submitted two mitigation plans to the Director in response. Ex.152; R., p.259. The first was submitted on April 25, 2014. Ex.152. It proposed mitigation in the form of managed ground water recharge at a location referred to as the Sandy Ponds. *Id.* Rangen protested the use of the Sandy Ponds recharge site, and informal discussions commenced between the Cities and Rangen. Ex.153; Tr., p.26. Rangen's concerns

with the Sandy Ponds site were addressed by identifying an alternative recharge site located near Gooding, Idaho ("Gooding Recharge Site"). *Id.* Rangen favored the Gooding Recharge Site, and the Cities proceeded to develop a second mitigation plan utilizing that site.

The Cities submitted their second plan on November 20, 2014. R., p.259. It proposed mitigation in the form of managed ground water recharge at the Gooding Recharge Site. *Id.* at 260. The mitigation was to be for a term commencing as of the date of the plan and continuing through March 31, 2016. *Id.* at 261. Rangen stipulated to the plan, and no protests were filed by other water users. *Id.* at 262-263. At the time, the Director had already partially approved a separate mitigation plan proposed by the Idaho Ground Water Appropriators, Inc. ("IGWA") in response to the Rangen call. *Id.* at 195. Out of the 3.4 cfs of mitigation due Rangen during the first mitigation year, the Director determined that IGWA's plan provided the full mitigation amount for that portion of the year commencing April 1, 2014 and ending January 18, 2015. *Id.* at 460. The Cities, being IGWA members, were determined to be protected from curtailment under the umbrella of the IGWA plan during that timeframe. *Id.* at 460. For the remainder of the first mitigation year, the Director determined that IGWA's plan only provided 1.2 cfs of mitigation, leaving a 2.2 cfs deficiency. *Id.* As a result, the Cities faced curtailment commencing January 19, 2015, unless the mitigation deficiency was addressed. *Id.* The Cities' second mitigation plan attempted to address the deficiency for that portion of Rangen's material injury caused by their offending diversions.

On January 16, 2015, the Director issued his *Final Order Conditionally Approving Cities Second Mitigation Plan. Id.* at 357-367. The *Order* conditionally approved the Cities' second mitigation plan, but effectively rejected it with respect to the first mitigation year. *Id.* The Director found that the plan "will not deliver mitigation water to Rangen by January 19, 2015." *Id.* at 359. Further, at best "the mitigation water will only be delivered to the recharge site for approximately one month of the first year in which mitigation [is] required," and that such delivery would provide little to no benefit to Rangen during that month. *Id.* Therefore, the Director recognized no mitigation credit for the Cities during the first year since their plan did not provide replacement water to Rangen at the time and place required (i.e., January 19, 2015). *Id.* at 362. However, he conditionally granted the plan, holding that mitigation credit would be granted to the Cities beginning the second mitigation year. *Id.* at 363. Despite conditional approval, the result of the Director's *Order* was that the Cities faced curtailment during that

portion of the first mitigation year commencing January 19, 2015 and ending March 31, 2015. *Id.*

The Director denied the Cities' subsequent requests for reconsideration, clarification and stay. *Id.* at 386 & 393. He did, however, grant the Cities' request for a hearing on its mitigation plan. *Id.* at 393. The hearing took place on January 30, 2015. On February 13, 2015, the Director issued his *Final Order*, which effectively affirmed his *Order* dated January 16, 2015. Nevertheless, the Cities' junior ground water rights were not curtailed during the first mitigation year. IGWA proposed and had approved an additional mitigation plan to address the 2.2 cfs deficiency that remained unaddressed from January 19, 2015 to March 31, 2015. Again, the Cities were determined to be protected from curtailment under the umbrella of that plan, and did not face curtailment despite the Director's *Final Order*.

On March 10, 2015, the Cities filed the instant *Petition for Judicial Review*, asserting that the Director erred in several respects in his *Final Order*. The case was reassigned by the clerk of the court to this Court on that same date. On March 27, 2015, the Court entered an *Order* permitting Rangen to appear as an intervenor. The parties subsequently briefed the issues raised on judicial review. In addition, amicus curiae briefs were filed by the Surface Water Coalition,[1] (2) the City of Pocatello, (3) the Association of Idaho Cities, and (4) the Idaho Dairymen's Association.[2] A hearing on the *Petition* was held before this Court on August 17, 2015. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day or August 18, 2015.

## II.
## STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court

[1] The term "Surface Water Coalition" refers collectively to the American Falls Reservoir District #2, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Canal Company.

[2] Following petition, the Court granted the Surface Water Coalition, the City of Pocatello, the Association of Idaho Cities, and the Idaho Dairymen's Association limited leave to file an amicus curiae brief and participate in oral argument on the *Petition for Judicial Review*.

shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions 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. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001).

## III.

## ANALYSIS

### A. Issues regarding the propriety of the Director's curtailment order are not properly before the Court.

Prior to addressing other arguments, it is, it seems, necessary to acknowledge a discrepancy recognized by the parties. The concept of mitigation is a simple one in theory. It embodies a principle whereby a junior water user, who is causing injury to a senior water user by way of his diversion, may take an action to offset that injury. If the injury is successfully offset, the junior may continue his otherwise offending diversion. While simple in theory, the application of this principle in the context of conjunctive management can be complex. This is due to the sheer numbers and categories of juniors involved in a typical conjunctive management call. The discrepancy recognized by the parties is an example of the type of complexities that may arise.

The discrepancy is as follows. In order to avoid curtailment, the plain language of the Director's curtailment order imposes an aggregate 9.1 cfs mitigation obligation on junior ground water users, including municipal users. R., p.42. This 9.1 cfs is the amount of water the Director determined will accrue to Rangen if all affected juniors within the Director's chosen trimline were to be curtailed. *Id.* at 37-41. However, it is admitted that the injurious effects of diversions by junior municipal users were not included in the curtailment simulations used by the Director to calculate the mitigation obligation. *Id.* at 415. That calculation was based solely on the

effects of diversions by junior irrigators. *Id.* The resulting discrepancy is that even though no portion of the 9.1 cfs mitigation obligation is attributable to injury caused by the Cities' diversions, the Cities are still required, under the express terms of the curtailment order, to provide mitigation or face curtailment. This leads to inquiries concerning the Cities' mitigation obligation under the curtailment order. In order to avoid curtailment must the Cities provide a portion of the 9.1 cfs in mitigation to offset their diversions, and if so, how much? Or, must the Cities provide some amount of water in addition to the 9.1 cfs, and if so, how much? Either scenario leads to legal complaints regarding the propriety of the Director's curtailment order.

Indeed, the parties raise such complaints in this proceeding. The Cities question the Director's ability to subject them to his curtailment order when their depletions were not included in the quantification of material injury or mitigation. They also question whether the curtailment order wrongfully imposes, in actuality, a mitigation obligation greater than the 9.1 cfs set forth in its express terms. Similar issues are raised by the City of Pocatello and the Association of Idaho Cities in their amicus brief. Additionally, Rangen asserts in this proceeding that it is "owed more water than the Director originally calculated and the agreement with the Cities was intended to address that separate obligation." Rangen *Opening Br.*, p.6.

While the Court acknowledges the legitimacy of these complaints, it is limited in the scope of its review. Were the Court to address issues regarding the propriety of the Director's curtailment order, it would transcend the limitations of this proceeding. If the Cities believed they were wrongfully subjected to the Director's curtailment order, they were required to file a petition to that effect with the Court within twenty-eight days of the service date of that order. I.C. § 67-5273(2). Likewise, if any affected water user believed that the Director wrongfully calculated the extent of Rangen's material injury and/or the mitigation obligation of junior users, they were required to timely raise those issues. *Id.* The Director's curtailment order was previously subjected to judicial review before this Court in Twin Falls County Case No. CV-2014-1338. In that proceeding, the Court addressed the issues properly raised and entered its *Judgment* on October 24, 2014. Since issues regarding the propriety of the curtailment order were required to be previously raised, they cannot now be raised for the first time in this proceeding. Consequently, the Court finds that such issues are not properly before it.

## B. The Director's effective rejection of the Cities' second mitigation plan with respect to the first mitigation year constitutes an abuse of discretion.

The Cities, as well as the amici curiae, argue the Director abused his discretion or otherwise erred in failing to grant the Cities a mitigation benefit during the first mitigation year. The decision to reject or approve a proposed mitigation plan is left to the discretion of the Director. *In Re Distribution of Water to Various Water Rights Held by or for Ben. of A&B Irr. Dist.*, 155 Idaho 640, 654, 315 P.3d 828, 842 (2013); I.C. § 42-602. In determining whether an agency abused its discretion, a court "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, 813, 252 P.3d 71, 94 (2011).

Rule 43 of the CM Rules governs mitigation plans.[3] It encourages parties to develop and submit stipulated mitigation plans to the Director. IDAPA 37.03.11.043.03.o. Indeed, the Rule goes so far as to permit the Director to consider stipulated mitigation plans that are not otherwise "fully in compliance with these provisions." *Id.* The Director is not bound to approve a stipulated mitigation plan, but if he rejects such a plan he must sufficiently support his determination so as not to act arbitrarily, capriciously, or to otherwise abuse his discretion. I.C. § 67-5279. Although the Director recognized the matter before him to be one of discretion, the Court finds, for the reasons set forth below, that the Director acted outside the outer bounds of that discretion when evaluating the second mitigation plan for the first mitigation year.

### i. The Director is not obligated to approve a stipulated mitigation plan.

As a preliminary matter, the Director is not required to approve a stipulated mitigation plan and has the discretion to reject such a plan. However, in exercising such discretion the decision to reject a stipulated plan must be supported by valid legal or factual reasons. Indeed well-founded reasons can exist for rejecting a stipulated mitigation plan. At foremost, any

[3] The term "CM Rule" as used herein refers to *Idaho Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11).

stipulated plan cannot transfer or impose upon any non-stipulating junior any portion of the total mitigation obligation attributable to the stipulating junior's diversion.

Other considerations exist as well. Stipulating to a mitigation plan under the CM Rules is not the same as entering into an agreement and stipulating to the dismissal of the delivery call action. Under a stipulated mitigation plan, the Director retains jurisdiction over the delivery call proceeding including the implementation of the mitigation plan. In the event the plan is not fully executed or otherwise fails to produce its intended results, the Director can be put in the position of overseeing the plan and/or ultimately readdressing enforcement of his curtailment order against the stipulating junior(s). Under such a scenario, a stipulated mitigation plan may merely result in delay of the curtailment proceedings. In this regard, prior to accepting a stipulated plan, the Director is vested with the discretion to review the viability of the plan including any agreed upon contingencies or remedies in the event the plan is not successfully executed or fails to produce its intended results as well as consider any additional burdens that maybe placed upon the Department in assuring that the plan is implemented. Any of these considerations, among other things, may provide a sound basis for rejecting a stipulated plan. However, here the Director did not base his decision on such considerations. Rather, he rejected the Cities' plan with respect to the first mitigation year on the grounds that (1) it did not provide mitigation to Rangen at the time and place required, and (2) granting mitigation credit the first year would be unfair to other juniors. Those grounds are addressed below.

### ii. The Director failed to consider non-water compensation to be provided to Rangen under the second mitigation plan.

The Cities' second mitigation plan was stipulated to by Rangen and was otherwise unopposed. R., pp.262-263. Rangen expressly agreed that the compensation to be provided under the plan "shall constitute full mitigation for the depleting effects of the Cities' out of priority groundwater pumping . . . through March 31, 2016." *Id.* at 261 & 274. Notwithstanding, the Director effectively rejected the plan with respect to the first mitigation year on the grounds that it did not provide mitigation to Rangen at the time and place required. *Id.* at 467-468. The Director found that "[a]t best, the mitigation water will only be delivered to the recharge site for approximately one month of the first year in which mitigation was required," and that Rangen "will accrue little or no benefit" during that month. *Id.* at 463.

The Director's analysis on this issue is limited to replacement water. However, mitigation need not be limited to replacement water under the CM Rules. The Rules acknowledge that mitigation may also be provided in the form of "other appropriate compensation to the senior-priority water right." [4] IDAPA 37.03.11.043.03.c. The Cities' second mitigation plan provides a package of mitigation compensation to Rangen. R., pp.259-301. Replacement water is part of the package, but additional compensation is also included. This includes the development, to be undertaken financially and logistically by the Cities, of a previously non-existent pilot recharge program and site, the location of which is favored by Rangen.[5] *Id.* In the *Final Order*, the Director acknowledged that the development of the Gooding Recharge Site was being undertaken by the Cities. R., p.462. However, he did not consider this compensation when analyzing whether the plan provided timely mitigation. The Director's failure to consider the totality of the plan – particularly in light of Rangen's stipulation that it provides sufficient mitigation compensation at the time and place required – results in an incomplete analysis by the Director of the issue and an abuse of his discretion.

### iii. The Director is not required, as a matter of law, to reject a stipulated mitigation plan that does not provide mitigation at the time and place required by the senior right.

Assuming that the Cities' plan fails to provide mitigation at the time and place required by the senior right, this fact alone does not preclude the Director from approving the plan given its stipulated nature. In his *Final Order*, and in briefing on judicial review, the Director asserts that that he may not, as a matter of law, approve a stipulated mitigation plan if it does not provide mitigation offset at the time and place required by the senior right. This is not the case. The express terms of the CM Rules authorize the Director to approve a stipulated mitigation plan even if it is not otherwise "fully in compliance with these provisions." IDAPA 37.03.11.043.03.o. Therefore, the Director has the authority to approve a stipulated mitigation

[4] While it is true the Director cannot compel an injured senior to accept mitigation in the form of something other than replacement water at the time and place of need, an injured senior can agree to accept alternative mitigation in lieu of replacement water.

[5] The Court notes that while the majority of the financial responsibility is to be undertaken by the Cities, it appears that a portion of the cost is to be borne by the Idaho Water Resource Board. R., p.273.

plan even if it does not provide mitigation at the time and place required by the senior right where, as here, the senior agrees to the timing of the mitigation.

The Director insinuates that he is compelled by court decisions to deny a stipulated mitigation plan under such circumstances, but does not cite to which decisions he refers. R., p.467. Without citation, the Court is unable to ascertain the decisions under which the Director feels bound. However, this Court finds no decision from an Idaho court that would require the Director to reject, as a matter of law, a stipulated mitigation plan that does not provide timely mitigation where the senior has stipulated to the timing of the mitigation. Therefore, the Court finds that the Director erred in determining that he may not approve the Cities' second mitigation plan as a matter of law.

**iv. The Director abused his discretion in determining that it would be unfair to other juniors to grant the Cities' mitigation credit during the first mitigation year.**

The Director declined to award mitigation credit during the first mitigation year on the additional grounds that doing so would be unfair to other junior users who may face curtailment:

> It is ironic and inconsistent for Rangen to stipulate to a mitigation plan that will not provide water in the time of need. Unconditional approval of the Cities' second Mitigation Plan would have allowed the Coalition of Cities to avoid curtailment on January 19, 2015, without providing timely mitigation. At the same time other junior ground water users might have been curtailed despite efforts to provide mitigation according to the Morris Exchange Order.

*Id.* at 468 (internal footnote omitted). The Court finds the Director's holding in this respect to be legally unfounded and therefore an abuse of his discretion.

Mitigation in the context of conjunctive management permits a junior, who is causing injury to a senior by way of his diversion, to take an action to offset that injury in order to continue his water use.[6] *See e.g.*, IDAPA 37.03.11.010.15. Essential to this concept is that an offending junior is only responsible for mitigating that portion of the senior's material injury attributable to his offending diversion. If successful, the mitigating junior has satisfied his legal obligation to the senior and may avoid curtailment as a matter of law. Considerations of equity to other junior users are irrelevant. The same principle applies to a stipulated mitigation plan so

[6] Should the junior desire to undertake such an action, he must submit it to the Director in the form of a proposed mitigation plan for review and approval. IDAPA 37.03.11.043.01.

long as that portion of the total mitigation obligation attributable to the stipulating junior's diversion is not transferred to, or imposed upon, any other non-stipulating junior.

In this case, the Cities' second mitigation plan proposed to mitigate only for that material injury caused by their junior ground water use. The record establishes that the Cities' portion of Rangen's material injury would not be transferred to, or imposed upon, any other junior users subject to the Rangen call. Considerations of whether other junior users would face curtailment are therefore irrelevant to the Director's evaluation of whether the Cities' mitigation plan should be approved. Likewise, the fact that Rangen was able to reach a stipulated mitigation agreement with the Cities, while unable to do so with other junior users, is irrelevant. The Court finds that the Director's consideration of, and reliance on, such factors in effectively rejecting the Cities' mitigation plan with respect to the first mitigation year was misplaced and consequently an abuse of discretion.

### C. The Cities have failed to establish that their substantial rights were prejudiced by the Director's *Final Order*.

Even where the Director is found to have abused his discretion, his decision must be affirmed unless the petitioner can establish that its substantial rights have been prejudiced. I.C. § 67-5279(4). The Cities have substantial rights in their water rights, particularly their ability to divert and use water under those rights when in priority. However, it cannot be said that the Director's *Final Order* prejudiced those rights. Although the Cities' mitigation plan was effectively rejected with respect to the first mitigation year, the record establishes there was no curtailment, partial or total, of any of the Cities' water rights during that year. R., p.460; *See also Director's Order Approving IGWA's Fourth Mitigation Plan* issued on October 29, 2014, issued in IDWR Docket No. CM-MP-2014-006. To the contrary, the Cities were permitted to continue their offending diversions under the umbrella of various mitigation plans submitted by IGWA. R., p.460. Therefore, the Court finds that neither the Cities' water rights, nor their ability to divert and use water under those rights was diminished during the first mitigation year.

With respect to the remainder of the term contemplated by the second mitigation plan, there is likewise no prejudice to the Cities' substantial rights. The *Final Order* acknowledges that mitigation under the plan will be granted commencing the second mitigation year, and that "the Cities' Second Mitigation Plan shall be in effect until March 31, 2016 . . . ." R., p.469.

Since the Cities have failed to establish that their substantial rights have been prejudiced, the Court finds that the Director's *Final Order* must be affirmed via operation of law. I.C. § 67-5279(4).

## IV.

## ORDER

Therefore, based on the foregoing, IT IS ORDERED that the Director's *Order Confirming Final Order Conditionally Approving Cities Second Mitigation Plan* issued on February 13, 2015 **is hereby affirmed**.

Dated September 8, 2015

ERIC J. WILDMAN
District Judge

**CERTIFICATE OF MAILING**

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on September 08, 2015, with sufficient first-class postage to the following:

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