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AUG 24 2012

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ATTORNEYS FOR THE CITY OF POCATELLO

**BEFORE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION)
OF WATER TO WATER RIGHT NOS.) Docket No. CM-DC-2011-004
36-02551 AND 36-07694)
) **CITY OF POCATELLO'S MOTION FOR**
(RANGEN, INC.)) **CLARIFICATION AND/OR**
_____) **RECONSIDERATION**

The City of Pocatello ("City" or "Pocatello"), by and through its attorneys White & Jankowski, LLP, hereby requests the Director reconsider his Order Granting SWC's Petition for Limited Intervention of August 14, 2012 ("Order") to limit the scope of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company's (collectively, "SWC") participation in this matter to briefing any issues *raised by other parties* involving ESPAM 2.0 pursuant to the Rules of Procedure of the Idaho Department of Water Resources.

ARGUMENT

The Director's Order can be read to expand the scope of this hearing to include any and all issues in "future conjunctive administration . . . us[ing] ESPAM 2.0" and to announce that his determination of such issues in the Rangen Delivery Call "will likely become precedent for future proceedings." Order at 2. Pocatello does not believe these broader issues are properly before the Director, and continues to contest the participation of SWC (and Buckeye Farms, Inc.) to the extent such participation is based on an impermissible expansion of the scope of this proceeding.

The Director found that the SWC has a "direct and substantial interest in application of ESPAM 2.0 in this proceeding." *Id.* Pocatello recognizes the Director's logic that ESPAM 2.0 issues raised in the context of the Rangen Delivery Call may be related to other senior water user delivery calls—however, every ESPAM 2.0 issue that *could* be raised is not correlatively relevant to the Rangen Delivery Call. Put another way, unless the Department formally announces otherwise, this Delivery Call is limited to the facts that Rangen, Inc. ("Rangen") and other parties that have a direct and substantial interest in the outcome have put at issue. The SWC has neither alleged nor demonstrated an interest in Rangen's water rights at issue in the Rangen Delivery Call, and its interest in litigating ESPAM 2.0 issues in this case must be limited to prevent the Director from pre-deciding ancillary issues relevant only to SWC's Delivery Call.

If the Director intends that the Rangen Delivery Call will form the agency's basis for determining the global application of ESPAM 2.0 (including the trimline) to *all other* delivery calls, only then would SWC's unbridled ability to raise any and all ancillary modeling issues be appropriate. However, such an expansion in scope would be inappropriate because, at least to date, the Director has not given notice to all water users in the Eastern Snake Plain Aquifer that

the Director is holding a hearing on the general use of ESPAM 2.0 in delivery calls which will have preclusive effect on all future delivery call proceedings.

Due process entitles property owners to an opportunity for a hearing before he is deprived of any significant property interest. Under Idaho law, a water right is real property, and the owner of a water right must be afforded due process of law before the right can be taken by the State.

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 814, 252 P.3d 71, 95 (2011) (internal quotations and citations omitted). In *Clear Springs*, the Idaho Supreme Court found that junior water users were entitled to a hearing prior to curtailment by the Department. *Id.* at 815, 252 P.3d at 96. Therefore “the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for a hearing.” *Id.* (emphasis added).

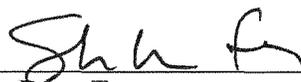
The more appropriate course is to limit SWC’s participation to briefing on ESPAM 2.0 issues raised by other parties—i.e., participation as amicus curiae. IDAPA 37.01.01.353 (hearing officer may grant petitions to intervene “subject to reasonable conditions”); *see also State v. United States*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000) (under the permissive intervention standard, SRBA court properly limited participation to amicus curiae status of Twin Falls Canal Company, North Side Canal Company, A & B Irrigation District, and Burley Irrigation District on issues untimely raised).

No participant in this proceeding should be permitted to raise modeling issues not pertinent to the facts at issue in Rangen’s Delivery Call, as notice has not been given to all water users that such a hearing would be held on ESPAM 2.0. This reasonable limitation will prevent the Rangen Delivery Call from mushrooming into a forum for the determination of ESPAM 2.0 issues that have no direct connection to Rangen’s Delivery Call.

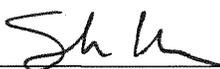
WHEREFORE, Pocatello respectfully requests the Director reconsider his Order and limit SWC's participation to briefing on any issues *raised by other parties* involving ESPAM 2.0.

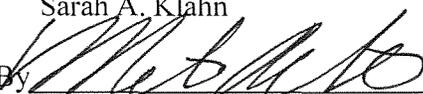
Respectfully submitted this 21st day of August, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2012, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Motion for Clarification and / or Reconsideration** for **Docket No. CM-DC-2011-004** upon the following by the method indicated:



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