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DEPARTMENT OF  
WATER RESOURCES

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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**  
(RANGEN, INC.) ) **OPPOSING SURFACE WATER COALITION'S**  
\_\_\_\_\_ ) **PETITION TO INTERVENE**

The City of Pocatello ("City" or "Pocatello"), by and through its attorneys White & Jankowski, LLP, hereby opposes Surface Water Coalition's ("SWC") July 19, 2012 Petition for Limited Intervention in the above-captioned matter ("Petition") pursuant to Idaho Department of Water Resources ("Department") Rule of Procedure 354. The grounds for said opposition are stated below.

1. On May 29, 2012, the Director of the Idaho Department of Water Resources ("Director") designated Pocatello as a Respondent in the above-captioned matter because "[s]ome of Pocatello's ground water rights are junior to Rangen, Inc.'s ("Rangen") surface water rights [and] [i]f Rangen is successful in its delivery call, Pocatello's junior ground water

rights could be subject to curtailment.” *Order Designating City of Pocatello a Respondent* at 1, May 29, 2012.

2. SWC’s Petition claims that it should be permitted to intervene because application of the Eastern Snake Plain Aquifer Model (“ESPAM” or “the Model”) 2.0 and the “trim line” to *Rangen’s* delivery call is at issue, and any decision will allegedly “have an impact on its application in future administrative proceedings.” Petition at 4. SWC has identified no direct or substantial interest in this matter, and has not demonstrated that its alleged interests are not adequately represented by existing parties. As such, SWC’s intervention would unduly broaden the scope of the *Rangen* delivery call and the Petition should be denied.
3. Department Rule of Procedure 350 provides that “[p]ersons not applicants or claimants or appellants, petitioners, complainants, protestants, or respondents to a proceeding **who claim a direct and substantial interest in the proceeding** may petition for an order from the presiding officer granting intervention to become a party.” IDAPA 37.01.01.350 (emphasis added).
  - a. The SWC has not claimed any direct and substantial interest in *Rangen’s* delivery call proceeding: it has identified no water rights junior to *Rangen’s* rights that are potentially called out by this delivery call, and has not demonstrated an ownership interest in *Rangen’s* water rights. As such, it has no interest in *Rangen’s* delivery call, or how the Model is applied to the specific facts at issue in this matter.
  - b. The Director has denied requests to intervene in past delivery call proceedings where the potential intervenor “does not identify in its petition any water rights it holds that are the subject of this proceeding. . . . [and] does not state in its petition

that it holds ground water rights that are potentially subject to the actions and relief requested.” *Order on Petitions to Intervene and Denying Motion for Summary Judgment; Renewed Request for Information, and Request for Briefs* at 2, Apr. 6, 2005 (denying Idaho Power’s Petition to Intervene because “Idaho Power has not demonstrated a direct and substantial interest in the subject of the proceeding” and because Idaho Power had the alternative means of protecting its interests by filing a separate delivery call), attached to this Motion as Exhibit A.

4. Department Rule of Procedure 353 requires that a petition to intervene only be granted where the intervention “**does not unduly broaden the issues**” before the Director. IDAPA 37.01.01.353 (emphasis added).

a. In this proceeding, the issues before the Director regarding ESPAM 2.0 are limited to whether and how ESPAM 2.0 and the trim line will be applied to determine curtailment and mitigation requirements if the Director finds material injury to *Rangen*. Any application of the Model and trim line is dependent on and limited to the facts in this case. SWC’s Petition makes clear that if SWC were granted intervention it would unduly broaden the issues before the Director, as it intends to request the Director to determine how he will apply the Model and trim line in all future delivery calls. Petition at 2. The Director does not have jurisdiction in this matter to make any broader determinations of how ESPAM should be applied in all “future conjunctive administration.” *Id.* at 2.

5. SWC’s Petition does not identify other instances where application of the Model has become “precedent” in other delivery calls, or why such a result is likely given that the Director and Hearing Officers have always made independent findings regarding the

application of the Model in each delivery call. *See, e.g., Director's Order* at 5, 15, Blue Lakes Delivery Call, May 19, 2005; *Hearing Officer's Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* at 13–15, 22–23, Blue Lakes and Clear Springs Delivery Calls, Jan. 11, 2008; *Director's Amended Order* at 7, 28, SWC Delivery Call, May 2, 2005; *Hearing Officer's Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* at 32–34, SWC Delivery Call, Apr. 29, 2008; *Director's Order* at 33, A&B Delivery Call, Jan. 29, 2008; but *cf. Petition* at 2, 4. Indeed, by SWC's logic, every water user on the Eastern Snake Plain Aquifer should intervene so that the Director can hold a general referendum on the Model. Such an exercise is without question beyond the scope of Rangen's delivery call.

6. SWC's Petition is an attempt to hijack Rangen's delivery call for purposes of deciding the use of the Model and trim line in all future conjunctive administration—issues that have always been litigated independently in individual delivery call proceedings. Indeed, SWC has been afforded extensive opportunity in its own delivery call to litigate how the Model is applied. *See Petition* at 4 (“In the Coalition Call proceedings, significant time and expense was spent addressing the prior versions of the model.”). *See also Director's Amended Order* at 7, 28; *Hearing Officer's Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* at 32–34, SWC Delivery Call, Apr. 29, 2008.
7. The SWC has an alternative means to raise issues with the application of the Model that are more appropriate than the Rangen call, and its attempt to broaden the scope of the Director's review in this matter is premature. The Department has yet to make a decision about how and when to apply the ESPAM 2.0 to the SWC's delivery call. SWC should

not be permitted to hijack these proceedings and expand the issues well beyond the scope of the discrete questions before the Director.

8. Finally, Department Rule of Procedure 353 requires that any potential intervener's interests be inadequately represented by existing parties to the proceeding. IDAPA 37.01.01.353. SWC has not addressed why Rangen cannot adequately represent SWC's alleged interests in this matter: presumably both seniors want application of the Model with no or the smallest trim line possible. As such, Rangen can adequately represent SWC's positions in this matter.

WHEREFORE, Pocatello respectfully requests that the Director deny SWC's Petition to intervene in the above-captioned matter.

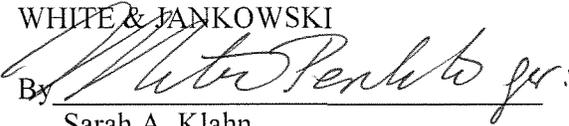
Respectfully submitted this 26th day of July, 2012.

CITY OF POCATELLO, ATTORNEY'S OFFICE

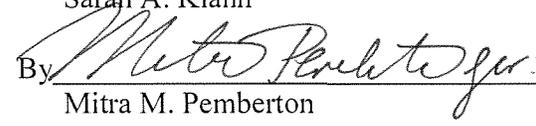
By 

A. Dean Tranmer

WHITE & JANKOWSKI

By 

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ATTORNEYS FOR CITY OF POCATELLO

## CERTIFICATE OF SERVICE

I hereby certify that on this 26<sup>th</sup> day of July, 2012, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Motion Opposing Surface Water Coalition's Petition to Intervene** for **Docket No. CM-DC-2011-004** upon the following by the method indicated:



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

IN THE MATTER OF THE REQUEST FOR )  
ADMINISTRATION IN WATER DISTRICT )  
120 AND THE REQUEST FOR DELIVERY )  
OF WATER TO SENIOR SURFACE WATER )  
RIGHTS BY 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 )  
\_\_\_\_\_ )

**ORDER ON PETITIONS  
TO INTERVENE AND  
DENYING MOTION FOR  
SUMMARY JUDGMENT;  
RENEWED REQUEST FOR  
INFORMATION; AND  
REQUEST FOR BRIEFS**

**Background**

On February 14, 2005, the Director of the Department of Water Resources (“Director” or “Department”) issued an Order in this matter and other related matters. The Order provided an initial response by the Director to the water delivery call made by letter on January 14, 2005, by the seven irrigation districts, reservoir district, and canal companies named in the above caption and referred to as the Surface Water Coalition (“Coalition”). The delivery call seeks the administration and curtailment of ground water rights within Water District No. 120 that are junior in priority to water rights held by or for the benefit of members of the Coalition. Among other actions, the Order designated the Coalition’s delivery call as a contested case and granted the petition of the Idaho Ground Water Appropriators, Inc. (“IGWA”) to intervene in the delivery call proceeding involving Water District No. 120.

In addition, the Order required each member of the Coalition to submit to the Director within thirty (30) days certain information called for in the Order. The Order states that the Director will consider the water delivery call as a call for administration and curtailment of junior priority ground water rights in Water Districts No. 120 and No. 130 that are alleged to, or may, be causing injury to the senior surface water rights of the members of the Coalition. The Order further states that the Director will make a determination of the extent of likely injury after April 1, 2005, when the U. S. Bureau of Reclamation and U. S. Army Corps of Engineers release their jointly prepared operating forecasts for inflow from the Upper Snake River Basin for the period April 1 through July 31, 2005. The forecasts are expected to be released on or about April 8, 2005. The Director expects to be able to issue an order addressing the extent of likely injury during the week of April 18, 2005.

### **Additional Petitions to Intervene**

In addition to IGWA, other entities have filed timely petitions to intervene in this matter including the Idaho Dairymen's Association ("IDA"), the United States Bureau of Reclamation ("USBR"), and the Idaho Power Company ("Idaho Power"). IDAPA 37.03.01.353 provides as follows:

If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties. If it appears that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding.

The IDA represents entities holding ground water rights that, based on the Coalition's water delivery call, are potentially subject to curtailment. Therefore, the IDA has a direct and substantial interest in the subject of the proceeding that may not be adequately represented by the present parties. Because the interests of the IDA will not unduly broaden the issues, the IDA is granted intervention.

The USBR is the legal owner of some of the water rights directly at issue in this proceeding as stated in Finding of Fact 54 of the Order of February 14, 2005. Therefore, the USBR has a direct and substantial interest in the subject of the proceeding that is not adequately represented by the present parties. Because the interests of the USBR will not unduly broaden the issues, the USBR is granted intervention.

Unlike the USBR, Idaho Power does not identify in its petition any water rights it holds that are the subject of this proceeding. Furthermore, unlike the IDA, Idaho Power does not state in its petition that it holds ground water rights that are potentially subject to the actions and relief requested. Therefore, Idaho Power has not demonstrated a direct and substantial interest in the subject of the proceeding and is denied intervention. Additionally, to the extent Idaho Power believes its water rights are being interfered with by the exercise of junior priority ground water rights, it has other adequate forms of relief available, such as the filing of a separate delivery call.

### **Motion for Summary Judgment**

On March 23, 2005, IGWA filed *Idaho Ground Water Appropriators' Motion for Summary Judgment and Memorandum in Support*. IGWA also filed the *Affidavit of Dr. Charles M. Brendecke* ("Brendecke Affidavit") and the *Affidavit of Mr. John Church* ("Church Affidavit") in support of the summary judgment motion. The motion asks the Director to dismiss the Coalition's delivery call based upon the supporting affidavits and numerous factual and legal arguments. On March 28, 2005, the Coalition submitted a letter to the Director objecting to the filing of the summary judgment motion by IGWA. The Coalition argues that the motion for summary judgment is inappropriate at this informal stage of the proceeding and

should be stricken, or if not stricken the Director should inform the Coalition as to whether it is expected or required to respond to the motion pursuant to Rule 270 of the Department's Rules of Procedure.

The Order issued by the Director on February 14, 2005, designated this matter as a contested case and did not specify that the matter would proceed under the Informal Proceedings provided for by Rules 100 through 103 of the Department's Rules of Procedure. IDAPA 37.01.01.100 - 103. The Order did state, however, that the Director intended to make a determination of the extent of likely injury to the rights held by or for the benefit of members of the Coalition after April 1, 2005, which will be prior to any opportunity for a hearing in the contested case. Once the Director has issued a further order addressing the merits of the delivery call, the parties will have an opportunity to request a hearing and engage in the normal steps of a contested case provided for under the Department's Rules of Procedure. IGWA's *Motion for Summary Judgment* will, therefore, be denied without prejudice at this time, and the Coalition shall have no duty to respond. The Director has reviewed the *Motion for Summary Judgment* and the Brendecke Affidavit, but does not intend to rely upon the information contained therein in making a determination of the extent of likely injury to the members of the Coalition. The Director has not reviewed the Church Affidavit and does not intend to do so.

### **Renewed Request for Information**

The Order of February 14, 2005, required that each member of the Surface Water Coalition file with the Director certain information called for under Conclusion of Law No. 38 of the Order for the past fifteen (15) irrigation seasons, 1990 to 2004, within thirty (30) days of the Order. The Coalition members filed information in response to this request on March 15 and 18, 2005.

The response filed by the Coalition members relied heavily on data obtained from the Department (total monthly diversions of natural flow and total monthly diversions of water released from reservoir storage), failed to identify members or shareholders holding individual ground water rights (alleging that such information is "irrelevant for purposes of the request for water right administration of Petitioners' surface water rights"), referred the Director to his own staff or the watermaster for Water District 01 (total amount of reservoir storage carried over to the subsequent year, quantity of water leased to other users through the water supply bank and the Water District 01 Rental Pool, and quantity of water made available to other users through means other than the water supply bank or the Water District 01 Rental Pool), provided data or estimates for the total number of acres irrigated by flood irrigation and the total number of acres irrigated by sprinkler irrigation for one year only (Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company), and a single list of crops for each member of the coalition (no acreage numbers and no history of crop rotation).

All of the information that was to have been provided pursuant to the Order of February 14, 2005, is relevant for the determination of the extent of material injury to surface water rights held by or for members of the Coalition. Ground water rights held by individual members of the entities comprising the Coalition (landowners in irrigation districts and shareholders in canal

companies) is especially relevant since such rights may have been established and used to supplement surface water supplies during times of shortage. If information about the ground water rights held by individuals within the Coalition members is not available, the Coalition may, as an alternative, supply documented information to the Director identifying the number and location of acres served by each Coalition member for which an inadequate water supply was available to irrigate or finish crops in specific years from any available water source.

The Coalition alleges that: "Since the Department 'maintains complete records for all claimed, permitted, licensed, and decreed water rights authorizing the diversion and use of ground water from the ESPA', the Department is capable of determining whether or not any landowners or shareholders of the respective Petitioner entity hold individual ground water rights." With the exception of the North Side Canal Company, the Department does not have records of the landowners and shareholders that receive water delivered by the member entities comprising the Coalition. Consequently, with the exception of the North Side Canal Company, the Department cannot determine whether landowners or shareholders of the respective member entity of the Surface Water Coalition hold individual ground water rights.

The Director hereby reiterates the request of the members of the Surface Water Coalition for submission of all information called for under Conclusion of Law No. 38 of the Order of February 14, 2005, to the extent that information has not been submitted to date. The failure to fully comply with this request will limit the Director's ability to fully address the relief requested by the Coalition.

### **Request for Briefs**

In preparing the forthcoming order determining the extent of likely injury that will be experienced by the members of the Surface Water Coalition, the Director has identified a legal issue for which briefing by the parties is requested. The issue is whether Idaho law permits the Coalition members to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the ground water users were not a party.

The Director requests that the parties review the cases of *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921); *Scott v. Nampa Meridian Irr. Dist.*, 55 Idaho 672, 45 P.2d 1062 (1934); *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997), and any other Idaho Supreme Court decisions that may be relevant to the issue raised. The Director requests that the parties provide simultaneous briefing on this issue to the Director within seven (7) days from the date of this order.

**ORDER**

Based upon and consistent with the foregoing,

IT IS HEREBY ORDERED as follows:

1. The Petitions to Intervene as parties in this matter filed by the Idaho Dairymen's Association and the United States Bureau of Reclamation are GRANTED, and the Petition to Intervene filed by the Idaho Power Company is DENIED.
2. The Motion for Summary Judgment filed by the Idaho Ground Water Appropriators is DENIED without prejudice.
3. The Director renews his request of the members of the Surface Water Coalition for submission of all information called for under Conclusion of Law No. 38 of the Order of February 14, 2005, to the extent that information has not already been submitted to the Director.
4. The parties are requested to provide simultaneous briefing to the Director within seven (7) days from the date of this order on whether Idaho law permits the Coalition members to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the ground water users were not a party.

DATED this 6<sup>th</sup> day of April 2005.

  
\_\_\_\_\_  
KARL J. DREHER  
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6<sup>th</sup> day of April 2005, the above and foregoing, was served on the following by facsimile and by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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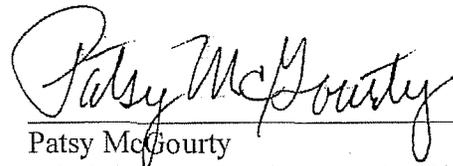
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