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DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF DISTRIBUTION OF )  
WATER TO WATER RIGHT NOS. 36-02551 )  
36-07694 )  
(RANGEN, INC.) )  
\_\_\_\_\_)

**REPLY IN SUPPORT OF  
PETITION FOR LIMITED  
INTERVENTION**

COME NOW, 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 (collectively, the "Surface Water Coalition," "Coalition" or "SWC"), by and through their undersigned attorneys of record, and submit this *Reply* in support of their petition for limited intervention.

The Coalition seeks to intervene in these proceedings for the limited purpose of addressing the application of the Eastern Snake Plain Aquifer Model 2.0 ("ESPAM 2.0").

## REPLY

The Idaho Ground Water Appropriators, Inc. (“IGWA”) and the City of Pocatello (“Pocatello”) (hereinafter collectively referred to as “Ground Water Users”) oppose the Coalition’s limited intervention in this case.<sup>1</sup> The Ground Water Users admit the petition is timely, but allege the Coalition does not have an interest in this case, that Rangen adequately represents its interests, and that the Coalition’s participation would somehow broaden the scope of the issues in this proceeding. Each of these arguments fails and is addressed separately below.

### **I. The Coalition Has a Direct and Substantial Interest in Proper Application of ESPAM 2.0 in Conjunctive Administration.**

IDWR Rule of Procedure 353 states a presiding officer will grant intervention if the petitioner shows “direct and substantial interest in any part of the subject matter of a proceeding . . .” IDAPA 37.01.01.353. The Coalition has a direct and substantial interest in proper implementation of the new ESPA model (ESPAM 2.0) in conjunctive administration. Recently, the Director ordered that IDWR “will utilize ESPAM version 2.0” for purposes of the Rangen delivery call, and that “any and all issues associated with ESPAM version 2.0 and the Department’s use of ESPAM version 2.0 will be addressed during the course of the January 28, 2013 hearing.” *See Order Re: Eastern Snake Plain Aquifer Model and the Rangen, Inc. Delivery Call.*

How IDWR first uses ESPAM 2.0 in conjunctive administration, regardless of the identity of the calling senior water right, is important for setting proper administrative protocol and ensuring a full record is developed on how the model was developed and should be used. Contrary to the Ground Water Users’ claims, it is clear that past administrative cases have set a

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<sup>1</sup> Pocatello styled its response to the Coalition’s petition to intervene as a “motion.” To the extent Pocatello’s opposition seeks some affirmative relief by way of a formal motion pursuant to Rule 260, the Director should deny the same.

precedent when it comes to interpreting the model and how it is used for water right administration. *See Order on Petition for Judicial Review* at 26-27 (Gooding County District Court, Fifth Jud. Dist., Case No. 2008-000551, July 24, 2009) (referencing and incorporating a decision in the Spring Users' call case on IDWR's use of a 10% "trim line" for ESPAM 1.1).

Accordingly, if the Rangen contested case determines how ESPAM 2.0 should be used in administration, and IDWR uses that protocol for other cases, including the SWC Delivery Call, there is no question the Coalition has a direct and substantial interest in that "part" of the subject matter of the contested case.<sup>2</sup> Although IGWA admits the Director could "reasonably determine the potential application of ESPAM 2.0 to future administrative proceedings," it seeks to bar the Coalition from participating in that decision. Contrary to IGWA's claim, there is no basis to exclude the Coalition from the development of a full record on the application of ESPAM 2.0 and its use in conjunctive administration.

Moreover, even under the Ground Water Users' alleged standard that a petitioner must hold a junior ground water right, A&B, BID, and Milner all own ground water rights that meet this criteria.<sup>3</sup> Presumably, the Ground Water Users would stipulate to these entities' intervention on that basis.

Finally, IGWA's and Pocatello's opposition is at odds with prior decisions in this matter. Importantly, IDWR previously recognized TFCC's party status in Rangen's delivery call proceeding. *See Order Approving Interim Mitigation* (March 24, 2004) and *Order Regarding Party Status (Rangen Delivery Call)* (September 13, 2005). Since TFCC does not own any

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<sup>2</sup> Since Rule 353 does require a petitioner to have an interest in all parts of the proceeding, i.e. facts specific to Rangen's water rights and the use of those rights, the Ground Water Users' arguments fail.

<sup>3</sup> A&B ground water rights: 36-2080, 36-15127A, 36-15127B, 36-15192, 36-15193A, 36-15193B, 36-15194A, 36-15194B, 35-15195A, 36-15195B, 36-15196A, 36-15196B; BID ground water right: 45-7720, 45-10963; Milner ground water right: 45-463.

ground water rights subject to Rangen's call, and is already a party to the case, it follows that A&B, AFRD#2, BID, Milner, MID, and NSCC should be granted intervention as well.

In sum, the Coalition has a direct and substantial interest in the part of the Rangen proceeding that addresses the proper interpretation and use of ESPAM 2.0 for conjunctive administration. The Ground Water Users have shown no meritorious position to oppose intervention on this issue. The Director should grant the Coalition's petition accordingly.

## **II. Rangen Does Not Adequately Represent the Coalition's Interests.**

Rangen does not adequately represent the Coalition's interests in this case. The Coalition consists of seven different irrigation districts and canal companies that divert water from the Snake River and Eastern Snake Plain Aquifer. Although Rangen holds senior surface water rights, it does not represent the unique and individual interests of the Coalition members, including the Coalition's "separate and distinct property rights." *See e.g., City of Pocatello's Petition to be Designated as Respondent or Alternatively to Intervene* (May 21, 2012).

Moreover, Rangen has no authority to represent the Coalition's position on the development and implementation of ESPAM 2.0 for purposes of conjunctive administration. How the model is interpreted and applied is subject to the individual parties' positions. Just as Pocatello claims an individual interest that is not adequately represented by IGWA, so too does the Coalition as it relates to Rangen.

## **III. The Coalition's Participation Will Not Broaden the Scope of the Contested Case.**

With no real basis to oppose the Coalition's intervention, the Ground Water Users resort to hyperbole, alleging the Coalition seeks to "hijack" and broaden the scope of these proceedings. *See Pocatello Resp.* at 4-5; *IGWA Resp.* at 2. To the contrary, the Coalition's limited intervention seeks only to address an issue which the Director has already ordered is part

of the proceeding. *See Order Re: Eastern Snake Plain Aquifer Model and the Rangen, Inc. Delivery Call.* Moreover, the Director has accepted the Modeling Committee's recommendation to begin using ESPAM 2.0 instead of version 1.1. *See id.* Accordingly, the Coalition's participation on this issue will not broaden the scope of the case, and is an appropriate forum to address the proper use of ESPAM 2.0 in conjunctive administration.

**CONCLUSION**

The Coalition has a direct and substantial interest in the proper application of ESPAM 2.0 in conjunctive administration. Since IDWR's use of, and "all issues associated with ESPAM 2.0" as it relates to conjunctive administration is already at issue in the Rangen delivery call case, the Coalition's petition should be granted. Since the motion is timely and the Coalition will not broaden the issues before the Hearing Officer, the Coalition should be permitted to intervene in these proceedings.

DATED THIS 30<sup>th</sup> day of July, 2012.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 30<sup>th</sup> day of July, 2012, the above and foregoing document was served on the following via email and first class mail, postage prepaid:

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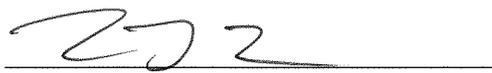
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