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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE MITIGATION PLAN
FILED BY THE IDAHO GROUND WATER
APPROPRIATORS FOR THE DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-02551 AND
36-07694 IN THE NAME OF RANGEN, INC.

Docket No. CM-MP-2014-001

REPLY OF THE CITIES OF BLISS,
BURLEY, CAREY, DECLO, DIETRICH,
GOODING, HAZELTON, HEYBURN,
JEROME, PAUL, RICHFIELD,
RUPERT, SHOSHONE, AND
WENDELL TO RANGEN, INC.'S
MEMORANDUM IN OPPOSITION TO
THE IDAHO CITIES' PETITION FOR
LIMITED INTERVENTION

The cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell ("Cities") by and through their counsel as above noted, hereby reply to Rangen, Inc.'s ("Rangen") March 5, 2014 *Memorandum in Opposition to the Idaho Cities Petition for Limited Intervention* ("Memorandum in Opposition"). Emphasis added.¹ Rangen asserts four bases for the Director to deny the Cities' February 28, 2014 *Petition for Intervention* ("Petition for Intervention") in the Idaho Ground Water Appropriators, Inc.'s ("IGWA") February 11, 2014 *Mitigation Plan and Request for Hearing* ("Mitigation Plan"). Rangen's bases for denial are as follows: (1) the Cities do not have a direct and substantial interest in IGWA's Mitigation Plan; (2) the Cities will unduly broaden the issues; (3) the Cities' interests are adequately represented by IGWA; and (4) if intervention is granted, the only attorney that should be authorized to appear at the hearing is the attorney for the Cities' "Steering Committee."

ARGUMENT

1. The Cities have a Direct and Substantial Interest in IGWA's Mitigation Plan

¹ It is unclear why Rangen believes the Cities' Petition for Intervention is "limited." The Cities have not sought limited intervention. The Cities reiterate "that they be granted intervenor status with the rights to present information, examine witnesses and provide argument." *Petition for Intervention* at 6.

Rangen admits that the Cities have junior-priority water rights that will be curtailed if IGWA's Mitigation Plan is not approved, yet claims the Cities cannot avail themselves of the procedures afforded them under the Department's Rules of Procedure and the CM Rules. In prior conjunctive management proceedings, the Director has found that cities, state agencies, and dairy operators, who have been faced with ordered curtailment, and independent of IGWA, have a "direct and substantial interest" in the outcome; thus, ordering intervention.² Just as CM Rule 40 allows senior-priority water users to protect their property rights through a delivery call, CM Rule 43 allows junior-priority ground water users, upon a CM Rule 42 finding of material injury, to protect their equally important property rights through mitigation proceedings.

Rangen attempts to compare the Cities' Petition to Intervene in this CM Rule 43 hearing with Buckeye Farms, Inc.'s ("Buckeye") attempted intervention in Rangen's CM Rule 40 delivery call. This is an apples to oranges comparison. Buckeye was denied intervention in Rangen's delivery call because the remedy that was available to Buckeye to protect its senior-priority water rights was the filing of its own delivery call. Here, the Cities were not subject to curtailment until the Director issued his *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (January 29, 2014), finding material injury consistent with CM Rule 42. Now that the Cities have been ordered curtailed, the remedy that is available to them to prevent curtailment on March 14, 2014, is intervention in IGWA's CM Rule 43 mitigation plan.

² *Order Granting Cities of Jerome, Wendell, Shoshone, Hazelton, Heyburn, and Paul's Petition to Intervene [in Blue Lakes and Clear Springs Delivery Calls and Replacement Water Plans]*, September 14, 2007; *Order on Requests for Hearing and Appointment of Independent Hearing Officer; Request for Stay; and [Idaho Dairymen's Association] Request for Intervention (Blue Lakes Delivery Call)*, July 29, 2005; *Order on Requests for Hearing and Appointment of Independent Hearing Officer; Request for Stay; and [Idaho Dairymen's Association] Request for Intervention (Clear Springs Delivery Call)*, July 29, 2005. *Order Granting [City of Pocatello and State Agency Ground Water Users'] Petitions to Intervene [in SWC Delivery Call and Replacement Water Plans]*, May 11, 2005.

The Cities, by virtue of holding junior-priority ground water rights that have been ordered curtailed, have a direct and substantial interest in IGWA's CM Rule 43 Mitigation Plan hearing. In order to protect their equally valuable junior-priority ground water rights from curtailment, the Cities must be granted intervention.

2. The Cities will not Unduly Broaden the Issues

Rangen argues that with "discovery and depositions [] now underway [there] is a very tight time schedule. Participation by the Idaho Cities at this point in time is unduly burdensome and will undoubtedly lead to expansion of the issues." *Memorandum in Opposition* at 3. IGWA filed its Mitigation Plan on February 11, 2014. On February 21, 2014, the Department issued a *Notice of Hearing* on IGWA's Mitigation Plan. On February 28, 2014, well within the fourteen-day time period in Department Rule of Procedure 352, the Cities timely filed their Petition to Intervene. Other than timing, Rangen has provided no other basis to assert that the Cities' intervention will unduly broaden the issues. Allowing intervention by the Cities when its Petition to Intervene was timely filed will not alter the hearing schedule and will not unduly broaden the issues at hearing.

3. The Cities' Interest is not Adequately Represented by IGWA

Rangen argues that the Cities have not indicated in the Petition for Intervention that "IGWA does not, or cannot continue to represent their interests and even the interests of those cities who are not members." *Memorandum in Opposition* at 3. This is not the standard by which the Director judges intervention. The Department's Rules of Procedure state that the Director may deny intervention if "the applicant's interest is adequately represented by existing parties." IDAPA 37.01.01.353. Here, the Cities have previously stated, and again herein

reiterate, that its interests are not adequately represented: (1) the Cities' distinct municipal interests may be different from the broad interests represented by IGWA in its Mitigation Plan; (2) establishment of precedent arising out of the IGWA Mitigation Plan, which includes but is not limited to the use of ESPAM 2.0, will affect the mitigation plan that will be offered in the future by the Cities; and (3) the scope of the IGWA Mitigation Plan will affect the mitigation plan that will be offered by the Cities. In order to adequately protect its junior-priority water rights, the Cities must be granted intervention.

Rangen also argues that intervention should be denied because three out of fourteen Cities were represented “for the past two years during Rangen’s delivery call” *Memorandum in Opposition* at 3 (emphasis added). As Rangen acknowledges, this proceeding on IGWA’s CM Rule 43 Mitigation Plan is a separate and distinct contested case from the hearing on Rangen’s CM Rule 40 delivery call. What happened in Rangen’s CM Rule 40 delivery call is not instructive for purposes of evaluating the Cities’ interest in the hearing on IGWA’s CM Rule 43 Mitigation Plan.

4. Representation at the Hearing is not for Rangen to Dictate

Lastly, if the Cities are granted intervention, Rangen attempts to condition the Cities’ intervention by asking the Director to limit appearance at the hearing “to the attorney for the [Cities’] Steering Committee.” *Memorandum in Opposition* at 4. Rangen’s request is unreasonable and inconsistent with past practice. In IGWA’s prior CM Rule 43 mitigation plan hearings, the Director did not limit the Surface Water Coalition (“SWC”), which is made up of seven irrigation entities, to representation by a single attorney. Like the SWC, each city holds its

own water rights, has its own city councils (boards in the case of the SWC), and its own attorneys.

Nevertheless, and as stated in the Petition for Intervention, the Cities developed a Steering Committee, which met to consolidate representation in one or more attorneys. The Steering Committee drafted a resolution for all Cities to adopt, which provides for consolidated representation in one or more attorneys. While not all of the resolutions have been adopted because regular meetings for all city councils have not yet been held, the Cities reiterate that the hearing will not be prolonged by examination or production of evidence by separate attorneys or representatives for each individual city.

CONCLUSION

Based on the foregoing, the Cities have a direct and substantial interest in the Mitigation Plan that will not be adequately represented by IGWA. Contrary to Rangen's assertions, granting the Cities' Petition for Intervention will not unduly broaden the issues. Thus, the Cities respectfully request that they be granted intervenor status with the right to present information, examine witnesses, and provide argument by one or more attorneys.

RESPECTFULLY SUBMITTED.

DATED this 7 day of March, 2014.

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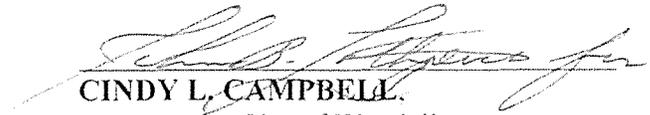
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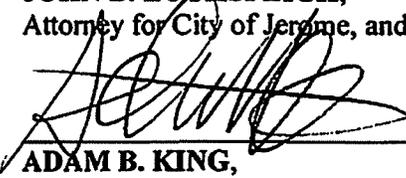
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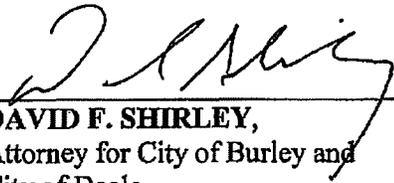
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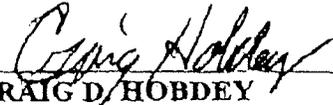
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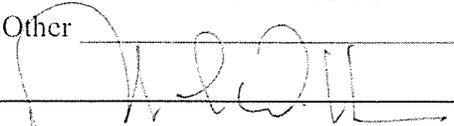
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I HEREBY CERTIFY That on this 7 day of March, 2014, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

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