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DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF RANGEN, INC.'S WATER RIGHT NOS. 36-02551 & 36-07694	Docket No. CM-DC-2011-004 **RANGEN, INC.'S MEMORANDUM IN OPPOSITION TO THE IDAHO CITIES' PETITION FOR LIMITED INTERVENTION**

Rangen, Inc. ("Rangen"), by and through its attorneys, and pursuant to Rule of Procedure 354, opposes the Idaho Cities' Petition for Limited Intervention. As grounds, Rangen states the following:

1. The Director set forth the standard for intervention in his *Order Denying Buckeye Farms, Inc.'s Petition for Limited Intervention* dated September 11, 2012. The Director explained:

> Rule of Procedure 352 provides that to be considered timely, a petition to intervene must be:

> [F]iled at least fourteen (14) days before the date set for formal hearing, or by the date of the prehearing conference, whichever is earlier, unless a different time is provided by order of notice.

Order Denying Buckeye Farms, Inc.'s Petition for Limited Intervention, p. 2 (quoting IDAPA 37.01.01.352).

2. Rangen initiated this water call on December 13, 2011. The prehearing conference was held on January 19, 2012. This matter has been pending for over two years. The formal hearing of this matter took place over two weeks in May 2013 – nearly a year ago. The Idaho Cities' request to intervene is two years past due under Rule of Procedure 352 and should be denied on that basis.

3. The Director ruled in his *Order Denying Buckeye Farms, Inc.'s Petition for Limited Intervention* that even if a Petition for Intervention is untimely, he can still grant it so long as the intervenor shows a direct and substantial interest in any part of the subject matter of the proceeding and unless the applicant's interest is adequately represented by existing parties. *Order Denying Buckeye Farms, Inc.'s Petition for Limited Intervention*, p. 2. In support of his interpretation, the Director quoted the portion of Rule of Procedure 352 which states: "The presiding officer may deny or conditionally grant petitions to intervene that are not timely filed for failure to state good cause for untimely filing, to prevent disruption, prejudice to existing parties or undue broadening of the issues, or for other reasons." Id. (quoting IDAPA 37.01.01.352).

4. The Director should not interpret Rule of Procedure 352 to allow for intervention after a formal hearing has taken place under any circumstances. Even if the Rule could be interpreted to allow post-hearing intervention, there is no justification for the Idaho Cities'

failure to intervene in this matter before now and their interests are otherwise adequately represented by IGWA.

5. The Idaho Cities justify their late entry in this case by stating: "Most of the Petitioners were not aware of the entry of the Order until several days after its occurrence." They claim that they need to join IGWA in a request for a stay so that they can formally organize and consolidate their legal representation. *See Petition*, pp. 5-6.

6. Idaho municipalities that own groundwater rights have to be concerned with water calls filed in the SRBA. Certainly the City of Pocatello recognized its interests in Rangen's Petition for Delivery Call shortly after it was filed and intervened and fully participated in the adjudication of this matter. It is not an excuse for other Idaho Cities to simply say "we didn't know," and then seek to intervene in, and delay, a legal matter that has been pending for over two years.

7. Rangen actually anticipated the "surprise" argument the Idaho Cities are now making and asked nearly two years ago that junior-priority groundwater pumpers be issued notices of possible curtailment so that they could be prepared in the event a curtailment order was issued just prior to the beginning of the irrigation season (at the time the request was made, the Director anticipated issuing on a final order on Rangen's call by April 1, 2013). *See Transcript of May 24, 2012 Hearing* ("Transcript") attached as *Exhibit 3 to Affidavit of J. Justin May in Opposition to the Idaho Cities' Petition for Limited Intervention and in Opposition to IGWA's Petition to Stay Curtailment* ("*May Affidavit*"). The Director advised counsel for IGWA that it had the responsibility of notifying its members ahead of a formal hearing of the possibility of curtailment. The Director stated:

> ***My inclination is that we place that burden upon [counsel for IGWA]. She's representing those folks, the groundwater users and they should, I***

> ***guess, have the ability to anticipate the possibility of curtailment.*** As we go through I'm not sure I want to be issuing a notice ahead of some decision. I think that's a little difficult. When the notices were issued I think they were issued after Carl Dreyer's [sic] initial orders, and so it was based on an order that had been issued, an evaluation of where we were at from the standpoint of storage in the system or, you know, what was predicted as a water year, and those were sent out as a result. But I think we're premature.

Transcript, p. 44, lines 10-22 (emphasis added).

IGWA unequivocally rejected the Director's determination:

> Ms. McHugh: *Just for the record, we aren't planning to send out any notices.*
>
> Mr. Haemmerle: You've got a lot of confidence. That's good.
>
> Ms. McHugh: I'll represent the IGWA ground water appropriators and the board, but we're not going to send out notices to individual groundwater users.

Transcript, p. 44, line 23 – p. 45, line 4. After this exchange, the Director commented that everyone needed to be prepared for the possibility of an April 1st curtailment order. *See Transcript*, p. 45, lines 5-13.

8. The Idaho Cities state that they are only seeking intervention "to support" the Idaho Ground Water Appropriators, Inc.'s Petition to Stay Curtailment and Request for Expedited Decision. *See Petition*, p. 3. If this is the only basis for their intervention, their petition should not be granted because their interests are adequately represented by IGWA.

9. IGWA actually represents many of the Idaho Cities who are now petitioning to intervene. Attached as Exhibit 1 to the *May Affidavit* is a copy of two pages from a website operated by Idaho Water Policy, Inc. and the Director of Idaho Groundwater Appropriators, Inc., Lynn Tominaga. It states: "Idaho Groundwater Appropriators represents agricultural, industrial and ***municipal*** ground water users across southeastern Idaho." *See Exhibit 1 to May Affidavit* (emphasis added). IGWA stated in its *Petition to be Designated as Respondent or*

Alternatively to Intervene in this call ("IGWA's Petition") that "IGWA represents Ground Water Districts whose members consist of hundreds of irrigators, *municipalities*, and commercial and industrial entities operating within the State of Idaho." *IGWA's Petition*, p. 2 (emphasis added). IGWA's letterhead shows that its City Members include: City of American Falls, City of Blackfoot, City of Chubbuck, City of Heyburn (now petitioning for intervention), City of Jerome (now petitioning for intervention), City of Paul (now petitioning for intervention), and the City of Rupert (now petitioning for intervention). *See Exhibit 2 to May Affidavit* for a copy of IGWA's letterhead showing its City Members. Just as the Director found that the Surface Water Coalition adequately represents Buckeye Farms' interests in this call, he should find that IGWA adequately represents the interests of the Idaho Cities and there is no need for them to intervene separately.

Wherefore, the Idaho Cities' Petition for Limited Intervention to support IGWA's request for a stay should be denied because their Petition is untimely and their interests are adequately represented by IGWA.

DATED this 19th day of February, 2014.

MAY, BROWNING & MAY, PLLC

By: _____
J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 19th day of February, 2014, he caused a true and correct copy of the foregoing document to be served upon the following as indicated:

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