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

IN THE MATTER OF APPLICATIONS
FOR PERMIT NOS. 63-34079 AND 63-
34080 IN THE NAME OF CHRIS EMMERT

**MUNICIPAL PROVIDERS'
SECOND PETITION TO INTERVENE**

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INTRODUCTION

COMES NOW the City of Meridian and the City of Caldwell, by and through their attorney Honsinger Law, PLLC, the City of Nampa and Suez Water Idaho Inc., by and through their attorneys Givens Pursley LLP, the City of Eagle, by and through its attorneys Moore Smith Buxton & Turcke, Chartered, the City of Boise, by and through its attorney Abigail R. Germaine, and the City of Kuna, by and through its attorney Richard T. Roats (collectively “Municipal Providers”) and hereby submit this *Second Petition to Intervene* in the above captioned matter currently on review before the Director of the Idaho Department of Water Resources (“IDWR”) or (“Department”). Municipal Providers are simultaneously filing *Municipal Providers’ Brief on Exceptions to the Director*.

PROCEDURAL HISTORY

Two applications for permit (Nos. 63-34079 and 63-34080) were filed by Applicant Chris Emmert (“Applicant” or “Emmert”) on May 8, 2015 and September 25, 2015, respectively. The applications were protested by Boise Project Board of Control (“Protestant” or “Boise Project”). (Depending on the context, the Boise Project also may refer to the project facilities owned and operated by the Protestant and its affiliates.) The Hearing Officer issued his *Preliminary Order Approving Applications for Permit* (“*First Preliminary Order*”) on June 19, 2017. On June 30, 2017, the Protestant filed *Boise Project Board of Control’s Petition for Reconsideration of Preliminary Order Approving Applications for Permit* (“*Petition for Reconsideration*”). Emmert filed *Applicant’s Opposition to Reconsideration* on July 14, 2017. On the same day, July 14, 2017, the Municipal Providers filed *Municipal Providers’ Petition to Intervene* (“*First Petition to Intervene*”) and *Municipal Providers’ Brief in Opposition to Petition for Reconsideration*. On July 19, 2017, Protestant filed a *Motion to Strike* the Municipal Providers’ petition to intervene,

together with a *Memorandum in Opposition to Petition for Intervention and in Support of Motion to Strike* (“*Opposition to Intervention*”). On July 20, 2017, Emmert filed *Applicant’s Notice of Non-Opposition to Motion to Intervene*. On the same day, July 20, 2017, the Municipal Providers filed *Municipal Providers’ Response to Boise Project’s Motion to Strike and Memorandum in Opposition*. On the following day, July 21, 2017, the Hearing Officer issued his *Order Denying Petition to Intervene* and his *Order Granting Petition for Reconsideration; Amended Preliminary Order Rejecting Applications for Permit* (“*Amended Preliminary Order*”). The *First Preliminary Order* and *Amended Preliminary Order* are referred to collectively as the “*Preliminary Orders*.” On July 24, 2017, the Hearing Officer issued an *Amended Order Denying Petition to Intervene*, which corrected the certificate of service without amending the substance of the order.

The Hearing Officer took no action with respect to Boise Project’s *Motion to Strike*, and did not address the arguments contained in *Municipal Providers’ Brief in Opposition to Petition for Reconsideration* other than to recognize their filing. On August 3, 2017, the Applicant filed *Applicant’s Exceptions to Amended Preliminary Order* (“*Applicant’s Exceptions*”).

The Municipal Providers seek intervention in this matter to address the *Amended Preliminary Order* and *Applicant’s Exceptions*, and to participate in any further proceedings or appeals in this matter.

THIS PETITION MAY BE TREATED AS A PETITION FOR RECONSIDERATION OR REVIEW

The Municipal Providers have not filed a petition for reconsideration or review of the Hearing Officer’s *Amended Order Denying Petition to Intervene* because that appears to be unnecessary. Given the exceptions filed by Emmert, the Municipal Providers have a fresh opportunity to intervene at this new stage of the proceeding. Accordingly, there is no reason to

re-hash that decision or to ponder the procedural intricacies of what would happen if the Hearing Officer's decision to deny intervention were reversed.

If, however, for any reason, the Department (either the Director or the Hearing Officer) determines that it makes more sense to reconsider or review the first intervention denial, this petition may and should be deemed a petition for reconsideration or review. If that were to occur, presumably, the next step would be to allow the Municipal Providers an opportunity to file their own exceptions to the *Amended Preliminary Order*, *nunc pro tunc*.

In any event, Municipal Providers discuss below their disagreement with the decision of the Hearing Officer. That argument is relevant either to a new petition to intervene on appeal or to a petition to reconsider or review the denial of the first intervention petition.

STANDARDS

I. PROCEDURAL RULE 350

Procedural Rule 350 describes who is eligible to seek intervention:

Persons 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, if a formal hearing is required by statute to be held in the proceeding.

IDAPA 37.01.01.350 (emphasis supplied).

There are three parts to this threshold eligibility requirement:

1. The person must not already be a participant in the proceeding.
2. The person must have a “direct and substantial interest in the proceeding.”
3. The proceeding must be a formal proceeding in which a hearing is required by statute (as opposed, for example, to agency action on an unopposed permit application).

II. PROCEDURAL RULE 352

Procedural Rule 352 sets out the deadline for a petition to intervene and certification for untimely petitions:

Petitions to intervene must be filed 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 or notice. Petitions not timely filed must state a substantial reason for delay. 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. Intervenors who do not file timely petitions are bound by orders and notices earlier entered as a condition of granting the untimely petition.

IDAPA 37.01.01.352 (emphasis supplied).

Thus, petitions to intervene normally must be filed at least 14 days prior to the hearing in a proceeding. However, petitions to intervene filed after that time, though deemed “untimely,” are not precluded and may be granted upon a showing of “substantial reason for delay” (*i.e.*, if there is “good cause” for the delay), so long as the intervention will not cause disruption, prejudice, broadening of the issues, or other problems.

In addition, the rule provides that the Department may grant an untimely petition upon conditions it deems appropriate.

III. PROCEDURAL RULE 353

Procedural Rule 353 sets out criteria for timely petitions for intervention:

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.

IDAPA 37.01.01.353 (emphasis supplied).

Presumably this rule does not apply here, because the Municipal Providers' petition is deemed "untimely." Two of the criteria are redundant with the criteria applicable to untimely petitions ("direct and substantial interest" and "does not unduly broaden the issues"). In addition, this rule requires that intervenor show that its interests are not adequately represented by others. It makes no sense that this criterion would apply to timely petitions but to untimely ones. Accordingly, the Department should consider this criterion under the catch-all "other reasons" applicable to untimely petitions.

MUNICIPAL PROVIDERS' INTERESTS

Six of the Municipal Providers (the Cities of Meridian, Nampa, Caldwell, Kuna, Eagle, and Boise) are municipal corporations and subdivisions of the State of Idaho. Each of these cities holds municipal and/or other ground water rights under which it diverts water for delivery to municipal customers within its service area. Suez Water Idaho Inc. is a regulated public utility that holds municipal and other ground water rights under which it diverts water for delivery to its customers within its certificated area, which includes parts of the Cities of Boise, Eagle, Garden City, and Meridian, as well as parts of unincorporated Ada County.

The Municipal Providers provide water to customers throughout the Treasure Valley for various purposes, including domestic in-home use, irrigation of homes and public spaces, commercial use, industrial use, and aesthetic and environmental use, among others. These are described collectively as municipal uses. Each of the Municipal Providers holds water rights potentially affected by the precedents that will be set in this matter, and some have water right applications now pending or anticipated that could be affected.

The Municipal Providers all have a substantial and direct interest in this proceeding and a substantial reason for their delay in submitting a petition to intervene. As explained more fully in the contemporaneously filed *Municipal Providers' Brief on Exceptions to the Director*, the Hearing Officer's *Amended Preliminary Order* sets forth reasoning and conclusions that are contrary to Idaho's prior appropriation doctrine and maximum use doctrine and that may negatively affect the Municipal Providers' exercise of their water rights and their ability to acquire new appropriations.

The concerns raised by these Municipal Providers are not unique. They are applicable to all municipal providers throughout Idaho and, indeed, to all ground water users. The Municipal Providers seek to address significant policy considerations that the Director should weigh as he considers the *Applicant's Exceptions* to the *Amended Preliminary Order*.

DISCUSSION

I. THE PETITION MEETS THE THRESHOLD REQUIREMENTS OF PROCEDURAL RULE 350.

As noted above, Procedural Rule 350 sets out the threshold requirements for who is entitled even to ask to intervene. It is a low threshold, which is met here.

A. Municipal Providers are not already participants.

The first criterion is trivial. Municipal providers are not already participants in this proceeding.

B. Direct and Substantial Interest

The second criterion is that Municipal Providers have a direct and substantial interest in the proceeding. They do. The Municipal Providers and their water rights are put directly at risk by precedential implications of the *Amended Preliminary Order*.

The Hearing Officer determined that the Applicant's proposed diversions of ground water would induce seepage of water from Lake Lowell stored by Protestant, and that the Applicant was therefore required to provide mitigation water to the Protestant to compensate for the induced seepage. The Hearing Officer would have made the same legal determination with respect to induced seepage from the Boise Project's canals, but he found that the Protestant's evidence of a hydraulic connection to ground water was insufficient to overcome that presented by Emmert. However, the Hearing Officer found that seepage from Protestant's canals required Emmert to provide additional mitigation water to account for conveyance losses in bringing the mitigation water through those canals to Lake Lowell. Because the Applicant lacked the prescience to foresee what kind of mitigation the Hearing Officer would impose, the Applicant did not provide conveyance loss evidence to quantify that mitigation requirement. For that reason, on rehearing, the Hearing Officer rejected the applications entirely, without prejudice. This surprise development sent the Applicant, who already has suffered significant litigation costs, back to square one.

The conclusions that the Applicant (and presumably all other ground water pumpers) are responsible for Protestant's induced seepage at its Lake Lowell storage facility, and likewise responsible for conveyance losses due to Protestant's delivery of mitigation water through Boise Project's own leaky canal system, are of great and immediate concern to the Municipal Providers.

Their concern is not abstract or academic. The Municipal Providers all pump groundwater pursuant to valid water rights. All serve growing communities and, hence, will be called upon to file future applications for additional groundwater rights. Some of their existing wells are closer to Lake Lowell than others, and some of their future wells proposed pursuant to

new water right applications will be closer to Lake Lowell than others. Regardless of their proximity to Lake Lowell, the conclusions in the *Amended Preliminary Order* invite the argument that any well in the valley induces additional seepage from Lake Lowell requiring mitigation from the applicant and/or the right holder.

Moreover, irrigation canals owned by the Boise Project and other irrigation entities criss-cross areas throughout which the Municipal Providers divert ground water. The same reasoning that the Hearing Officer used to find Emmert responsible for additional induced seepage from Lake Lowell could be used against any of the Municipal Providers with respect to additional seepage from these canals induced by their own groundwater pumping, whether conducted pursuant to future or existing groundwater rights.

The fact that the Hearing Officer found the evidence of hydraulic connection presented in this particular case was insufficient is of little comfort to Municipal Providers who likely will be required to spend taxpayer or ratepayer dollars opposing the next round of protests and other actions if the Hearing Officer's action is not overturned.

The Municipal Providers' water rights (present and future) are geographically located so as to be directly affected by whatever mitigation precedent is established in this litigation. Accordingly, they are significantly impacted by the *Amended Preliminary Order* because the conclusions and reasoning therein can be used against them in the future. This constitutes a "direct and substantial interest" in this proceeding.

In its *Opposition to Intervention*, Boise Project contended that this allegation of a direct and substantial impact is "patently absurd," because the Department will take up anew the

mitigation issue in any future application. *Opposition to Intervention* at 3.¹ The Hearing Officer agreed, noting that “a preliminary order by a Department hearing officer does not establish irrefutable legal precedent.” *Amended Order Denying Petition to Intervene* at 3.

With all due respect, there is no such thing as irrefutable legal precedent. All precedent is refutable. But administrative precedent is powerful and refuting it is costly and uncertain. Let us be deadly serious. Boise Project did not pour untold litigation dollars into fighting a poor seed farmer’s miniscule water right applications because they care about 325 acre-feet of ground water withdrawals. They know and understand that precedent is a powerful thing. Precedent, frankly, is what drives many protests and interventions, and much litigation over water rights.²

C. This is a formal proceeding in which a hearing was required to be held.

The third criterion is that the proceeding in which intervention is sought is one in which a formal hearing is required by statute to be held. The obvious purpose of this criterion is to prevent non-parties who have missed the protest deadline from subsequently intervening in a contested case in which no person has filed a timely protest or in which all protests have been resolved informally so that no hearing need be held. In other words, if an application or other matter will be handled informally (without hearing), a latecomer may not disrupt that process and force the agency and applicant to a hearing that otherwise would not have occurred.

For example, in *In the Matter of Application for Transfer No. 73696 in the Name of*

¹ Boise Project also contended that the Municipal Providers failed to establish their standing. Those arguments, which were not addressed or relied on by the Hearing Officer, were refuted in *Municipal Providers’ Response to Boise Project’s Motion to Strike and Memorandum in Opposition*, at 5 (July 20, 2017).

² For example, the cities of Boise, Meridian, and Caldwell are all intervenors in Suez’s Integrated Municipal Application Package. Their interests are direct and substantial, though based solely on the important precedents that will be established in that proceeding.

Robert Rohe (“*Rohe I*”), IDWR (Final Order Denying Petition for Review of Order Denying Petition to Intervene, May 12, 2010) (reproduced in Exhibit C at page 40), the Director denied an untimely petition to intervene on the basis of Procedural Rule 350 (among other reasons, see discussion in section I.C beginning on page 12). In that case, the Idaho Water Resource Board sought to intervene at the eleventh hour in a matter that had never gone to hearing because all timely protests had been resolved early on. The Director was on the verge of ruling in a matter that had never gone to hearing.³ The *Rohe I* case, is the perfect example of what Procedural Rule 350 is intended to prevent—tardy intervention in contested cases where there is no hearing.

This case has gone to hearing (and conceivably might again), so the third criterion is met.

II. THE PETITION MEETS THE REQUIREMENTS IN PROCEDURAL RULES 352 AND 353.

A. Granting intervention will not cause disruption or prejudice.

The Hearing Officer determined that because mere precedent was involved, “the interests of the Municipal Providers are not direct and substantial enough to outweigh the disruption and prejudice that granting intervention would cause.” *Amended Order Denying Petition to Intervene* at 3. The Hearing Officer appeared particularly concerned with the 21-day timeframe in which he was obligated to act. He noted that intervention was sought “[w]ith a mere week left before the Hearing Officer is required to dispose of the Petition for Reconsideration” *Amended Order Denying Petition to Intervene* at 2.

That concern was driven by the confoundingly strict ruling in *A&B Irrigation Dist. v. IDWR*, 154 Idaho 652, 301 P.3d 1270 (2012) (Eismann, J.) (interpreting Idaho Code § 67-5246). There is no need to debate whether the Hearing Officer could or should have managed to address

³ Indeed, the Director issued his final ruling on the merits of the contested case on the same day that he denied intervention. *In the Matter of Application for Transfer No. 73696 in the Name of Robert Rohe* (“*Rohe II*”), IDWR (Final Order and Order Denying Exceptions May 12, 2010).

the vital issues raised by Municipal Providers within the timeframe set by statute. Thankfully, that constraint is not present at this stage of the proceeding. Section 67-5246 (applicable to motions for reconsideration) is not applicable here. Instead, Procedural Rule 730 affords the Director ample time to consider the exceptions.⁴

B. Municipal Providers accept the case as they find it.

The Hearing Officer stated, incorrectly, that the Municipal Providers raise “legal theories not previously advanced in these proceedings, namely that injury applies only at the point of diversion for a water right, the maximum use theory, and the use of this case to circumvent the *Rules for Conjunctive Management of Surface and Ground Water*” which would “broaden the scope of the proceedings.” *Amended Order Denying Petition to Intervene*, at 3.

It is certainly true that the Municipal Providers have an entirely different emphasis and strategic approach to this matter than does Emmert. (See discussion in section II.C beginning on page 15.) But it is not true that these are brand new issues.

Emmert addressed the point of diversion issue in his written closing argument. “Protestant does not have a water right to appropriate and store any ground water in Lake Lowell. Its only recognized source is Boise River water diverted at the Diversion Dam many miles up-valley on the Boise River. Accordingly, when analyzing whether the quantity of water available to Protestant’s existing rights will be reduced, the Department looks not to Lake Lowell, but to whether flows of the Boise River are reduced at Protestant’s point of diversion.” *Applicant’s Closing Arguments* at 9 (April 24, 2017). Emmert also addressed the maximum use

⁴ No deadline is stated for the Director to decide whether to “grant a petition to review the preliminary order,” which, presumably refers to the exceptions. Briefing and oral argument will follow, with no deadline specified. Thereafter a 56-day clock starts, but even that may be extended for good cause. IDAPA 37.01.01.730.02(d).

doctrine in an entire section devoted to the subject. *Id.* at 10-13. The issue about Boise Project's avoidance of the Conjunctive Management Rules was not presented as a new legal issue but as context for the Department's consideration of the other legal issues presented. Emmert also provided this context: "If the Protestant has its way, the Department effectively is setting the reasonable pumping level for the regional aquifer surrounding Lake Lowell at the ground surface." *Id.* at 12.

These are not new issues raised for the first time by Municipal Providers. They are new only in the sense that the Hearing Officer has never seen fit to address them.

The fact that Municipal Providers seek to present issues from their own municipal perspective, more thoroughly or, perhaps, even more effectively, than Emmert, does not equate to broadening the scope of the proceedings. Indeed, one would hope that the decision-maker would welcome additional perspectives on vitally important issues that already have been placed before him and which, in any event, he is obligated to consider.

Moreover, the Municipal Providers have made clear that their interests lie in the legal issues, not in this particular evidentiary dispute. Accordingly, they do not seek to expand the evidence in this proceeding. Of course, if there were to be a remand allowing further evidence taking, Municipal Providers would be entitled to submit additional evidence like anyone else. Their whole objective, however, is to avoid any remand and associated factual battle.

C. Municipal Providers' interests are not adequately represented.

The Municipal Providers' interests are directly adverse to those of the Protestant. Although the Municipal Providers' interests are generally aligned with those of the Applicant, the Applicant is unable to adequately represent the Municipal Providers' interests.

The Applicant is a private party engaged in a for-profit enterprise. Resolution on terms he can live with may differ from the interests of Municipal Providers. Municipal Providers are public and regulated entities whose concerns reach across the public they serve. They divert and deliver vastly more ground water from many more wells—hundreds of them—than the 235 acre-feet sought by the Applicant. Consequently, a decision requiring mitigation of a small percentage of ground water diversions might be undesirable but ultimately acceptable to the Applicant. Such requirements, however, would carry far greater consequences for the Municipal Providers and the hundreds of thousands of citizens and businesses they serve.

The Municipal Providers have obligations to their customers and constituents that the Applicant cannot practically or legally fulfill. Municipal Providers have an obligation to serve all who come to their service areas now and into the future. Accordingly, they must continually plan for future growth, which includes the acquisition of additional ground water rights. If the Municipal Providers are required to mitigate for all future water rights they acquire, the overall impact could be enormous. Moreover, if mitigation water is not available in a particular year, the Municipal Providers cannot simply forego diversion for a season under their existing rights because they have an ongoing obligation to serve.

For all of these reasons, the Applicant simply cannot be expected to adequately represent the Municipal Providers' concerns regarding the issues raised in this proceeding and the troubling precedents that could be set.

D. There are substantial reasons for delay.

The period within which a petition for intervention is normally filed has passed. However, the Director may grant a delayed petition for intervention upon a showing of substantial reason for delay. The Municipal Providers were unaware that a potential mitigation

requirement for canal seepage was even an issue in this proceeding until the *First Preliminary Order* was issued. Boise Project raised only issues related to the effects of ground water pumping upon its Lake Lowell water rights in its Protest. With the filing of Boise Project's *Petition for Reconsideration*, the Municipal Providers became aware of the potential of a finding that mitigation could be required for seepage from canals. That significantly expanded the potential impact of this decision, and the Municipal Providers filed their *First Petition to Intervene* with the Hearing Officer—within the 14-day timeframe for responding to Boise Project's *Petition for Reconsideration*. Because it was impossible for the Municipal Providers to be aware of this potential until the Hearing Officer's issuance of the *First Preliminary Order* and Boise Project's subsequent *Petition for Reconsideration*, the Municipal Providers have shown a substantial reason for their delay in seeking intervention into this proceeding.

In its *Memorandum in Opposition to Petition for Intervention and in Support of Motion to Strike*, Boise Project argues that the Municipal Providers should have been aware of the potential impacts of this proceeding because evidence introduced into the case referenced canal seepage prior to the issuance of the *First Preliminary Order*. For the Municipal Providers to be aware of such evidence, they would have had to monitor the case full-time, an absurd proposition.

In any event, the delay in intervention is outweighed by the public interest in allowing the Director to hear the concerns of these Municipal Providers who serve and represent the interests of much of the Treasure Valley and who wish to inform the decision maker of the far-reaching policy implications of this seemingly “small” case. Moreover, granting intervention at this stage of the proceeding—review of the matter by the Director—will not prejudice the parties, broaden the issues, or disrupt the proceedings, because the Municipal Providers are merely seeking the opportunity for the Director to hear and consider their arguments on his review of this matter.

They are not seeking to reopen the record to introduce additional testimony and evidence, but believe it is important for the Director to consider the policy implications and impacts of a decision in this case on Idaho's municipal water suppliers.

E. This is a live matter.

Under Procedural Rule 350, the Director has discretion to consider "other reasons" for denying an application for intervention. In two instances, the Department has denied intervention because the petition was so late that there was nothing left to do in the proceeding.

(1) This is not like *Rohe I*.

The first is *Rohe I* (reproduced in Exhibit C at page 40), in which the proposed intervenor (Idaho Water Resource Board) sat out an entire proceeding, including the resolution of protests, the approval of the transfer application, a petition for reconsideration, an amendment of the approval, a second petition for reconsideration, and a denial of the second petition. Exceptions were then filed by the applicant. The Department rejected two late protests. Then, at the last moment, the Water Board filed its untimely petition to intervene. That was denied under Procedural Rule 350 (as discussed above in section I.C beginning on page 12). Upon a petition for review of the denial, the Director offered a second reason under Procedural Rule 352:

Because the petition to intervene was filed late in the proceedings and the final order regarding the transfer is being issued simultaneously with this order, it does not make sense to grant intervention at this late stage of the process. There is almost nothing left for the Board to participate in now.

Rohe I, at 3.

First, in sharp contrast to the Water Board's sitting out two prior petitions for reconsideration, Municipal Providers filed a petition to intervene prior to the 14-day deadline for responding to the first and only rehearing petition before the Hearing Officer in this case.

Second, this is not a situation in which there is almost nothing left to participate in. The *Municipal Provider' Second Petition for Intervention* was filed only one day after the *Applicant's Exceptions*. Moreover, the *Municipal Providers Brief on Exceptions to the Director* are being filed simultaneously, so that those arguments may be considered at the same time as the Director considers briefing provided by the parties.

(2) This is not like *Rangen*.

This *Second Petition to Intervene* also stands in sharp contrast to the petition to intervene that was denied by the Director in the *Rangen* matter. In that proceeding, a group of cities in the Magic Valley filed an untimely petition to intervene in a conjunctive management delivery call proceeding. Unlike the Emmert matter, the *Rangen* delivery call was highly publicized and well known throughout the water user community. Even more significantly, the Magic Valley cities did not seek to intervene until after the final order was issued and after a timely petition for reconsideration was fully briefed and decided.

In other words, by the time the Magic Valley cities filed their petition, the case was dead. This was called out as the reason for denial of the petition.

The Cities have not demonstrated good cause or any other reason to grant the untimely Petition as there is nothing for the Cities to further participate in before the Department with respect to this proceeding. . . . Because the petitions for reconsideration have been denied, there are not further proceedings related to the Curtailment Order for the Cities to participate in.

In the Matter of Distribution of Water to Water Right Nos. 36-02551 and 36-07694 ("Rangen"), IDWR, at 2 (Order Denying Idaho Cities' Petition for Limited Intervention, Mar. 26, 2014) (underlined emphasis added) (copy attached as Exhibit A at page 28)..

The Municipal Providers' posture in this case is the exact opposite of the cities' situation in *Rangen* where a final order had been issued, for all intents and purposes ending that case. The

Municipal Providers here seek to intervene in a live case in which exceptions have been filed and have not yet been considered by the Director. The Municipal Providers' *First Petition to Intervene* before the Hearing Officer was appropriate for that reason, and this *Second Petition to Intervene* is also appropriate before the Director.⁵

F. Municipal Providers have coordinated their response.

In order to minimize the burden of their intervention on the Applicant, the Protestant, the Hearing Officer, and the Department, the Municipal Providers previously coordinated their efforts to speak with one voice, and have continued to do so by filing this joint petition and a concurrently filed joint brief in support of the *Applicant's Exceptions* filed by the Applicant.

SUMMARY

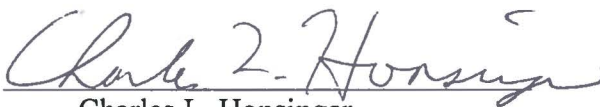
Upon learning of the Hearing Officer's *First Preliminary Order* and the Protestant's *Petition for Reconsideration*, the Municipal Providers quickly organized and responded to the new issues raised therein. They submitted their *First Petition to Intervene* and provided a unified response that did not require the parties or the Hearing Officer to reply to multiple arguments made by multiple parties. Although the Hearing Officer erroneously denied their *First Petition to Intervene*, the Municipal Providers believe it is important for the Director and IDWR to consider their concerns. Thus, they have again organized and responded to the *Amended Preliminary Order* and subsequent *Applicant's Exceptions* by jointly submitting this *Second*

⁵ In *In the Matter of Distribution of Water to Water Rights Held by Members of the Big Wood & Little Wood Water Users Association Diverting from the Big Wood River*, IDWR, (Order Granting Late Request to Participate, Aug. 21, 2015) (copy attached as Exhibit B at page 32), the Director granted a late request for participation despite the fact that the intervenors were informed by the Department of the deadline for filing and nonetheless missed the deadline. Here, in contrast, Municipal Providers received no notice from the Department with respect to this proceeding and the startling expansion of its scope subsequent to the protest. They have nonetheless promptly filed their petition and brief (aka answer) in opposition to the Protestant's petition for reconsideration within the 14-day deadline set by the Department's rules.

Petition to Intervene and their *Brief in Support of Applicant's Exceptions*. Their briefing will be valuable in assisting the Director to consider the long-term effects and policy considerations related to the issues of ground water pumping impacts on storage and delivery facilities, and the mitigation required therefor. They have established a direct and substantial interest in this proceeding, and they have shown a substantial reason for delay. They are not seeking to broaden the issues, and the Applicant does not adequately represent their interests in this proceeding. Accordingly, the Director should grant this *Second Petition to Intervene*.

Respectfully submitted this 4th day of August, 2017.

HONSINGER LAW, PLLC

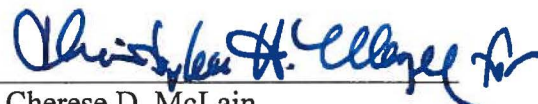
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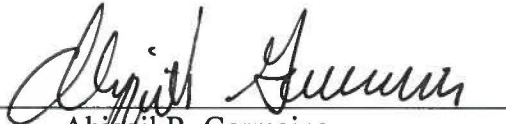
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Christopher H. Meyer

Exhibit A *RANGEN*- ORDER DENYING PETITION FOR LIMITED INTERVENTION (MAR. 26, 2014)

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

IN THE MATTER OF DISTRIBUTION OF	)	CM-DC-2011-004
WATER TO WATER RIGHT NOS. 36-02551	)	
AND 36-07694	)	ORDER DENYING IDAHO
	)	CITIES' PETITION FOR
(RANGEN, INC.)	)	LIMITED INTERVENTION
	)	
	)	

BACKGROUND

On January 29, 2014, the Director ("Director") of the Idaho Department of Water Resources ("Department") issued the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order").

On February 14, 2014, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell ("Cities") filed their *Petition for Limited Intervention* ("Petition") seeking to intervene in the proceeding.

In response to the Cities' Petition, on February 19, 2014, Rangen, Inc. ("Rangen") filed its *Memorandum in Opposition to the Idaho Cities' Petition for Limited Intervention* and the *Affidavit of J. Justin May in Opposition to the Idaho Cities' Petition for Limited Intervention*.

ANALYSIS

As the Cities acknowledge, the Petition was untimely filed. Specifically, 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." IDAPA 37.01.01.352. Rangen initiated the water call at issue in this case in 2011. The prehearing conference was held on January 19, 2012. The formal hearing on this matter took place in May 2013. The Cities did not file their Petition until February 14, 2014, well after the formal hearing on this matter.

However, Rule of Procedure 352 provides that "[t]he presiding officer may deny or conditionally grant petitions to intervene that are not timely filed for failure to state good cause

**ORDER DENYING IDAHO CITIES' PETITION
FOR LIMITED INTERVENTION - Page 1**

for untimely filing, to prevent disruption, prejudice to existing parties or undue broadening of the issues, or for other reasons.” IDAPA 37.01.01.352. Even a timely-filed petition to intervene may be denied when the interests of the party seeking intervention are already adequately represented in the proceeding. IDAPA 37.01.01.353.

The Cities assert the Petition “is sought for the limited purpose of supporting the Idaho Ground Water Appropriators, Inc.’s, *Petition to Stay Curtailment and Request for Expedited Decision*, dated February 11th, 2014.” *Petition* at 1. The Cities contend that “nothing currently contemplated by the Petitioners will disrupt the proceedings, prejudice any existing party, or unduly broaden any of the current issues presented.” *Id.* at 5. The Cities argue:

Intervention will permit the Cities to participate in this action which directly relates to their water use and will allow the Cities to propose a mitigation plan tailored to the unique circumstances of the Cities and the municipal water rights they own. The scope of the [Curtailment] Order, the unique aspects of municipal water rights compared to other types of water rights, including irrigation rights, and the lack of the Cities’ direct participation in the proceedings to date constitute good cause for the untimely filing of the Petition as required by Rule of Procedure No. 352.

Id. at 5.

The Cities have not demonstrated good cause or any other reason to grant the untimely Petition as there is nothing for the Cities to further participate in before the Department with respect to this proceeding. After the Director issued the Curtailment Order, the Idaho Ground Water Appropriators, Inc. (“IGWA”) timely filed *IGWA’s Petition for Reconsideration* (“IGWA Petition”), Rangen timely filed *Rangen, Inc.’s Motion for Reconsideration and Clarification* (“Rangen Motion”), and the City of Pocatello (“Pocatello”) timely filed *City of Pocatello’s Motion to Reconsider* (“Pocatello Motion”). On March 4, 2014, the Director issued an *Order on Reconsideration* denying the IGWA Petition and Pocatello Motion and denying the Rangen Motion except for the request to clarify the basis for the amounts designated in the mitigation phase-in. Because the petitions for reconsideration have been denied, there are no further proceedings related to the Curtailment Order for the Cities to participate in.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

The Idaho Cities’ Petition for Limited Intervention is DENIED.

DATED this 26th day of March, 2014.


GARY SPACKMAN
Director

**ORDER DENYING IDAHO CITIES’ PETITION
FOR LIMITED INTERVENTION - Page 2**

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I HEREBY CERTIFY that on this 26th day of March, 2014, the above and foregoing document was served on the following by providing a copy in the manner selected:

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**ORDER DENYING IDAHO CITIES' PETITION
FOR LIMITED INTERVENTION - Page 3**

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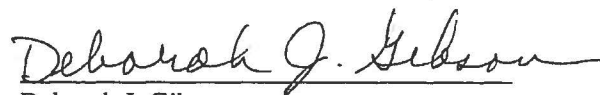
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Admin. Assistant for the Director

**ORDER DENYING IDAHO CITIES' PETITION
FOR LIMITED INTERVENTION - Page 4**

Exhibit B BIG WOOD - ORDER GRANTING LATE REQUEST TO PARTICIPATE (AUG. 21, 2015)

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

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHTS HELD BY
MEMBERS OF THE BIG WOOD & LITTLE
WOOD WATER USERS ASSOCIATION
DIVERTING FROM THE BIG WOOD
RIVER

Docket No. CM-DC-2015-001

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHTS HELD BY
MEMBERS OF THE BIG WOOD & LITTLE
WOOD WATER USERS ASSOCIATION
DIVERTING FROM THE LITTLE WOOD
RIVER

Docket No. CM-DC-2015-002

**ORDER GRANTING LATE REQUEST
TO PARTICIPATE**

BACKGROUND

On February 24, 2015, the Director ("Director") of the Idaho Department of Water Resources ("Department") received two conjunctive management water delivery call letters from counsel for members of the Big Wood & Little Wood Water Users Association. The letters allege senior surface water users on the Big Wood and Little Wood Rivers are being injured by water users diverting ground water hydraulically connected to the Big Wood and Little Wood Rivers. The letters request the Director regulate junior ground water users consistent with the prior appropriation doctrine.

The Director initiated new contested case proceedings and assigned each delivery call letter its own docket number. The Big Wood Delivery Call was assigned docket no. CM-DC-2015-001. The Little Wood Delivery Call was assigned docket no. CM-DC-2015-002.

On March 20, 2015, the Department sent letters to ground water users the Department identified as potentially affected by one or both of the above-described delivery calls, including Brian Lamar Smith and Diane Steffey-Smith ("the Smiths"). The purpose of the letters was to inform the water users of the delivery calls and notify them of a planned status conference. The letters invited the water users to file a written notice with the Department if they planned to participate in delivery call proceedings. The Department received over 100 notices of intent to participate.

The Department also published general notice of the delivery calls and the status conference in the Idaho Mountain Express and Camas Courier on March 25th, 2015 & April 1st, 2015; and the Times News on March 26th, 2015 & April 2nd, 2015.

ORDER GRANTING LATE REQUEST TO PARTICIPATE - Page 1

On May 13, 2015, the Director issued an *Order Governing Participation* ("Order") stating:

Holders of ground water rights that may be affected by one or both of the above-described delivery calls that have not filed a notice of intent to participate but wish to actively participate in the contested case proceedings must file with the Department a written notice of intent to participate in CM-DC-2015-001 or CM-DC-2015-002 or both cases, by May 27, 2015.

Order at 2 (emphasis in original). On June 1, 2015, the Department received a letter from the Smiths stating they "wish to participate in CM-DC-2015-001 and CM-DC-2015-002."

The Director will treat the Smiths' June 1, 2015, letter as a motion to grant a late request to participate in the Big Wood and Little Wood Delivery Call proceedings. As explained above, the Smiths are ground water users the Department identified as potentially affected by one or both of the above-described delivery calls. The Department received the Smiths' letter only a few days past the May 27, 2015, deadline established in the Order. Granting the Smiths' motion will not result in prejudice to other parties. The Director will grant the Smiths' motion.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Smiths' motion to grant a late request to participate in the Big Wood and Little Wood Delivery Calls is GRANTED.

DATED this 21st day of August 2015.


GARY SPACKMAN
Director

ORDER GRANTING LATE REQUEST TO PARTICIPATE - Page 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 21st day of August 2015, I served a true and correct copy of the above and foregoing document by placing a copy of the same in the United States mail, postage prepaid and properly addressed and by e-mail to participants who have provided e-mail addresses to the Department for service to the following:

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ORDER GRANTING LATE REQUEST TO PARTICIPATE - Page 3

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CLIFFSIDE HOMEOWNERS ASSN INC
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SALIGAO LLC
SANDOR & TERI SZOMBATHY
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STONEGATE HOMEOWNERS ASSN LLC
THE ANNE L WINGATE TRUST
THE BARKER LIVING TRUST
THE DANIEL T MONOOGIAN REVOCABLE
TRUST
THE JONES TRUST
THE RALPH W & KANDI L GIRTON 1999
REVOCABLE TRUST

THE RESTATED MCMAHAN 1986
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Exhibit C ROHE I– DENIAL OF PETITION TO INTERVENE (5-12-2010)

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

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 73969 IN THE NAME OF) FINAL ORDER DENYING PETITION
ROBERT ROHE) FOR REVIEW OF ORDER DENYING
) PETITION TO INTERVENE
)

FINDINGS OF FACT

1. On August 2, 2007, the Department received application for transfer no. 73969 ("transfer application") in the name of Robert Rohe ("applicant"). The transfer application proposed to change the point of diversion and place of use for water right no. 37-21956 from the Big Wood River. The transfer application was published in the *Idaho Mountain Express* on November 5 and 12, 2008. The Department received a protest to the application from the Big Wood Canal Company on November 21, 2008. A prehearing conference regarding the protest was held on March 27, 2009. The protest was withdrawn on March 30, 2009. There were no other timely protests to the application.

2. The Department approved the transfer application on August 7, 2009 and issued the approval as a preliminary order of the Department pursuant to Section 67-5243, Idaho Code. On August 21, 2009, the Department received a petition for reconsideration of the order from the applicant. On September 4, 2009, the Department issued a preliminary order amending the transfer application approval. On September 16, 2009, the Department received a second petition for reconsideration from the applicant. On September 18, 2009, the Department denied the applicant's second petition for reconsideration.

3. On October 13, 2009, the Department received a *Brief in Support of Exceptions to Order Denying Petition for Reconsideration* from the applicant. The applicant has not requested a hearing to contest the transfer application approval. A final order regarding the transfer application is being issued simultaneously with this order.

4. On August 21, 2009, the Department received *South County Estates Protest and Petition for Hearing on Transfer Approval Notice* filed on behalf of South County Estates, LLC ("South County"). On August 24, 2009, the Department received *Hiawatha Canal Water Users Association of Lateral or Laterals Protest and Petition Contesting Transfer* filed on behalf of Hiawatha Canal Water Users Association of Lateral or Laterals ("Hiawatha"). South County and Hiawatha requested a hearing on the matter before the Director pursuant to Section 42-1701A(3), Idaho Code. On September 4, 2009, the Department issued an order rejecting South County and

FINAL ORDER DENYING PETITION FOR REVIEW OF
ORDER DENYING PETITION TO INTERVENE, Page 1

Hiawatha's protests against the transfer application and denied their requests for hearing because they had not filed timely protests in the matter pursuant to Section 42-222, Idaho Code. The Department also ruled that pursuant to the Department's Rule of Procedure 350 (IDAPA 37.01.01.350), South County and Hiawatha cannot petition to intervene in the proceedings initiated by the transfer application unless a formal hearing is requested by the applicant.

5. On January 26, 2010, the Department received a *Petition to Intervene* filed on behalf of the Idaho Water Resource Board ("Board"). The Board holds two minimum stream flow water rights in a reach of the Big Wood River where the transfer application proposes to change the point of diversion. On February 9, 2010, the Department denied the Board's request to intervene in this proceeding. Consistent with its position in the South County and Hiawatha protests, the Department ruled the Board cannot petition to intervene at this stage in the proceeding unless a formal hearing is requested by the applicant. On February 25, 2010, the Department received a petition titled *Idaho Water Resource Board's Petition for Review of Order Denying Petition to Intervene*. The petition asks the Department to reconsider its denial of the Board's request to intervene.

CONCLUSIONS OF LAW

1. The Rules of Procedure of the Idaho Department of Water Resources govern contested case proceedings before the Department of Water Resources. IDAPA 37.01.01.001. Rule of Procedure 350 sets forth the standard for when intervention in a contested case is permissible. It provides:

Persons 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, if a formal hearing is required by statute to be held in the proceeding.

IDAPA 37.01.01.350 (emphasis added).

2. The Board is not an applicant or claimant or appellant, petitioner, complainant, protestant, or respondent to this proceeding. As such, pursuant to Rule of Procedure 350, the Board may petition for intervention only if a formal hearing is required by statute to be held in the proceeding.

3. In this case, a protest was filed but the protest was resolved prior to the hearing on the protest. Since there is no requirement to hold the hearing absent a protest and the applicant has not requested a hearing, Rule of Procedure 350 does not allow for intervention and the Board's request should be denied.

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ORDER DENYING PETITION TO INTERVENE, Page 2

4. Even if intervention were proper under the Rule of Procedure 350, the Department is reluctant to grant intervention at the final stage of the contested case proceeding. Rule of Procedure 352 provides:

Petitions to intervene must be filed 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 or notice. Petitions not timely filed must state a substantial reason for delay. 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. Intervenor who do not file timely petitions are bound by orders and notices earlier entered as a condition of granting the untimely petition.

IDAPA 37.01.01.352.

The prehearing conference in this matter was held on March 27, 2009. Because the petition to intervene was not submitted 14 days before the prehearing conference, the petition is not timely. Under Rule of Procedure 352, approval of an untimely petition to intervene is discretionary. Because the petition to intervene was filed late in the proceeding and the final order regarding the transfer is being issued simultaneously with this order, it does not make sense to grant intervention at this late stage of the process. There is almost nothing left for the Board to participate in now.

5. This does not mean that the Board is precluded from participating should the applicant seek a hearing before the Department or if the applicant appeals the final order to a district court. If the applicant seeks a hearing in the matter before the Department, the Department may consider petitions to intervene at that time pursuant to Rule of Procedure 350. If the applicant instead appeals the final order regarding the transfer to a district court, the Board can seek permission to intervene from the district court.

ORDER

IT IS HEREBY ORDERED that the *Petition for Review of Order Denying Petition to Intervene* filed by the Idaho Water Resource Board on February 25, 2010 is DENIED. This order

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ORDER DENYING PETITION TO INTERVENE, Page 3

does not preclude possible intervention before the Department if a hearing is requested by the applicant, nor does it preclude possible intervention before the district court upon judicial review of the final order of the Director.

DATED this 12th day of May 2010.



Gary Spackman
Interim Director

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CERTIFICATE OF SERVICE

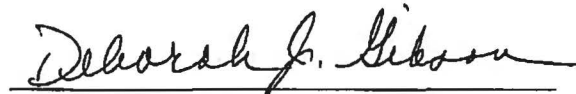
I HEREBY CERTIFY that on this 12th day of May, 2010, a true and correct copy of the document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid, and properly addressed to the following:

Document(s) Served: Final Order and Explanatory Information to Accompany a Final Order.

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