

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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

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

Docket No. CM-MP-2014-006
Docket No. CM-DC-2011-004

**ORDER DENYING PETITION TO
AMEND AND REQUEST FOR
TEMPORARY STAY**

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”).¹ The Curtailment Order recognizes that holders of junior-priority ground water rights may avoid curtailment if they participate in a mitigation plan which provides “simulated steady state benefits of 9.1 cfs to Curren Tunnel [sometimes referred to as the “Martin-Curren Tunnel”] or direct flow of 9.1 cfs to Rangen.” *Curtailment Order* at 42. The Curtailment Order explains that mitigation provided by direct flow to Rangen, Inc. (“Rangen”) “may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year.” *Id.*

On April 11, 2014, the Director issued the *Order Approving in Part and Rejecting in Part IGWA’s Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* (“Amended Curtailment Order”). On June 20, 2014, the Director issued an *Order Approving IGWA’s Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order* (“Second Amended Curtailment Order”). The Second Amended Curtailment Order approved mitigation required by the Curtailment Order through January 18, 2015. *Second Amended Curtailment Order* at 18. The Second Amended Curtailment Order also stated that water rights bearing priority dates junior or equal to August 12, 1973, will be curtailed

¹ The Curtailment Order was appealed in *Rangen, Inc., v. IDWR*, Twin Falls County Case No. CV-2014-1338. Judge Wildman issued his *Memorandum Decision and Order on Petitions for Judicial Review* (“Memorandum Decision”) on October 24, 2014, which affirmed the Director on a number of issues, but held the Director erred by applying a trim line to reduce the zone of curtailment. *Memorandum Decision* at 28. The Memorandum Decision has been appealed to the Idaho Supreme Court, Docket No. 42772-2015.

on January 19, 2015, if further mitigation is not provided by junior ground water right holders. *Id.*²

On August 27, 2014, Idaho Ground Water Appropriators, Inc. (“IGWA”), filed *IGWA’s Fourth Mitigation Plan and Request for Expedited Hearing* (“Fourth Mitigation Plan”). The Fourth Mitigation Plan consists of the “Magic Springs Project.” *Fourth Mitigation Plan* at 2. The Magic Springs Project is comprised of multiple components including design, construction, operation, and maintenance of the water intake and collection facilities, pump station, and pipeline to transport water from SeaPac’s Magic Springs facility to the head of Billingsley Creek directly up gradient from the Rangen Facility. *Id.* at 3.

The Director held a hearing for the Fourth Mitigation Plan on October 8, 2014, at the Department’s State office in Boise, Idaho. On October 29, 2014, the Director issued the *Order Approving IGWA’s Fourth Mitigation Plan* (“Fourth Mitigation Plan Order”). In approving the fourth mitigation plan, the Director reaffirmed the requirement that mitigation water must be delivered to Rangen on or before January 18, 2015, and if mitigation water was not delivered to Rangen, water rights bearing priorities dates equal or junior to August 12, 1973 are subject to curtailment. Of relevance to this order, the Director also ordered that, “if IGWA decides to construct a temporary pipeline system, IGWA must build the pipeline with new pipe.” *Fourth Mitigation Plan Order* at 21. Rangen filed a petition for judicial review of the Fourth Mitigation Plan Order on November 25, 2014. *See* Docket No. 2014-4633.³

On January 16, 2015, IGWA submitted to the Department *IGWA’s Petition to Amend Order Approving Fourth Mitigation Plan, or, in the Alternative, Temporarily Stay Curtailment; and Request for Expedited Decision* (“Petition to Amend”).⁴ IGWA states: “All permanent components of the [Magic Springs] Project are on schedule to be completed by [the January 19 deadline] except for the steel pipe that transports water from Magic Springs up the adjacent talas (sic) slope and cliff. Consequently, while the steel pipe is being completed, HDPE pipe will be used to transport water this short distance.” *Petition to Amend* at 2.

IGWA submitted with its Petition to Amend an *Affidavit of Robert Hardgrove in Support of IGWA’s Petition to Amend Order Approving Fourth Mitigation Plan, or, in the Alternative, Temporarily Stay Curtailment* (“Hardgrove Affidavit”). In the affidavit, Robert Hardgrove (“Hardgrove”), lead engineer on the Magic Springs Project, states that “[t]he temporary HDPE pipe is nearly completely installed. We discovered today that the supplier of the pipe ... provided used pipe. However, [the supplier] assured us the pipe has only been used to transport

² On November 21, 2014, the Director issued the *Order Granting Rangen’s Motion to Determine Morris Exchange Water Credit; Second Amended Curtailment Order* (“Order Determining Morris Exchange Water Credit”). This order increased the mitigation obligation owed to Rangen because of a shortfall in the Morris Exchange Agreement and reiterated that water rights bearing priority dates junior or equal to August 12, 1973, will be curtailed on January 19, 2015, if further mitigation is not provided by junior ground water right holders. *Order Determining Morris Exchange Water Credit* at 4-5.

³ A *Notice of Reassignment* was issued on December 1, 2014, assigning the case to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District for disposition and further proceedings.

⁴ That same day, Rangen filed *Rangen, Inc.’s Objection to IGWA’s Petition to Amend Order Approving Fourth Mitigation Plan, or, in the Alternative, Temporarily Stay Curtailment*.

clean water. It was previously used to pipe clean groundwater from the wells to fill water trucks. It has not been used to transport irrigation water, chemicals, or other contaminants.” *Hardgrove Affidavit* at 2. Hardgrove further states: “The HDPE pipe on site will be flushed at a [rate] greater than 10 ft/sec before being connected to the permanent pipe above the rim. The high flushing rate will be effective at cleaning the interior surface of the pipe, removing any sediment that exists from previous uses or installation.” *Id.* It is Hardgrove’s view the HDPE pipe currently installed will, upon being flushed as stated above, “deliver the same quality of water as new HDPE pipe.” *Id.* Therefore, IGWA requests that the Fourth Mitigation Plan Order “be amended to allow the use of used temporary pipe as long as it has not previously been used to transport chemicals or other contaminants.” *Petition to Amend* at 2. Alternatively, “IGWA requests a temporary stay of curtailment to enable new temporary pipe to be procured and installed, or to enable the permanent steel pipe to be completed.” *Id.*

ANALYSIS

Request to Amend

The Department’s Rules of Procedure provide that “[t]he agency head may modify or amend a final order of the agency . . . at any time before notice of appeal to the District Court has been filed or the expiration of the time for appeal to the District Court, whichever is earlier . . .” IDAPA 37.01.01.760. As explained above, Rangen filed a petition for judicial review of the Fourth Mitigation Plan Order in November 2014. The Director does not have authority to modify or amend the Fourth Mitigation Plan Order at this stage of proceedings. IGWA’s request to amend must be denied.

Request for Temporary Stay

The Director has authority to stay a final order pursuant to the Department’s Rules of Procedure:

Any party or person affected by an order may petition the agency to stay any order, whether interlocutory or final. Interlocutory or final orders may be stayed by the judiciary according to statute. The agency may stay any interlocutory or final order on its own motion.

IDAPA 37.01.01.780. The authority to stay a final order is also reflected in I.C. § 67-5274 and I.R.C.P. 84(m), which provide that an “agency may grant, or the reviewing court may order, a stay upon appropriate terms.” The use of the word “may” demonstrates the Director’s discretionary authority to stay enforcement of an order. *See Bank of Idaho v. Nesseth*, 104 Idaho 842, 846, 664 P.2d 270, 274 (1983).

IGWA has been aware of the January 19, 2015, deadline since the Director issued the Second Amended Curtailment Order on June 20, 2014. The Director declines to grant IGWA’s request for temporary stay.

ORDER

Based upon and consistent with the foregoing, the Director hereby orders as follows:

IT IS ORDERED that IGWA's request to amend the Fourth Mitigation Plan Order is DENIED.

IT IS FURTHER ORDERED that IGWA's request for temporary stay is DENIED. During the week of January 19, 2015, the Department will begin mailing written notice to water users holding water rights bearing priorities dates equal or junior to August 12, 1973, of the requirement to curtail the diversion and use of ground water. The Director recognizes that many nonirrigation beneficial uses are authorized by multiple water rights, some of which may be subject to curtailment, and some of which may bear priority dates senior to August 12, 1973, and are not subject to curtailment. The Department also recognizes that water for these multiple water rights may be delivered through integrated and possibly complex delivery systems. Department staff will analyze the individual systems to determine how the junior water rights can be physically curtailed. The Director encourages the holders of junior water rights to contact the Department directly or wait for Department staff to contact them prior to voluntarily shutting off diversions of ground water.

Dated this 17th day of January 2015.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 17th, 2015, I served a true and correct copy of the *ORDER DENYING PETITION TO AMEND AND REQUEST FOR TEMPORARY STAY* on the persons listed below by the method indicated.

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Deborah Gibson
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EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) The petition for reconsideration is disposed of; or
 - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.
- (8) The provisions of this section do not preclude an agency from taking immediate

action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.