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DEPARTMENT OF
WATER RESOURCES

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Attorneys for Rangen, Inc.

**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.)

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 & 36-07694 IN
THE NAME OF RANGEN, INC.

**CM-DC-2011-004
CM-MP-2014-001**

**RANGEN, INC.'S MOTION TO
DETERMINE MORRIS
EXCHANGE WATER CREDIT
AND ENFORCE CURTAILMENT**

COMES NOW, Rangen, Inc. ("Rangen"), by and through its attorneys, and hereby moves
the Director to 1) Determine 2014-2015 Morris Exchange Water Credit utilizing 2014 Martin

Curren Tunnel measurements¹, and 2) Enforce the January 29, 2014 Curtailment Order. This Motion is based upon the following:

1. On January 29, 2014, Director Spackman entered an order finding that Rangen's use of Water Right Nos. 36-02251 and 36-07694 is being materially injured by junior-priority ground water pumping. *Final Order re: Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962*, p. 36 at ¶ 36 ("Curtailment Order"). Director Spackman ordered that ground water pumping junior to July 13, 1962 be curtailed west of the Great Rift and within the area of common ground water supply as defined by CM Rule 50. *Id.* at p. 42.

2. Director Spackman also ordered that holders of ground water rights affected by the *Curtailment Order* had the right to file a mitigation plan in order to continue to use their rights out of priority. Director Spackman ordered:

IT IS FURTHER ORDERED that holders of ground water rights affected by this Order may participate in a mitigation plan through a Ground Water District or Irrigation District if a plan is proposed by a Ground Water District or Irrigation District. The mitigation plan must provide simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen. If mitigation is provided by direct flow to Rangen, the mitigation 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. Holders of ground water rights that are not members of a ground water district may be deemed a nonmember participant for mitigation purposes pursuant to H.B. No. 737 (Act Relating to the Administration of Ground Water Rights within the Eastern Snake Plain, ch. 356, 2006 Idaho Sess. Laws 1089) and Idaho Code § 42-5259. If a mitigation plan is approved and the holder of such a junior priority ground water right elects not to join a ground water district, the Director will require curtailment.

Curtailment Order, p. 42 (emphasis added).

¹ Rangen has petitioned for judicial review of the various orders approving credit for Morris Exchange Water. Rangen does not waive any issues related to the approval of Morris Exchange Water Credit or the methodology for calculating any such credit. This motion simply points out that even utilizing the Department's flawed methodology, the Morris Exchange Water is insufficient.

3. IGWA subsequently filed a series of “mitigation plans.” The Director found after a hearing that IGWA’s First Mitigation Plan did *not* satisfy either the 9.1 cfs steady state mitigation obligation or the 3.4 cfs direct flow mitigation obligation for the first year. *See Amended Order Approving in Part and Rejecting in Part IGWA’s Mitigation Plan; Order Lifting Stay Issued on February 21, 2014; Amended Curtailment Order (“First Mitigation Plan Amended Final Order”)* entered on May 16, 2014. The Director gave mitigation credit for “aquifer enhancement activities” and “Morris exchange water,” which were two of the nine components of IGWA’s First Mitigation Plan. *Id.*

4. The Director approved 1.2 cfs of annual mitigation credit for April 1, 2014 through March 31, 2015 as a result of the “aquifer enhancement activities.”²

5. The Morris Exchange Water Credit was estimated based upon anticipated flows in the Curren Tunnel. The Director determined the Morris Exchange Water credit using historical average Curren Tunnel flows from April 15 through October 15 during the years 2002 through 2013 in order to estimate the anticipated flows for that same time period in 2014. The Department utilized the historical average flows because flow data was not yet available for the 2014 irrigation season.

6. Using the historical average Curren Tunnel flows of 3.7 cfs for the 184 day period between April 15 and October 15, the Director approved 1.8 cfs of annual Morris Exchange Water mitigation credit for April 1, 2014 through March 31, 2015.

² For the purpose of this motion, Rangen has used the 1.2 cfs estimate for “aquifer enhancement activities” determined by the Director in the *First Mitigation Plan Amended Final Order*. Like the Morris Exchange Water credit, this “aquifer enhancement activities” credit was based upon estimates from anticipated activities in 2014. Rangen expects that when the data is available to perform a similar analysis on the activities actually undertaken in 2014, there will be a similar reduction in the actual credit related to “aquifer enhancement activities.”

7. The combination of 1.2 cfs credit for “aquifer enhancement activities” and 1.8 cfs Morris Exchange Water Credit resulted in total mitigation credit for the First Mitigation Plan of 3.0 cfs for April 1, 2014 through March 31, 2015. This is 0.4 cfs short of the first year direct flow obligation from the Curtailment Order. *First Mitigation Plan Amended Final Order*, p. 21.

8. IGWA filed its Second Mitigation Plan on March 10, 2014. It involved the acquisition of Tucker Springs water rights in order to divert up to 9.1 cfs of that water and pipe it over a mile to the Research Hatchery. The water was to be delivered over the canyon rim to Rangen’s raceways.

9. Rangen told the Director that IGWA had no intention of ever building the Tucker Springs pipeline to deliver water to Rangen:

MR. HAEMMERLE: Director, I think I'm glad that Mr. Budge took this opportunity to vent his frustrations with this entire process because, frankly, we have frustrations as well.

Our biggest frustration, I guess, Director, is that we keep coming before you in all these administrative processes for the approval of plans that are never going to be built.

Now, what IGWA is here to do, Director, is they're here to have a mitigation plan approved and say "There, Director, see, we can have a plan approved." "What do you think, Rangen?"

What we think is that IGWA has gone around with respect to the Tucker Springs plan and advised the whole world that they have no intent of developing this plan. None. If there's no intent to develop this plan and get Rangen any actual water, then this whole process is frankly a farce. That's what it is.

That's our frustration, Director, is that we keep slopping things up against the wall. IGWA keeps doing that. And the reason they're doing that is they want you to issue stay after stay after stay without the delivery of one drop of water that satisfies your call -- that satisfies the order on our call.

(Haemmerle, Hrg. Tr. CM-MP-2014-003, Vol. I, 6/4/2014, *Affidavit of J. Justin May*, Exh. A, Tr., p.56, L.1-25).

10. Despite Rangen's admonition and the fact that IGWA admitted that no water could be delivered until January 2015 at the earliest, the Director conditionally approved the Second Mitigation Plan on June 20, 2014. *See Order Approving IGWA's Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order ("Order Approving Tucker Springs Mitigation Plan")*. Since the Second Mitigation Plan did nothing about the 0.4 cfs shortage for 2014, the Director creatively "reaveraged" the Morris Exchange Water credit in order to avoid enforcement of the Curtailment Order.

11. Starting with the historical average Curren Tunnel flow of 3.7 cfs utilized in the *First Mitigation Plan Amended Final Order*, the Director reaveraged that flow to provide 2.2 cfs of mitigation credit for 293 days rather than 1.8 cfs of mitigation credit for 365 days. As a result of this reaveraging, the Director determined that the first year mitigation obligation of 3.4 cfs was satisfied until January 18, 2015 and there would be a 2.2 cfs deficit from January 19, 2015 until March 31, 2015.

12. The Director justified the reaveraging of the Morris Exchange Water credit based upon an expectation that the Second Mitigation Plan would deliver water:

3. Because there is an expectation of additional water being delivered to Rangen by the Second Mitigation Plan, (a) recalculate the period of time the Morris exchange water is recognized as mitigation to equal the number of days that the water will provide full mitigation to Rangen, and (b) require curtailment or additional mitigation from IGWA under the Second Mitigation Plan after the time full mitigation under the First Mitigation Plan expires.

Order Approving Tucker Springs Mitigation Plan, p. 6.

13. Just as Rangen predicted, IGWA has taken no steps to build the Tucker Springs pipeline since the Director approved the Plan. In fact Bob Hardgrove, the engineer that designed the Tucker Springs pipeline for IGWA, testified during the hearing on IGWA's Fourth Mitigation

Plan on October 8, 2014 that IGWA had stopped implementation of the Second Mitigation Plan before it was even approved. (Hardgrove, Hrg. Tr. CM-MP-2014-006, 10/8/2014, *Affidavit of J. Justin May*, Exh. B, Tr., p.189, L. 15 – p.191, L.2). Lynn Carlquist, the Chairman of the Board of the North Snake Ground Water District and a board member of IGWA, testified at the hearing on IGWA’s Fourth Mitigation Plan that IGWA has no intention of going forward with the Tucker Springs Plan. (Carlquist, Hrg. Tr. CM-MP-2014-006, 10/8/2014, *Affidavit of J. Justin May*, Exh. B, Tr., p.74 – 78).

14. IGWA formally withdrew the Second Mitigation Plan on October 30, 2014.

15. With the withdrawal of the Second Mitigation Plan, there is no approved mitigation plan that even proposes to provide sufficient water to meet the Curtailment Order’s first year obligation of 3.4 cfs. The CM Rules provide that the Director may not allow out-of-priority ground water pumping without an approved mitigation plan. *In the Matter of Distribution of Water to Various Water Rights*, 155 Idaho 640, 315 P.3d 828 (2013).

16. The Martin Curren Tunnel measurements for April 15, 2014 through October 15, 2014 are now available. See Memorandum from Dave Colvin, P.G. of Leonard Rice Engineers, Inc., dated October 31, 2014 (“*Leonard Rice Engineers, Inc. Memorandum*”) (*Affidavit of J. Justin May*, Exh. C).

17. As expected, the actual average Curren Tunnel flow from April 15, 2014 through October 15, 2014 was substantially less than the historical average of 3.7 cfs. The actual average daily Curren Tunnel during the period from April 15, 2014 through October 15, 2014 was 2.4 cfs rather than the historical average of 3.7 cfs. (“*Leonard Rice Engineers, Inc. Memorandum*”) (*Affidavit of J. Justin May*, Exh. C).

18. Conjunctive Management Rule 43.03k provides that a mitigation plan should provide for “. . . monitoring and adjustment as necessary to protect senior-priority water rights from material injury.” IDAPA 37.03.11.43.03k. [In the *First Mitigation Plan Amended Final Order*, the Director stated that the credits could be recalculated prior to the next irrigation season.] *First Mitigation Plan Amended Final Order*, p.6. The Director acknowledged during the October 8, 2014 hearing that he feels a “heightened obligation to protect the senior water rights holder when they’re not receiving their water” based on recent court decisions. (*Affidavit of J. Justin May*, Exh. A, Tr., p. 133, lines 21-23). “The Department monitors activities conducted pursuant to approved mitigation plans in order to ensure compliance with mitigation requirements and if IGWA fails to comply with those requirements junior ground water right holders will be curtailed.” (*Affidavit of J. Justin May*, Exh. D, *Idaho Department of Water Resources’ Brief in Response to Rangen, Inc.’s Opening Brief*, CV-2013-2446, p. 13). The monitoring and adjustment of any credits must be made in a timely fashion in order to protect the senior water user. (*Affidavit of J. Justin May*, Exh. E, *Memorandum Decision and Order on Petitions for Judicial Review*, CV-2010-382, p. 38). To protect Rangen’s senior rights, the Director must recalculate the mitigation credit that he gave junior-priority ground water users for the Morris Exchange Water based on actual Martin-Curren Tunnel flows.

19. At Rangen’s request, Leonard Rice Engineers has calculated what the Morris Exchange Water credit would be utilizing the methodology employed by the Director in evaluating IGWA’s first and second mitigation plans and substituting the actual average daily flow of 2.4 cfs for the historical average daily flow of 3.7 cfs. See *Leonard Rice Engineers, Inc. Memorandum*, (*Affidavit of J. Justin May*, Exh. C) The result of these calculations is set forth in the *Leonard Rice Engineers, Inc. Memorandum* (*Affidavit of J. Justin May*, Exh. C). The annual average is 1.1 cfs

rather than 1.8 cfs. This 1.1 cfs provides 2.2 cfs for only 184 days rather than 293. This means that utilizing the Department's own methodology together with actual Curren Tunnel flows, the Morris Exchange Water Credit was fully utilized on October 2, 2014 rather than January 18, 2015 as predicted in the Second Mitigation Plan Order. *Id.*

Rangen respectfully requests that the Director calculate the Morris Exchange Water Credit for 2014 utilizing the actual Martin-Curren Tunnel flows and curtail out-of-priority ground water pumping as necessary to address the material injury acknowledged in the January 29, 2014 Curtailment Order.

DATED this 31st day of October, 2014.

MAY, BROWNING & MAY

By 
 J. Justin May

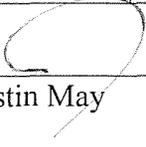
CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 31st day of October, 2014 he caused a true and correct copy of the foregoing document to be served by email and first class U.S. Mail, postage prepaid upon the following:

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