

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

IN THE MATTER OF THE MITIGATION
PLAN FILED BY A&B IRRIGATION
DISTRICT FOR THE DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-02551
& 36-07694 IN THE NAME OF RANGEN,
INC.

CM-MP-2014-002

**FINAL ORDER APPROVING
MITIGATION PLAN**

FINDINGS OF FACT

1. On December 13, 2011, Rangen, Inc. (“Rangen”) filed a *Petition for Delivery Call* with the Idaho Department of Water Resources (“Department”).
2. On January 29, 2014, the Director of the Department (“Director”) issued a *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“Curtailment Order”). A temporary stay of the Curtailment Order was subsequently issued on February 21, 2014.
3. On April 11, 2014, the Director issued *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”).
4. A&B Irrigation District’s water rights 36-15127B, 36-15193B, 36-15194B, 36-15195B, and 36-15196B (“A&B’s Junior Priority Water Rights”) are subject to curtailment pursuant to the Curtailment Order and the Amended Curtailment Order.
5. On March 7, 2014, A&B Irrigation District (“A&B”) filed *A&B Irrigation District’s Rule 43 Mitigation Plan* (“Mitigation Plan”) in the above-captioned proceeding with the Department.
6. The Mitigation Plan, along with attached documentation, provides that “A&B has curtailed the diversion of ground water under its senior priority water right (36-2080) for the irrigation of 1,377.8 acres within the Unit B portion of the irrigation district. *See Ex. A.*” *Mitigation Plan* at 2. “A&B has converted the 1,378 acres (Ex. A) from ground water to a surface water supply of A&B Irrigation District, consisting of stored water in American Falls and Palisades Reservoirs (water rights as recommended in the SRBA Court, 1-2064, 1-2068).” *Id.*

7. The Mitigation Plan also explains that A&B’s use of surface water on the acres previously irrigated with ground water provides additional incidental recharge to the ESPA, plus that A&B has also enrolled 121 acres in the federal Conservation Reserve Enhancement Program (“CREP”). *Mitigation Plan* at 3.

8. The Mitigation Plan provides that, pursuant to modeling performed by Brockway Engineering using the Eastern Snake Plain Aquifer Model 2.1 (“ESPAM”), diversion of ground water for the acres served by A&B’s Junior Priority Water Rights would result in an average depletion of 0.06 cfs at the Curren Tunnel. *Mitigation Plan* at 3.

9. The Mitigation Plan further provides that the mitigation benefits for A&B’s conversion of the 1,378 acres, incidental recharge associated with that conversion, and enrollment of 121 acres in the federal CREP program (“ongoing aquifer enhancement activities”) total 0.07 cfs at the Curren Tunnel. *Id.* The following chart, produced from information provided in the Mitigation Plan, reflects the benefits of each aspect of the ongoing aquifer enhancement activities according to Brockway Engineering:

	At Rangen Cell (cfs)	At Curren Tunnel (cfs)
Conversions	0.10	0.06
Incidental Recharge	0.02	0.01
CREP	0.00	0.00
Total Mitigation	0.12	0.07

10. The Department also modeled A&B’s depletions using ESPAM. The Department’s analysis shows an average depletion to the Curren Tunnel of 0.07 cfs.

11. The results of the Department’s modeling of the mitigation benefits associated with the ongoing aquifer enhancement activities is reflected in the following chart:

	At Rangen Cell (cfs)	At Curren Tunnel (cfs)
Conversions (avg 2009-2013)	0.086	0.054
Incidental Recharge (transmission losses)	0.016	0.010
CREP	0.007	0.004
Total Mitigation	0.109	0.07 ¹

12. There is a minor difference in the results calculated by the Department and Brockway Engineering in the average depletion and the ongoing aquifer enhancement activities. The difference appears to be the result of differing approaches in calculating the average depletion and the benefits of mitigation. To determine Crop Irrigation Requirement (CIR), the Department used average precipitation and evapotranspiration data from the last ten years from

¹ The total mitigation benefit at the Curren Tunnel is rounded to the hundredth.

ESPAM. It is not clear how Brockway Engineering calculated CIR in its model runs. The Department used average deliveries over the last five years to A&B's conversion acres to determine credit for the conversion of the 1,378 acres from ground water to a surface water supply. It appears Brockway Engineering used values submitted with A&B's 2009 Blue Lakes mitigation plan.

13. The Department's analysis shows that A&B will need to maintain all ongoing aquifer enhancement activities, including the enrollment of its CREP acres, in order to fully mitigate for its depletions.

14. The Mitigation Plan was advertised in the Idaho Mountain Express and the Mountain Home News, beginning on March 19, 2014, and ending on March 26, 2014. It was also advertised in the Times News beginning on March 20, 2014, and ending on March 27, 2014.

15. On April 7, 2014, Rangen filed *Rangen Inc.'s Protest to A&B Irrigation District's Mitigation Plan*. On the same day, Rangen and A&B also filed a *Joint Stipulation Regarding A&B Irrigation District's Mitigation Plan* ("Stipulation").

16. A&B and Rangen stipulate that the mitigation provided by A&B's conversion acres "is sufficient to mitigate the depletion effect from A&B's Junior-Priority Water Rights." *Stipulation* at 3.

17. A&B and Rangen further stipulate "to the approval of A&B's Mitigation Plan subject to an Order that the Conversion Acres will remain converted and shall be irrigated only with surface water so long as A&B's Mitigation Plan remains in effect." *Stipulation* at 3.

18. The Stipulation does not address whether A&B and Rangen reached any agreement regarding mitigation provided by the CREP acres.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

2. In addition, Idaho Code § 42-1805(8) provides the Director with authority to "promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department."

3. Idaho Code § 42-603 grants the Director authority to adopt rules governing water distribution. In accordance with chapter 52, title 67, Idaho Code, the Department adopted rules regarding the conjunctive management of surface and ground water effective October 7, 1994. CM Rule O. The CM Rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against junior-priority ground water rights in an area having a common ground water supply. CM Rule 1.

4. CM Rule 42.02 states: "The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan."

5. CM Rule 43.01(a-d) sets forth the criteria for submission of a mitigation plan to the Director.

6. CM Rule 43.03 establishes the factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights. CM Rule 43.03(e) states: "Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal." CM Rule 43.03(o) states: "Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions."

7. A&B suggests that the purpose of the Mitigation Plan is to completely mitigate for the depletions resulting from use of A&B's Junior-Priority Water Rights. *Mitigation Plan* at 4. However, based upon the Department's calculations, the Stipulation potentially does not completely mitigate for A&B's depletions because the Stipulation only requires that A&B's conversion acres remain converted. It does not require that A&B maintain its CREP acres. If A&B removes the 121 acres from the federal CREP program, A&B will no longer be completely mitigating for its depletions according to the Department's analysis. Since it appears that the intent of A&B and Rangen was to ensure that A&B is fully mitigating for its depletions, the Director should not only require that the conversion acres remain converted as requested by the parties, but the Director should also require that A&B maintain its CREP acres to completely mitigate for its depletions.

8. Having reviewed the Mitigation Plan, analyses performed using ESPAM, the CM Rules, the Stipulation, and the proceedings herein, the Director approves the Mitigation Plan pursuant to CM Rule 43.03(e) and (o).

ORDER

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

The Mitigation Plan submitted by A&B is APPROVED.

IT IS FURTHER ORDERED that the conversion acres will remain converted and should be irrigated with only surface water so long as the Mitigation Plan remains in effect.

IT IS FURTHER ORDERED that the 121 acres currently enrolled in the federal CREP program shall remain enrolled in the program so long as the Mitigation Plan remains in effect.

IT IS FURTHER ORDERED that this is a FINAL ORDER of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-6272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to the district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or 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) of an order denying a petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code §67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 28th day of April, 2014.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of April, 2014, the above and foregoing document was served on the following by providing a copy of the *FINAL ORDER APPROVING MITIGATION PLAN* in the manner selected:

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Deborah J. Gibson
Administrative Assistant to the Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

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

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

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 of: a) 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.