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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 THE SECOND
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.

“TUCKER SPRINGS”

Docket No. CM-MP-2014-003

**RANGEN, INC.’S PROTEST TO
IGWA’S SECOND MITIGATION
PLAN**

COMES NOW, Rangen, Inc. and protests IGWA’s Second Mitigation Plan filed with the Idaho Department of Water Resources on March 10, 2014 (“Second Mitigation Plan”) pursuant

to the provisions of Rule 43 of the Conjunctive Management Rules, Rule 250 of the Rules of Procedure of the Idaho Department of Water Resources and other applicable law.

Rangen has the right to oppose IGWA's Second Mitigation Plan. The Second Mitigation Plan proposes that IGWA's members be allowed to provide an additional alternative means of water delivery to Rangen from Tucker Springs and thereby continue junior-priority ground water pumping despite the Director's order that such junior ground water pumping causes material injury to Rangen's water rights.

The initial bases for Rangen's Protest are as follows:

1. The Second Mitigation Plan is facially unapprovable because it does not comply with Rule 43.01 of the Conjunctive Management Rules:

a. The Second Mitigation Plan does not contain the mailing address of the person or persons submitting the plan.

b. The Second Mitigation Plan does not identify the water rights benefiting from the Mitigation Plan.

c. The Second Mitigation Plan does not adequately identify the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies.

d. The Second Mitigation Plan does not contain the information necessary for the Director to evaluate the factors set forth in Rule 43.03 of the Conjunctive Management Rules.

2. The Final Order Regarding Rangen, Inc.'s Petition for Delivery Call found that Rangen has suffered material injury. The injury is ongoing and significant. IGWA has submitted a mitigation plan that is incomplete at best. Based upon the arguments in its *Petition*

to *Stay Curtailment* filed in Rangen's Delivery Call, CM-DC-2011-004, the lack of detail in its Second Mitigation Plan, and its failure to provide that detail, IGWA seems prepared to argue that the Second Mitigation Plan should be approved even though incomplete because IGWA claims that its members will suffer irreparable injury if curtailed. It must be recognized as an initial matter that injury to a junior as a result of curtailment is not a factor that the Director may consider when considering a mitigation plan. As the Director has acknowledged, Rangen has suffered material injury due to junior-priority ground water pumping for years. Because of junior-priority ground water pumping Rangen's rights have been effectively curtailed because the junior-priority ground water users have been withdrawing water that would otherwise have flowed from the Martin-Curren Tunnel. If junior-priority ground water pumping is allowed to continue Rangen will continue to suffer material injury. Rangen's water rights, just like the water rights of others in the State of Idaho, are property rights entitled to protection.

3. In order to protect senior water rights, Rule 40 of the Conjunctive Management Rules requires curtailment upon a finding of material injury. IDAPA 37.03.11.040.01.a. Out-of-priority pumping may be allowed only "pursuant to a mitigation plan that **has been approved** by the Director." IDAPA 37.03.11.040.01.b (emphasis added). Approval is not a formality and must occur before out-of-priority pumping can be allowed. The Director cannot allow out-of-priority pumping to continue while junior-priority ground water pumpers investigate whether mitigation is feasible. The Idaho Supreme Court has recently ruled that the practice of allowing pumping under a "replacement water" plan in the hope, or expectation, that a mitigation plan may get approved at some future time is not authorized. *In the Matter of Distribution of Water to Various Water Rights*, ___ Idaho ___, ___ P.3d ___ (Idaho Supreme Court 2013 Opinion No. 134). Out-of-priority pumping must be curtailed until a mitigation plan has been approved.

4. Pursuant to the Conjunctive Management Rules, in the Final Order Regarding Rangen Inc.'s Petition for Delivery Call, the Director concluded that "[b]ecause Rangen has suffered material injury, the Director will curtail ground water rights bearing dates of priority earlier than July 13, 1962, with points of diversion located both within the area of common ground water supply and west of the Great Rift." *Final Order Regarding Rangen Inc.'s Petition for Delivery Call* (January 29, 2014), *Conclusion of Law 60*.

5. The Final Order Regarding Rangen Inc.'s Petition for Delivery Call provides that a "mitigation plan must provide simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen." *Final Order Regarding Rangen Inc.'s Petition for Delivery Call* (January 29, 2014), p. 42. The Final Order Regarding Rangen Inc.'s Petition for Delivery Call further provides that "[i]f 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." *Final Order Regarding Rangen Inc.'s Petition for Delivery Call* (January 29, 2014), p. 42 (emphasis added). IGWA's Second Mitigation Plan proposes to provide an unspecified amount of water "up to 9.1 cfs" (*IGWA's Second Mitigation Plan and Request for Hearing*, p. 2). The Second Mitigation Plan does not indicate when such water might be available or in what quantities. The Second Mitigation Plan does not appear to provide direct flow to Rangen of 3.4 cfs in the first year. It is not clear how much water, if any, might be provided in subsequent years.

6. The Second Mitigation Plan is vague and ambiguous and provides no opportunity to evaluate the reliability of the source of replacement water over the term in which it is proposed to be used under the Second Mitigation Plan.

7. The Second Mitigation Plan does not identify that it will provide replacement water, at the time and place required by Rangen's senior priority water rights, sufficient to offset the depletive effect of junior-priority ground water withdrawals within the area of curtailment at such time and place necessary to satisfy the Rangen's senior priority water rights.

8. The Second Mitigation Plan contains no "contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable" and therefore violates Rule 43.03.c. *In the Matter of Distribution of Water to Various Water Rights*, ___ Idaho ___, ___ P.3d ___ (Idaho Supreme Court 2013 Opinion No. 134).

9. IGWA's Second Mitigation Plan is simply speculation without any information or detail. Rangen has previously considered and rejected similar projects for a variety of reasons. IGWA's Second Mitigation Plan does not address critical factors such as: project feasibility, necessary access easements and rights-of-way, monitoring, maintenance and repair of the delivery system, delivery system security, potential injury to other water users, water quality, water temperature, delivery system reliability, compensation and insurance or bonding for losses sustained by Rangen in the event of a delivery system failure, compensation and insurance or bonding for losses sustained by others in the event of a delivery system failure, and indemnification and hold harmless provisions to protect Rangen against any claims for losses sustained by others in the event of a delivery system failure. Until such a plan is both submitted and approved following a hearing, the junior out-of-priority ground water pumping must be curtailed.

10. In general, the Second Mitigation Plan is vague and ambiguous, does not provide for adequate mitigation, provides no certainty that replacement water will be delivered to prevent

injury to Rangen, provides no certainty that it will not injure water users downstream of Tucker Springs, is contrary to existing findings and determinations of the Director and the District Court, is not in compliance with Idaho law, does not provide a reliable source of replacement water for Rangen, and otherwise fails to adequately mitigate for injury caused by junior-priority ground water users that are members of IGWA.

11. Rangen further objects to the Second Mitigation Plan for such other and further reasons as may be discovered or offered at the hearing on this matter.

Wherefore, Rangen requests that the Director deny and dismiss the Second Mitigation Plan, and for such other relief as the Director deems proper.

DATED this 3rd day of April, 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 3rd day of April, 2014 he caused a true and correct copy of the foregoing document to be served upon the following by the indicated method:

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