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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 RE IGWA'S AMENDED THIRD
PLAN TO MITIGATE MATERIAL
INJURY TO WATER RIGHT NOS. 36-
02551 & 36-07694 HELD BY RANGEN,
INC., AND OTHER WATER RIGHTS IN
WATER DISTRICT 36A

Docket No. CM-MP-2014-005

**RANGEN, INC.'S PROTEST TO
IGWA'S AMENDED THIRD
MITIGATION PLAN**

COMES NOW, Rangen, Inc. 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 and protests IGWA's Amended Third Mitigation Plan filed with the Idaho Department of Water Resources on June 10, 2014 ("Third Mitigation Plan").

Rangen has the right to oppose IGWA's mitigation plan. The Third Mitigation Plan proposes that IGWA's members be allowed to continue junior 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 Third Mitigation Plan is facially unapprovable because it does not comply with Rule 43.01 of the Conjunctive Management Rules:

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

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

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

d. The Third 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. IGWA's Third Mitigation Plan contains five proposals.

3. IGWA's first proposal is to install measurement devices at the Sandy Ponds. IGWA has indicated that the engineering for this proposal is incomplete and that it will be completed at some point in "the near future." It appears at this time that the engineering is still not complete.

4. The lack of measuring devices at the Sandy Ponds is only one of the many issues regarding mitigation credit related to water in the Sandy Ponds. IGWA has failed to specify the source, quantity, and frequency of delivery of water for which it seeks mitigation credit. IGWA is not entitled to any mitigation credit for waste water or spills delivered by the North Side Canal Company to the Sandy Ponds. IGWA has also failed to indicate how any credit for water delivered might be calculated. Given the location and nature of the Sandy Ponds little or no benefit would be expected to accrue to the Martin-Curren Tunnel as a result of water delivered to the Sandy Ponds.

5. The second and fourth proposals in IGWA's Third Mitigation Plan suggest that Rangen should be required to change its means of diversion. IGWA raised this issue before the Department during the hearing on Rangen's Call. The Director has already determined that Rangen's means of diversion are reasonable. IGWA also requests mitigation credit for any water that might result from a change in Rangen's means of diversion. There is no basis for granting any such mitigation credit. Rangen is currently receiving 75 cfs less than the amount of its decreed water rights. If there were legitimate, reliable, and lawful means for Rangen to obtain more water through modification of its means of diversion Rangen could choose to make such modifications. There is no reason IGWA would be entitled to mitigation credit regardless of the result of such modifications. Rangen has considered and rejected making the modifications suggested by IGWA in its second and fourth proposals. Rangen's reasons for rejecting these proposals are numerous, reasonable, and have been the subject of many hours of hearings before the Department in various proceedings. However, even if it were determined that Rangen would be entitled under its water rights to dig a horizontal well or reuse water that has already passed through its Research Hatchery, IGWA would not be entitled to mitigation credit if one or more

of those projects were undertaken. IGWA cannot mitigate for the depletion of the aquifer caused by junior ground water pumping by changing the means by which Rangen diverts or uses water. On the other hand, if it would be unlawful for Rangen to undertake such projects under its water rights it would also be unlawful for IGWA to pursue such projects.

6. IGWA's second proposal is to dig a horizontal well. This proposal is very risky. It would likely result in injury not only to Rangen, but also other water users and it would be unlikely to produce additional water over the long term. This proposal has already been considered and rejected by the Director. "Prior to construction of a horizontal well, IGWA would need to obtain a water right to divert and beneficially use water from the horizontal well. IGWA has not filed any applications to appropriate water from a horizontal well. IGWA did not identify a location for construction of the well, and did not present any evidence about land ownership or easements on land where a well could be constructed. The source of water proposed to be diverted is trust water. The Department has issued a moratorium on all appropriations of water from the ESPA in the area where the proposed horizontal well would be constructed. Any horizontal well proposal will need to address injury to other water users. IGWA failed to satisfy its burden because it failed to present any evidence that it will be able to address the injury to other water users." *Amended Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order*, p. 15. IGWA has once again failed to address any of these issues.

7. The Director has already considered and rejected proposal four as well. "There is no evidence in the record that IGWA has the water rights or property access to construct and operate a pump-back and aeration system to provide mitigation to Rangen. IGWA did not present any evidence about how the water rights or property access would be acquired. IGWA

also failed to provide even basic design plans in support of this proposal.” *Amended Order Approving in Part and Rejecting in Part IGWA’s Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order*, p. 17. If a pump back system such as proposed by IGWA were a valid and lawful use of Rangen’s water rights, then the implementation of such a pump back would not provide Rangen with any additional water that it does not already have the legal right to use. If it would be unlawful for Rangen to implement such a system, it would be unlawful for the Director to authorize IGWA to implement a pump back system under the guise of mitigation.

8. The Director has also already considered and rejected proposal three. “Given the uncertainty of the application given the specific facts which have developed in this case, the Director concludes that it is too speculative to consider.” *Amended Order Approving in Part and Rejecting in Part IGWA’s Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order*, p. 13. Nothing has changed. Rangen objects to any credit related to Application for Water Permit no. 36-16976. IGWA’s application is speculative and should not be approved. Rangen has filed an objection to IGWA’s application. Rangen has also filed its own competing application. Furthermore, Rangen continues to contend that Rangen’s existing water rights entitle Rangen to the use of the water IGWA proposes to provide as mitigation. Application for Water Permit no. 36-16976 would not provide Rangen with any water that it would not otherwise be entitled to use.

9. The fifth proposal in the Third Mitigation Plan is referred to by IGWA as the Aqua Life Project. IGWA proposes to pump water from the Aqua Life Hatchery to Rangen’s Research Hatchery. IGWA’s fifth proposal does not adequately 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, disease, 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.

10. The Third 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).

11. The Third Mitigation Plan will not provide replacement water, at the time and place required by Rangen’s senior priority water rights, sufficient to offset the depletive effect of junior ground water withdrawals within the area of curtailment at such time and place necessary to satisfy Rangen’s senior priority water rights.

Wherefore, for these reasons and for such other and further reasons as may be discovered or offered at the hearing on this matter Rangen requests that the Director deny and dismiss the Third Mitigation Plan, and for such other relief as the Director deems proper.

DATED this 7 day of July, 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 2 day of July, 2014 he caused a true and correct copy of the foregoing document to be served upon the following by the indicated method:

<p>Original:</p> <p>Director Gary Spackman IDAHO DEPARTMENT OF WATER RESOURCES P.O. Box 83720 Boise, ID 83720-0098 deborah.gibson@idwr.idaho.gov</p>	<p>Hand Delivery <input checked="" type="checkbox"/></p> <p>U.S. Mail <input type="checkbox"/></p> <p>Facsimile <input type="checkbox"/></p> <p>Federal Express <input type="checkbox"/></p> <p>E-Mail <input checked="" type="checkbox"/></p>
<p>Garrick Baxter Emmi Blades IDAHO DEPARTMENT OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov emmi.blades@idwr.idaho.gov kimi.white@idwr.idaho.gov</p>	<p>Hand Delivery <input type="checkbox"/></p> <p>U.S. Mail <input type="checkbox"/></p> <p>Facsimile <input type="checkbox"/></p> <p>Federal Express <input type="checkbox"/></p> <p>E-Mail <input checked="" type="checkbox"/></p>
<p>Randall C. Budge Thomas J. Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED P.O. Box 1391 101 South Capitol Blvd, Ste 300 Boise, ID 83704-1391 Fax: 208-433-0167 rcb@racinelaw.net tjb@racinelaw.net bjh@racinelaw.net</p>	<p>Hand Delivery <input type="checkbox"/></p> <p>U.S. Mail <input type="checkbox"/></p> <p>Facsimile <input type="checkbox"/></p> <p>Federal Express <input type="checkbox"/></p> <p>E-Mail <input checked="" type="checkbox"/></p>



 J. Justin May

Idaho Department of Water Resources Receipt

Receipt ID: C099126

Payment Amount \$25.00 Date Received 7/7/2014 12:04 PM Region STATE

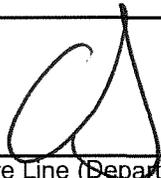
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Payer MAY BROWNING & MAY

Comments PROTEST REGARDING IGWA'S THIRD MITIGATION PLAN

Fee Details

Amount	Description	PCA	Fund	Fund Detail	Subsidiary	Object
\$25.00	PROTESTS	56103	0229	21		1155



Signature Line (Department Representative)