

SERVICE COPY

Robyn M. Brody (ISB No. 5678)
BRODY LAW OFFICE, PLLC
P.O. Box 554
Rupert, ID 83350
Telephone: (208) 434-2778
Facsimile: (208) 434-2780
robynbrody@hotmail.com

DISTRICT COURT
TWIN FALLS CO., IDAHO
J. Justin May (ISB No. 5818)
MAY, BROWNING & MAY, PLLC
1419 W. Washington
Boise, ID 83702
Telephone: (208) 429-0905
Facsimile: (208) 342-7278
jmay@maybrowning.com

JUN 13 PM 12:18

CLERK

DEPUTY

Fritz X. Haemmerle (ISB No. 3862)
HAEMMERLE & HAEMMERLE, PLLC
P.O. Box 1800
Hailey, ID 83333
Telephone: (208) 578-0520
Facsimile: (208) 578-0564
fxh@haemlaw.com

Attorneys for Petitioner, Rangen, Inc.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

RANGEN, INC., an Idaho Corporation,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES and GARY SPACKMAN, in
his official capacity as Director of the Idaho
Department of Water Resources,

Respondent.

Case No. CV- *2014-2446*

PETITION FOR JUDICIAL REVIEW

L(3): \$96.00

COMES NOW the Petitioner, RANGEN, INC. ("Petitioner" or "Rangen"), by and through its attorneys of record, Fritz X. Haemmerle of Haemmerle & Haemmerle, P.L.L.C.; Robyn M. Brody of Brody Law Office, PLLC; and J. Justin May of May Browning & May,

1 PLLC, and pursuant to Idaho Code Sections 67-5270 through 67-5279 and I.R.C.P. 84 files this
2 Petition for Judicial Review as follows:

3 **PETITION FOR JUDICIAL REVIEW**

4 1. Petitioner owns and operates a fish research and propagation facility in the
5 Thousand Springs area near Hagerman, Gooding County, State of Idaho. The Petitioner
6 Corporation is located and generally operates its business out of Buhl, Twin Falls County, State
7 of Idaho

8 2. The Petitioner operates the facility with several water rights. Because the
9 Petitioner was not receiving the amount of water it rightfully possess under water rights 36-
10 02551 and 36-07694, Rangen filed a water call under Idaho's Constitution, statutes, and rules
11 adopted by the Respondent, Idaho Department of Water Resources (hereinafter "Respondent" or
12 "Department"), for conjunctive administration of water rights. The water call was filed on
13 December 13, 2011. This matter came before the Department based on a contested case ("water
14 call") in Department Case No. CM-DC-2011-004. The Director issued a final order finding that
15 Rangen is being materially injured by junior-priority groundwater pumping and ordered
16 curtailment of junior rights on January 29, 2014. On February 21, 2014, the Director entered an
17 *Order Granting IGWA's Petition to Stay Curtailment* in Case No. CM-DC-2011-004 ("*First Stay*
18 *Order*")

20 3. Thereafter, the Director held a hearing on the Idaho Ground Water Appropriators,
21 Inc.'s ("IGWA") First Mitigation Plan, Department Case No. CM-MP-2014-001. Rangen filed a
22 Protest to that Plan. On April 11, 2014, after a hearing, the Director of the Department issued an
23 *Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay*
24

1 Issued February 21, 2014; Amended Curtailment Order, issued in Case Nos. CM-MP-2014-001
2 and CM-DC-2011-004 ("Order").

3 4. On April 17, 2014, IGWA filed its *Second Petition to Stay Curtailment, and*
4 *Request for Expedited Decision* in CM-DC-2011-004 ("*Second Stay Petition*"). The Director
5 issued an *Order Granting IGWA's Second Stay Petition* on April 28, 2014 ("*Second Stay*
6 *Order*").

7 5. Motions for Reconsideration were filed on the Order. Rangen filed a Motion for
8 Reconsideration. On May 16, 2014, the Director issued his *Final Order on Reconsideration* in
9 Case Nos. CM-MP-2014-001 and CM-DC-2011-004 ("*Final Order on Reconsideration*"). He
10 also issued simultaneously therewith an *Amended Order Approving in Part and Rejecting in Part*
11 *IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment*
12 *Order* in Case Nos. CM-MP-2014-001 and CM-DC-2011-004 ("*Amended Order*").

13 6. Name of agency from which judicial review is sought: Idaho Department of
14 Water Resources ("Respondent") and its Director Gary Spackman, an agency of the State of
15 Idaho.
16

17 7. The Petition is taken to the District Court of the Fifth Judicial District, County of
18 Twin Falls.

19 8. Decisions being appealed: The *First Stay Order; Order; Second Stay Order;*
20 *Amended Order; and Final Order on Reconsideration.*

21 9. A transcript of all proceedings in Case No. CM-DC-2011 is requested. A
22 transcript of those proceedings has been prepared previously, but to the extent it has not been
23 prepared or does not include any proceedings since January 29, 2014, that transcript is requested.
24 The Petitioner also requests a transcript of all proceedings in CM-MP-2014-001. The contested
25

1 hearing held between March 17-19, 2014, was believed to have been recorded by the
2 Department. Also, there was a transcript prepared by M&M Court Reporters, Boise, Idaho. All
3 other proceedings, including monthly status conferences, were recorded by the Department.

4 10. Petitioner has requested an estimate for preparation of the transcript and record,
5 and Petitioner has tendered an estimated fee for same.

6 11. The Petitioner's substantial rights have been prejudiced by the Department's Orders
7 including, but not necessarily limited to the diminishment of water rights, 36-02551 and 36-
8 07694, as those rights were Decreed by the Snake River Basin Water Adjudication and permitted
9 and licensed by the Department, and the failure of the Department to account for all water
10 available to Rangen from this water call under the operation of the Department's ground water
11 model, ESPAM2.1, and the Director's *Order, Second Stay Order, Amended Order, Order on*
12 *Reconsideration* have denied the Petitioner's rights to receive its legally entitled water under
13 water rights duly perfected under Idaho law. Furthermore, the Petitioner's substantial rights have
14 been prejudiced by the failure of the Director and Department to deliver that amount of water
15 necessary to address the Petitioner's injury caused by junior groundwater pumping.
16

17 12. Under the standards of evaluation as set forth under Idaho Code Section 67-5279,
18 the *First Stay Order; Order; Second Stay Order; Amended Order; and Final Order on*
19 *Reconsideration:*

- 20 a. are in violation of constitutional, statutory provisions or administrative rules
21 of the Department;
22 b. are in excess of the statutory authority or authority of the Department under
23 the administrative rules of the Department;
24 c. were made upon unlawful procedures; and
25

1 d. were arbitrary, capricious, and/or an abuse of the agency discretion.

2 13. The issues presented for the appeal, as identified in paragraph 12, and as more
3 specifically identified in this paragraph include, but are not necessarily limited to, the following:

- 4 a. Whether as a matter of fact or law, the Director failed to account for the
5 Petitioner's 1957 water right, 36-15501, and whether the Director should have
6 taken the 1957 right into account when he determined IGWA's mitigation credits
7 for water diverted through the Sandy Pipeline rather than through the Martin
8 Curren Tunnel.
- 9 b. Whether a correct accounting of the Petitioner's 1957 water right would have
10 required the Director to recalculate his findings of fact and conclusions of law on
11 what mitigation credits IGWA was entitled to receive based on water that was not
12 diverted from the Martin Curren Tunnel, but rather, diverted from the Sandy
13 Pipeline.
- 14 c. Whether the Director correctly utilized average flows from the Martin Curren
15 Tunnel, instead of actual flows, and whether the use of average flows allowed
16 IGWA to receive more mitigation credits than to which it is entitled.
- 17 d. Whether IGWA satisfied its burden in showing that it deserved credits for those
18 water rights held by Butch Morris without a showing that those water rights are
19 actually available to Mr. Morris.
- 20 e. Whether the Conjunctive Management Rules, as applied to this case, result in the
21 Petitioner being deprived of its Constitutionally protected property rights and its
22 right to have its water rights timely administered in accordance with the prior
23 appropriation doctrine.
- 24 f. Whether the Director appropriately calculated mitigation credit.
- 25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- g. Whether the Director appropriately modified the curtailment order to allow continued pumping without partial mitigation.
- h. Whether the Director has discretion to issue a Stay.
- i. Whether the Director abused his discretion by the issuance of a Stay.
- j. Whether the Director erred by partially approving a mitigation plan based upon the projection of future flows without a contingency for if flows are not as anticipated.

14. Petitioner reserves the right to file a separate statement of the issues within fourteen (14) days after the filing of this Petition.

15. Other parties to the Case included the City of Pocatello, the Idaho Ground Water Appropriators, Inc. ("IGWA"), the A&B Irrigation District, American Falls Reservoir District # 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, the Twin Falls Canal Company (collectively, the "Surface Water Coalition" or "SWC"), and Blind Canyon Aquaranch, Inc. .

16. Service of this Petition has been made on the Department, and notice of this filing has been made on parties to the contested case in CM-DC-2011-004 and CM-MP-2014-001.

DEMAND FOR ATTORNEY FEES AND COSTS

As a result of the Department's actions, Petitioner has had to retain counsel. For services rendered, the Petitioner is entitled to attorney fees and costs should they prevail in this action pursuant to Idaho Code Section 12-117 and pursuant to Rule 54 of the Idaho Rules of Civil Procedure.

RIGHT TO AMEND

1
2 The Petitioner reserve the right to amend this Petition in any respect as motion practice
3 and discovery proceed in this matter.

4 WHEREFORE, the Petitioner prays for the following relief:

5 A. A finding that the *First Stay Order; Order; Second Stay Order; Amended Order;*
6 *and Final Order on Reconsideration:* were:

- 7 a. in violation of constitutional, statutory provisions or current administrative
8 rules of the Department;
9 b. in excess of the statutory authority or administrative rules of the Department;
10 c. made upon unlawful procedures; and
11 d. arbitrary, capricious, and/or an abuse of the agency discretion.

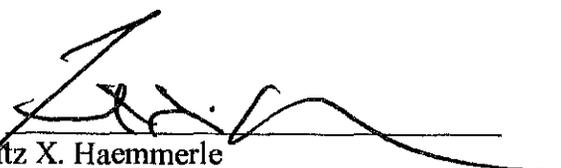
12 B. That the Court set aside the *First Stay Order; Order; Second Stay Order;*
13 *Amended Order; and Final Order on Reconsideration* in whole or part, and/or
14 remand the foregoing Orders back for further proceedings;

15 C. For an award of reasonable costs and attorneys' fees pursuant to applicable law,
16 including but not limited to Idaho Code Section 12-117, and Idaho Rule of Civil
17 Procedure 54; and
18

19 D. For such other and further relief as the Court deems just and equitable.

20 RESPECTFULLY SUBMITTED this 13 day of June, 2014.

21 HAEMMERLE & HAEMMERLE, P.L.L.C.

22
23
24 By: 
Fritz X. Haemmerle

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 13 day of June, 2014 she caused a true and correct copy of the foregoing document to be served upon the following as indicated:

<p>Courtesy Copy to: Snake River Basin Adjudication Court P.O. Box 2707 Twin Falls, ID 83303-2707</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 type="checkbox"/></p>
--	---

<p>Original: 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 checked="" type="checkbox"/></p> <p>Facsimile <input type="checkbox"/></p> <p>Federal Express <input type="checkbox"/></p> <p>E-Mail <input checked="" type="checkbox"/></p>
--	---

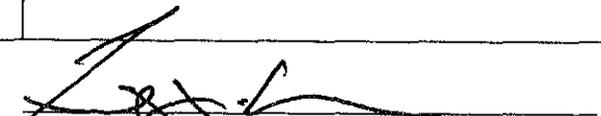
<p>Garrick Baxter Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov kimi.white@idwr.idaho.gov</p>	<p>Hand Delivery <input type="checkbox"/></p> <p>U.S. Mail <input type="checkbox"/></p> <p>Facsimile <input type="checkbox"/></p> <p>Federal Express <input type="checkbox"/></p> <p>E-Mail <input checked="" type="checkbox"/></p>
--	---

<p>Randall C. Budge TJ Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED 201 E. Center Street P.O. Box 1391 Pocatello, ID 83204 rcb@racinelaw.net tjb@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>
---	---

<p>Sarah Klahn Mitra Pemberton WHITE & JANKOWSKI Kittredge Building, 511 16th Street, Suite 500 Denver, CO 80202 sarahk@white-jankowski.com</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>
---	---

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

mitrap@white-jankowski.com	
Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson, L.L.P. 195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 Facsimile: (208) 735-2444 flt@idahowaters.com jks@idahowaters.com	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, ID 83318 wkf@pmt.org	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
Jerry R. Rigby Hyrum Erickson Robert H. Wood Rigby, Andrus & Rigby, Chartered 25 North Second East Rexburg, ID 83440 jrigby@rex-law.com herickson@rex-law.com rwood@rex-law.com	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
Gary Lemmon Blind Canyon Aquaranch, Inc. 2757 S 1050 East Hagerman, ID 83332 glemmon@northrim.net	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>


Fritz X. Haemmerle