

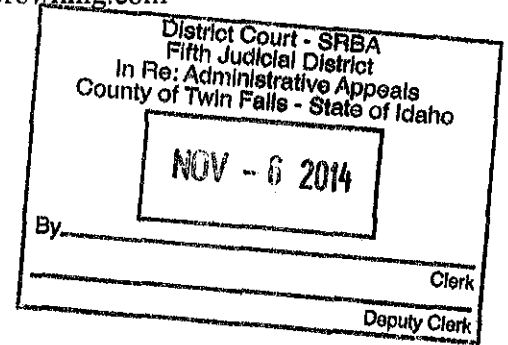
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**DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

RANGEN, INC.,

Petitioner,

vs.

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

Respondents.

IDAHO GROUND WATER
APPROPRIATORS, INC., and SALMON
FALLS LAND & LIVESTOCK CO.,

Intervenors.

Case No. CV-2014-2935

**RANGEN, INC.'S RESPONSE IN
OPPOSITION TO MOTION TO
DISMISS APPEAL**

COMES NOW Rangen, Inc. (“Rangen”), through its attorneys, and submits the following Response in Opposition to Motion to Dismiss Appeal.

I. INTRODUCTION

Rangen’s appeal raises two categories of issues related to IGWA’s Second Mitigation Plan: (1) the Director’s sua sponte decision to re-average the Martin-Curren Tunnel flows to calculate the Morris Exchange Water credit; and (2) the Director’s “conditional” approval of the Tucker Springs Project to allow out-of-priority ground water pumping to continue without protecting Rangen’s interests in the event water is not delivered. The Department has filed a Motion to Dismiss this appeal, arguing that it is now moot because IGWA has withdrawn its Second Mitigation Plan. The Department’s Motion is not well taken.

IGWA’s withdrawal of the Second Mitigation Plan changes nothing about this appeal. IGWA’s decision to withdraw the Second Mitigation Plan confirms what Rangen has argued from the outset of this matter – the Tucker Springs pipeline will not be built and it was improper for the Director to allow out-of-priority pumping based on the “conditional” approval of a “concept.” Contrary to the Department’s position, the withdrawal of the Second Mitigation Plan does not render Rangen’s appeal moot. The issues related to the Morris Exchange Water credit are still live and justiciable because junior users continue to pump out-of-priority based on the re-averaging done by the Director in the final order on appeal in this case. The issues related to the Tucker Springs Project likewise should be addressed by the Court under three well-recognized exceptions to the mootness doctrine. This appeal raises important legal issues that need to be addressed by the Court, and, as such, the Department’s Motion to Dismiss should be denied.

II. ARGUMENT

“An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded through judicial decree of specific relief.” *Ameritel Inns, Inc. v.*

Greater Boise Auditorium District, 141 Idaho 849, 852, 119 P.3d 624, 627 (2005). The Idaho Supreme Court has explained that “[t]here are three recognized exceptions to the mootness doctrine: (1) when there is the possibility of collateral legal consequences imposed on the person raising the issue; (2) when the challenged conduct is likely to evade judicial review and thus is capable of repetition; and (3) when an otherwise moot issue raises concerns of substantial public interest.” *Id.*

A. Rangen’s Challenge to the Director’s Decision to Re-Average the Martin-Curren Tunnel Flows Presents a “Real and Substantial” Controversy that Should be Resolved by the Court.

When the Director issued his January 29, 2014 decision on Rangen’s Petition for Delivery Call, he ordered that junior-priority ground water pumpers deliver 3.4 cfs of water to Rangen by March 14, 2014 or be curtailed. (A.R., p. 42). IGWA filed its First Mitigation Plan approximately two weeks later. (A.R., p. 522). The Director approved parts of the First Mitigation Plan, granting IGWA mitigation credits totaling 3.0 cfs (1.2 cfs for “aquifer enhancement activities” and 1.8 cfs for Morris Exchange Water credits). (*Id.* at p. 523).

Because the First Mitigation Plan fell short of the juniors’ 3.4 cfs mitigation obligation, IGWA filed a *Second Petition to Stay Curtailment*. (*Id.*). The Director granted IGWA’s *Second Petition* based on IGWA’s Tucker Springs Mitigation Plan (the plan at issue in this appeal) even though no hearing had been held and the plan had not yet been approved:

Curtailment of diversions of ground water for irrigation in April and May would provide little benefit to Rangen because significant irrigation with ground water does not normally intensify until late May or June. In contrast, curtailment of the irrigation of 25,000 acres during the period of reduced ground water use is significant. IGWA’s Second Mitigation Plan has been published and a pre-hearing status conference is scheduled for April 30, 2014. The Second Mitigation Plan proposes direct delivery of water from Tucker Springs to Rangen. The plan is *conceptually viable, and given the disparity in impact to the ground water users if curtailment is enforced versus the impact to Rangen if curtailment is stayed, the ground water users should have an opportunity to present evidence at an*

expedited hearing for their second mitigation plan. All of the standard of the conjunctive management rules will apply at the hearing.

(A.R., p. 179) (emphasis added).

Rangen told the Director at the outset of the Tucker Springs hearing that IGWA had no intention of ever building the 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.

(Tr. Vol I, p. 56, ll. 1-25). Bob Hardgrove, IGWA's engineer in charge of the mitigation projects, recently affirmed Rangen's position when he testified in a hearing on IGWA's Fourth Mitigation Plan that he did not do any work on the Tucker Springs Mitigation Plan after the Director approved it. (Tr., p. 190, ll. 6-9) (*see* Exhibit 1 to *May Affidavit*). It has been clear from the beginning that the Tucker Springs project would never be built.

One of the express conditions of the Director's *Order Approving Tucker Springs Mitigation Plan* was that the Tucker Springs pipeline had to be built so that water would be delivered by January 19, 2015. (A.R., p. 539). The Director realized that the Tucker Springs pipeline, if it were

built, would not provide water immediately because the water rights had to be transferred and the pipeline had to be constructed. The Director also realized that the junior pumpers were still short of mitigation water. Recognizing the .40 cfs shortage and not wanting to enforce his own curtailment order, the Director creatively recalculated the credit for the Morris Exchange Water that he previously gave in the First Mitigation Plan. The Director justified the recalculation of the Morris Exchange Water because of the expectation that the Tucker Springs pipeline would be built:

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.

(A.R., pp. 527-28). Just as Rangen predicted, however, IGWA does not intend to build the Tucker Springs pipeline, and, in fact, has now withdrawn the plan completely.

There is no stay presently in place protecting the juniors' right to pump. The only reason that junior users are being allowed to pump is because of the Director's approval of the Tucker Springs Mitigation Plan, and, most notably, the re-averaging that he did of the Martin-Curren Tunnel flows in order to find that junior users had satisfied their mitigation obligation. Rangen is challenging the Director's re-averaging, and his decision is still very much a "real and substantial" controversy that is impacting Rangen's use of its water rights. In fact, Rangen just recently filed a Motion to Determine Morris Exchange Water Credit and Enforce Curtailment requesting that the Director re-calculate the credits that have been given based on actual tunnel flows since the start of this year's irrigation season. (*See Exhibit 2 to Affidavit of J. Justin May in Support of Rangen, Inc.'s Response in Opposition to Motion to Dismiss Appeal ("May Affidavit")*). The credits given for the Butch Morris Exchange Water are still very much at issue, and the Court

should address the issues that Rangen has raised on appeal here. Accordingly, Rangen requests that the Department's Motion to Dismiss Appeal be denied.

B. The Court Should Review the Tucker Springs Pipeline Issues Based on the Three Exceptions to the Mootness Doctrine.

Even though IGWA has now confirmed that it has no intention of building the Tucker Springs pipeline, the legal challenges that Rangen has raised should still be reviewed by the Court under the three exceptions to the mootness doctrine. *See Ameritel Inns, Inc. v. Greater Boise Auditorium District*, 141 Idaho 849, 852, 119 P.3d 624, 627 (2005) (three exceptions are: (1) possibility of collateral legal consequences imposed on appellant; (2) conduct is likely to evade judicial review and is capable of repetition; and (3) issue raises concerns of substantial public interest). Rangen has submitted an Opening Brief setting forth in detail its specific challenges to the Tucker Springs pipeline and will not repeat them here. While Rangen understands that it is probably not necessary for the Court to delve into issues such as whether the Director adequately considered whether the Tucker Springs pipeline is likely to introduce PKD into Rangen's Research Hatchery or whether other water users will be harmed by the implementation of the pipeline, the appeal raises larger issues that need to be addressed by the Court.

At its core, Rangen's appeal is about the Director's failure to protect the senior's interests. Rangen's central complaint is that the Director "conditionally" approved a conceptual mitigation plan and allowed junior-priority ground water pumping to continue without requiring IGWA to have contingency plans in place to protect Rangen in the event of a failure to deliver water. Now that the Tucker Springs Plan has been abandoned, what remedy is available to Rangen when IGWA fails to deliver water on January 19, 2015? Farmers are not pumping in January.

The Director did not protect Rangen's interests when he conditionally approved the Second Mitigation Plan and he did not protect Rangen's interests when he recently issued "conditional"

approval of IGWA's Fourth Mitigation Plan – yet another pipeline plan to deliver water to Rangen. (See Exhibit 3 to *May Affidavit* for a copy of the order approving the Fourth Mitigation Plan). The Court needs to address the challenges raised by Rangen because the Director's decisions continue to have collateral impact on Rangen (i.e., the Director is using the approval of successive conditional mitigation plans to allow out-of-priority pumping to continue), are capable of repetition and evade review (e.g., the Director has now "conditionally" approved the Fourth Mitigation Plan), and are of great public importance because of the precedent they set for water rights administration. Because Rangen's challenges to the Second Mitigation Plan fall squarely within the three exceptions to the mootness doctrine, the Department's Motion to Dismiss Appeal should be denied.

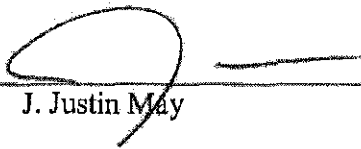
III. CONCLUSION

For the foregoing reasons, Rangen respectfully requests that the Director's and IDWR's Motion to Dismiss Appeal be denied.

DATED this 6th day of November, 2014.

MAY, BROWNING & MAY, PLLC

By


 J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 6th day of November, 2014 he caused a true and correct copy of the foregoing document to be served by the method indicated upon the following:

Original to: SRBA District Court 253 3 rd Avenue North P.O. Box 2707 Twin Falls, ID 83303-2707	Hand Delivery	<input checked="" type="checkbox"/>
	U.S. Mail	<input type="checkbox"/>
	Facsimile	<input type="checkbox"/>
	Federal Express	<input type="checkbox"/>
	E-Mail	<input checked="" type="checkbox"/>

Facsimile: (208) 736-2121	
Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 Deborah.gibson@idwr.idaho.gov	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"/>
Garrick Baxter 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	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"/>
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J. Justin May