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Attorneys for 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-2014-4970** **MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER GRANTING STAY OF CURTAILMENT ORDER**

Rangen, Inc., through its attorneys, submits the following Memorandum in Support of Motion for Reconsideration of Order Granting Stay of Curtailment Order.

I. BACKGROUND

On January 20, 2015, Idaho Ground Water Appropriators, Inc. ("IGWA") filed a Petition seeking judicial review of Director Gary Spackman's Order Denying Petition to Amend and Request for Stay entered on January 17, 2014 in connection with Rangen's December 2011 Petition for Delivery Call (CM-DC-2011-004) and IGWA's Fourth Mitigation Plan (CM-MP-2014-006) (hereinafter referred to as the "Magic Springs" Mitigation Plan). At the same time, IGWA filed a Motion for Stay of Curtailment Order and a Motion to Shorten Time in this case and in Twin Falls County Case No. CV-2014-4970 (petition for judicial review of the Director's recalculation of the Morris Exchange credit). The Court held a hearing that same day at 4:00 p.m. and granted the Motion to Shorten Time. The Court then scheduled a hearing on the merits of IGWA's Motions for Stay of Curtailment Order for January 22, 2015 at 1:30 p.m.

The Court conducted a hearing on IGWA's Motions for Stay of Curtailment Order as scheduled and granted the Motion from the bench. During the hearing the Court asked counsel for IGWA what impediments – besides the steel pipe -- existed:

> THE COURT: Well, Mr. Budge, let me ask you this: What other impediments are there towards completing the pipeline? I mean, you talked about getting the 400-foot section of steel pipe in there, but are there other impediments that are existing out there?

Tr., p. 35, lines 20-25 (attached as Exhibit 1 to *May Affidavit*).[1] IGWA explained that a thrust block had to be completed and the steel pipe had to be installed. Tr., p. 36. Counsel for IGWA asserted: "***So it's ready to go once the steel pipe is in place***." Tr., p. 36, lines 13-14 (emphasis added). The Court then asked about insurance. IGWA stated it was a "nonissue." Tr., p. 37, lines

[1] All exhibits referenced herein are attached to the *Affidavit of J. Dee May in Support of Motion for Reconsideration of Order Granting Stay of Curtailment Order*.

19-21. IGWA also told the Court that IGWA did a water supply bank transfer as a "safeguard" because the transfer application for the Magic Springs water has not been approved, but that "the authority to pump water is there." Tr., p. 31, line 23 – p. 32, line 5. IGWA did not disclose to the Court, however, that the rental that has been approved from the water supply bank is for 5.5 cfs – not the 7.81 cfs which IGWA indicated it was prepared to deliver to make up for the shortfall caused by the delay.

After the hearing, the Court entered a written order confirming the stay it had granted from the bench. The Court ordered that IGWA has until February 7, 2015, to complete construction of the Magic Springs pipeline in accordance with the terms and conditions of the Fourth Mitigation Plan and that IGWA must deliver 7.81 cfs of water to Rangen beginning on that date.

Rangen learned about a Magic Springs water lease for the first time when counsel for IGWA told the Court about it during the January 22nd hearing. Neither IGWA nor the Department had ever informed Rangen that IGWA had applied for such a lease nor that it had been approved on January 15, 2015. *See Rangen's Objection to Stay*, p. 7. Immediately after the hearing, Rangen requested a copy of all documentation pertaining to the lease from IGWA and IDWR. The information was provided on the morning of January 23, 2015. *See* Exhibit 2 for a copy of the IDWR documents related to the lease of water from SeaPac to the IWRB and Exhibit 3 for a copy of the IDWR documents related to the rental of the same water from the IWRB to IGWA.

Rangen has now had the opportunity to review the lease and rental documents. Based on that review, Rangen respectfully requests that the Court vacate the stay that was granted because: (1) contrary to IGWA's representation IGWA does not have the right to pump 7.81 cfs of water as ordered; and (2) the issuance of the rental agreement circumvented the issues of whether the Magic

Springs Mitigation Plan will constitute an enlargement of the underlying water right or otherwise cause material injury to other users.

II. ARGUMENT

A. IGWA Cannot Comply with the Court's Delivery Order Because Its Rental Agreement with the IWRB is Limited to 5.5 CFS of Water.

While construction of the Magic Springs pipeline is critical to IGWA's Fourth Mitigation Plan, equally important is having the legal right to deliver the water to Rangen for use at its Research Hatchery. The North Snake Groundwater District, Magic Valley Groundwater District, and Southwest Irrigation District have applied for a permit to transfer 10 cfs of water from Magic Springs to the Rangen Research Hatchery. A hearing was held by Director Spackman on December 19, 2014, but, to date, the transfer has not been approved.

On December 15, 2014, just four days before the transfer hearing, IGWA went to the IWRB to facilitate a lease of 5.5 cfs of water for use at Rangen's facility. IGWA submitted paperwork to lease 5.5 cfs of Magic Springs water to the IWRB (*see* Exhibit 2, p. 17) and then rent that same 5.5 cfs (*see* Exhibit 3, p. 5). The rental agreement between IGWA and the IWRB is unequivocal – it is for 5.5 cfs. *See* Exhibit 3, p. 1. This means that at the present time IGWA does not have the legal means to deliver the water that the Court has ordered that it deliver on February 7th.

To be sure, IGWA's inability to deliver 7.81 cfs of water to Rangen on February 7, 2015, is a huge impediment. This impediment was acknowledged when IDWR supplied Rangen with the lease/rental documents on January 23, 2015, and also notified Rangen in an email that ". . . new documents are being prepared by IGWA due to the need to provide additional flow to Rangen." *See* Exhibit 4. This impediment should have been disclosed to Rangen and the Court

and is a factor that should have been taken into consideration by the Court when ruling on IGWA's Motion for Stay of Curtailment Order.

B. The Stay Should be Vacated Because the Issuance of the Rental Agreement Circumvented the Issues of Enlargement and Material Injury.

Rangen opposed the Magic Springs Mitigation Plan and the proposed transfer of SeaPac's underlying water right from Magic Springs because, among other things, it would enlarge SeaPac's water right and injure many other water rights. SeaPac's water right is a non-consumptive fish propagation right. The water comes from Magic Springs, flows through SeaPac's facility which is located next to the Snake River, and then immediately flows to the river. The Magic Springs Mitigation Plan does NOT protect this return flow to the Snake River. After the Magic Springs water goes through the Rangen facility it will flow down Billingsley Creek where it will be fully consumed. The water will not return to the Snake River which means that SeaPac's non-consumptive water right will be turned into a fully consumptive right. *See Rangen's Closing Brief in Opposition to Fourth Mitigation Plan* (Exhibit 5) and *Rangen's Closing Brief* submitted in the transfer proceeding (Exhibit 6).

The Director was required to evaluate injury to other water rights when considering the Magic Springs Mitigation Plan. Rule 43.03.j of the Conjunctive Management Rules states:

> Factors that may be considered by the director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following:
>
> j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

IDAPA 37.03.11.43.03.j. The Director has acknowledged this important duty. During the hearing on IGWA's Tucker Springs mitigation plan, the Director stated:

> And I will tell you that with respect to the issue of injury that – an, TJ, you stated this yourself, that the Director had in the past ruled and referred to the conjunctive management rules that require that the Director consider injury in its review of – or in his review of the mitigation plan.
>
> Now, the distinction, I guess, I draw is that the issue of injury and the presentation of evidence doesn't – in a mitigation hearing does not need to rise to the level of proof that would be required in a transfer proceeding. And I don't want to mischaracterize the standard, other than to say that the issue, in my opinion, should be is there a reasonable possibility that – or is there a way in which the mitigation plan can be implemented so that it does cause injury to other water users or IGWA in general.
>
> So when I started my narrative here, I said that I would not rule on the issues. ***But at least with respect to injury, the Director has a responsibility to consider injury as part of the mitigation hearing, and I will consider injury and take evidence related to that subject.***

Tr., p. 32, line 15 – p. 33, l. 12 (emphasis added) (Exhibit 7).

Despite the prior acknowledgement of his duty to consider injury issues in the mitigation plan hearing, Director Spackman's conditional approval of the Fourth Mitigation Plan expressly deferred the enlargement/material injury issues to the pending transfer proceeding. The Order stated:

> 12. The Fourth Mitigation Plan should be approved conditioned upon the approval of the IGWA's September 10, 2014, Application for Transfer of Water Right to add the Rangen facility as a new place of use for up to 10 cfs from water right number 36-7072 or an authorized lease through the water supply bank. ***The consideration of a transfer application is a separate administrative contested case evaluated pursuant to the legal standards provided in Idaho Code §§ 42-108 and 42-222. Issues of potential injury to other water users due to a transfer are most appropriately addressed in the transfer contested case proceeding.***

See Order Approving IGWA's Fourth Mitigation Plan, p. 19 (Exhibit 8) (emphasis added).

IGWA filed an application for transfer to change the SeaPac water rights to allow use at Rangen's Research Hatchery on September 10, 2014. Such a transfer can only be approved by the Department if the transfer will not enlarge the water right or injure other water rights. *See* I.C. § 42-222(1). Rangen protested the transfer application. *See* Exhibit 9.

IGWA's transfer application was originally assigned to James Cefalo, an IDWR hearing officer. *See* Exhibit 10. After conditional approval of the Fourth Mitigation Plan, Director Spackman reassigned the transfer proceeding to himself and issued a Notice of Hearing and Scheduling Order. *See* Exhibit 11. Director Spackman conducted a hearing on the matter on December 19, 2014. The hearing took almost an entire day and consisted of the testimony of multiple water engineers and water rights experts and Frank Erwin, the water master of Water District 36A where the Rangen Research Hatchery and Billingsley Creek are located. *See* Exhibit 12 for a copy of the transcript of the hearing. At the end of the hearing, Director Spackman identified serious and complex legal issues associated with the transfer application and requested that the parties address them in their post hearing briefing:

> THE HEARING OFFICER: Okay. Two weeks. I want to talk to you just briefly about some concerns I have that may not have been voiced or identified, and I'll talk to you about three of them, if I can, just quickly.
>
> And so if I turn to 42-222, which is the statute that describes the filing of applications for transfer, how the Department should review them. And there is one particular provision -- I'm looking in the code, but this is -- sorry, everybody else probably doesn't have their volumes with them. But this is subsection (1), last sentence in subsection (1). It's a long subsection.
>
> MR. BUDGE: In 222?
>
> THE HEARING OFFICER: In 222. And it says, the last sentence, "Provided, however, minimum stream flow water rights may not be established under the local public interest criterion and may only be established pursuant to Chapter 15, Title 42, Idaho code."

And I just want to ask the question whether asking a watermaster to shepherd 10 cfs from Rangen to the mouth of Billingsley Creek establishes a de facto minimum stream flow and perhaps is prohibited by 42-222? I don't know the answer. I just ask the question.

This question has come up in a couple of other contested case hearings that I've held. And at least in one of them that I think factually was farther away from characterization of a minimum stream flow where we required a bypass flow. There were those in the legal community and the water community who pointed to this and wondered whether I had established a minimum stream flow. That particular approval did not propose to shepherd water
through an entire reach. This one does.

There's another provision, and we've talked about the enlargement of use. And I just -- I look at the criterion, and so I just want to read it.

MR. HAEMMERLE: I'm sorry, Director. What section are you on?

THE HEARING OFFICER: This is the same subsection (1). It's very long.

MR. HAEMMERLE: Okay.

THE HEARING OFFICER: And it sets out the criteria or the factors that the Director must consider. And one of them, of course, is the enlargement of use criterion. And it says, "The change does not constitute an enlargement in use of the original right." I'm not sure I know what that means, "in use of the original right." And so the issue has really been set up well here. And I understand the differences. But it really is in the interpretation of, I think, what an enlargement in use of the original right means. What does that mean? I don't know, in the context in looking at these facts.

And -- but I recognize -- and it troubles me a little, frankly, that we could propose approving an application for transfer that would -- that would not result in an enlargement use -- enlargement of use if we look myopically at a portion of the total use that would result but ignore the rest of it. But again, I just -- I look at it, and I don't know what that term means.

The last question that I want to ask is -- and it hinges, I guess, on this interpretation of what an enlargement of use is. But either way, we interpret the enlargement of use, at least from the testimony, without some careful regulation and very difficult regulation on Billingsley Creek. There will be an increase of consumptive use. And from my perspective, that increase in consumptive use will be very difficult or almost impossible to avoid.

> ***And so then my next question is, is the water that will be consumed, is it trust water? Is it actually trust water, water that's been placed in trust and held by the State of Idaho? And would that increased consumption invoke the other provisions of trust water? Now, I know it refers to it in 202 -- 42-202, and I think it's (c), and talks about the appropriation of water. But is it trust water?***
> And those are, I guess, questions or issues we didn't talk about today, but ones that I think I need to look at in the evaluation of the application.
>
> ***And I just wanted to throw them out to everybody because I think I have an obligation.***
>
> MR. HAEMMERLE: I will say, Director, in 120 years of jurisprudence in the state of Idaho, it's an honor to be involved in these issues, because I think they are probably first-time issues.
>
> THE HEARING OFFICER: Okay. There you go. So I don't have anything else. Do the parties have anything?
>
> MR. HAEMMERLE: Thanks for the direction, Director.
>
> THE HEARING OFFICER: Yeah. I don't want to write a decision that surprises the parties somehow. I want you to know that I'll look at those matters and issues that I at least detailed for you.

(Tr., p. 261, l. 15 – 264, l. 14) (emphasis added).

The transfer application has never been approved. Director Spackman has not issued a decision on the transfer application or any analysis of the enlargement/injury that would result from the transfer. It now appears that the transfer proceeding was merely a ruse. Four days before the hearing on the transfer proceeding began, IGWA applied for a lease and rental from the water bank. *See* Exhibits 2 and 3. Neither IGWA nor the Director disclosed or mentioned this application during the hearing on the transfer application. *See* Exhibit 12.

The IDWR staff memos that were generated in connection with the lease/rental documents affirmatively show that Department policies and procedures were circumvented to issue these agreements without the knowledge and input of Rangen and to avoid the issues raised in the

protested transfer application. On January 2, 2015 – the day that Rangen and IGWA submitted their post-hearing briefing in the transfer proceeding – Remington Buyer, an IDWR employee, issued two memoranda. One addressed the lease application with SeaPac and IWRB. *See* Exhibit 2, p. 22. The other addressed the rental application with IGWA and IWRB. *See* Exhibit 3, p. 12.

Mr. Remington's Memorandum on the lease agreement expressly states that the lease/rental applications were submitted because Rangen protested the transfer. *See* Exhibit 2, p. 22. It states: "This lease rental application is being submitted due to the protesting of the transfer application." The Memorandum acknowledges that the IWRB usually does not consider rental applications where transfer proceedings have been initiated. The Memorandum also acknowledges that the IWRB avoids reviewing those applications where there is a protest. Nonetheless, these policies were expressly circumvented:

> As a matter of avoiding duplicative work, the Water Supply Bank tends not to consider lease and rental applications where transfer proceedings are pending, and the Bank avoids considering a lease/rental if an associated transfer is protested. This lease/rental transaction however is being proposed to accomplish mitigation activities approved by an order of the Director of IDWR (IGWA's Fourth Mitigation Plan) and the mitigation activities are sanctioned by the IWRB, thus the bank will consider this transaction.

Exhibit 2, p. 21.

Mr. Remington superficially addressed material injury/enlargement issues in his Memorandum on the rental agreement. Exhibit 3, p. 12. Again, his analysis was done on the same day that IGWA and Rangen submitted their final briefing in the transfer proceeding, yet Mr. Remington does not address the legal issues or concerns that Director Spackman asked the parties to address. It does not appear that Mr. Remington considered any of the evidence that the Department had on the enlargement/material injury issues during the transfer proceeding.

There is also no evidence that *Director Spackman* considered the lease/rental applications. Section 42-1763 requires the Director to do the same enlargement/material injury analysis in connection with the lease/rental applications that he was required to do in connection with the Magic Springs Mitigation Plan and the transfer proceeding. It states:

> 42-1763. Rentals from bank -- Approval by director. The terms and conditions of any rental of water from the water supply bank must be approved by the director of the department of water resources. ***The director of the department of water resources may reject and refuse approval for or may partially approve for a less quantity of water or may approve upon conditions any proposed rental of water from the water supply bank where the proposed use is such that it will reduce the quantity of water available under other existing water rights, the water supply involved is insufficient for the purpose for which it is sought, the rental would cause the use of water to be enlarged beyond that authorized under the water right to be rented, the rental will conflict with the local public interest as defined in section 42-202B, Idaho Code, or the rental will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates.*** The director shall consider in determining whether to approve a rental of water for use outside of the state of Idaho those factors enumerated in subsection (3) of section 42-401, Idaho Code.

I.C. § 42-1763 (emphasis added).

The Director did not do this analysis even though he had just conducted a full day hearing on the matter and had extensive testimony from experts and legal briefings from the parties. In fact, it appears that the Department staff who reviewed the lease and rental applications ignored all of the evidence and legal briefing that the Director had just received.

In addition, IGWA's rental agreement for the 5.5 cfs was not approved by the Director. The agreement was signed by Cheri Palmer for Brian Patton, the Acting Administrator for the IWRB. *See* Exhibit 3, p. 2. Ms. Palmer certified on behalf of Mr. Patton as follows:

> Having determined that this agreement satisfied the provisions of Idaho Code § 42-1763 and IDAPA 37.02.03.030 (Water Supply Bank Rule 30), for the rental and

> use of water under the terms and conditions herein provided, and none other, I hereby execute this Rental Agreement on behalf of the Idaho Water Resource Board.

See id. Even if one assumes that Ms. Palmer has the authority to make the certifications on behalf of Mr. Patton, the problem with this certification is that the legal responsibility to review rental agreements rests with Director Spackman – not the IWRB.

The Idaho legislature put the responsibility for reviewing and approving rental agreements squarely on the shoulders of the Director – not the IWRB:

> 42-1763. Rentals from bank -- Approval by director. ***The terms and conditions of any rental of water from the water supply bank must be approved by the director of the department of water resources.*** The director of the department of water resources may reject and refuse approval for or may partially approve for a less quantity of water or may approve upon conditions any proposed rental of water from the water supply bank where the proposed use is such that it will reduce the quantity of water available under other existing water rights, the water supply involved is insufficient for the purpose for which it is sought, the rental would cause the use of water to be enlarged beyond that authorized under the water right to be rented, the rental will conflict with the local public interest as defined in section 42-202B, Idaho Code, or the rental will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates. The director shall consider in determining whether to approve a rental of water for use outside of the state of Idaho those factors enumerated in subsection (3) of section 42-401, Idaho Code.

I.C. § 42-1763 (emphasis added).

The certification that the rental agreement meets the criteria of I.C. § 41-1763 was given by the IWRB – not the Director. This does not comply with Idaho law and renders the rental agreement a nullity. Without the Director's approval of the rental agreement, IGWA does not have the ability to comply with the Court's February 7th Order, and, as such, Rangen requests that the stay be vacated.

It is unconscionable for the Magic Springs Mitigation Plan to be implemented without an analysis of whether the plan results in an enlargement of SeaPac's water rights or causes material injury to Snake River water users because the water will not return to the Snake River once it enters Billingsley Creek. The Director refused to address this issue in the mitigation plan hearing and said he would address it in the transfer proceeding. The Department and IWRB ignored their standard operating policies and procedures to consider the lease/rental applications even though a transfer proceeding had been commenced and there was a protest. Rangen was not notified of the applications and was deprived of the opportunity to participate. The Department and IWRB ignored the evidence and legal briefing that they had in their possession and they accomplished indirectly what they could not do directly – the approval of the use of water without a full injury analysis. The Director did not approve the lease/rental applications and he did not do the injury/enlargement analysis. In fact, the Director has not yet addressed in any forum or proceeding whether the Magic Springs Mitigation Plan causes material injury to others or results in an enlargement of SeaPac's water rights. As such, the Court should not allow pumping to commence through the Magic Springs pipeline until IGWA, the Department and the IWRB comply with Idaho law. Respectfully, Rangen requests that the stay be vacated.

III. CONCLUSION

For the foregoing reasons, Rangen respectfully requests that Rangen's Motion for Reconsideration be granted and that the stay be vacated.

DATED this 26th day of January, 2015.

MAY, BROWNING & MAY, PLLC

By: _____
J. Dee May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 26th day of January, 2015 he caused a true and correct copy of the foregoing document to be served upon the following as indicated:

Original: State of Idaho SRBA District Court 253 3rd Avenue North P.O. Box 2707 Twin Falls, ID 83303-2707 Facsimile: (208) 736-2121	Hand Delivery ☑ U.S. Mail ☐ Facsimile ☐ Federal Express ☐ E-Mail ☐
Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 deborah.gibson@idwr.idaho.gov	Hand Delivery ☑ U.S. Mail ☐ Facsimile ☐ Federal Express ☐ E-Mail ☑
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