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

RANGEN, INC.,

Petitioner,

vs.

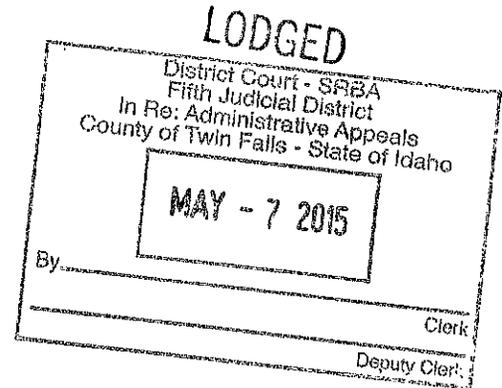
THE IDAHO DEPARTMENT OF WATER
RESOURCES and GARY SPACKMAN in his
capacity as Director of the Idaho Department of
Water Resources,

Respondents,

IDAHO GROUND WATER
APPROPRIATORS, INC.,

Intervenor.

Case No. CV-2014-4970



RANGEN, INC.'S REPLY BRIEF

On Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

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TABLE OF CONTENTS

I. INTRODUCTION 3

II. ARGUMENT 3

 A. The Director exceeded his authority by allowing continued out-of-priority groundwater pumping without a properly enacted mitigation plan..... 3

 B. Rangen’s substantial rights have been prejudiced..... 5

III. CONCLUSION..... 6

TABLE OF AUTHORITIES

Cases

Hawkins v. Bonneville County Board of Commissioners, 254 P.3d 1224 (2011) 6

In the Matter of Distribution of Water to Various Water Rights, 155 Idaho 640, 315 P.3d 828
(2013) 3

I. INTRODUCTION

This brief is filed in reply to *Idaho Department of Water Resources' Brief in Response to Rangen, Inc.'s Opening Brief* ("IDWR's Response Brief") and *IGWA's Response Brief* ("IGWA's Response Brief"), and in support of Rangen, Inc.'s appeal of the Director's *Order Granting Rangen's Motion to Determine Morris Exchange Water Credit; Second Amended Curtailment Order* ("Morris Exchange Order").

II. ARGUMENT

A. The Director exceeded his authority by allowing continued out-of-priority groundwater pumping without a properly enacted mitigation plan.

The issue in this case is narrow. Does the Director have the authority to allow out-of-priority ground water pumping to continue without a properly enacted mitigation plan after a finding that the out-of-priority pumping is causing material injury? The Idaho Supreme Court has previously answered this question. "The Conjunctive Management Rules require that out-of-priority diversions only be permitted pursuant to a properly enacted mitigation plan." *In the Matter of Distribution of Water to Various Water Rights*, 155 Idaho 640, 653, 315 P.3d 828, 841 (2013). In these circumstances, the Director does not have the discretion to simply allow junior-priority groundwater pumping to continue.

On January 19, 2014, the Director entered an order determining that out-of-priority ground water pumping is causing material injury to Rangen's water rights. *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962, (Curtilment Order)* (Suppl. A.R., CM-DC-2011-004, p.1-104). At the time that the Director issued the Morris Exchange Order that is at issue in the present case, there was no properly enacted mitigation plan. The Director agreed with Rangen that even under the generous reallocation of the Morris Exchange credit, the First Mitigation Plan was insufficient as of October 2, 2014. (Morris

Exchange Order, A.R., CV-2014-2446, at p. 760; A.R. CV-2014-4970, at p. 101). The Fourth Mitigation Plan was only conditionally approved and did not even propose to provide mitigation in 2014. In fact, the Fourth Mitigation Plan proposed to provide compensatory water in the future, but did not propose to mitigate the depletive effects of out-of-priority pumping. (IGWA's Fourth Mitigation Plan, A.R., CV-2014-4663, p.1-24) The Fourth Mitigation Plan proposed to pump water through a pipeline from Magic Springs. It did not propose to provide any water in 2014. The Fourth Mitigation Plan contained no contingencies should the pipeline fail to be built or deliver water.

Despite the finding of material injury and lack of a mitigation plan that actually provided water at Rangen's time of need, both the Department and IGWA argue that the Director has the discretion to simply allow out-of-priority pumping to continue for practical considerations. IGWA argues that the "[b]y assigning a curtailment date sixty days out, [the Director] simply exercised his discretionary powers under the doctrine of beneficial use." *IGWA's Response Brief*, p. 9. This argument is apparently based upon the requirement that the Director consider "reasonableness of the senior water right diversion . . . and reasonableness of use." *IGWA's Response Brief*, p. 8. Rangen of course disagrees with the argument that the Director has the discretion to decide which of the water rights are causing material injury to curtail. This issue was addressed before this Court in the consolidated cases of Twin Falls County Case No. CV-2014-1338/Gooding County Case No. CV-2014-179. This issue is currently being briefed in the Idaho Supreme Court on appeal from that decision. *See*, S. Ct. No.42772. More importantly, however, whether the Director has the discretion argued by the Department and IGWA to determine which out-of-priority pumping is causing material injury is not at issue in this case. The question before the Court in this case is once the Director has determined that the senior diversion and use of water

is reasonable and that material injury is occurring, does the Director have the authority to simply decide to allow out-of-priority pumping to continue.

Both the Department and IGWA also argue that the Director has discretion in this case because the Conjunctive Management Rules allow the Director to provide for a phase-in of curtailment. Such an argument has no relevance to this case. The Director did phase-in curtailment as part of the Curtailment Order. (Curtailment Order, Suppl. A.R., CM-DC-2011-004, p.1-104 at p. 42). The Director found that IGWA had not satisfied even the phased-in obligation under the Curtailment Order.

B. Rangen's substantial rights have been prejudiced.

Both the Department of Water Resources and IGWA argue that Rangen has not demonstrated prejudice to a substantial right. The Department argues that "Rangen cannot demonstrate prejudice to a substantial right because IGWA has delivered to Rangen the amount of water necessary to address material injury to [Rangen's water rights]." *IDWR's Response Brief*, p. 8. According to IGWA, "[c]urtailment [*sic*] the small amount of pumping that occurs during the winter for sixty days would not have provided Rangen with enough water, if any at all, to make a difference in its fish operation." *IGWA's Response Brief*, p.13.

These arguments construe Rangen's rights too narrowly. Rangen's water rights are a constitutionally protected property right. The effects of ground water pumping on the aquifer are cumulative as is the aquifer's response to curtailment. Thus, the Director's efforts to put off and delay curtailment also delay recovery of the aquifer. Just as important in this case is Rangen's substantial right in having the correct procedure and legal standards applied to its call.

Of course, assuming that a decision is procedurally fair, applicants for a permit also have a substantial right in having the governing board properly adjudicate their applications by applying correct legal standards. *Lane Ranch P'ship v. City of Sun Valley*, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007); *cf. Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 842, 70 P.3d 669, 680 (2003) (remanding

because the agency misstated the relevant legal standard and denied an application to transfer water rights).

Hawkins v. Bonneville County Board of Commissioners, 254 P.3d 1224, 1229 (2011). As set forth in Rangen's opening brief, the present order is merely the most recent in a series of similar decisions by the Director. Each of these orders, like the present order, exercises authority and discretion that the Director does not have, yet each is effectively unreviewable due to the time frames involved. Yet, the cumulative result is that the Director allowed out-of-priority pumping to continue for another full irrigation season unabated while material injury to Rangen also continued. As a result, Rangen's substantial rights have been prejudiced.

III. CONCLUSION

For the reasons specified above, Rangen requests that the Court find that the Morris Exchange Order was in violation of Idaho law, and in excess of the statutory authority or administrative rules of the Department.

DATED this 7th day of May, 2015.

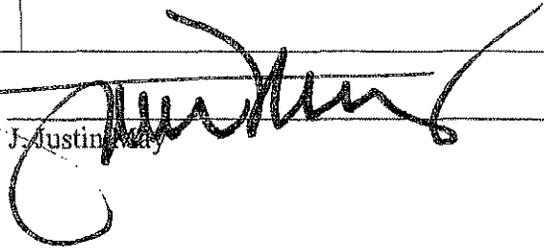
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By 
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CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 7th day of May, 2015 he caused a true and correct copy of the foregoing document to be served by the method indicated upon the following:

<p>Original: SRBA District Court 253 3rd Avenue North P.O. Box 2707 Twin Falls, ID 83303-2707</p>	<p>Hand Delivery <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input type="checkbox"/></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 type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> 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"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>Randall C. Budge TJ Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED PO Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net bjh@racinelaw.net</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>


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