

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

CITIES OF BLISS, BURLEY, CAREY, DECLO,  
DIETRICH, GOODING, HAZELTON,  
HEYBURN, JEROME, PAUL, RICHFIELD,  
RUPERT SHOSHONE, AND WENDELL,

Petitioners,

vs.

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

Respondents,

RANGEN, INC.,

Intervenor

IN THE MATTER OF THE COALITION OF  
CITIES' SECOND MITIGATION PLAN FOR  
THE DISTRIBUTION OF WATER TO WATER  
RIGHT NOS. 36-15501, 36-02551, AND 36-  
07694 HELD BY RANGEN, INC.

Case No. CV-2015-172

District Court - SRBA Fifth Judicial District In Re: Administrative Appeals County of Twin Falls - State of Idaho	
JUN 11 2015	
By _____	Clerk
_____	Deputy Clerk

**RANGEN, INC.'S INTERVENOR BRIEF**

On Review from the Idaho Department of Water Resources

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Honorable Eric J. Wildman, Presiding

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## I. STATEMENT OF CASE

The Coalition of Cities' Second Mitigation Plan was a stipulated mitigation plan resulting from a long period of negotiation between Rangen and the Coalition of Cities. Rangen agreed to the plan and believes that as a stipulated plan it should have been approved by the Director. Rangen supports the Cities in their overall position that the plan should have been given immediate effect, but disagrees with some of the Cities' factual and legal assertions. This Brief is intended to set out and clarify Rangen's position.

To begin with Rangen agrees generally with the Statement of the Case set forth in the *Coalition of Cities' Opening Brief*. However, there is one factual issue that Rangen believes requires some clarification.

The Coalition states:

Despite not reviewing, considering, or modeling the impacts of municipal water rights, the Director applied the Curtailment order to "all consumptive ground water rights, including agricultural, commercial, industrial, and municipal uses. . . ."

*Coalition of Cities' Opening Brief*, p. 2 (citation and emphasis omitted). Similarly, the Coalition states:

Despite the uncontradicted fact that junior-priority ground water rights for municipal purposes were not examined by the Director in his Curtailment Order, and in order to avoid curtailment, the Cities filed its *CM Rule 43 Mitigation Plan for Managed Recharge and Other Aquifer Enhancement Activities* ("First Mitigation Plan").

*Id.* at 3.

This is not a correct characterization of the consideration of non-irrigation water rights in the modeling process. It is true that municipal water rights were not part of the curtailment simulation utilizing ESPAM 2.1 to quantify the specific mitigation obligation found in the Curtailment Order. However, municipal rights are represented in the model and were therefore

reviewed, considered, modeled, and examined by the Director as part of his determination of material injury in the Curtailment Order. As noted in the *Staff Memorandum* prepared by Jennifer Sukow:

Estimates of municipal water use were included in calibration of ESPAM2.1, but junior priority municipal water use was not included in the curtailment simulation used to calculate the mitigation obligation in the January 29, 2014 order. Input for the curtailment simulation was calculated based on irrigation consumptive use. The irrigated area associated with junior groundwater rights was calculated using the Curtailment IAR tool from the ESPAM2 Recharge Tools. The Curtailment IAR tool applies a mask to remove urban areas and wetlands from the irrigated lands for which consumptive use is calculated.

(Ex. 157, at p 2-3). This clarification is important because it must be recognized that the impact from the Cities' pumping was modeled and included in the determination of material injury. The impact was only excluded from the methodology used to calculate the 9.1 cfs mitigation obligation.

## II. ARGUMENT

### a. **The Cities' Second Mitigation Plan could not have been approved over Rangen's objection.**

The Coalition contends that the Director should have unconditionally approved the Second Mitigation Plan because it provides water to Rangen when needed. *Coalition of Cities Opening Brief*, p.17. Rangen disagrees with the Cities' contention that the plan provides sufficient water to Rangen to offset the depletions caused by the Cities' out-of-priority pumping. The Director's findings in this regard are correct. To be clear, Rangen believes the Coalition's Second Mitigation Plan should have been approved and given immediate effect. However, the quantity and timing of increased Curren Tunnel flow is not sufficient for the plan to be approvable *without* Rangen's agreement. To be approved over Rangen's objection, the Cities' Second Mitigation Plan must "provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal . . . ." CM Rule 43.03.b. Both

Jennifer Sukow of the Department of Water Resources and Christian Petrich on behalf of the Coalition of Cities performed simulations using ESPAM2.1 comparing the impact of the Cities' out-of-priority pumping with the benefit of recharge proposed in the Cities' Second Mitigation Plan. Sukow concluded that:

Because the recharge is scheduled to occur near the end of the first year of mitigation (April 2014 through March 2015), the recharge does not offset the Cities' predicted impacts to discharge at Curren Tunnel during the first year.

(Ex. 157, at p. 5). Petrich calculated the impact of the Cities' pumping to be approximately half of that calculated by Sukow and also used a more conservative estimate for the benefit of recharge. (Ex. 100). However, when compared over the same time frame, Petrich's analysis leads to the same conclusion. (Ex. 143). Recharging 1,500 acre feet of water over a 20-day period in February 2015 will not result in sufficient water beginning April 1, 2014 to offset the depletions caused by the Cities' out-of-priority pumping. This is not surprising since the recharge was not proposed to occur until February 2015.

Because the Cities' Second Mitigation Plan does not provide water sufficient to timely offset the impact of Coalition members' out-of-priority pumping, the mitigation plan could not have been approved over Rangen's objection. As explained below, Rangen's agreement to the Cities' Second Mitigation Plan is an important factual and legal consideration. The Director should have approved the Plan and given it immediate effect, but only because Rangen agreed to it. Senior water users are entitled to enter into agreements with individual junior water users and those agreements can be approved as mitigation plans.

**b. Senior water users are entitled to enter into agreements with individual junior water users and those agreements can be approved as mitigation plans.**

The Director commented that it was ironic and inconsistent that Rangen would stipulate to the Cities' Second Mitigation Plan since it does not provide water to Rangen at its time of need.

(R., Vol. 2, p. 468, ¶ 19). As part of that comment, the Director added a footnote without citing any legal authority that a senior user cannot enter into a stipulated mitigation plan with a junior user while continuing to call on other junior users. (R., Vol. 2, p. 468, FN3). The Director's position is legally and factually flawed.

To begin with, the CM Rules expressly allow the Director to approve a stipulated mitigation plan even though it would otherwise not be approvable under the CM Rules. The Rules expressly provide that the Director may consider:

Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan *even though such a plan may not otherwise be fully in compliance with these provisions*.

CM Rule 43.03.o (emphasis added). The CM Rules also provide that the Director may consider whether the mitigation plan provides replacement water or other appropriate compensation:

Whether the mitigation plan provides replacement water supplies **or other appropriate compensation** to the senior-priority water right when needed during a time of shortage . . . .

CM Rule 43.03.c (emphasis added).

Rangen's decision to agree to the Cities' Second Mitigation Plan was Rangen's decision to make. The Director should not have second-guessed that decision. Having said that, it was neither ironic nor inconsistent for Rangen to support the Plan and the Director's findings to the contrary are not justified. The Cities' Second Mitigation Plan was filed pursuant to an agreement between the Coalition of Cities, Clear Springs Foods, Idaho Power Company, and Rangen, Inc. (R., Vol. 2, 259-301, Exh. 2 at 270) ("Memorandum Agreement"). The purpose of the Memorandum Agreement is in part to study the efficacy of a recharge site referred to as the Gooding Site which Rangen and the other parties to the agreement believe has promise for restoring aquifer levels and spring flows at the Curren Tunnel and other springs. (R., Vol. 2, 259-301, Attachment B at 289) ("Draft Proposal"). As part of the Agreement, the Cities have agreed to pay the majority of the

costs for the conveyance, engineering, and construction as shown on Attachment B, the Draft Proposal.

From Rangen's perspective, the Second Mitigation Plan provides not only some water to address the impact of the Cities' out-of-priority pumping, but also avoids the Sandy Ponds (a proposed recharge site which Rangen has opposed), and provides information and data that may allow for more efficient restoration of aquifer levels and spring flows. Rangen has long been an active supporter of both recharge activities and the study of ESPA. Thorleif Rangen was one of the founding member of the Lower Snake River Aquifer Recharge District ("LSARD"). Rangen's Vice President, Wayne Courtney, is currently on the LSARD Board. Rangen has participated in the Eastern Snake Hydrologic Modelling Committee almost since its inception. Rangen has also consistently opposed mitigation plans that propose to use ineffective or otherwise undesirable recharge sites such as the Sandy Ponds. *See Rangen, Inc.'s Protest to IGWA's Amended Third Mitigation Plan*, CM-MP-2014-005; *Rangen Inc.'s Protest to Coalition of Cities' Mitigation Plan*, CM-MP-2014-004 (Ex. 153). Similarly, Rangen has consistently opposed mitigation plans that propose to merely move water around between declining spring sources without mitigating or addressing the underlying problem of aquifer mining. *See Rangen, Inc.'s Protest to IGWA's Second Mitigation Plan*, CM-MP-2014-003; *Rangen, Inc.'s Protest to IGWA's Amended Third Mitigation Plan*, CM-MP-2014-005; and *Rangen Inc.'s Protest to IGWA's Fourth Mitigation Plan*, CM-MP-2014-006.

The Cities filed their first mitigation plan on April 25, 2014. The Cities' first mitigation plan proposed recharge at the Sandy Ponds. Rangen opposes recharge at the Sandy Ponds for a variety of reasons. *See Rangen Inc.'s Protest to Coalition of Cities' Mitigation Plan*, CM-MP-2014-004 (Ex. 153) and *Rangen, Inc.'s Protest to IGWA's Amended Third Mitigation Plan*, CM-

MP-2014-005. Shortly after IGWA filed its first mitigation plan, Rangen and the Cities began negotiations about alternative means to satisfy the Cities' mitigation obligation. The end result of those negotiations was the Memorandum Agreement. (R., Vol. 2, 259-301, Exh. 2 at 270). Rangen believes the Memorandum Agreement is in its best interests and supports the approval of the Second Mitigation Plan. The Director should have approved the Cities' Second Mitigation Plan and given mitigation credit immediately in order to give effect to a negotiated agreement that Rangen favors. The Director's decision to condition his approval of the Cities' Second Mitigation Plan should be reversed.

**c. The Director's concern about the fairness to other junior water users who may have been curtailed is unfounded.**

The Director's decision to conditionally approve the Coalition's Second Mitigation Plan appears to be implicitly premised on the notion that it would be unfair to give immediate effect to the Cities' mitigation plan when other junior water users faced curtailment even though they had made some mitigation efforts through the Morris Exchange Credit. (R., Vol. 2, p. 468, ¶ 19). While Rangen contends that the Director's refusal to give effect to the agreement reached by the parties was error, the Director also overlooked a critical point -- the 9.1 cfs mitigation obligation that the Director calculated was owed to Rangen did not include the impact of the Cities' pumping. In other words, Rangen was owed more water than the Director originally calculated and the agreement with the Cities' was intended to address that separate obligation.

On January 29, 2014, the Director determined that out-of-priority ground water pumping, including pumping under various water rights held by members of the Coalition of Cities, 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* ("Curtailment Order"). (R., Vol. 1, 1-104). The Director ordered curtailment of water rights junior to July 13, 1962 on or

before March 14, 2014. (R., Vol. 1, p. 42). The Director further determined that junior ground water pumpers could avoid curtailment through approval of a mitigation plan providing for simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen. (R., Vol. 1, p. 42). This mitigation obligation was based upon a curtailment simulation utilizing ESPAM2.1.

It is important to recognize, however, that the 9.1 cfs mitigation obligation does not include the impact from the Cities' pumping:

Estimates of municipal water use were included in calibration of ESPAM2.1, but junior-priority municipal water use was not included in the curtailment simulation used to calculate the mitigation obligation in the January 29, 2014 order.

(Ex. 157, p. 2). As a result, the impact of the out-of-priority ground water pumping that the Coalition proposed to mitigate under the Cities Second Mitigation Plan was not included in the 9.1 cfs mitigation obligation. As the Director stated:

The Department did not calculate additional depletions caused by diversion of ground water by the Cities or other industrial or commercial uses. As a result, the mitigation obligations of the ground water users were lower, by some small number, because the comprehensive depletionary effects of all diversions were not calculated. The omission in the calculation of the depletive effects of other ground water pumping did not eliminate the true and actual depletive effect of the additional pumping by the Cities, industries, and commercial users.

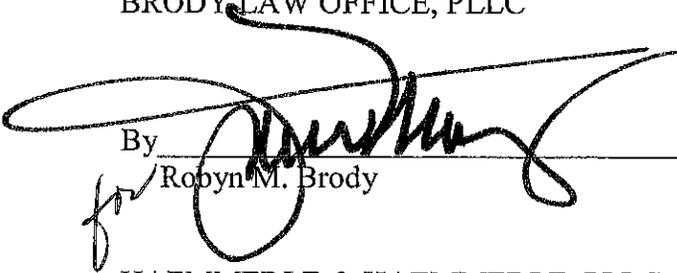
(R., Vol. 2, at 459). This means that any mitigation provided by the Cities to address this additional depletive effect should have no effect on the overall mitigation obligation provided in the Curtailment Order. There is nothing unfair or inconsistent or ironic in Rangen's decision to enter into an agreement with the Cities to address the Cities' mitigation obligation – an obligation which was not included in the original 9.1 cfs obligation. Because of Rangen's consent, the Director should have approved and given immediate effect to the Cities' Second Mitigation Plan.

**III. CONCLUSION**

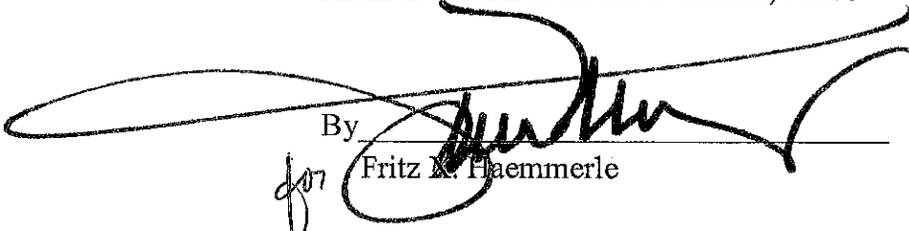
It is important that a senior water user be able to settle and resolve delivery calls on the terms and conditions that it believes are in its best interests. The CM Rules expressly permit the Director to approve plans that would not otherwise be approvable if the senior water user is consenting. In this case, the Director ignored the CM Rules and substituted his own judgment for Rangen's. This was error. Rangen respectfully requests that the Director's decision to conditionally approve the Cities' Second Mitigation Plan be reversed.

DATED this 11th day of June, 2015.

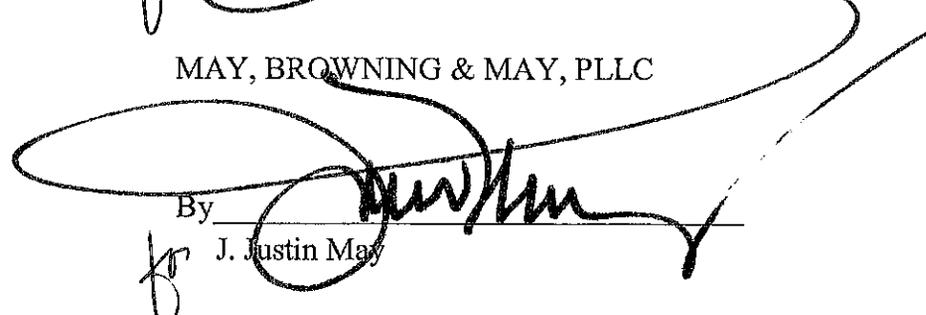
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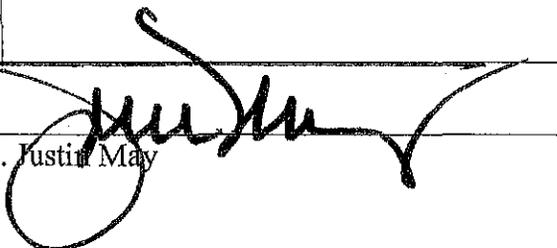
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### CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 11th day of June, 2015 I caused a true and correct copy of the foregoing document to be served by the method indicated upon the following:

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for  J. Justin May