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Attorneys for Rangen, Inc.

IN THE DISTRICT COURT OF THE FIFTH JUDICAL 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,** **Respondents.** **IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551 & 36-07694 (RANGEN, INC.), IDWR DOCKET NO. CM-DC-2011-004**	)	**Case No. CV-2015-0237** **RANGEN, INC.'S OBJECTION TO MOTION FOR STAY; MOTION TO STRIKE**

COMES NOW the Petitioner, Rangen, Inc. ("Rangen") by and through its attorneys of record, Robyn M. Brody of Brody Law Office, P.L.L.C.; J. Justin May of May, Browning & May, P.L.L.C.; and Fritz X. Haemmerle of Haemmerle Law, P.L.L.C., and files these objections to the Motion to Stay filed by the Idaho Ground Water Appropriators ("IGWA").

I. BACKGROUND FACTS AND RULES

Attached as Exhibit 5 to the Affidavit of J. Justin May in Opposition to Motion to Stay Curtailment Order ("Affidavit") is the Director's *Order Denying Petition to Amend and Request for Temporary Stay*, dated January 17, 2015 ("Order").

Attached as Exhibit 1 to the Affidavit is the Director's *Order Approving IGWA's Fourth Mitigation Plan*, dated October 29, 2014. ("*Fourth Mitigating Order*").

Attached as Exhibit 6 to the Affidavit are IDAPA Rules 37.01.01.760 and IDAPA 37.01.01.780.

II. MOTION TO STRIKE

Rangen asks the Court to strike the Affidavits of Robert Hardgrove and Charles M. Brendecke. These Affidavits are entirely new evidence and were never considered by the Director. The Affidavits are being offered on issues of fact, namely on the issue of whether used pipe is the same as "new pipe."

On judicial review of issues of fact, the court is "confined to the agency record for judicial review as defined in this chapter, supplemented by additional evidence taken pursuant to Section 67-5276. Section 67-5276 provides a mechanism for the admission of "additional evidence."

Provided that the party offering the evidence has: (1) shown good cause for failure to present the evidence to the agency; or (2) that there were irregularities in the procedure before the agency.

In this case, there has been no showing as to why the information held by Mr. Hardgrove and Mr. Brendecke could not have been provided to the agency, and there are certainly no irregularities in the procedures used by the Director in failing to act upon IGWA's request. Most importantly, there is no mechanism for the Court to substitute its own judgment, or to modify an agency Order, based on new evidence.

In the event the Court considers IGWA's Affidavits, then the Court should also consider Rangen's Affidavits.

III. OBJECTIONS

A. IGWA HAS NOT SERVED ALL OF THE PARTIES WITH THE MOTION TO STAY CURTAILMENT AND NOTICE OF HEARING IN CV-2015-0237.

IGWA filed CV-2015-0237 in Twin Falls County yesterday. The case involves review of an administrative decision filed in Rangen's December 2011 Petition for Delivery Call, CM-DC-2011-004. There are numerous parties to CM-DC-2011-004 including, but not limited to, the City of Pocatello, Fremont-Madison Irrigation District, and the Surface Water Coalition. See Certificate of Service below for a complete list of parties. It does not appear from the Certificate of Mailing attached to IGWA's Motion to Stay Curtailment that all of the parties were served either the petition itself or the motions. It appears that the only parties that were provided notice of the filings and hearing were Rangen and the Idaho Department of Water Resources. It would be improper to proceed with a hearing on the present Motion without the other parties being given notice and the opportunity to be heard.

B. IGWA MAY NOT INJECT NEW ISSUES INTO CASE NUMBER CV-2014-4970.

IGWA raises new issues in CV-2014-4970. Case No. 4970 is an Appeal filed by Rangen of the Director's Order entitled "*Order Granting Rangen's Motion to Determine Morris Exchange Water Credit; Second Amended Curtailment Order.*" As an intervening party, IGWA cannot inject new issues into this Appeal. No part of this Appeal involved the Director's Decision not to amend the Fourth Mitigation Order or his discretionary election not to grant a temporary stay. In fact, IGWA neither appealed nor cross-appealed from the Order that is at issue in CV-2014-4970. IGWA cannot prevail in any manner in this case because it has not requested any remedy. Having failed to appeal from the Order, IGWA cannot now attempt a backdoor appeal simply by requesting a stay of an Order it did not appeal in the first place.

For this reason, a request for stay in Case No. CV-2014-4970 would not be proper.

C. IGWA'S ATTEMPT TO ARGUE FOR RELIEF OF THE CONDITIONS OF THE FOURTH MITIGATION PLAN IS A BACKDOOR ATTEMPT TO ILLEGALLY RAISE ISSUES IT FAILED TO TIMELY RAISE ON THE DIRECTOR'S ORDER ON THE FOURTH MITIGATON PLAN.

IGWA's request for stay is really a backdoor attempt to amend the Director's Order Granting the Fourth Mitigation Plan, regarding the necessity to provide "new pipe." The Fourth Mitigation Plan was filed by Rangen in Case No. CV-2014-4633. IGWA is not a party to this Appeal. Accordingly, any attempt to amend any part of the Fourth Mitigation Order would be improper as IGWA failed to appeal any portion of the Fourth Mitigation Plan Approval, including the necessity for "new pipe."

D. THERE IS NO BASIS UPON WHICH IGWA COULD OBTAIN RELIEF UNDER IDAHO CODE SECTION 67-5279

IGWA filed its Petition for Judicial Review on two issues. Those issues are as follows: (1) Whether the Director erred in concluding he has no authority to issue an amended curtailment order; and (2) Whether the Director abused his discretion by failing to grant a temporary stay of the curtailment order.

Under Idaho Code Section 67-5279, a Court may grant relief if it is shown that the agency decision is: "(a) in violation of constitutional or statutory provisions; (b) in excess of statutory authority of the agency; (c) made upon unlawful procedure; or (d) or arbitrary, capricious or abuse of discretion.

As to the first issue of whether the Director could amend his Order, the Director cited its own agency rule in concluding that it had no authority to amend any order once the order is one appeal. "The agency head may modify or amend a final order of the agency . . . at any time before notice of appeal to the District Court has been filed." IDAPA 37.01.01.760. In this case, the Director correctly noted that Rangen had appealed the *Fourth Mitigation Order*, and therefore, the Director lacked any authority to modify the *Order*. *Order*, p. 3. There are no grounds possible for the Court to reverse this Decision under the Section 67-5279 since the Director was clearly complying with its own administrative rules in declining to amend the *Order*.

As to the second issue as to whether the Director acted outside of his authority in failing to grant a stay, the Director once again cited his own agency rule which reads: "An Agency ***may*** grant, or the reviewing court may order, a stay upon appropriate terms." IDAPA 37.01.01.780. (Emphasis added). The Director correctly noted the permissive nature of the rule and elected not to exercise his discretion in granting a stay. In denying the stay, the Director outlined all the stays previously obtained by IGWA, and he ultimately concluded that "IGWA has been aware of the January 19, 2015, deadline since the Director issued the Second Amended Curtailment Order on

June 20, 2014. The Director declines to grant IGWA's request for temporary stay. " Order, p. 3. Given the purely discretionary nature of the Director's ruling, this court would be merely substituting its own judgment for the judgment of the Director if it were to grant a stay. Courts are not permitted to substitute their judgment for the judgment of the agency.

Since there is no way for IGWA to prevail under the criteria of evaluation set forth under Section 67-5279, the Court must decline to enter any stay. It would be highly erroneous for the Court to grant a stay when it is impossible for the Court to grant the underlying relief sought in the Appeal.

E. IGWA IGNORES ALL THE OTHER VIOLATIONS OF THE *FOURTH MITIGATION ORDER.*

IGWA admits that it did not deliver "new pipe" as required under the *Fourth Mitigation Order*. *Fourth Mitigation Order*, p. 21. IGWA seeks a decision of this Court on the grounds that the pipe in the "as built" pipe is good enough. If the Court were to accept this argument, it would be substituting its own judgment for the judgment of the Director. Again, the Director ordered "new pipe" after having conducted an evidentiary hearing on the Fourth Mitigation Plan. IGWA did not appeal any aspect of the *Fourth Mitigation Order*., including the requirement of having new pipe. The Court is not allowed to second guess the agency and amend the Director's Order. Again, the Court is not allowed to take any action on the agency decision unless the decision was in violation of the factors set forth under Section 67-5279.

The pipe is not the only issue. IGWA has also (1) failed to obtain an approved transfer for the water delivered through the pipe; and (2) it has not provided insurance to cover Rangen for any losses. On the transfer issue, the very first part of the Order reads as follows: "It is approved conditioned upon approval of 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 for water right number 36-7072 or an authorized lease through the water supply bank." *Fourth Mitigation Order*, p. 20. No transfer has been approved, and Rangen is not aware of any leased water being approved for the delivery of water.

IGWA was also ordered to "purchase an insurance policy for the benefit of Rangen to cover any losses of fish attributable to the failure of the temporary or permanent pipeline system to the Rangen Facility." *Fourth Mitigation Order*, p. 21. In this case, no insurance has been provided to Rangen.

To the extent and consideration of these other violations, it would be inappropriate for the Court to grant a stay based on the fact that IGWA did not provide "new pipe." IGWA's violations go well beyond the new pipe, and a party should not be able to claim a stay when the party seeking the stay has not fulfilled its obligations.

IV. CONCLUSION

For all these reasons, the Court should:

1. Grant the Motion to Strike; and
2. Deny the Motion to Stay.

DATED this 21 day of January, 2015.

Fritz X. Haemmerle

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 21 day of January, 2015 he caused a true and correct copy of the foregoing document to be served upon the following as indicated:

Original: 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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