

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

GARRICK L. BAXTER, ISB #6301
EMMI L. BLADES, ISB #8682
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
emmi.blades@idwr.idaho.gov

Attorneys for Respondents

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

IDAHO GROUND WATER
APPROPRIATORS, INC.,

Petitioner,

vs.

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

Respondents.

Case No. CV-2015-237

**RESPONSE TO MOTION FOR
RECONSIDERATION**

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-02551
& 36-07694 (RANGEN, INC.), IDWR
DOCKET NO. CM-DC-2011-004

COME NOW, Respondents Gary Spackman, in his official capacity as Director (“Director”) of the Idaho Department of Water Resources (“Department”), and the Department, an executive agency of the State of Idaho, by and through their attorneys of record, and respond to *Rangen, Inc.’s Motion for Reconsideration of Order Granting Stay and Motion to Shorten Time* (“Motion for Reconsideration”) and *Memorandum in Support of Motion for Reconsideration of Order Granting Stay of Curtailment Order* (“Memorandum”) filed with the Court by Rangen, Inc. (“Rangen”), on January 26, 2015. Rangen also filed an *Affidavit of J. Dee May in Support of Motion for Reconsideration of Order Granting Stay of Curtailment Order* (“May Affidavit”).¹

BACKGROUND

On January 20, 2015, Idaho Ground Water Appropriators, Inc. (“IGWA”), filed *IGWA’s Motion to Stay Curtailment Order* (“Motion to Stay”) in the above-captioned case.² IGWA moved the Court, “acting for and on behalf of its members . . . to stay implementation of” the Director’s November 21, 2014, *Order Granting Rangen’s Motion to Determine Morris Exchange Water Credit; Second Amended Curtailment Order* (“Final Order”). *Motion to Stay* at 1.

The Court held a hearing on the Motion to Stay on January 22, 2015. At the hearing, counsel for IGWA responded to the Court’s questioning regarding impediments to completion of the Magic Springs project, which was approved by the Director in the October 29, 2014, *Order Approving IGWA’s Fourth Mitigation Plan* and addressed in the Final Order. Counsel for IGWA represented to the Court that a thrust block had to be completed and steel pipe had to be installed. Tr. p. 36 (Attached as Ex. 1 to May Affidavit). The Court inquired about insurance and counsel for IGWA represented it was a “nonissue.” *Id.* at 37. Counsel for IGWA also represented that, while the transfer application for the Magic Springs water has not yet been approved by the Department, “as a safeguard, we did a [Water Supply Bank (“WSB”)] transfer, a temporary application. That has been approved by the [D]epartment. So the authority to pump the water is there.” *Id.* at 31-32.

On January 22, 2015, the Court issued its *Order Granting Motion to Stay Curtailment Order* (“Order Granting Stay”). The Court stated “IGWA requests that this Court stay curtailment of certain ground water rights” identified in the Final Order until February 7, 2015, so IGWA may complete the Magic Springs project approved by the Director. *Order Granting Stay* at 1. The Court ordered that “[i]mplementation of curtailment under the Director’s [Final Order] **is hereby stayed until February 7, 2015.**” *Id.* at 2 (emphasis in original). The Court also ordered that “IGWA shall complete the Magic Springs mitigation project and deliver water to Rangen per the Director’s specifications set forth in his [Final Order] on or before February 7, 2015, and deliver 7.81 cfs as mitigation to Rangen to make up for the delay on or before February 7, 2015.” *Id.*

Rangen asks the Court to vacate the stay granted in the Order Granting Stay “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

¹ Rangen filed these same entitled documents in Case No. CV-2014-4970.

² IGWA filed this same entitled document in Case No. CV-2014-4970.

Magic Springs Mitigation Plan will constitute an enlargement of the underlying water right or otherwise cause material injury to other users.” *Memorandum* at 3-4.

RESPONSE

IGWA Has Legal Authority to Deliver the Required Water

Rangen asserts IGWA cannot comply with the Court’s order to deliver 7.81 cfs as mitigation to make up for the delay on or before February 7, 2015, because only 5.5 cfs of Magic Springs water was leased to the WSB (*see* Ex. 2 to May Affidavit) and then rented to IGWA (*see* Ex. 3 to May Affidavit). *Memorandum* at 4.

While the original WSB lease and rental were for only 5.5 cfs, on January 26, 2015, amended lease and rental applications were submitted to the Department to increase the quantity of water from 5.5 cfs to 7.81 cfs. *See* Exs. 1 and 2 respectively, attached to the *Affidavit of Emmi L. Blades in Support of Response to Motion for Reconsideration* (“Blades Affidavit”). Department staff reviewed the amended applications and prepared a Memorandum explaining the results of that review on January 27, 2015. *See* Ex. 3 attached to the Blades Affidavit. IGWA submitted the necessary payment. *See* Ex. 4 attached to the Blades Affidavit. The amended lease contract between the IWRB and SeaPac of Idaho was executed by the parties and approved by the Department. *See* Ex. 5 attached to the Blades Affidavit. The contract for IGWA to rent the 7.81 cfs of water from the WSB was executed. *See* Ex. 6 attached to the Blades Affidavit. Accordingly, IGWA has in place an approved WSB lease and rental application which currently provides IGWA legal authority to deliver 7.81 cfs of Magic Springs water to Rangen in accordance with the Court’s Order Granting Stay.

Certain allegations made by Rangen also merit further discussion. While Rangen suggests it was surprised by IGWA’s WSB applications, it should not have been. The Director’s *Order Approving IGWA’s Fourth Mitigation Plan* expressly states that an authorized lease through the WSB is an alternative available to IGWA. It is not the Department’s obligation to provide special notification to Rangen when IGWA files new applications, just as it was not the Department’s obligation to notify IGWA when Rangen filed its application for permit with the Department related to use of the Bridge Diversion. The Department complies with all notice requirements required by statute.

Finally, Rangen infers the Department should have notified the Court at the January 22, 2015, hearing that IGWA’s WSB applications were limited to only 5.5 cfs. If counsel for the Department had realized it at the time, counsel would have brought the issue to the attention of the Court and the parties. It was only the following day that the issue was brought to the attention of the Department.

Rangen Cannot Challenge Approval of the Water Supply Bank Rental Application Because of Failure to Exhaust Administrative Remedies

Rangen also asserts the stay should be vacated because the rental agreement “does not comply with Idaho law” and that, as a result, the rental agreement is “a nullity.” *Memorandum* at 12. First, the allegation that the approval does not comply with Idaho law is false. As required by Idaho Code § 42-1763, Department staff analyzed the rental. *See* Ex. 3 attached to the Blades Affidavit; Exs. 2 and 3 attached to the May Affidavit. Remington Buyer, an employee of the Department, made specific conclusions related to the issues outlined in Idaho Code § 42-1763. The Director can and has delegated authority to undertake this review to IDWR staff. Idaho Code § 42-1701 (“The Director may delegate such duties as are imposed upon him by law to an employee of the department of water resources whenever in the opinion of the director, such delegation is necessary for the efficient administration of his duties.”). More importantly, however, even if Rangen believes the rental approval was in error, its remedy is not to seek to have this Court declare it void in this proceeding, but is to follow the appeal procedures outlined in Idaho Code § 42-1766.

The doctrine of exhaustion requires that where an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before the courts will act. *McKart v. United States*, 395 U.S. 185 (1969); *Pounds v. Denison*, 115 Idaho 381, 766 P.2d 1262 (Ct. App. 1988). No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938), *cited in Dickerson v. Crutcher*, 101 Idaho 377, 379, 613 P.2d 934, 936 (1980). Furthermore, the doctrine of exhaustion generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered. *Palmer v. Board of County Comm'rs of Blaine County*, 117 Idaho 562, 565, 790 P.2d 343, 346 (1990), *citing Grever v. Idaho Telephone Co.*, 94 Idaho 900, 903, 499 P.2d 1256, 1259 (1972).

Here, Rangen cannot ask this Court to declare the approval of the WSB rental “void” or “a nullity” because Rangen has failed to exhaust its administrative remedies. In order to challenge the approval of the WSB rental application, Rangen must first exhaust its statutorily provided administrative remedy.

CONCLUSION

Based upon and consistent with the foregoing, Respondents respectfully request that the Court deny Rangen's motion for reconsideration of the Order Granting Stay.

DATED this 28TH day of January 2015.

LAWRENCE G. WASDEN
Attorney General

CLIVE R. J. STRONG
Chief, Natural Resources Division

A handwritten signature in black ink, appearing to read "GARRICK L. BAXTER", written over a horizontal line.

GARRICK L. BAXTER
EMMI L. BLADES
Deputy Attorneys General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January 2015, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

Original to:
SRBA District Court
253 3rd Ave. North
P.O. Box 2707
Twin Falls, ID 83303-2707
Facsimile: (208) 736-2121

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

J. JUSTIN MAY
MAY BROWNING
1419 W. WASHINGTON
BOISE, ID 83702
jmay@maybrowning.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

ROBYN BRODY
BRODY LAW OFFICE
P.O. BOX 554
RUPERT, ID 83350
robynbrody@hotmail.com


U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

FRITZ HAEMMERLE
HAEMMERLE & HAEMMERLE
P.O. BOX 1800
HAILEY, ID 83333
fxh@haemlaw.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

RANDALL C. BUDGE
T.J. BUDGE
RACINE OLSON
P.O. BOX 1391
POCATELLO, ID 83204-1391
rcb@racinelaw.net
tjb@racinelaw.net

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail



Garrick L. Baxter
Deputy Attorney General