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BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO RANGEN, INC.'s WATER RIGHT NOS. 36-15501, 36-134B, AND 36-135A	**DOCKET NO.: CM-DC-2014-004** **RANGEN, INC.'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Rangen, Inc. ("Rangen"), by and through its attorneys of record, submits the following Reply Memorandum in Support of Motion for Summary Judgment.

I. INTRODUCTION

From the outset of this case, Rangen has taken the position that the Director has the information needed to rule in favor of Rangen on the Petition for Delivery Call at issue and that no hearing is needed. The Director rejected Rangen's position during the first status conference and gave the parties the opportunity to file dispositive motions on their claims and defenses. Rangen was the only party to file a dispositive Motion.

Rangen has filed a Motion for Summary Judgment requesting that its Petition for Delivery Call regarding Water Right No. 36-15501 be granted.[1] The Intervenors have raised four issues in opposition to the Motion: (1) Rangen's domestic and irrigation uses of water under Water Right Nos. 36-134B and 36-135A have not been examined by the Department; (2) the measurements of the Martin-Curren Tunnel flow are inadequate; (3) the Department's decision to allow Rangen to continue to use the talus slope water mitigates any injury to Rangen's water supply; and (4) Water Right No. 36-15501 has not been "examined" and a "fully developed record" does not exist. These arguments are without merit for the reasons set forth below. The Intervenors have failed to demonstrate that there is a genuine issue of material fact, and therefore, Rangen's Motion for Summary Judgment should be granted.

II. ARGUMENT

A. Rangen Has Withdrawn Those Portions of the Petition for Delivery Call which Pertain to Water Right Nos. 36-134B and 36-135A.

The Intervenors contend that the Director should not grant Rangen's Motion for Partial Summary Judgment because Rangen's domestic and irrigation uses of water under Water Right Nos. 36-134B and 36-135A have not been examined. On October 21, 2014, Rangen withdrew those portions of its Petition for Delivery Call which pertain to those two water rights. *See Notice of Withdrawal of Rangen, Inc.'s Petition for Delivery Call As To Water Right Nos. 36-134B and 36-135A.* As such, the Intervenors' arguments are moot and should not be used as the basis to deny Rangen's Motion for Summary Judgment.

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1 Rangen has withdrawn those portions of its Petition for Delivery Call which relate to Water Right Nos. 36-134B and 36-135A. *See Notice of Withdrawal of Rangen, Inc.'s Petition for Delivery Call As To Water Right Nos. 36-134B and 36-135A* filed on October 21, 2014.

B. The Director Has Already Ruled that the Average Historical Flows of the Martin-Curren Tunnel are Not Adequate to Satisfy Rangen's 1957 Water Right.

The Intervenors contend that Rangen's Motion for Summary Judgment should be denied because the measurements of the Martin-Curren Tunnel water flow are inadequate. Specifically, they point to problems with IDWR measuring equipment and the fact that the "white pipe" measurements for water that is diverted by Rangen from the Tunnel were not included in the analysis. The Intervenors' arguments do not raise genuine issues of material fact that preclude summary judgment in Rangen's favor.

From the outset it is important to recognize that the Department has in its possession all of the measurements of the flow of the Martin-Curren Tunnel, including the water diverted through the white pipe. There is no reason that Rangen should have to submit this information in the context of a summary judgment motion to get a ruling on whether the 1957 right is short. Second, the Intervenors have not shown that the flow of water diverted through the white pipe would actually make a difference in the determination that Rangen's 1957 right is not being satisfied. In other words, they have not shown that these measurements are material. Third, the Department fixed the measuring device in the Martin-Curren Tunnel on March 5, 2014. *See Exhibit 1 to Supplemental Affidavit of Justin May in Support of Motion for Summary Judgment* ("*Supplemental May Affidavit*") submitted herewith.

While the Intervenors have tried to create issues of fact to preclude summary judgment, none of them address the Director's prior determination that there is insufficient water in the Martin-Curren Tunnel to satisfy Rangen's 1957 water right. In the Director's *Amended Order on IGWA's First Mitigation Plan*, the Director explained that flows from the Martin-Curren Tunnel have been measured for approximately twenty years. *See Amended Order Approving in Part and*

Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order, CM-MP-2014-001 and CM-DC-2011-004, at ¶ 16 ("*Amended Order on IGWA's First Mitigation Plan*") (attached as Exhibit 2 to *Supplemental May Affidavit*). He explained that the Tunnel flow is the sum of the average monthly discharge from the mouth as measured by the Department and the average monthly flow of water diverted by Rangen through the six-inch white pipe. *Id.* He then set forth in a table the average historical flows from the Tunnel during the irrigation seasons from 1996 – 2013. *Id.* at ¶ 17. He then found that the "average of the average" of historical irrigation season flows is 3.7 cfs. *Id.*

The Director then allocated the 3.7 cfs (the average of the average historical irrigation season flows) to the Martin-Curren Tunnel water rights in order of priority. Rangen argued in a Motion for Reconsideration that the Director erred by failing to allocate water to its 1957 right. The Director denied Rangen's Motion, finding:

> If the Director were to adopt Rangen's suggested computation, the Director would unlawfully allocate water to Rangen's junior water right before allocating water to the senior water rights held by Morris. Rangen's water right no. 36-15501 bears a priority date of July 1, 1957. Morris' most junior water right shown in the table in Finding of Fact ¶ 27 has a priority date of December 1, 1908. ***Because Morris is entitled to the 3.2 cfs before water right no. 36-15501 come into priority, the Director will not change his computation of the mitigation credit to IGWA for exchange of irrigation water diverted from the Curren Tunnel.***

Final Order on Reconsideration, p. 2, CM-MP-2014-001 and CM-DC-2011-004 (attached as Exhibit 4 to *May Affidavit*) (emphasis added). This ruling makes it clear that Rangen's 1957 right is not being satisfied and that all of the Martin-Curren Tunnel water is being allocated to Butch Morris' prior rights. The Intervenors have not raised any issues of material fact that call into question this determination. As such, Rangen's Motion for Summary Judgment should be granted.

C. The Director Has Already Ruled that IGWA is Not Entitled to Mitigation Credit for Talus Slope Water.

The Intervenors contend that Rangen's 1957 Water Right is not short because the Director has granted Rangen permission to use the talus slope water. Although cleverly couched in terms of "available water supply," the Intervenors are seeking to be excused from their responsibility to mitigate for the injury they are causing because of Rangen's use of talus slope water. This is the same mitigation argument that IGWA has been making for months and that the Director has repeatedly rejected.

IGWA asked the Director to approve the assignment of its talus slope permit to Rangen as part of its First Mitigation Plan. The Director rejected IGWA's request because the ground water districts' permit for the talus slope water is too speculative. *See Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order*, CM-MP-2014-001 and CM-DC-2011-004, p. 13 (attached as Exhibit 3 to *Supplemental May Affidavit*). IGWA made the request for credit again in its Third Mitigation Plan. This time, however, IGWA sought approval of mitigation credit for the permit rather than approval of the assignment of the permit itself. The Director again rejected IGWA's request because of the speculative nature of the ground water districts' permit application. *See Order Limiting Scope of Mitigation Plan; Limiting Scope of Hearing; Setting Deadline to Submit Engineering Plans*, CM-MP-2014-005, p. 2 (attached as Exhibit 4 to *Supplemental May Affidavit*). The Intervenors refuse to accept the Director's decision that they cannot get mitigation credit for the talus slope water until such time as the ground water districts have a valid permit for that water and the Director approves a mitigation plan for such credit. Until that happens, the Intervenors' position is not well taken.

Although somewhat unclear, the City of Pocatello appears to argue that if Rangen is granted the permit for the talus slope water (as opposed to the ground water districts), its 1957 right will be satisfied. *See Pocatello's Response to Rangen's Motion for Summary Judgment*, p. 6. Pocatello has cited no authority for its assertion that water for a new right from a separate source should be used to satisfy Rangen's 1957 Martin-Curren Tunnel right. The reality is that the 1957 Martin-Curren Tunnel right is short because the Director has allocated all of the current flow to the Butch Morris rights in order to maximize the credit that IGWA has been given for the Morris Exchange Water. The talus slope water does not compensate for this injury, and Rangen's Motion for Summary Judgment should be granted.

D. Rangen Does Not Have to Re-Adjudicate Water Right No. 36-15501.

The Cities contend that summary judgment cannot be granted because Water Right No. 36-15501 must be "examined" and there must be a "fully developed record." *Coalition of Cities Response to Rangen, Inc.'s Motion for Summary Judgment*, p. 13. The Cities' argument is contrary to Idaho law.

The Idaho Supreme Court has made it clear that Rangen does not have the burden of re-proving its adjudicated right. *See AFRD #2 v IDWR*, 143 Idaho 862, 878 154 P.2d 433, 449 (2007). The *AFRD* Court held:

> While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, the burden is not on the senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right.

Id. (emphasis added).

The Cities have not raised any specific defense to Rangen's 1957 right. They have not raised any because they recognize that the Director has already rejected their arguments in Rangen's 2011 Petition for Delivery Call. Even if the Cities did have a defense, it is their burden to raise the defense in response to Rangen's Motion for Summary Judgment. "[A] nonmoving defendant has the burden of supporting a claimed affirmative defense on a motion for summary judgment." *Chandler v. Hayden*, 147 Idaho 765, 771, 215 P.3d 485 (2009). They have not raised any such defense and since there is no requirement that Rangen's water right be "examined" or the record be "fully developed," summary judgment in Rangen's favor should be granted.

III. CONCLUSION

For the foregoing reasons Rangen respectfully requests that the Director grant Rangen's Motion for Summary Judgment and order the administration of all Martin-Curren Tunnel rights in accordance with the prior appropriation doctrine.

DATED this 24th day of October, 2014.

MAY, BROWNING & MAY, PLLC

By:_____
J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 24th day of October 2014 he caused a true and correct copy of the foregoing document to be served upon the following:

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