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MAR 14 2014
DEPARTMENT OF
WATER RESOURCES

Attorneys for Rangen, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

**IN THE MATTER OF THE MITIGATION
PLAN FILED BY THE IDAHO GROUND
WATER APPROPRIATORS FOR THE
DISTRIBUTION OF WATER TO WATER
RIGHT NOS. 36-02551 AND 36-07694 IN
THE NAME OF RANGEN, INC.**

Docket No. CM-MP-2014-001

**RANGEN'S MOTION TO DISMISS
PROPOSALS 3-9 OF IGWA'S
MITIGATION PLAN AND LIMIT
SCOPE OF HEARING**

Rangen, Inc. ("Rangen"), by and through its attorneys, hereby move Director Spackman to dismiss Proposals 3-9 of IGWA's Mitigation Plan and limit the scope of the hearing to be conducted on March 17-18, 2014 by precluding IGWA from introducing evidence or eliciting testimony from witnesses concerning these Proposals. As grounds, Rangen states the following:

- I. ASSIGNMENT OF WATER RIGHT APPLICATION NO. 36-16976 IS CONJECTURAL AND SPECULATIVE AND ANY OPINION ISSUED CONCERNING "APPROVABILITY" BY THE DIRECTOR WOULD BE PREMATURE AND ADVISORY IN NATURE.**

In Proposal 3, IGWA contends that it will mitigate the damage done by junior-priority groundwater pumping by assigning Water Right Application No. 36-16976 to Rangen. IGWA

**RANGEN'S MOTION TO DISMISS PROPOSALS 3-9 OF IGWA'S MITIGATION PLAN AND
LIMIT SCOPE OF HEARING - 1**

states that Proposal 3 is “immediately available to deliver water directly to Rangen.” *See Mitigation Plan*, p. 1. Water Right Application No. 36-16976 has not yet been approved by IDWR and the applicants have made no attempt to condemn Rangen’s real property to access the water. IGWA asserts that approval of Water Right Application No. 36-16976 is “certain,” but Rangen has protested IGWA’s Application and disputes that it can be approved. *See Exhibit 2053*. Rangen has also filed its own Application for Water Right to use the same water that IGWA’s application seeks to appropriate.¹ *See Exhibit 2068*. That application is likely to be granted. *See, e.g.*, Exhibit 2072 (Watermaster’s Non-opposition to Rangen’s Application). Until IGWA’s application is actually approved, the water is not “immediately available to deliver water directly to Rangen” as IGWA claims and cannot be approved as part of IGWA’s current Mitigation Plan.

Conjunctive Management Rule 43.03 outlines the factors that the Director must consider when evaluating IGWA’s Mitigation Plan. The Rule states in relevant part:

Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following:

- a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.
- b. Whether the mitigation plan will 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 on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.

¹ Rangen also intends to file for judicial review of the Director’s ruling which limits Rangen’s use of water to that emanating from the mouth of the Martin-Curren Tunnel itself.

CM Rule 43.03.a-b (IDAPA 37.03.11.043.a – b).

Proposal 3 will not provide replacement water to Rangen in compliance with Idaho law unless, and until, IGWA's Water Right Application is approved and IGWA obtains legal access to the water by condemning Rangen's property. At this point in time there is no way to evaluate whether water will actually be delivered under IGWA's Water Right Application, or, even if it is approved, how much water will actually be delivered. As such, Proposal 3 does not satisfy the Rule 43.03 factors set forth above and cannot be approved as part of IGWA's Mitigation Plan. If IGWA successfully obtains the right to proceed on its Water Right Application and is able to obtain legal access to Rangen's property (points Rangen does not concede), then IGWA can submit a Mitigation Plan addressing the assignment of this water right application in the future. Until that time, however, Proposal 3 should be dismissed and the Director should not permit IGWA to present any evidence or elicit any testimony concerning this Proposal.

II. FISH REPLACEMENT AND MONETARY COMPENSATION AS MITIGATION OPTIONS EXCEED IDWR'S AUTHORITY.

In Proposals 4 and 5, IGWA proposes to mitigate the damage caused by junior-priority groundwater pumping by supplying Rangen with fish or compensating Rangen for lost profits. These proposals do not satisfy the requirements for actual replacement water required by CM Rule 43.03 and exceed the authority of the Director.

IGWA has made this type of proposal before, and IDWR has unequivocally rejected it because it exceeds the Director's authority. In the Snake River Farms delivery call, Director Tuthill ruled:

The Ground Water Districts argue that CM Rule 43.03.c allows the Director to compel a senior to accept monetary compensation in lieu of replacement water. "There is nothing in the language that limits the Director's discretion or defines what 'other compensation' means. The only logical conclusion is that 'other appropriate compensation' means money, or in this case

money or fish” *Brief in Support of Mitigation Plan* at 7. **The Ground Water Districts’ interpretation is incorrect.**

The phrase “other appropriate compensation” was included in CM Rule 43.03.c for narrow purposes. If injury is found in a ground water to ground water delivery call and it is determined that reasonable pumping levels have been exceeded or that the right is not excepted under the Ground Water Act, CM Rule 43.03.c authorizes the Director to approve a mitigation plan that proposes to pay a senior right holder the cost associated with deepening a well and increased pumping costs, thereby providing access to water. *Parker v. Wallentine*, 103 Idaho 506, 512, 650 P.3d 648, 654 (1982). Another instance could occur if a senior rented storage water equal to the amount of injury determined by the Director to be attributable to junior ground water depletions. Rather than ordering an additional supply of water to be provided, it would be appropriate for the Director to order the junior to reimburse the senior’s cost incurred in securing the water. Another reason is to allow the Director to approve mutually agreed upon forms of mitigation, such as monetary compensation. **Had the Ground Water Districts and Clear Springs agreed that monetary compensation was an appropriate form of compensation, the Director could have approved the entirety of the Second Mitigation Plan; however, they have not and that portion of the Plan must be denied in the absence of an agreement presented.**

Except in limited circumstances, the Director would exceed his statutory authority under Idaho Code § 42-602 if he were to compel a senior to accept monetary compensation. *American Falls* at 872, 154 P.3d at 443. Despite the Ground Water Districts’ argument to the contrary, *Brief in Support of Mitigation Plan* at 5-6, a rule cannot provide more authority than authorized by statute. *Holly Care Center v. State, Dept. of Employment*, 110 Idaho 76, 78, 714 P.2d 45, 47 (1986). **Otherwise requiring a senior to accept monetary compensation while the junior continues to divert and delete the resource would violate the priority of right principle of the prior appropriation doctrine.** Idaho Const. Art. XV, § 3. **Unless mutually agreed upon, forced monetary compensation must result in water or access to water for the senior.**

Final Order Accepting Ground Water Districts’ Withdrawal of Amended Mitigation Plan, Denying Motion to Strike, Denying Second Mitigation Plan and Amended Second Mitigation Plain in Part; and Notice of Curtailment, ¶¶ 13-15 (emphasis added) (footnotes omitted) (.

IGWA and Rangen have not agreed upon compensation or fish replacement. As such, there is no grounds for approving Proposals 4 and 5 of the Mitigation Plan because it would

exceed the Director's authority. Proposals 4 and 5 should be dismissed and the Director should not permit IGWA to present any evidence or elicit any testimony concerning these Proposals.

III. IMPROVEMENTS TO THE MARTIN-CURREN TUNNEL, THE CONSTRUCTION OF A HORIZONTAL WELL, AN OVER-THE-RIM DELIVERY SYSTEM, AND DIRECT PUMP BACK ARE MERE CONCEPTS WITHOUT TECHNICAL ANALYSIS AND CANNOT BE APPROVED AS CONJECTURAL SOLUTIONS.

Proposals 6-9 of IGWA's Mitigation Plan are concepts for providing replacement water to Rangen. IGWA acknowledges, however, that these proposals are conceptual in nature and require engineering, technical analysis, land and/or water right acquisition, and facilities construction. *Mitigation Plan* at 1-2. IGWA is asking the Director to review and approve these proposals as concepts and provide IGWA with guidance to proceed with acquisitions, engineering, technical support, financial plans and construction commitments. *Id.* at 2. There is no provision under the Conjunctive Management Rules for the Director to provide such an advisory, conceptual opinion.

As explained above, the issue to be decided in this case is whether Proposals 6-9 satisfy the criteria set forth in CM Rule 43.03. There is no way that the Director can evaluate the Rule 43.03 criteria because there is no information contained in the Mitigation Plan and IGWA has not done any of the engineering necessary to determine whether any of these "concepts" are actually feasible or will result in actual replacement water for Rangen. Without the detailed engineering information there is simply no way to evaluate or approve Proposals 6-9 and they should be dismissed.

IGWA contends that it wants the approval of Proposals 6-9 as "concepts." There is no provision in Rule 43.03 that allows for any type of preliminary approval of a "concept." In the Snake River Farms case, Clear Springs suggested a pump-up plan as an alternative to an over-

the-rim delivery system. The hearing officer in that case refused to evaluate the pump-up plan stating: "Doubtless this [pump-up plan] should be explored for practicality if it would eliminate the conflict between the parties, but for now it is a concept without technical analysis to support it." *Opinion and Recommendation Concerning the Over-the-Rim Mitigation Plan* at ¶¶ 5 and 6. The hearing officer concluded: "Beyond conjectural solutions, within this record the Over-the-Rim plan is the only alternative to curtailment to provide the final amount of water necessary to meet the Ground Water Districts' mitigation requirement." *Id.* at ¶ 6.


There is simply no way to evaluate Proposals 6-9 at this time. If IGWA develops a detailed plan for one or more of these proposals, then IGWA can submit a Mitigation Plan proposing the alternative in the future. Proposals 6-9 should be dismissed and the Director should not permit IGWA to present any evidence or elicit any testimony concerning these Proposals

IV. CONCLUSION.

For the foregoing reasons Rangen respectfully requests that the Director enter an Order dismissing Proposals 3 – 9 of IGWA's Mitigation Plan and precluding IGWA from presenting any evidence of eliciting any testimony concerning these Proposals.

DATED this 14 day of March, 2014.

BRODY LAW OFFICE, PLLC

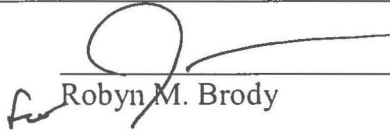
By: 
Robyn M. Brody

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 14 day of March, 2014, I caused a true and correct copy of the foregoing document to be served using the method indicated upon the following:

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