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DEPARTMENT OF
WATER RESOURCES

Attorneys for Rangen, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

**IN THE MATTER OF THE AMENDED
THIRD 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. AND OTHER
WATER RIGHTS IN WATER DISTRICT 36A.**

Docket No. CM-MP-2014-005

**MOTION TO DISMISS
PROPOSALS ONE, TWO, THREE
AND FOUR OF IGWA'S AMENDED
THIRD MITIGATION PLAN**

Rangen, Inc. ("Rangen"), by and through its attorneys, hereby moves Director Spackman to dismiss proposals one, two, three and four of IGWA's Amended Third Mitigation Plan ("Third Mitigation Plan").

IGWA's Third Mitigation Plan is essentially a rehash of arguments that IGWA made unsuccessfully during the hearing on Rangen's 2011 Call and rejected proposals from IGWA's First Mitigation Plan. IGWA has slightly repackaged its proposals and subtly rephrased its rhetoric. However, IGWA has not even attempted to address the fundamental and inherent

**MOTION TO DISMISS PROPOSALS ONE, TWO, THREE AND FOUR OF IGWA'S
AMENDED THIRD MITIGATION PLAN - 1**

flaws. During the status conference held in this matter on July 22, 2014, the Director addressed some of the issues with IGWA's proposals, but did not formally dismiss any portions of IGWA's Third Mitigation Plan. The Director bifurcated the hearing in this matter and determined that the second and third of IGWA's proposal would not be considered during the hearing in this matter currently scheduled for September 8-10, 2014. These two proposals as well as proposals one and four should be dismissed for the following reasons rather than simply postponed.

I. The installation of measuring devices is not a mitigation plan.

IGWA's first proposal is to install measuring devices at the Sandy Ponds. IGWA's stated reason for this proposal is that, "IGWA's First Mitigation Plan requested mitigation credit for past recharge that has occurred via the Sandy Ponds. The IDWR denied the request due to inadequate measurement of the amount of water diverted out of the Sandy Ponds." *IGWA's Amended Third Mitigation Plan, p.2*. While it is true that one of the issues with mitigation credit related to the Sandy Ponds is the lack of measuring devices, installing them now cannot address the problems with past recharge.

IGWA's Third Mitigation Plan does not propose any recharge. It proposes only to install measuring devices. IGWA has failed to specify the source, quantity, and frequency of delivery of any water for which it seeks mitigation credits. The only water that IGWA identifies is a pending application for a permit to appropriate waste water.¹ To the extent that IGWA's first proposal relies upon this application for permit, it should be dismissed for the same reasons set forth below regarding IGWA's third proposal. IGWA's permit application has been protested and is currently pending before the Department.

¹ IGWA also mentions a mitigation plan filed by the Coalition of Cities. Any issues related to that mitigation plan are appropriately addressed in any hearing that may be scheduled regarding that plan.

The lack of measuring devices at the Sandy Ponds is only one of the many issues regarding mitigation credit related to water in the Sandy Pond. It is just conceptually the simplest issue related to the Sandy Ponds. Nevertheless, IGWA has failed to even complete the engineering on the measuring devices. IGWA has indicated that the engineering for this proposal is incomplete and that it will be completed at some point in “the near future”. IGWA has failed completely to address the more difficult issues such as how any credit for water delivered might be calculated, the fact that the Sandy Ponds are not an approved recharge site, and the fact that given the location and nature of the Sandy Ponds, little or no benefit would be expected to accrue to the Martin Curren Tunnel as a result of water delivered to the Sandy Ponds.

It makes little sense for the parties to expend resources on the relatively minor and incompletely framed issue of measuring devices in the context of this expedited hearing. If, and when, IGWA has water and a plan for how that water can be used to mitigate depletion of the aquifer, required measuring devices can be addressed as part of that plan. Until the plan is complete, IGWA’s first proposal should be dismissed.

II. IGWA has failed to address previously identified problems with its second, third, and fourth proposals.

The second and fourth proposals in IGWA’s Third Mitigation Plan suggest that Rangen should be required to change its means of diversion. Rangen has considered and rejected making these modifications. Rangen’s reasons for rejecting these proposals are numerous, reasonable, and have been the subject of many hours of hearings before the Department in various proceedings including the hearing on Rangen’s 2011 Call. The Director has considered all of IGWA’s arguments and determined that Rangen’s means of diversion are reasonable. *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962*, p. 36, ¶ 34.

Despite the determination that Rangen's means of diversion are reasonable, IGWA not only suggests that Rangen should be required to make changes or allow IGWA to make changes, it also once again requests mitigation credit for any water that might result from those changes. There is no basis for granting any such mitigation credit. Rangen is currently receiving 75 cfs (98.6%) less than the amount of its decreed water rights. If there were legitimate, reliable, and lawful means for Rangen to obtain more water through modification of its means of diversion Rangen could choose to make such modifications. Even if IGWA is correct about the additional water that would result from the modification it proposes, Rangen would still be short water after making those modifications.

The Director has already considered and rejected IGWA's second and fourth proposals. IGWA's Third Mitigation Plan provides slightly more detail about the technical aspects of those proposals, but fails to address the reasons they were rejected. IGWA's second proposal is to dig a horizontal well. Even if IGWA could legally drill a horizontal well, this proposal is very risky. The Director previously found that a horizontal well would likely result in injury not only to Rangen, but also other water users. Rejecting this proposal as part of the First Mitigation Plan, the Director stated:

Prior to construction of a horizontal well, IGWA would need to obtain a water right to divert and beneficially use water from the horizontal well. IGWA has not filed any applications to appropriate water from a horizontal well. IGWA did not identify a location for construction of the well, and did not present any evidence about land ownership or easements on land where a well could be constructed. The source of water proposed to be diverted is trust water. The Department has issued a moratorium on all appropriations of water from the ESPA in the area where the proposed horizontal well would be constructed. Any horizontal well proposal will need to address injury to other water users. IGWA failed to satisfy its burden because it failed to present any evidence that it will be able to address the injury to other water users.

Amended Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order, p. 15. IGWA's Third Mitigation Plan fails to address any of the issues identified by the Director.

IGWA's fourth proposal is a pump back system. This was addressed during the May 2013 hearing on Rangen's delivery call and rejected and was rejected again as part of IGWA's First Mitigation Plan. In his decision on IGWA's First Mitigation Plan, the Director stated:

There is no evidence in the record that IGWA has the water rights or property access to construct and operate a pump-back and aeration system to provide mitigation to Rangen. IGWA did not present any evidence about how the water rights or property access would be acquired. IGWA also failed to provide even basic design plans in support of this proposal.

Amended Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order, p. 17. IGWA's Third Mitigation Plan fails to address any of the issues identified by the Director.

There is also a more fundamental problem with IGWA's second and fourth proposals. Even if it were determined that Rangen would be entitled under its water rights to dig a horizontal well or reuse water that has already passed through its Research Hatchery, IGWA would not be entitled to mitigation credit if one or more of those projects were undertaken. IGWA cannot mitigate for the depletion of the aquifer caused by junior ground water pumping by simply dictating how Rangen diverts and uses water under its water right or usurping any rights that Rangen may have to change how it diverts and uses water under its water rights. There are two possibilities: 1) Rangen has the legal right under its water rights to make the changes suggested by IGWA in its second and fourth proposals, or 2) Rangen does not have the legal right under its water rights to make the changes suggested by IGWA in its second and fourth proposals. If Rangen's water rights would allow the changes, IGWA has not provided

any authority giving IGWA the right to commandeer Rangen's right to do so under the guise of mitigation. For instance, if a pump back system such as proposed by IGWA is a valid and lawful use of Rangen's water rights and not an expansion, then the implementation of such a pump back would not provide Rangen with any additional water that it does not already have the legal right to use. Any proposal to simply use Rangen's own water rights in a different manner than Rangen currently uses them is not a mitigation plan.

The Director has also already considered and rejected proposal three. "Given the uncertainty of the application given the specific facts which have developed in this case, the Director concludes that it is too speculative to consider." *Amended Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order*, p. 13. Nothing has changed. Rangen objects to any credit related to Application for Water Permit no. 36-16976. IGWA's application is speculative and should not be approved. Rangen has filed an objection to IGWA's application. Rangen has also filed its own competing application. Furthermore, Rangen continues to contend that Rangen's existing water rights entitle Rangen to the use of the water IGWA proposes to provide as mitigation. Application for Water Permit no. 36-16976 would not provide Rangen with any water that it would not otherwise be entitled to use.

III. CONCLUSION.

For the foregoing reasons Rangen respectfully requests that the Director enter an Order dismissing proposals one, two, three, and four of IGWA's Amended Third Mitigation Plan.

DATED this 25 day of July, 2014.

MAY, BROWNING & MAY

By: 

J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 25 day of July, 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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