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Attorneys for Rangen, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE FIFTH MITIGATION PLAN FILED BY THE IGWA TO PROVIDE MITIGATION TO RANGEN, INC.	Docket No. CM-MP-2014-008 **RANGEN, INC.'S PROTEST TO IGWA'S FIFTH MITIGATION PLAN**

COMES NOW, Rangen, Inc. pursuant to the provisions of Rule 43 of the Conjunctive Management Rules, Rule 250 of the Rules of Procedure of the Idaho Department of Water Resources and other applicable law and protests IGWA's Fifth Mitigation Plan filed with the Idaho Department of Water Resources on December 18, 2014 ("Fifth Mitigation Plan").

Rangen has the right to oppose IGWA's mitigation plan. The Fifth Mitigation Plan proposes that IGWA's members be allowed to continue junior ground water pumping despite the Director's order that such junior ground water pumping causes material injury to Rangen's water rights.

The initial bases for Rangen's Protest are as follows:

1. The Fifth Mitigation Plan is facially unapprovable because it does not comply with Rule 43.01 of the Conjunctive Management Rules:

a. The Fifth Mitigation Plan does not contain the mailing address of the person or persons submitting the plan.

b. The Fifth Mitigation Plan does not identify the water rights benefiting from the Fifth Mitigation Plan.

c. The Fifth Mitigation Plan does not contain the information necessary for the Director to evaluate the factors set forth in Rule 43.03 of the Conjunctive Management Rules.

2. In the Matter of Application for Permit No. 36-16976 in the Name of North Snake Ground Water District et. al. ("Water Right Permit No. 36-16976"), the Hearing Officer issued the *Preliminary Order Issuing Permit,* dated November 18, 2014, for appropriation of water from the talus slope, a copy of which is attached to IGWA's Fifth Mitigation Plan. As noted on pages 11 and 12 of the Preliminary Order, the location of both the place of use and the place of diversion are located on property owned by Rangen. IGWA does not have access to Rangen property, and has not even begun any eminent domaine proceedings to acquire access or ownership. IGWA does not have the right or ability for perfect this permit or deliver any water to Rangen.

3. On March 7, 2014, Rangen filed a Protest to the Application for Water Right Permit 36-15976. A copy of the Protest is attached hereto as Exhibit 1. On December 2, 2014, Rangen filed its *Exceptions to Preliminary Order* and *Rangen's Brief in Support of Exceptions to Preliminary Order.* A copy of each of those pleadings are attached hereto as Exhibits 2 and 3 respectively. Rangen protests IGWA's Fifth Mitigation Plan for the same reasons set forth in Rangen's exceptions and protest to the issuance of the Application for Permit No. 36-16976.

4. On January 2, 2015, Rangen's Application for Permit No. 36-17002 to appropriate the water from the talus slope was granted therefore Rangen has an independent right to use this water. Further, Rangen claims to use this same water pursuant to its already existing water rights. There is no basis for giving IGWA mitigation credit for water that Rangen already has the right to use.

5. IGWA does not have the present ability to deliver any water pursuant to its Fifth Mitigation Plan.

6. The Fifth Mitigation Plan contains no "contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable" and therefore violates Rule 43.03.c. *In the Matter of Distribution of Water to Various Water Rights*, 155 Idaho 640, 315 P.3d 828 (2013).

7. The Fifth Mitigation Plan will not provide replacement water, at the time and place required by Rangen's senior priority water rights, sufficient to offset the depletive effect of junior ground water withdrawals within the area of curtailment at such time and place necessary to satisfy Rangen's senior priority water rights.

Wherefore, for these reasons and for such other and further reasons as may be discovered or offered at the hearing on this matter Rangen requests that the Director deny and dismiss the Fifth Mitigation Plan, and for such other relief as the Director deems proper.

DATED this 16th day of January, 2015.

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 16th day of January, 2015 he caused a true and correct copy of the foregoing document to be served upon the following by the indicated method:

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 ☐
Garrick Baxter Emmi Blades IDAHO DEPARTMENT OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov emmi.blades@idwr.idaho.gov kimi.white@idwr.idaho.gov	Hand Delivery ☐ U.S. Mail ☐ Facsimile ☐ Federal Express ☐ E-Mail ☑
Randall C. Budge Thomas J. Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED P.O. Box 1391 Pocatello, ID 83204-1391 Fax: 208-232-6109 rcb@racinelaw.net tjb@racinelaw.net bjh@racinelaw.net	Hand Delivery ☐ U.S. Mail ☐ Facsimile ☐ Federal Express ☐ E-Mail ☑
Idaho Ground Water Appropriators, Inc. c/o Randy C. Budge RACINE, OLSON NYE BUDGE & BAILEY P.O. Box 1391 Pocatello, ID 83204-1391	Hand Delivery ☐ U.S. Mail ☐ Facsimile ☐ Federal Express ☐ E-Mail ☑

J. Justin May

EXHIBIT 1

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Attorneys for Rangen, Inc.

RECEIVED
MAR 07 2014
DEPT. OF WATER RESOURCES
SOUTHERN REGION

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT PERMIT 36-16976	Water Permit No. 36-16976 **PROTEST FILED BY RANGEN, INC.**

Rangen, Inc. ("Rangen"), P.O. Box 706, 115 13th Avenue South, Buhl, Idaho 83316, by and through its attorneys, and pursuant to Idaho Code Section 42-203A, or as otherwise allowed by statues, and under IDAPA 37.03.08.03, or as otherwise provide by administrative rules, hereby files its protest to Water Right Application No. 36-16976. As defined herein, the "Application" refers all applications for water right 36-16976 including the original Application for Permit filed on or about April 3, 2013; the First Amended Application filed on or about February 10, 2014; and the Second Amended Application for Permit filed on or about February 11, 2014.

PROTEST

1. The Application will cause injury to Rangen in that the Application is for places of use (POU) and points of diversion (POD) located on Rangen's property. As more fully stated herein, Rangen does not grant the Applicants any authority to enter or use Rangen's property for the purposes stated in the Application. The Applicants do not own the property where the POU's and POD's are located and no just compensation has been paid to Rangen for said property. Accordingly, the Applicants have not fully stated how it intends to gain lawful access and use of Rangen's property as that use is sought in the Application.

2. Section 3 of the Application lists two, 10 acre tracts as the location of the points of diversion (POD's). Those POD's are specifically described as follows: Sec. 32 SESWNW and Sec 32 SWSWNW. No specific structure or local names or tags are listed as POD's. These two tracts include the Martín Curren Tunnel and the Bridge Diversion from Billingsley Creek. The POD's are on land owned by Rangen. See, attached Deed as Exhibit 1.

3. All the requested uses imply that the diverted water will be applied to specific places of use for the specified purposes. The place of use (POU) for the requested purpose is listed in Section 8 of the Amended Application as Sec. 31, SWNE and SENE, and Sec. 32, SWNW. These requested POU's in the Application are, in fact, the place of use for Rangen's fish propagation water rights. This implies that the water applied for will be diverted, applied to and beneficially used on Rangen's hatchery facilities. Again, the Applicants have no authority to use the property owned by Rangen for the purposes and places of use cited in the Application.

4. The proposed diverting works listed in the Application are the "Hydraulic pump(s) (size TBD); screw-operated head gate on Billingsley Creek." The intent appears to be that water under the proposed permit will be diverted by pumping from the source "Springs;

Billingsley Creek" and/or a diversion structure on Billingsley Creek. Again, the diverting works would all be on land owned by Rangen Inc.

5. As indicated herein, the POD's and POU's cited in the Application are on land owned by Rangen. Rangen has not granted the Applicants any permission to enter upon lands owned by Rangen to perfect any POD's or POU's cited in the Application. Rangen denies that the Applicants have any Constitutional or statutory authority to file an eminent domain action against Rangen to gain accesses to Rangen's property to prefect any POD's or POU's. Specifically, Idaho Code Section 42-5224(13) authorized Ground Water Districts to use eminent domain powers for "mitigating" purposes. "Fish propagation" as cited in the Application is not for mitigation purposes.

6. Furthermore, Rangen does not concede that Idaho Code Section 42-5224 is consistent with the Constitutional enabling provisions which allow condemnation for water purposes. See, Idaho Cons, Art 1, Sec. 14; Art XV, Sec. 3. Even if Section 42-5224 is consistent with enabling Constitutional provisions addressing commendation and rights of eminent domain, the Applicants have not paid Rangen any just compensation, and therefore, is not entitled to access Rangen's property until such just compensation has been paid. "Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid." Idaho Cons, Art. 1, Section 14. Furthermore, the interest covered by IGWA and its representative Ground Water Districts do not represent the type of "public uses" necessary to support any type of eminent domain proceeding.

7. Under IDAPA 37.03.08.40.05.e.i (Rule 40.05),

> The Applicants shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary for all project facilities and the place of use or **if such interest can be obtained by eminent domain proceedings the Applicants must show**

> **that appropriate actions are being taken to obtain the interest.** Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code. (7-1-93) ii. The Applicants shall submit copies of applications for other needed permits, licenses.

(Emphasis added). Here, the Applicants have failed to show any actions taken to obtain any property interest through eminent domain.

8. Section 10 of the Application indicates that Rangen owns the property at the point of diversion and that Rangen and members of Applicant Ground Water Districts own the land to be irrigated. This is incorrect. The Applicant Ground Water Districts do not own the land at the listed place of use. This statement may mean that the Applicants fully intend to exercise eminent domain powers to gain ownership of the facilities as indicated in Section 10c of the application. Again, the Applicants have failed to take any action to condemn Rangen's property.

9. Billingsley Creek is completely appropriated, and adding another irrigation use will cause injury to other users.

> It is a fundamental concept that under our constitution, water which has already been appropriated is not subject to appropriation by another, unless it has been abandoned by the original appropriator or his successor in interest. Idaho Const. Art. 15, §§ 3, 4, 5. Before any permit to appropriate water to a beneficial use can ripen into a right to use the water, it is basic that the permit holder must show a supply of unappropriated water. Idaho Const. Art. 15, § 3.

Cantlin v. Carter (State of Idaho), 88 Idaho 180, 397 P.2d 761 (1964). Here, there is nothing in the file indicating that the Applicant has shown that there is water available to appropriate, particularly true for the mitigation for irrigation purpose.

10. Water emanating from the Martin Current Tunnel forms the headwaters of Billingsley Creek. To the extent that the mitigation for irrigation would be used to provide water for other users out of the Martin Curren Tunnel, the taking and diversion of water out of Billingsley Creek would cause injury to senior water users in Billingsley Creek.

11. Consistent with the requirements of showing steps towards condemning Rangen's property, the Applicants are generally required to provide information relative to financial resources. See, Rule 40.50.f. Included with this information, the Applicants are required to provide a "current financial statement certified to show accuracy of the information" or a financial commitment letter in order to establish that it is "reasonably probable that financing will be available to appropriate the water and apply it to the beneficial use proposed." Because the Applicants must construct new facilities and buy Rangen's property to put in use the Application, the Applicants must produce the items requested under the rules.

12. The source of water is listed as "Springs: Billingsley Creek." This Description is not specific and does not include the Marin Curren Tunnel. The aerial photograph accompanying the application does not show the specific location of the source.

13. The Application is not specific enough to satisfy the filing requirements of a permit. Under Idaho Code Section 42-202(4),

> [t]he application shall be accompanied by a plan and map of the proposed works for the diversion and application of the water to a beneficial use, showing the character, location and dimensions of the proposed reservoirs, dams, canals, ditches, pipelines, wells and all other works proposed to be used by them in the diversion of the water, and the area and location of the lands proposed to be irrigated, or location of place of other use.

Here, the Application is deficient in satisfying the requirements of Section 42-202(4).

14. Section 3 of the Application lists the purposes for the application as follows: 12 cfs for "mitigation for irrigation" and 12 cfs for "fish propagation." Both uses are year-around. The discharge rate is for 12 cfs. The Applicants have failed to describe the information as to the supply of the 12 cfs as requested by the Department in a Memo from Corey Skinner, dated February 11, 2014. The Applicants have filed to justify the need, availability and volume as required by IDAPA 37.03.08.d.i-ii.

15. The Applicant lists three (3) quarter-quarter sections as the place of use of the mitigation for irrigation. Three (3) quarter-quarter sections equals 120 acres. With a duty of water of 0.02 cfs per acre (see, Idaho Code Section 42-202(6)), even if this Applicant had access to the listed place of use, the Applicant would only need 2.4 cfs. Here, the Applicant is seeking 12 cfs of water, which far exceeds the duty of water necessary to irrigate 120 acres.

16. The requested purpose of use "mitigation for irrigation" is not an approved purpose of use, and irrigation cannot be claimed for a year around use.

17. The map provided with the Application is an aerial photo with an oval area shaded which includes parts of the SWNW Sec 32 with a note that the "Point of diversion to be located in in(sic) this area." This depiction of the POD is not consistent with the listed POD in Section 3 of the Application and is not specific as to the 10 acre tracts listed in Section 3.

18. On February 11, 2014, the Department requested additional information as required by IDAPA 37.03.08.40.05 (Rule 40.50) of the Water Appropriation Rules. Based on information and belief, this additional information has not been submitted but the Application has been advertised.

19. The Additional Information Requirements outlined in Rule 40.05 include, but are not limited to the following:

- (ciii). Information shall be submitted concerning any design, construction, or operation techniques which will be employed to eliminate or reduce the impact on other water rights. The information provided thus far does not address this requirement.
- (di). Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate, during the peak

use period and the average use period, the volume to be diverted per year , the period of year that water is required, and the volume of water that will be consumptively used per year. This information has not been provided.

- (dii). Information shall be submitted on the quantity of water available from the source applied for. This information has not been provided.
- (e) Information relative to good faith, delay or speculative purposes of the Applicants. The request for delay in processing, even though it was addressed by IDWR in evaluating the request, speculated on even the need for a permit since the hearing was not complete and is even speculative as the ability of the Applicants to secure easements and/or ownership of facilities.
- (eii) The Applicants shall submit copies of applications for other needed permits, licenses, and approvals. The Department of Environmental Quality (DEQ) and Idaho Fish and Game Department (IFGD) are normally required to provide input on a permit application of this magnitude.
- (fii) The Applicants shall submit plans and specifications along with estimated construction costs for the project works. The plans shall be definite enough to allow for determination of project impacts and implications. This information has not been provided.
- (g) Information Relative to Conflict with the Local Public Interest. Nothing was submitted as required.

20. The Application is signed by Thomas J. Budge, Attorney. There is no power of attorney authorizing the signing of the application by Thomas J. Budge in the backfile of the IDWR water right database for this application. See, IDAPA 37.03.08.03.(xii) through (xiv).

21. If there is more than one Applicant, each Applicant must sign the Application. The Application was not signed by all Applicants. See, IDAPA 37.03.08.03.(xii). Furthermore, the Applicants fail to include the addresses of the Applicant Ground Water Districts.

22. For all the reasons contained herein, the Application is speculative and there is no showing how the purposes of use can be fulfilled or how the Applicant will be able to appropriate the water and put it to a beneficial use.

Right to Amend

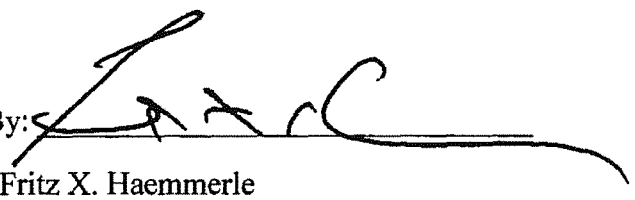
Rangen reserves the right to amend this protest as further information is obtained. See, IDAPA 37.01.01.305.

WHEREFORE, the Protestant prays for the following relief:

1. That the Permit be denied in all respects.
2. For attorney's fees and costs as may be allowed by law.
3. For any other relief as deemed just and equitable.

RESPECTFULLY SUBMITTED this 7th day of March, 2014.

HAEMMERLE & HAEMMERLE, P.L.L.C.

By: 

Fritz X. Haemmerle

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 7 day of March, 2014, 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 ☑
Garrick Baxter IDAHO DEPARTMENT OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov kimi.white@idwr.idaho.gov	Hand Delivery ☐ U.S. Mail ☐ Facsimile ☐ Federal Express ☐ E-Mail ☑
Randall C. Budge TJ Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED 201 E. Center Street P.O. Box 1391 Pocatello, ID 83204 rcb@racinelaw.net tjb@ racinelaw.net	Hand Delivery ☐ U.S. Mail ☑ Facsimile ☐ Federal Express ☐ E-Mail ☑

Fritz X. Haemmerle

Exhibit

1

THIS INDENTURE, Made this 22 day of May

in the year of our Lord one thousand nine hundred and sixty-two

E. H. Bean and Elsie V. Bean, husband & wife,

of Hagerman, County of Gooding, State of Idaho

the part ies of the first part, and

Rangen Inc., a corporation,

of Buhl, County of Twin Falls, State of Idaho

the part y of the second part.

WITNESSETH, That the said part ies of the first part, for and in consideration of the sum of

Thirty-five thousand and no/100 ($35,000.00)---------- DOLLARS,

lawful money of the United States of America,

to them in hand paid by the said part y of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell, convey and confirm unto the said part y of the second part, and to its/successors heirs and assigns forever, all of the following described real estate, situated in , County of Gooding, State of Idaho, to-wit:

A parcel of land in Sections 31 and 32, T. 7 S., R. 14 E., B.M., described as beginning at a point that is East 1321.00 feet along the section line common to Sections 29 and 32, T. 7 S., R. 14 E., B.M., and S 0° 16' E., 1334.55 feet, from the Section corner common to Sections 29, 30, 31, and 32, T. 7 S., R. 14 E., B.M.;
Thence S 0° 02 3/4' W, 1414.80 feet;
Thence N 77° 08 1/4' W, 2738.41 feet;
Thence N 0° 01 3/4' E, 840.82 feet;
Thence S 89° 35 3/4' E, 1159.53 feet;
Thence S 88° 57 3/4' E, 1511.03 feet to the point of beginning; containing 69.358 acres.

Together with water rights, including but not limited to ,73 inches of water with a priority of October 9, 1885, developed and diverted from the waters, seeps, springs and rivulets in the rimrock above the headwaters of Billingsley Creek and 8 inches of the waters of said seeps, springs and rivulets with a priority of April 1, 1908, as decreed in the case of the New International Mortgage Bank v. Idaho Power Co., which decree was dated March 22, 1932 and recorded in Book 6 of Judgments, Page 31, records of Gooding County.

TOGETHER, With all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all estate, right, title and interest in and to the said premises, as well in law as in equity, of the said part ies of the first part.

TO HAVE AND TO HOLD, All and singular the above mentioned and described premises, together with the appurtenances, unto the part y of the second part, and to its/ heirs and assigns forever, and the said part ies of the first part, and their heirs, the said premises in the quiet and peaceable possession of the said part y of the second part, its/successors heirs and assigns, against the said part ies of the first part, and their heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same shall and will WARRANT and by these presents forever DEFEND.

IN WITNESS WHEREOF, The said part leaf the first part ha ve hereunto set their hands and seal s the day and year first above written.

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF

E H Bean [Seal]
Elsie V. Bean [Seal]
[Seal]
[Seal]

STATE OF IDAHO
County of Gooding } ss.

On this 23 day of May in the year 19 62, before me the undersigned a Notary Public in and for said State, personally appeared

E. H. Bean and Elsie V. Bean

known to me to be the person s whose name s are subscribed to the within instrument, and acknowledged to me that the y executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

H. F. Le Master
Notary Public for the State of Idaho
Residing at Gooding, Idaho

SEAL)

STATE OF IDAHO

FILED

No. 28063

WARRANTY DEED

E. H. BEAN
and
ELSIE V. BEAN
TO
RANSOM, INC.

Dated 19

STATE OF IDAHO
County of GOODING } ss.

I hereby certify that the within instrument was filed for record at request of

RANSOM, INC.

at 10:30 o'clock A. M. this 6 day of June A. D. 19 67

in my office, and duly recorded in Book

Fee $

Ex-Officio Recorder.

Deputy

6-8-67

EXHIBIT 2

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Attorneys for Rangen, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE APPLICATION FOR PERMIT NOS. 36-16976	**EXCEPTIONS TO PRELIMINARY ORDER**

COMES NOW the Protestant/Applicant, Rangen, Inc. ("Rangen"), by and through its attorneys, Fritz X. Haemmerle, of Haemmerle & Haemmerle, P.L.L.C., Justin May of May, Browning and May, P.L.L.C., and Robyn M. Brody of Brody Law Office, PLLC, and hereby files these Exceptions to the Preliminary Order Issuing Permit issued by Hearing Officer James Cefalo in Permit No. 36-16976, dated November 18, 2014 (hereinafter "*Order*").

I. EXCEPTIONS

1. The hearing officer erred in deciding that "mitigation" is a recognized purpose of use for a water right.

2. The Hearing Officer erred in finding that the POU is located where "water is injected into infrastructure.

3. The Hearing Officer erred in concluding that the Application was not speculative or void.

4. The Hearing Officer erred in finding that the application was complete.

5. The Hearing Officer had no authority to subordinate the Permit.

DATED this 2 day of December, 2014.

FRITZ X. HAEMMERLE
Attorney for Rangen, Inc.

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 2nd day of December, 2014 he caused a true and correct copy of the foregoing document to be served by email and first class U.S. Mail, postage prepaid upon the following:

Original: James Cefalo Idaho Department of Water Resources 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 james.cefalo@idwr.idaho.gov sharla.cox@idwr.idaho.gov	Hand Delivery ☐ U.S. Mail ☑ Facsimile ☐ Federal Express ☐ E-Mail ☑
Randall C. Budge Thomas J. Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED 201 E. Center St. P.O. Box 1391 Pocatello, ID 83304-1391 rcb@racinelaw.net tjb@racinelaw.net bjh@racinelaw.net	Hand Delivery ☐ U.S. Mail ☐ Facsimile ☐ Federal Express ☐ E-Mail ☑
Blind Canyon Aquaranch, Inc. c/o Gary Lemmon 2757 South 1050 East Hagerman, ID 83332 glemmon@northrim.net	Hand Delivery ☐ U.S. Mail ☐ Facsimile ☐ Federal Express ☐ E-Mail ☑
Craig Hobdey P.O. Box 176 Gooding, ID 83330 hobdeycraig@gmail.com	Hand Delivery ☐ U.S. Mail ☐ Facsimile ☐ Federal Express ☐ E-Mail ☑
Idaho Dept. of Environmental Quality Attn: Sandy Gritton 650 Addison Ave. St. W. Ste. 500 Twin Falls, ID 83301-3380	Hand Delivery ☐ U.S. Mail ☐ Facsimile ☐ Federal Express ☐ E-Mail ☑

J. Justin May

EXHIBIT 3

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE APPLICATION FOR PERMIT NOS. 36-16976	**RANGEN'S BRIEF IN SUPPORT OF EXCEPTIONS TO PRELIMINARY ORDER**

COMES NOW the Protestant/Applicant, Rangen, Inc. ("Rangen"), by and through its attorneys, Fritz X. Haemmerle, of Haemmerle & Haemmerle, P.L.L.C., Justin May of May, Browning and May, P.L.L.C., and Robyn M. Brody of Brody Law Office, PLLC, and hereby files exceptions to the Preliminary Order Issuing Permit issued by Hearing Officer James Cefalo in Permit No. 36-16976, dated November 18, 2014 (hereinafter "*Order*").

I. OVERVIEW

On September 17, 2014, the Idaho Department of Water Resources ("Department") held a hearing on the GWD Application at issue. The Department was scheduled to hold a

hearing on Rangen's Permit Application immediately following the close of evidence in the Ground Water Districts' case, but prior to doing so, the GWDs stipulated and agreed that Rangen's Permit Application meets the criteria of Idaho Code Section 42-203(a) and should be issued.

The parties agreed to submit a Closing Brief addressing whether the GWD Application should be granted and whether the permit issued to Rangen should contain subordination language (the parties agreed that this was the only issue that needed to be decided by the Department).

As explained below, the Hearing Officer should have denied the GWD Application because: (1) the Application is speculative; and (2) the Application is incomplete and no priority date can be established.

The bottom line of this case is that the GWDs filed the Application without any ordered mitigation responsibility to Rangen. In fact, five of the applicants still do not have any mitigation obligation to Rangen. The GWDs do not intend to perfect the right for which they have filed, and they do not have the means of perfecting it. Instead, the GWDs simply intend to assign their Application to Rangen so that Rangen can involuntarily perfect the water right on behalf of the GWDs.

The GWDs intend to force Rangen to use its own facility, with its own overhead, permits and resources, to perfect a water right on behalf of the GWDs. This is the same water that Rangen has been diverting and using since 1962 with full knowledge of the Department. The GWDs intend to perfect their water right without actually engaging in any act to put the water to beneficial use, or even paying Rangen for its efforts to perfect the water right. The precedent set by the GWDs' Application would cause monumental

problems for the Department by allowing users to engage in overt speculation in the development of Idaho's water resources.

The GWDs' Application is nothing more than clever lawyering to disguise an illegal water grab. This so-called "mitigation plan" does not add a single drop of water to Billingsley Creek to actually compensate for the material injury caused by junior-priority ground water pumping in the Eastern Snake Plain Aquifer ("ESPA").

On November 18, 2014, the Hearing Officer issued his Preliminary Order Issuing Permit. This is an Appeal (Exceptions) from that decision.

II. UNCONTESTED FACTS

1. Seven different GWDs filed Application for Permit No. 36-16976 on April 30, 2013. (Exh. 1000).

2. The Application included two purposes of use: fish propagation and mitigation. (Exh. 1004). As for "fish propagation," the GWDs testified they have no intent to raise fish with the water they seek to appropriate. (Tr. p. 75, l. 12-18).

3. As for "mitigation", the GWDs had no ordered "mitigation" responsibility towards Rangen, or anyone else on Billingsley Creek at the time their Application was filed. Two of the GWDs, North Snake and Magic Valley GWDS did not have a mitigation obligation towards Rangen or anyone else until January 29, 2014, when the Director issued his Order on Rangen's Delivery Call. (Tr. p. 65, l. 19-24). The remaining five GWDs that filed the GWD Application still do not have a mitigation obligation towards Rangen, or a mitigation towards anyone else, when the Application was heard in September, 2014. (Tr. p. 66, p. 12-14).

4. The Application stated a place of use (POU) and point of diversion (POD) entirely located on Rangen's real property. (Exh. 1004)

5. The Ground Water Districts do not have the consent or authority to perfect the water they seek to appropriate using Rangen's property. (Exh. 1006).

6. The GWDs have taken no steps or taken any "action" to gain possessory use of Rangen's property. The GWDs did file a Notice of Eminent Domain ("Notice"), but the Notice does not indicate that the GWDs seek to gain access to raise fish at Rangen's Research Hatchery to perfect their Application. (Exh. 1014).

7. The GWD Application was executed by "Thomas J. Budge, Attorney." At the time the Application was filed, there was no Power of Attorney or corporate resolution giving Mr. Budge the authority to execute the Application on behalf of the GWDs. (*See*, Exh. 1000, 1004). No addresses for the Applicant GWDs were listed on the Application. (*Id.*)

8. The Water Master submitted a letter recommending denial of the GWD Application. (Exh. 2042).

9. The parties stipulated that Rangen's Application satisfies the requirements of I.C. § 42-203A(5). (Tr. p. 262, l.. 1-7; p. 263, l. 21-24). Rangen amended its quantity to 21.8 cubic feet per second ("cfs") during the hearing to reflect highest quantity of water that was measured at the Rangen facility during a five-year look back period from the date of filing. (Exh. 2017).

10. The GWDs' Application does not add any new water to Billingsley Creek. (Tr. p. 213, l. 13-17).

III. ISSUES PRESENTED

1. The hearing officer erred in deciding that "mitigation" is a recognized purpose of use for a water right.

2. The Hearing Officer erred in finding that the POU is located where "water is injected into infrastructure."

3. The Hearing Officer erred in concluding that the application was not speculative or void.

4. The Hearing Officer erred in finding that the application was complete.

5. The Hearing Officer had no authority to subordinate the Permit.

IV. ARGUMENT

A. THE HEARING OFFICER ERRED IN DECIDING THAT "MITIGATION" IS A RECOGNIZED PURPOSE OF USE FOR A WATER RIGHT.

This is a novel and unprecedented Application. This is the first water right filed for the purpose of "mitigation". Historically, water rights with a "mitigation" purpose have been created when a user leaves a part of some other use (i.e., irrigation) behind to address an injury of the use of a particular and identified water right. For example, "Mitigation" was the designated beneficial use of a right on the Hiawatha Canal system.

The conveyance loss of the right forfeited or abandoned in the ditch is left behind to properly convey the remaining rights in the ditch system. *See e.g.*, 37-22630 (Hiawatha Canal Water Decreed for Conveyance Loss).

The common component of historical rights which show "mitigation" as a use is that the use is tied to a particular water right and/or an identified injury.

In this case, the mitigation use is not tied to any particular use or injury. The mitigation use, as claimed by the GWDs, can float at any given time depending on whether any ground water right or user in the seven different GWDs have a current "mitigation"

responsibility. Again, in this case, at the time the Application was heard, five of the GWDs did not have any mitigation responsibility.

To the extent this particular "mitigation" use can float to different water rights and users in the different GWDs, the right is entirely speculative. A user should not be able to claim a water right and hold it for a "rainy day."

Despite these problems, the Hearing Officer relied upon the definition of "Mitigation Plan" under IDAPA 37.03.11.015.15 to ultimately conclude that "mitigation" is an authorized purpose of use. None of the analysis on this point has any citation to any authority or historic use. None of the analysis is based upon any evidence in the record. It seems that the definition of "mitigation" was derived on an *ad hoc* basis to achieve the purpose of approving this Application.

Nevertheless, the Hearing Officer concluded that there were three types of "compensation mitigation." Again, without citation to any authority, it is anyone's guess how these three "compensation mitigation" uses were authorized or created. At any rate, the Hearing Officer concluded that the "compensation mitigation" proposed by the GWDs is the "first type" of compensation mitigation.

> The first type of compensation mitigation involves providing water directly to a senior water user owning water rights on a source that has been diminished by junior water users. Mitigation water is diverted from a separate source and delivered directly into the senior water user's system.

Order, p. 8.

Rangen adamantly disputes that water coming from the Martin Current Tunnel (MCT) and the water forming the headwaters to Billingsley Creek constitute separate sources of water. The water coming from the MCT ultimately comes down onto a talus slope and then forms Billingsley Creek. This being the case, the water coming from the

MCT and Billingsley Creek are not different sources of water. The word "mitigation" does not describe how a water right will be used in any manner that would allow the evaluation of the Idaho Code Section 42-203A(5) factors. In order to evaluate the Application, more information is necessary. The additional information is how the right would actually be used. The GWD Application does not specify a particular use (i.e "mitigation for irrigation," "mitigation for fish propagation," etc.) for which the mitigation use is associated.

In order to evaluate the GWD Application, another use, "fish propagation," had to be assumed with, and added to, the "mitigation" use. The entire evaluation by the GWDs' experts assumed the "mitigation" use was, in fact, for "fish propagation." Scott King admitted this fact:

> Q. Okay. Is it your opinion, then, all's they have to do is obtain unappropriated water under a permit and do nothing else and it's perfected?
>
> A. No.
>
> Q. Then how is this water right perfected?
>
> A. The water right's perfected by using it for beneficial use within the facility.
>
> Q. Okay. And you understand -- that's clear that's your testimony, that's how this water right gets perfected?
>
> A. That's my understanding of how this water right would be perfected, yes.
>
> Q. All right. So someone's got to file a proof of beneficial use that says the water right is in fact used within the facility for a beneficial purpose, which is, I take it, fish propagation?
>
> A. Correct.

(Tr. p. 233-34).

The Hearing Officer's analysis of the impact/consumption use of the application

also is based upon an implied use of "fish propagation". The fact that the "mitigation" use is evaluated with respect to the "fish propagation" use is also reflected in the GWDs' Application. The POU description for both uses in Section 4 of the Application is the same, and all the uses occur within Rangen's Research Hatchery. (Exh. 1001).

"Mitigation," by itself, without any identifying beneficial use for which the right is mitigating, is not a recognized purpose of use, and, such a right cannot be perfected.

B. THE HEARING OFFICER ERRED IN FINDING THAT THE POU IS LOCATED WHERE "WATER IS INJECTED INTO INFRASTRUCTURE."

The Hearing Officer erred in finding that the POU for the GWDs' Application is where the "water is injected into Rangen's infrastructure." The Hearing Officer described the POU as follows:

> In this scenario, mitigation occurs at the point of delivery to the augmented source. The place of use would properly be described as the location of where water is added to the diminished source . . . Mitigation occurs when water is injected into the infrastructure of the senior water right holder.

Order, p. 10-11.

The sole evidence at the hearing was that the beneficial use takes place in the raceways of Rangen's facility. IGWA identified the raceways as the POU in its Application. As previously indicated, IGWA's own expert, Scott King, also testified that the POU takes place in the raceways. The Hearing Officer found that Mr. King testified "that the beneficial use of mitigation would occur throughout the raceways at the Rangen facility and that the mitigation beneficial use would end where water is returned to Billingsley Creek." *Order*, p. 10.

Despite the evidence adduced during the hearing, the Hearing Officer relied on IGWA's post-trial briefing wherein IGWA argued that the mitigation takes place "at the

point where water is delivered to Rangen." *Id.* In relying on IGWA's briefing, rather than the record, the Hearing Officer violated the Department's own procedural rules. Contested hearings on Applications are governed by the Departments Procedural Rules. "Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding." IDAPA 37.01.01.712.01. Briefs are not evidence. *See*, IDAPA 37.01.01.600 – 606. The only evidence in the record is that the beneficial use occurs in the raceways.

Even if the Hearing Officer could conclude, as a matter of law, that the mitigation use occurs at the point where water is injected into Rangen's facility, such a ruling ignores fundamental principles of Idaho water law. The most fundamental law is that water must be used for a beneficial use, and that a water right is not obtained unless there is a diversion and application of water to a beneficial use. The Idaho Supreme Court in *United States v. Pioneer Irrigation Water District*, 144 Idaho 106, 113, 157 P.3d 600 (2007), stated:

> A common theme throughout [Idaho water law] is the recognition of the connection between beneficial use of water and ownership rights. The underlying principle of the state law, which requires application of the water to beneficial use before a water right is perfected, is the same. In Idaho the appropriator must apply the water to a beneficial use in order to have a valid water right under both the constitutional method of appropriation and statutory method of appropriation. *Basinger*, 36 Idaho at 598, 211 P. at 1086-87; I.C. §§ 42-217 & 42-219. The requirement of beneficial use is repeatedly referred to throughout the Idaho Code.
>
> * * *
>
> Further, I.C. § 42-104 states, "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases." Idaho Code § 42-201(1) provides in part: "All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise.... Such appropriation shall be perfected only by means of the application, permit and license procedure as provided in this title." As previously noted, in order to obtain a licensed water

> right in Idaho one must prove that the water has been applied to a beneficial use. I.C. § 42-217. The districts act on behalf of the landowners within the districts to put the water to beneficial use. It is that beneficial use that determines water right ownership.

In this case, under all well-established rules of appropriation, the mere delivery of water can never constitute a "beneficial use" of water. Whether or not "mitigation" by itself can be considered a water right, the mere delivery of water to a place of use is not a beneficial use of water. Idaho water law always speaks in terms of "delivery and use" of water. Without both delivery and use of water, a beneficial use never occurs. *Id.*; IDAHO CONS., Art. XV, Section 3; *Nielsen v. Parker*, 19 Idaho 727, 115 P. 488(1911); *Furey v. Taylor*, 22 Idaho 605, 127 P. 676 (1912); *Cantln v. Carter*, 85 Idaho 179, 397 P.2d 761 (1964).

Here, the actual use of the water delivered, i.e. fish propagation, sets both the need for the mitigation water and the limit for which the mitigation water is required. "But for" Rangen's material injury caused by its inability to use its fish propagation rights, the GWDs would have no need or ability to obtain a permit for mitigation. Accordingly, without proof that the water is actually applied to fish propagation, the mitigation water right can never be perfected.

C. THE HEARING OFFICER ERRED IN CONCLUDING THAT THE APPLICATION WAS NOT SPECULATIVE OR VOID.

1. The Ground Water Districts may not file an Application without ownership of the POD or POU.

The Hearing officer erred in finding that the Application was not void.

The GWD Application designates a POU and POD that are wholly located on Rangen's property. Because the GWDs do not own the POU or POD designated in their Application, their Application is speculative, and, therefore, void.

The long-standing rule in Idaho and most every other jurisdiction with respect to perfecting a water right on property not owned by the water user is as follows:

> It is quite generally held that a water right initiated by trespass is void. That is to say, one who diverts water and puts it to a beneficial use by aid of a trespass does not, pursuant to such trespass, acquire a water right. Any claim of right thus initiated is void.

Lemmon v. Hardy, 95 Idaho 778, 780, 519 P.2d 1168 (1974), *citing Bassett v. Swenson,* 51 Idaho 256, 5 P.2d 722 (1931). *See also*, Joyce *Livestock v. U.S.A.*, 144 Idaho 1, 18, 156 P.3d 502, (2007); *Branson v. Miracle*, 107 Idaho 221, 227, 687 P.2d 1348 (1984).

Under this rule, the Court in *Lemmon* held that the ***"[l]ack of a possessory interest in the property designated as the place of use is speculation. Persons may not file an application for a water right and then seek a place for use thereof.***" *Id.* at 781. (Emphasis added). To the extent an application is filed without a possessory right in the place of use, the application is void.

Here, the undisputed fact is that Rangen owns the POU and POD. *Order*, p. 11, 12. Accordingly, under *Lemmon v. Hardy*, and the fact that Rangen is not acting, and will not act, as the GWDs agent in perfecting the water right, it is not possible for IGWA to develop a right because it does not own the POU.

2. The Hearing Officer erred in finding that the GWDs had taken the necessary steps to gain access to Rangen's property.

As indicated in Section C, *infra*, the GWDs have no possessory right in the POU or POD, which are both located entirely on Rangen's property. For this reason alone, the Application is speculative and void on its face.

The Application is also speculative because it fails to satisfy the good faith requirements of IDAPA 37.03.08.040.05.e, which reads as follows:

> i. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary **for all project facilities and the place of use or if such interest can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest.** Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code.
>
> ii. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department apprised of the status of the applications and any subsequent approvals or denials.

IDAPA 37.03.08.040.05.e. (Emphasis added).

Again, the POD and POU for the Application are located on Rangen's property. For all the reasons already stated, the Application can be perfected only by raising fish in Rangen's facility. In this case, no "action" has been taken to gain access, or to take, Rangen's facility to raise fish. The GWDs' Notice of Eminent Domain sent to Rangen in August 2014 is not any type of "action" showing the GWDs have actually taken any step towards obtaining an interest in Rangen's property.

The Notice is defective because there is nothing in it advising Rangen that the GWDs intend to gain a possessory interest (i.e. fee title interest) in Rangen's Research Hatchery to raise fish in order to perfect their Application. The absence of any intent is illustrated in the testimony of Lynn Carlquist, the Board member who testified on behalf of all of the GWDs:

> Q. There's two purposes of use for the eminent domain contained in that document, as you can see; correct?
>
> A. Yes
>
> Q. Neither one of those involves the perfecting of the water on Rangen's property; correct?
>
> A. Well, I think they show how we would use that water on Rangen's property.

Q. Okay. You don't intend to place your own people, own employees, on the property to raise fish, do you

A. Not at this time, no.

Q. Okay. And certainly there's nothing in your notice or eminent domain that indicates that that's what you're going to do?

A. To raise fish or to what?

Q. Right. To raise fish –

A. No

Q. On Rangen's property.

A. No.

Q. To actually operate, physically invade our property to raise fish; correct?

A. No.

(Tr. p. 81-82).

Even if the GWDs had sought a possessory interest in Rangen's facility, the GWDs are also not prepared to raise fish. Rangen owns a NPDES Permit, a CAFO Permit, and a Department of Agriculture Permit authorizing them to operate the Research Hatchery. (Exh. 2020). The GWDs have no such permits and have not applied for them.

Most importantly, there is also no legal authority for the GWDs to actually condemn Rangen's property to raise fish. As the Hearing Officer correctly decided, the GWDs have narrow eminent domain powers. The Board of a Ground Water District can only:

> . . . exercise the power of eminent domain in the manner provided by law for the condemnation of private property for ***easements, rights of way, and other rights of access*** of to property necessary to the exercise of the mitigation powers herein granted, both within and without the district.

I.C. § 42-5224 (13). (Emphasis added).[1] Section 42-5224 expressly and unequivocally limits Ground Water Districts' eminent domain powers to situations where they are obtaining easements, rights of way or other rights of access. It does not grant the Districts the power to condemn and take fee title possession of property (i.e., take Rangen's Research Hatchery to raise fish).

As to the legal authority, the Hearing Officer correctly found that the GWDs did not have the necessary legal authority under Section 5224 to obtain a "fee title" interest in Rangen's facility to raise fish. Having made this finding, he should have concluded that the GWDs did not have the authority to occupy Rangen's property to use its point of diversion and to build a pump station on its property. The occupation of Rangen's land to construct a building, i.e. pump station, and to take use of a diversion structure (dam) goes way beyond merely obtaining a right-of-way or easement. Rather, these types of invasions can only be obtained through the obtaining of a fee title interest in land. I.C. § 7-702(1). Consistent with the Hearing Officer's decision relative to fish propagation, he should have also determined that the GWDs needed to obtain a fee interest in land to build the pump station and to use Rangen's bridge diversion, which Rangen built and paid for.

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[1] Idaho's condemnation statutes specify the three distinct property interests which may be obtained by eminent domain These three interests are as follows:

> 7-702. ESTATES SUBJECT TO TAKING. The following is a classification of the estates and rights in lands subject to be taken for public use:
> 1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine.
> 2. An easement, when taken for any other use.
> 3. The right of entry upon, and occupation of, lands, and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use.

The lack of any "action" to gain access, the lack of intent to raise fish, the lack of permits to actually raise fish, and the lack of legal authority to gain possession of the Research Hatchery, is all evidence that the GWD Application is improper and cannot be approved under Idaho's longstanding prior appropriation rules.

For all these reasons, the GWD Application should be denied in its entirety.

3. The "mitigation" use was speculative at the time the Application was filed.

The GWD Application was filed with a "mitigation" purpose of use. However, at the time the Application was filed (April 2013), there was no ordered mitigation obligation owed by the GWDs. In fact, five of the applicants were determined not to have a mitigation obligation to Rangen. (Tr. p. 65, l. 4). Therefore, there was no water upon which the Districts could possibly have filed for under an Application for Permit specifying "mitigation" as a purpose of use at the time the GWD Application was filed.

Where no valid water right is possible, it can be concluded that the application is filed for speculative purposes, not for development of a water right. *Lemmon v. Hardy, supra,* at p. 780. Permits for speculative purposes may not be granted, and are void on their face. *Id.*; I.C. § 42-203A(5).

As such, the Department should deny the GWDs' Application.

4. The entire Application is speculative because none of the GWDs intend to apply any water to a beneficial use.

The Application is also speculative and void under Department rules. Under IDAPA 37.03.08.045.01.b, **"[s]peculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use . . . "** (Emphasis added).

In this case, the GWDs testified that they do not intend to perfect the Application by applying water to the beneficial uses specified under the Application. Lynn Carlquist testified as follows:

> Q. Now, I take it when you filed this in April of 2013 you had absolutely no intent to raise fish on Rangen's property?
>
> A. That was not our intent at the time, no.
>
> Q. And today you have no intent of raising fish in Rangen's property; correct?
>
> A. That's correct.

(Tr. p. 75, l. 12-18).

Rather, the Districts' intent is to assign the permit to Rangen and force Rangen to perfect the water on their behalf. (Tr. p. 75, l. 23-25; p. 76, l. 2-3). To perfect the Application, the GWD's intend to use Rangen's facility, its permits and staff to perfect the Application wholly located on Rangen's own property. (Tr. p. 72-79). Without the intention to actually apply the water to a beneficial use, the Application is speculative and void.

Idaho Courts have not ruled on whether an Applicant can obtain a permit when it does not intend to apply the water to a beneficial use. However, Colorado and most every prior appropriation jurisdiction have long-standing rules with respect to whether permits can be issued when the Applicant does not have the intent to apply the water to a beneficial use.

For example, in *Colorado River Water Conservation District v. Vidler Tunnel Water Company*, 594 P.2d 566 (Colo. 1979), a seminal case on the definition of speculative permits, the Colorado Supreme Court, citing Constitutional principles nearly identical to Idaho's Water Constitutional Provisions, held that Applications for Conditional Decrees

(Application to Appropriate Water), must: (1) have the intent to appropriate the water and an overt act manifesting such intent; and (2) its intent is not based on a speculative sale or transfer of the water to be appropriated.

The *Vidler* court established what has become known as the "anti-speculation doctrine".

> **Our constitution guarantees a right to appropriate, not a right to speculate. The right to appropriate is for use, not merely for profit. As we read our constitution and statutes, they give no one the right to preempt the development potential of water for the anticipated future use of others not in privity of contract, or in any agency relationship, with the developer regarding that use.** To recognize conditional decrees grounded on no interest beyond a desire to obtain water for sale would as a practical matter discourage those who have need and use for the water from developing it. **Moreover, such a rule would encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whatever unappropriated water remains.** Twenty-five years ago this Court emphatically rejected the "claim that mere speculators, not intending themselves to appropriate and carry water to a beneficial use or representing others so intending, can by survey, plat, and token construction compel subsequent bona fide appropriators to pay them tribute by purchasing their claims in order to acquire right guaranteed them by our Constitution."

Id. at 569. (Emphasis added). The "anti-speculation doctrine" announced in *Vidler* has been adopted by many other jurisdictions. *See e.g., Bacher v. State Engineer of Nevada*, 146 P.3d 793, 799 (Nev. 2006). The doctrine "addresses the situation in which the purported appropriator does not intend to put water to use for its own benefit and has no contractual or agency relationship with one who does." *Id.* at 799, *citing Three Bells Ranch v. Cache La Poudre*, 758 P.2d 164, 173 n.11 (Colo. 1988).[2]

Just like Colorado, the Idaho Constitution guarantees the right to appropriate, not

[2] "This doctrine precludes speculative water right acquisitions without a showing of beneficial use. Precluding applications by persons who would only speculate on need ensures satisfaction of the beneficial use requirement that is so fundamental to our State's water law jurisprudence. Thus, we agree with this limitation on an applicant's showing of third-party need and adopt the anti-speculation doctrine's formal relationship requirement for Nevada." *Id.* at 146 P.3d 799.

speculate, on the development of water resources. IDAHO CONS., Art. XV. Under the Idaho Constitution and the specific definition of "speculation" set forth in IDAPA 37.03.08.045.01.b, the GWDs' Application is speculative because the GWDs have no intent to appropriate the water, and they have no agreement with anyone to develop the water right on their behalf.

Here, the Hearing Officer ignored the anti-speculation doctrine. To make matters worse, the Hearing Officer actually encourages speculation. In his Order, the Hearing Officer held that users may appropriate water if mitigation obligations are "reasonably foreseeable." *Order,* p. 12.

Users in Idaho can now obtain a permit; just in case they have an obligation to mitigate and are, in fact, ordered to mitigate; when they have no intent to ever appropriate water; when they never actually apply the water to a beneficial use or actually have a voluntary contract with an agent who will apply the water to a beneficial use on their behalf.

To avoid speculation, the Hearing Officer's decision should be rejected.

D. THE HEARING OFFICER ERRED IN FINDING THAT THE APPLICATION WAS COMPLETE.

The Hearing Officer erred in concluding that the Original Application was complete. *Order*, p. 13. The Districts' Application should not have been accepted because it was incomplete. The Application was not complete because there was no evidence that the Application was executed properly. IDAPA 37.03.08.035.01.d provides that all applications for a water right:

> shall include all necessary information as described in Rule Subsection 035.03. An application for permit that is not complete as described in Rule Subsection 035.03 will not be accepted for filing and will be returned along with any fees

submitted to the person submitting the application. **No priority will be established by an incomplete application**.

IDAPA 37.03.08.035.01.d (Emphasis added).

Along with being returned, an incomplete application is not entitled to a priority date. A priority date is only established when an application "is received in complete form." IDAPA 37.03.08.035.02.b.; *Lemmon v. Hardy, supra,* at p. 781.

One of the requirements for a complete application is a duly authorized signature on the Application. In pertinent part, IDAPA 37.03.08.035.03.b requires:

> i. **The name and post office address of the applicant shall be listed**. If the application is in the name of a corporation, the names and addresses of its directors and officers shall be provided. If the application is filed by or on behalf of a partnership or joint venture, the application shall provide the names and addresses of all partners and shall designate the managing partner, if any.
>
> * * *
>
> xii. **The application form shall be signed by the applicant listed on the application or evidence must be submitted to show that the signatory has authority to sign the application.** An application in more than one (1) name shall be signed by each applicant unless the names are joined by "or" or "and/or."
>
> xiii. **Applications by corporations, companies or municipalities or other organizations shall be signed by an officer of the corporation or company or an elected official of the municipality or an individual authorized by the organization to sign the application.** The signatory's title shall be shown with the signature.
>
> * * *
>
> xiv. Applications may be signed by a person having a current "power of attorney" authorized by the applicant. **A copy of the "power of attorney" shall be included with the application.**

IDAPA 37.03.08.035.03.b (Emphasis added).

Here, the Application was signed by "Thomas J Budge, Attorney." There is no indication from the face of the Application as to whom Mr. Budge represented. He does

not indicate specifically which, if any, of the Districts he was signing for. Furthermore, none of the addresses of the Applicants are included. At the time of filing, there was no "evidence" of any authority. To date, no evidence of authority at the time of the filing of the Application has been submitted to the Department.

During the hearing, the Districts admitted Corporate Resolutions for the North Snake and Magic Valley Ground Water Districts, but no Corporate Resolutions were admitted showing authority for the other five Ground Water Districts. The Resolutions were dated September, 2014. (Exh. 1076, 1077). Likewise, the Districts submitted Powers of Attorney for the Magic Valley and North Snake Ground Water Districts, but no Powers of Attorney were admitted from the other five Ground Water Districts. The Powers of attorney were dated in May, 2014. (Exh. 1073, 1074).

Because no authority has been filed for all the Applicant GWDs, the Application is not complete and no permit can be granted and no priority date can be established. Again, if an application is not complete, the application may not be accepted and must be returned to the applicant. *Lemmon v. Hardy, supra*, at p. 781; IDAPA 37.03.08.035.01.d and 03.b. If the Department does not return the Application, the Applicants still cannot receive any priority date because the Application is not complete even at this late date.

Evidence of Mr. Budge's authority to file the Application is not a mere formality. It is essential that agents working on behalf of their principals have express authority to act. This is particularly true with respect to public entities. In this case, Mr. Carlquist's testimony, on behalf of the North Snake Ground Water District, was anything but clear when it came to whether the Board of Directors ever authorized Mr. Budge to file the Application at issue prior to its filing. At best, Mr. Carlquist's testimony establishes that he

had telephone "conferences" with fellow board members where they discussed filing the application and that they said yes to get the Application filed. (Tr., p. 61, ll. 14-23). Mr. Carlquist admitted that a meeting of the Board was never convened to consider the filing of the Application. (*See id.*)

A Ground Water District can only act through its Board of Directors. One of the specific powers of the Board of Directors is to "appropriate. . . water within the state. I.C. § 42-5224(8). The Board of Directors can only act through regular monthly meetings or special meetings. *See* I.C. § 42-5223(3). The Board has to give 72-hour advance notice of special meetings and all meetings are public. *See id.* Public agencies, like the GWDs, cannot make decisions during private telephone calls with each other. Public agencies can only make decisions in public during regularly convened monthly meetings or special meetings after proper notice and publication of an agenda. "If an action, or any deliberation or decision making that leads to an action, occurs at any meeting which fails to comply with [Idaho's Open Meeting Law] such action shall be null and void." I.C. § 67-2347.

Instead of following all the Department's procedures, the Hearing Officer essentially excused the GWDs' lack of compliance on the basis that the Application was accepted by the Department when it was filed. *Order*, p. 13. The fact that the Department accepted the Application is not dispositive as to whether the Application was complete when it was filed.

E. THE HEARING OFFICER ERRED IN SUBORDINATING THE APPLICATION.

Rangen contests the subordination clause placed on the Permit. *Order*, p. 15 (Condition 7). The constitutional and statutory law in Idaho is that users are entitled to

water "first in time, first in right." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). Essentially, the subordination language eviscerates "first in time, first in right" principles, and gives the GWDs the immunity they seek.

To the extent that this Application addresses the GWDs' obligation to mitigate for Rangen's loss of water, the Conjunctive Management Rules require that replacement water under a mitigation Plan "must include contingency provisions to assure protection of the senior right on the event the mitigation water source becomes unavailable." IDAPA 37.03.11.043.c. The subordination provision suggested by the Hearing Officer removes the only protection Rangen might have if the water under the Permit becomes unavailable, which is to file a water call on the replacement water.

When water rights are issued, there must be respect for the ultimate water law principle ("first in time, first in right"), unless the Department is given authority to subordinate the rights. In this case, there is no authority for the Department to subordinate this type of Application. The decision to subordinate is wholly arbitrary and capricious, was done without any lawful authority and constitutes a violation of the Idaho Constitution.

V. CONCLUSION

The GWD Application should be **DENIED** because:

1. The hearing officer erred in deciding that "mitigation" is a recognized purpose of use for a water right.
2. The Hearing Officer erred in finding that the POU is located where "water is injected into infrastructure.
3. The Hearing Officer erred in concluding that the application was not speculative or void.
4. The Hearing Officer erred in finding that the application was complete.
5. The Hearing Officer had no authority to subordinate the Permit.

DATED this 2 day of December, 2014.

FRITZ X. HAEMMERLE
Attorney for Rangen, Inc.

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 2nd day of December, 2014 he caused a true and correct copy of the foregoing document to be served by email and first class U.S. Mail, postage prepaid upon the following:

Original: James Cefalo Idaho Department of Water Resources 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 james.cefalo@idwr.idaho.gov sharla.cox@idwr.idaho.gov	Hand Delivery ☐ U.S. Mail ☑ Facsimile ☐ Federal Express ☐ E-Mail ☑
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J. Justin May