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12 **Attorneys for Intervenor, Rangen, Inc.**

District Court - SRBA Fifth Judicial District In Re: Administrative Appeals County of Twin Falls - State of Idaho
APR - 3 2014
By _____ Clerk
_____ Deputy Clerk

11 **IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE**
12 **STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

13 IDAHO GROUND WATER) Case No. CV-2014-179
14 APPROPRIATORS, INC.,)
15 Petitioner,) CROSS-PETITION FOR JUDICIAL
16 vs.) REVIEW
17 IDAHO DEPARTMENT OF WATER)
18 RESOURCES and Gary Spackman, in his)
19 official capacity as Director of the Idaho)
20 Department of Water Resources,)
21 Respondent,)
22 RANGEN, INC., an Idaho Corporation,)
23 Intervenor.)

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

1 COME NOW the Intervenor, RANGEN, INC. ("Intervenor" or "Rangen"), by and
2 through its attorneys of record, Fritz X. Haemmerle of Haemmerle & Haemmerle, P.L.L.C.;
3 Robyn M. Brody of Brody Law Office, PLLC; and J. Justin May of May Browning & May,
4 PLLC, and pursuant to Idaho Code Sections 67-5270 through 67-5279 and I.R.C.P. 84(c), and
5 the Court's *Procedural Order Governing Judicial Review of Final Order of Director of Idaho*
6 *Department of Water Resources*, dated March 28, 2014 (hereinafter "Procedural Order"), files
7 this Cross-Petition for Judicial Review as follows:
8

9 **PETITION FOR JUDICIAL REVIEW**

10 1. Rangen owns and operates a fish research and propagation facility in the
11 Thousand Springs area near Hagerman, Gooding County, State of Idaho. Rangen Corporation is
12 located and generally operates its business out of Buhl, Twin Falls County, State of Idaho

13 2. Rangen operates the facility with several water rights. Because Rangen was not
14 receiving the amount of water it rightfully possess under water rights 36-02551 and 36-07694,
15 Rangen filed a water call under the Idaho's Constitution, statutes and rules adopted by the
16 Respondent, Idaho Department of Water Resources (hereinafter "Respondent" or "Department"),
17 for conjunctive administration of water rights. The water call was filed on December 13, 2011.
18 This matter came before the Department based on a contested case ("water call") in Department
19 Case No. CM-DC-2011-004.
20

21 3. Name of agency from which judicial review is sought: Idaho Department of
22 Water Resources ("Respondent") and its Director Gary Spackman, an agency of the State of
23 Idaho.
24
25

1 4. This Cross-Petition is taken to the District Court of the Fifth Judicial District,
2 County of Gooding, through an appeal filed by the Idaho Ground Water Appropriators, Inc.
3 (“Petitioner” or “IGWA”), in Gooding County Case No. CV-2014-179.

4 5. Decision being cross-appealed: Between May 1 through the 16 of May, 2013, the
5 Department, by and through its Director, Gary Spackman, held a contested hearing on Rangen’s
6 water call. On January 29, 2014, the Director issued his “*Final Order Regarding Rangen, Inc.’s*
7 *Petition for Delivery Call; Curtailing Ground Water Junior to July 13, 1962*” (hereinafter “Final
8 Order”). Thereafter, parties to the contested case filed Motions for Reconsideration of the Final
9 Order. On March 4, 2014, the Director issued his “*Order on Reconsideration.*” Rangen is
10 appealing both Orders, all in Department of Water Resources Case No. CM-DC-2011-004.
11 Rangen is also appealing the Director’s “Order Granting, in Part, and Denying, in Part, Rangen,
12 Inc.’s Motion for Partial Summary Judgment Re: Source,” also in Case No. CM-DC-2011-004.

13 6. A transcript of all proceedings in Case No. CM-DC-2011 is requested. The
14 contested hearing between May 1 through 16, 2013, was believed to have been recorded by the
15 Department. Also, there was a transcript prepared by M&M Court Reporters, Boise, Idaho. All
16 other proceedings, including monthly status conferences, were recorded by the Department.
17

18 7. Rangen has requested an estimate for preparation of the transcript and record, and
19 Rangen has tendered an estimated fee for same.

20 8. Rangen's substantial rights have been prejudiced by the Department's Orders
21 including, but not necessarily limited to the diminishment of water rights, 36-02551 and 36-
22 07694, as those rights were Decreed by the Snake River Basin Water Adjudication and permitted
23 and licensed by the Department, and the failure of the Department to account for all water
24 available to it from this water call under the operation of the Department's ground water model,
25

1 ESPAM2.1, and the Director's Final Order and Order on Reconsideration have denied the
2 Rangen's rights to receive its legally entitled water under water rights duly perfected under Idaho
3 law.

4 9. Under the standards of evaluation as set forth under Idaho Code Section 67-5279,
5 the Final Order and Order on Reconsideration:

- 6 a. are in violation of constitutional, statutory provisions or administrative rules
7 of the Department;
- 8 b. are in excess of the statutory authority or authority of the Department under
9 the administrative rules of the Department;
- 10 c. were made upon unlawful procedures; and
- 11 d. were arbitrary, capricious, and/or an abuse of the agency discretion.

12 10. The issues presented for the appeal, as identified in paragraph 9, and as more
13 specifically identified in this paragraph include, but are not necessarily limited to, the following:

- 14 a. Whether as a matter of fact or law that Rangen's decreed source under water
15 rights 36-02551 and 36-07694 , the "Martin Curren Tunnel," encompasses the
16 entire spring complex that forms the headwaters of Billingsley Creek, as opposed
17 to just water emanating from the Martin Curren Tunnel.
- 18 b. Whether as a matter of fact and law that Rangen's Partial Decrees under 36-02551
19 and 36-07694 allow the diversion of the springs that form the headwaters of
20 Billingsley Creek, as opposed to just water emanating from the Martin Curren
21 Tunnel.
- 22 c. Whether the Department is estopped from concluding Rangen is not entitled to
23 divert from entire talus slope, as opposed to just the water emanating from the
24

1 Martin Curren Tunnel, based on prior decisions of Director and prior inactions
2 and conclusions of Department staff

- 3 d. Whether under a curtailment run made under ESPAM2.1, the conclusion that
4 Rangen is entitled to 63% of the spring flow in the Rangen Cell is supported by
5 substantial evidence in the record as a whole and, based on Rangen's Decrees, is
6 supported as a matter of law.
- 7 e. Whether as a matter of fact or law that the junior user parties failed to
8 demonstrate their own efficient use of water without waste.
- 9 f. Whether Finding 51 of the Final Order is supported by substantial evidence in the
10 record as a whole (Weir Coefficient).
- 11 g. Whether the use of a trim line is supported by agency rules, justified by on
12 substantial evidence in the record, or does the use of a trim line constitute an
13 arbitrary and capacious decision.
- 14 h. Whether, if a trim line is not an arbitrary or capacious decision, the citation to
15 prior trim lines as set forth in Conclusions 42 through 46 of the Final Order are
16 entirely unrelated to the operation of ESPAM2.1 in this water call.
- 17 i. Whether the Director's calculations of the benefit to the Rangen Spring Cell was
18 correct given the Director's use of the "Great Rift" as a trim line.
- 19 j. Rangen adopts the issues raised by IGWA in its Petition for Judicial Review,
20 issues 5.1 through 5.7, for the purpose of responding to the issues as the facts and
21 law require.

22
23 12. Other parties to the Case included the City of Pocatello, the Idaho Ground Water
24 Appropriators, Inc. ("IGWA"), and the A&B Irrigation District, American Falls Reservoir
25 District # 2, Burley Irrigation District, Miler Irrigation District, Minidoka Irrigation District,

1 North Side Canal Company and Twin Falls Canal Company (collectively, the "Surface Water
2 Coalition" or "SWC").

3 13. Service of this Petition has been made on the Department, and notice of this filing
4 has been made on parties to the contested case in CM-DC-2011-004.

5 **DEMAND FOR ATTORNEY FEES AND COSTS**

6 As a result of the Department's actions, Rangen has had to retain counsel. For services
7 rendered, the Rangen is entitled to attorney fees and costs should they prevail in this action
8 pursuant to Idaho Code Section 12-117 and pursuant to Rule 54 of the Idaho Rules of Civil
9 Procedure.

10 **RIGHT TO AMEND**

11 Rangen reserve the right to amend this Petition in any respect as motion practice and
12 discovery proceed in this matter.

13 WHEREFORE, Rangen prays for the following relief:


- 14 A. That the issues raised by the Petitioner IGWA be denied in all respects;
- 15 B. That the Court find in favor of the Intervenor finding that the Final Order and
16 Order on Motion for Reconsideration was:
- 17 a. is in violation of constitutional, statutory provisions or current administrative
18 rules of the Department;
- 19 b. is in excess of the statutory authority or administrative rules of the
20 Department;
- 21 c. were made upon unlawful procedures; and
- 22 d. were arbitrary, capricious, and/or an abuse of the agency discretion.
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- C. That the Court set aside the Orders, in whole or part, and/or remand the Orders back for further proceedings;
- D. For an award of reasonable costs and attorneys' fees pursuant to applicable law, including but not limited to Idaho Code Section 12-117, and Idaho Rule of Civil Procedure 54; and
- E. For such other and further relief as the Court deems just and equitable.

RESPECTFULLY SUBMITTED this 3 day of April, 2014.

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

By: 
Fritz X. Haemmerle

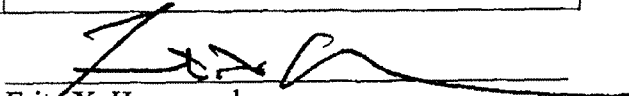
CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 3 day of April, 2014, he caused a true and correct copy of the foregoing document to be served upon the following as indicated:

<p>Original: Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 deborah.gibson@idwr.idaho.gov</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>Garrick Baxter Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov kimi.white@idwr.idaho.gov</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>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</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>Sarah Klahn Mitra Pemberton WHITE & JANKOWSKI Kittredge Building, 511 16th Street, Suite 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>
<p>Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us</p>	<p>Hand Delivery <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/></p>

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John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson, L.L.P. 195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 Facsimile: (208) 735-2444 tlt@idahowaters.com jks@idahowaters.com	Hand Delivery <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, ID 83318 wkf@pmt.org	Hand Delivery <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
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Fritz X. Haemmerle

