

RECEIVED

OCT 29 2014

DEPARTMENT OF
WATER RESOURCES

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

RANGEN, INC.,

Petitioner,

vs.

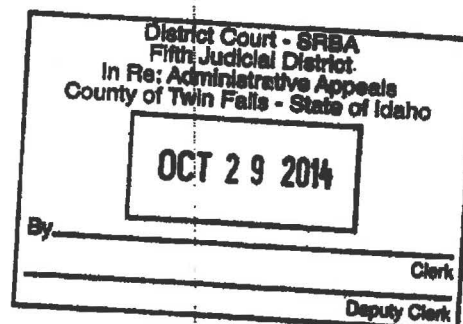
THE IDAHO DEPARTMENT OF WATER
RESOURCES and GARY SPACKMAN in his
capacity as Director of the Idaho Department of
Water Resources,

Respondents,

IDAHO GROUND WATER
APPROPRIATORS, INC., A&B IRRIGATION
DISTRICT, BURLEY IRRIGATION
DISTRICT, MILNER IRRIGATION
DISTRICT, AMERICAN FALLS RESERVOIR
DISTRICT #2, MINIDOKA IRRIGATION
DISTRICT, NORTH SIDE CANAL
COMPANY and TWIN FALLS CANAL
COMPANY,

Intervenors.

Case No. CV-2014-2446



RANGEN, INC.'S REPLY BRIEF

On Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

ATTORNEYS FOR RANGEN, INC:

Robyn M. Brody (ISB No.
5678)
Brody Law Office, PLLC
P.O. Box 554
Rupert, ID 83350
Telephone: (208) 434-2778
Facsimile: (208) 434-2780
robynbrody@hotmail.com

Fritz X. Haemmerle (ISB No.
3862)
Haemmerle & Haemmerle,
PLLC
P.O. Box 1800
Hailey, ID 83333
Telephone: (208) 578-0520
Facsimile: (208) 578-0564
fxh@haemlaw.com

J. Justin May (ISB No. 5818)
May, Browning & May,
PLLC
1419 W. Washington
Boise, Idaho 83702
Telephone: (208) 429-0905
Facsimile: (208) 342-7278
jmay@maybrowning.com

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

RANGEN, INC.,

Case No. CV-2014-2446

Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER
RESOURCES and GARY SPACKMAN in his
capacity as Director of the Idaho Department of
Water Resources,

Respondents,

IDAHO GROUND WATER
APPROPRIATORS, INC., A&B IRRIGATION
DISTRICT, BURLEY IRRIGATION
DISTRICT, MILNER IRRIGATION
DISTRICT, AMERICAN FALLS RESERVOIR
DISTRICT #2, MINIDOKA IRRIGATION
DISTRICT, NORTH SIDE CANAL
COMPANY and TWIN FALLS CANAL
COMPANY,

Intervenors.

RANGEN, INC.'S REPLY BRIEF

On Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

ATTORNEYS FOR RANGEN, INC:

Robyn M. Brody (ISB No.
5678)
Brody Law Office, PLLC
P.O. Box 554
Rupert, ID 83350
Telephone: (208) 434-2778
Facsimile: (208) 434-2780
robynbrody@hotmail.com

Fritz X. Haemmerle (ISB No.
3862)
Haemmerle & Haemmerle,
PLLC
P.O. Box 1800
Hailey, ID 83333
Telephone: (208) 578-0520
Facsimile: (208) 578-0564
fxh@haemlaw.com

J. Justin May (ISB No. 5818)
May, Browning & May,
PLLC
1419 W. Washington
Boise, Idaho 83702
Telephone: (208) 429-0905
Facsimile: (208) 342-7278
jmay@maybrowning.com

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	1
A.	The Department mischaracterized and failed to address Rangen's argument regarding the enforcement of future "aquifer enhancement activities."	1
B.	Morris Exchange Water	6
III.	CONCLUSION.....	6

TABLE OF AUTHORITIES

Cases

<i>In the Matter of Distribution of Water to Various Water Rights</i> , 155 Idaho 640, 315 P.3d 828 (2013)	2
<i>Rayl v. Salmon River Canal Co.</i> , 66 Idaho 199, 157 P.2d 76 (1945)	6

I. INTRODUCTION

This Reply Brief is filed in response to arguments raised in the Respondents' Brief filed by the Idaho Department of Water Resources. No other parties filed briefs in response to Rangen's Opening Brief.

II. ARGUMENT

A. The Department mischaracterized and failed to address Rangen's argument regarding the enforcement of future "aquifer enhancement activities."

The Director has improperly allowed out-of-priority ground water pumping to continue based upon the simulated effect of activities that may or may not occur in the future without any attempt to ensure that the activities will occur. The issue Rangen has raised in this appeal is not whether the Director may consider future activities as part of a mitigation plan under any circumstances as the Department's brief suggests. *Respondent's Brief*, p. 12. The issue is that the Director made the future activities optional. The Director has already determined that Rangen's senior water rights are being materially injured by out-of-priority ground water pumping. *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962 the "Curtailment Order"* (Exhibit 2042). The Director has allowed that pumping and continued material injury based upon the assumption that "conversions, CREP, and voluntary curtailment" would continue and would be the same as 2013. *Amended Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* (the "*Amended Order on IGWA's First Mitigation Plan*") (A.R., findings of fact 6-7, pp.603-604). Reliance upon an assumption falls far short of the standard necessary to protect Rangen's senior water rights. Protection of senior users requires at a minimum that any mitigation plan that proposes future "aquifer enhancement activities" must propose specific activities, contain a mechanism for enforcement of the

performance of those activities, and contain a contingency plan in the event the activities do not occur. *In the Matter of Distribution of Water to Various Water Rights*, 155 Idaho 640, 315 P.3d 828 (2013).

The Department's analysis for both the steady state and transient benefits from "aquifer enhancement activities" depends upon the assumption that future activities will occur. For steady state, the Department "assum[ed] constant implementation of fixed aquifer enhancement activities." *Amended Order on IGWA's First Mitigation Plan* (A.R., p.603). This means that the Department assumed that current activities will occur permanently. (Tr., Vol. II, p. 311, l.16 – 19). For transient runs, "[f]or 2014, conversions, CREP, and voluntary curtailment projects were assumed to be identical to 2013, and private party managed recharge was assumed to be zero." *Amended Order on IGWA's First Mitigation Plan* (A.R., p. 604). If these assumptions are inaccurate and activities are different, the Department's simulations will not be accurate predictions. Jennifer Sukow testified as follow with regard to Exhibit 1025:

Q. So going forward, for instance for 2014, did you make any attempt to determine what the value would be for 2014?

A. No. That would depend on what practices they actually carry out in 2014.

Q. And same thing for 2015 and beyond; correct?

A. Yes. It will always depend on what practices they actually undertake.

Q. So under this analysis that you're doing here, you're just looking back at what happened in previous years and making no attempt to predict what the effect will be in the future; correct?

A. That's correct.

Q. What would happen to the numbers that you've got here if the activities stopped or changed?

A. These numbers will change.

(Tr., Vol. II, p. 313, l.17 – p. 314, l.8). Jennifer Sukow also testified that the activities are not consistent each year.

Q. I notice that there's a difference between 2011, 2012, and 2013 for each of these.

It appears, based upon the difference, that the same activities don't actually occur in each year; is that correct?

A. That's correct.

Q. Okay. And so the assumptions that go into each of these, that the activity is going to occur permanently, is not really a correct assumption, is it?

A. Yeah, that's true.

(Tr., Vol. II, p.313, 1.2 – 11). Despite this, the Director's Order does not require any particular "aquifer enhancement activities" to occur in the future.

In footnote 5 on page 11 of Respondent's Brief, the Department states that "[t]he predicted flow benefits to Rangen in Exhibit 1025 were accepted and referred to by all parties in the presentation of evidence." While Rangen accepted the methodology used by the Department to calculate the steady state benefit, this was with the caveat that there be an Order requiring the activities to occur if there was to be any steady state credit for future activities. (Haemmerle, Tr., Vol. I, p.59, 1.20 – p.60, 1.12). It should be noted that Rangen does not generally dispute the methodology used by the Department to simulate the benefit at the Curren Tunnel of the past "aquifer enhancement activities" considered as part of the first mitigation plan. Similarly Rangen does not dispute that the Department's methodology can be used to simulate the benefit of the future "aquifer enhancement activities" that the Department assumed would occur.¹ The issue in this appeal is not the numerical calculation of the predicted benefit if the mitigation occurs. The issue in this appeal is that the Director allowed pumping to continue, but made future mitigation activities optional.

It is important to understand the nature of the so-called "aquifer enhancement activities." What the Director refers to as "aquifer enhancement activities" are for the most part substitute curtailment. These activities consist of conversions from ground water to surface water, drying up ground water irrigated acres through participation in CREP, voluntary curtailment of ground water

¹ Rangen does not agree that this methodology is appropriate for analyzing the impact of all "aquifer enhancement activities" regardless of magnitude and spatial distribution. For instance, the benefit if any of large, localized and sporadic recharge may require a different analysis. However, that is not at issue in this appeal.

acres, as well as some recharge that occurred in past years. (Exhibit 1025). This substitute curtailment is completely voluntary and participation varies from year to year. *Id.* No individual ground water user can be compelled to participate or continue to participate either by IGWA, the Department, or the Court.

The Risk that ground water users will not continue with the voluntary substitute curtailment is entirely upon Rangen. Virtually all of the conversions from ground water to surface water are “soft conversions.” *Id.* As described in Rangen’s Opening Brief, this means that a farmer can simply flip a switch to use ground water again if surface water becomes unavailable. . (Carlquist, Tr., Vol. I, p. 152, l. 18-22, p. 158, l.15-18). The ground water users are unwilling to commit to “hard conversions” because they risk being unable to irrigate if there is a shortage of surface water. (Carlquist, Tr., Vol. I, p. 153, l.18 – p. 154, l.5; *Opening Brief*, pp. 8-9) Yet this is precisely the risk that the Director is willing to place on Rangen, the senior water user. If ground water users decide, for whatever reason, to once again use ground water on softly converted acres, or take acres out of CREP, or stop being voluntarily curtailed, the benefit of “aquifer enhancement activities” predicted by the Director’s Order will not occur. At that point Rangen has no practical remedy because out-of-priority pumping and the consequent material injury has already been allowed to continue.

The Department’s brief suggests that Rangen should be satisfied because “[t]he Department monitors activities conducted pursuant approved mitigation plans in order to ensure compliance with mitigation requirements and if IGWA fails to comply with those requirements junior ground water rights holders will be curtailed.” *Respondent’s Brief*, p. 13. It is not clear exactly what the Department is arguing. There is no evidence in the record that the Department monitors conversions or acres that have been dried up to ensure that those acres remain converted

or dried up. Even if it were true that the Department intends to conduct such monitoring it is not clear how it would do so. The Director's Order does not identify any acres that must remain converted or dried up. In fact, although the Department states that "[t]he record is replete with evidence regarding the aquifer enhancement activities for which IGWA received mitigation credit," the only such evidence in the record relates to past activities. *Respondent's Brief*, p. 14. Not only are the future activities not identified, there is nothing in the Director's Order requiring that any particular activities occur. The Department merely assumes there will be some. Even if the Department decided to do some monitoring, there is no basis in the Director's Order to require ground water users to continue with conversions or dry ups. It appears that the Department means instead that it will look back at some point after the irrigation season is over and see if the relied upon assumptions were correct. The sole "contingency provisions if future enhancement activities for which IGWA received mitigation credit do not occur" is the following:

If the proposed mitigation falls short of the annual mitigation requirement, the deficiency can be calculated at the beginning of the irrigation season. Diversion of water by junior water right holders will be curtailed to address the deficiency.

Respondent's Brief, p.13.

Unfortunately, that is simply too late. Out-of-priority ground water pumping for irrigation cannot be curtailed after the irrigation season is already over. By the time the Department gets around to "monitoring," another irrigation season will have passed and Rangen will have suffered yet another year of material injury. This Court recently considered another example of the Director's wait and see approach. The Court's conclusions regarding that approach have equal applicability in this case:

If junior users are unable to secure all or part of their mitigation obligation in November due to cost, scarcity or unwillingness, the remedy of curtailment is lost, as the out-of-priority water use will have already occurred. In that scenario, there is no contingency to protect senior water rights as required by the *2013 SWC Case*. Such a result is not contemplated by the CM rules, and is in contravention of the

plain language of CM Rule 40 and the Idaho Supreme Court's precedent in the 2013 *SWC Case*.

Memorandum Decision and Order on Petitions for Judicial Review (Methodology Case), p. 15.

B. Morris Exchange Water

Relying upon *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 157 P.2d 76 (1945), the Department contends that “[a]doption of Rangen’s argument would wrongly diminish Morris’s senior water right as it would prevent Morris from exercising his right to enter into an agreement with another water user to use his senior water rights.” *Respondent’s Brief*, p. 16. The problem with this argument is that this case does not involve any such right to freely contract. The issue in this case is whether the Director has the authority under the CM Rules to allow continued out-of-priority ground water pumping under a mitigation plan that directly results in material injury to a senior water right. The direct consequence of this “mitigation plan” is that there is no water in the Curren Tunnel to satisfy Rangen’s 1957 water right because all available water is being used instead to “mitigate” for a 1962 call from the exact same source of water. Such a result is inconsistent with the Director’s obligation to conjunctively manage water resources in accordance with priority and the CM Rules.

III. CONCLUSION

For the reasons specified above, Rangen requests that the Court find that the Orders were in violation of Idaho law, in excess of the statutory authority or administrative rules of the Department, arbitrary capricious, and an abuse of discretion. Rangen requests that the Orders be reversed and this matter remanded for further proceedings.

DATED this 29th day of October, 2014.

MAY, BROWNING & MAY, PLLC

By 
J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 29th day of October, 2014 he caused a true and correct copy of the foregoing document to be served by the method indicated upon the following:

Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 Deborah.gibson@idwr.idaho.gov	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"/>
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 <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"/>
Randall C. Budge TJ Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED PO Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net bjh@racinelaw.net	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"/>
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"/>


J. Justin May