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Attorneys for Rangen, Inc.

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

RANGEN, INC., an Idaho corporation,

Petitioner,

vs.

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

Respondents.

Case No. CV-2014-272

**AFFIDAVIT OF J. WAYNE
COURTNEY IN SUPPORT OF
RANGEN, INC.'S VERIFIED
APPLICATION FOR
PEREMPTORY WRIT OF
MANDATE**

STATE OF IDAHO)
) ss
County of Twin Falls)

J. WAYNE COURTNEY, being first duly sworn on oath, deposes and says:

1. My name is J. Wayne Courtney. I am the Executive Vice President of Rangen, Inc. The matters contained in this affidavit are based on my personal knowledge and beliefs.

1. Rangen is an agricultural company located in Buhl, Idaho. Rangen manufactures and sells aquaculture and animal feed, buys and sells agricultural commodities, and owns and operates a bean warehouse. Rangen has been doing business in Idaho for nearly 90 years and has been owned by the same family for that entire time.
2. Rangen owns and operates a research and fish propagation facility (“Research Hatchery”) near Hagerman, Idaho in Gooding County. Historically, Rangen has used the Research Hatchery to do aquaculture feed research for Rangen and others and to raise fish for commercial purposes.
3. Rangen is the beneficial owner of Water Right Nos. 36-02551 and 36-07694 (“Rangen’s Water Rights”).
4. Rangen’s Water Rights entitle Rangen to divert spring water to supply the Research Hatchery.
5. On December 13, 2011, Rangen filed a *Petition for Delivery Call* with IDWR seeking the delivery of water because the springs that supply Rangen’s Water Rights have been declining for decades due to junior-priority groundwater pumping in the Eastern Snake Plain Aquifer.
6. After Rangen filed its *Petition for Delivery Call*, Director Spackman held monthly status conferences because the ESPAM2.1 model that was used to evaluate Rangen’s call was not yet final. During the May 2012 status conference Rangen raised the issue of providing junior users with notice of the call so that they could be prepared for a possible curtailment. Director Spackman advised counsel for IGWA that it had the

responsibility of notifying its members ahead of a formal hearing of the possibility of curtailment. The Director stated:

My inclination is that we place that burden upon [counsel for IGWA]. She's representing those folks, the groundwater users and they should, I guess, have the ability to anticipate the possibility of curtailment. As we go through I'm not sure I want to be issuing a notice ahead of some decision. I think that's a little difficult. When the notices were issued I think they were issued after Carl Dreyer's [sic] initial orders, and so it was based on an order that had been issued, an evaluation of where we were at from the standpoint of storage in the system or, you know, what was predicted as a water year, and those were sent out as a result. But I think we're premature.

Hearing Transcript, p. 44, lines 10-22 (emphasis added). A true and correct copy of portions of the *Hearing Transcript* are attached hereto as Exhibit 1.

IGWA made it clear that it would not issue notices:

Ms. McHugh: *Just for the record, we aren't planning to send out any notices.*

Mr. Haemmerle: You've got a lot of confidence. That's good.

Ms. McHugh: I'll represent the IGWA ground water appropriators and the board, but we're not going to send out notices to individual groundwater users.

Hearing Transcript, p. 44, line 23 – p. 45, line 4.

After this exchange, the Director commented that all parties needed to be prepared for the possibility of an April 1st curtailment order. *See Hearing Transcript*, p. 45, lines 5-13.

7. In October 2012, Director Spackman again advised the parties that if he found material injury, curtailment would be ordered regardless of the time of year:

The Director must use the best available science, and at the same time must also protect senior-priority rights by enforcing an order finding material injury. Therefore, **the parties should be fully aware that if material**

injury is found, the order finding material injury will be enforced, regardless of the time of year in which it is issued.

Order Suspending Hearing and Setting Status Conference, p. 2 (emphasis added).

A true and correct copy of the Order Suspending Hearing and Setting Status Conference is attached hereto as Exhibit 2.

8. After Rangen waited nearly eighteen months and produced tens of thousands of documents and participated in countless depositions, Director Spackman finally held a hearing on Rangen's *Petition for Delivery Call* from May 6, 2013 to May 16, 2013. Idaho Ground Water Appropriators, Inc. ("IGWA") and the City of Pocatello ("Pocatello") were allowed to intervene in the matter and defend against Rangen's *Petition for Delivery Call*.
9. On January 29, 2014, more than eight months after the hearing was held, Director Spackman entered a *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962 ("Final Order")*. A true and correct copy of the *Final Order* is attached to Rangen's Petition for Writ of Mandate as Exhibit B. In his *Final Order*, Director Spackman found that junior-priority groundwater pumping in the ESPA is materially injuring Rangen's Water Rights. He found, among other things that:

26. As a result of declining spring flows, Rangen has been hindered in its ability to exercise its water rights from the Curren Tunnel. A number of Rangen staff testified regarding the impact of the declining flows and Rangen's ability to raise more fish if Rangen had more water. Finding of Fact 59. The Director finds the testimony of Rangen's staff on this point credible. ***The reduction in flows from the Curren Tunnel have caused a reduction in the number of fish that Rangen could raise at the Rangen Facility and impeded Rangen's full beneficial use of water that could have been diverted pursuant to its water rights.***

32. As previously discussed, as a result of declining spring flows, Rangen has been hindered in its ability to exercise its water rights from the Curren Tunnel. The reduction of flows affects the number of fish Rangen raises and the research it is able to undertake. ***Ground water diversions have reduced the quantity of water available to Rangen for beneficial use of water pursuant to its water rights.***

36. ***The Director concludes that pumping by junior ground water users has materially injured Rangen.***

Final Order, ¶¶ 26, 32 and 36 (emphasis added).

10. Consistent with his finding of material injury, Director Spackman ordered the curtailment of certain junior-priority groundwater rights within the area of common groundwater supply located West of the Great Rift. The *Final Order* stated in relevant part:

IT IS HEREBY ORDERED that, at 12:01 a.m. on or before March 14, 2014, users of ground water holding consumptive water rights bearing priority dates junior to July 13, 1962, listed in Attachment C to this order, within the area of common ground water, located west of the Great Rift, and within a water district that regulates ground water, shall curtail/refrain from diversion and use of ground water pursuant to those water rights unless notified by the Department that the order of curtailment has been modified or rescinded as to their water rights. This order shall apply to all consumptive ground water rights, including agricultural, commercial, industrial, and municipal uses, but excluding ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(1)), pursuant to IDAPA 37.03.11.020.11.

Final Order, p. 42.

11. Director Spackman also ordered that the holders of ground water rights affected by the *Final Order* had the right to file a mitigation plan in order to continue to use their rights out of priority and phased-in the mitigation requirement over a period of five years.

Director Spackman ordered:

IT IS FURTHER ORDERED that holders of ground water rights affected by this Order may participate in a mitigation plan through a Ground Water District or Irrigation District if a plan is proposed by a Ground Water District or Irrigation District. *The mitigation plan must provide simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen. If mitigation is provided by direct flow to Rangen, the mitigation may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year.* Holders of ground water rights that are not members of a ground water district may be deemed a nonmember participant for mitigation purposes pursuant to H.B. No. 737 (Act Relating to the Administration of Ground Water Rights within the Eastern Snake Plain, ch. 356, 2006 Idaho Sess. Laws 1089) and Idaho Code § 42-5259. If a mitigation plan is approved and the holder of such a junior priority ground water right elects not to join a ground water district, the Director will require curtailment.

Final Order, p. 42 (emphasis added).

12. Director Spackman explained how he determined the phased-in mitigation requirement in an *Order on Reconsideration* entered on March 4, 2014. A true and correct copy of the *Order on Reconsideration* is attached to *Rangen's Petition for Writ of Mandate* as Exhibit C. He explained in relevant part:

The volume of mitigation water required during the first four years of the five year phase in period was calculated using the transient, superposition version of ESPAM2.1. The benefit of curtailment to the aquifer was simulated at a constant rate equivalent to the average annual consumptive use. The simulated volume of water accruing to the Rangen model cell during each of the first four years was calculated from the model results and multiplied by 63% to predict the volume of benefit at the Martin-Curren Tunnel. The volume accruing to the Martin-Curren Tunnel during each year was converted to an average discharge rate in cubic feet per second. The predicted volume of benefit at the Martin-Curren tunnel during each of the first four years of curtailment was found to be 2,442 AF (3.4 cfs), 3,742 AF (5.2 cfs), 4,368 AF (6.0 cfs) and 4,813 AF (6.6 cfs).

Order on Reconsideration, p. 5.

13. On February 11, 2014, IGWA filed a *Petition to Stay Curtailment, and Request for Expedited Decision* ("IGWA's *Petition to Stay Curtailment*"). A true and correct copy

of IGWA's *Petition to Stay Curtailment* is attached to *Rangen's Petition for Writ of Mandate* as Exhibit D.

14. On February 12, 2014, IGWA filed a *Mitigation Plan and Request for Hearing* ("*First Mitigation Plan*"). A true and correct copy of the *First Mitigation Plan* is attached to *Rangen's Petition for Writ of Mandate* as Exhibit E.

15. Rangen opposed IGWA's *Petition to Stay Curtailment* by filing *Rangen's Response in Opposition to IGWA's Petition to Stay Curtailment* ("*Rangen's Opposition to Stay*"). A true and correct copy of *Rangen's Opposition to Stay* is attached to *Rangen's Petition for Writ of Mandate* as Exhibit F. Rangen argued, among other things, that a stay was not proper because the Department's Conjunctive Management Rules provide that out-of-priority water use can only occur pursuant to a properly enacted mitigation plan that satisfies the mitigation obligation set forth in the *Final Order*. See *Rangen's Opposition to Stay*, p. 6 (citing *In the Matter of Distribution of Water to Various Water Rights*, _____ Idaho _____, _____ P.3d _____ (2013 Opinion No. 134)).

16. Before a hearing to approve IGWA's First Mitigation Plan was held, Director Spackman granted IGWA's *Petition to Stay Curtailment*. A true and correct copy of the *Order Granting IGWA's Petition to Stay Curtailment* ("*Stay Order*") is attached to *Rangen's Petition for Writ of Mandate* as Exhibit G. Director Spackman granted the stay, holding that:

Given that IGWA has submitted a mitigation plan, which appears on its face to satisfy the criteria for a mitigation plan pursuant to the Conjunctive Management Rules and the requirements of the Director's Curtailment Order, and because of the disproportional harm to IGWA members when compared with the harm to Rangen if a temporary stay is granted, the

Director will approve the temporary stay pending a decision on the mitigation plan. The Director will conduct an expedited hearing for the mitigation plan and to [sic] issue a decision shortly thereafter. ***Ground water users are advised that in the event the mitigation plan is not approved, the curtailment order will go into effect immediately.***

Stay Order, p. 5 (emphasis added).

17. On March 17-19, Director Spackman held a hearing on IGWA's First Mitigation Plan.

18. Contrary to Director Spackman's initial impression, he found after a hearing that IGWA's First Mitigation Plan did not satisfy the 3.4 cfs mitigation obligation for the first year. *See Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order ("First Mitigation Plan Order")* entered on April 11, 2014. A true and correct copy of the *First Mitigation Plan Order* is attached to *Rangen's Petition for Writ of Mandate* as Exhibit H.

19. As part of the *First Mitigation Plan Order*, Director Spackman also lifted the stay that had previously been granted to IGWA and modified the original curtailment order contained in the *Final Order on Rangen's Petition for Delivery Call*.¹ He ordered in relevant part:

IT IS FURTHER ORDERED that the stay issued in the February 21, 2014, *Order Granting IGWA's Petition to Stay Curtailment* of the Curtailment Order is hereby lifted.

¹ Rangen and IGWA have both filed Petitions for Judicial Review of the Final Order. *See Rangen v. IDWR*, Twin Falls County Case No. CV-2014-1338 and *IGWA v. IDWR*, Gooding County Case No. CV-2014-179. Both Petitions were pending in the SRBA at the time Director Spackman modified the original curtailment order as part of his First Mitigation Plan Order. Rangen disagrees with how Director Spackman has calculated certain mitigation credits approved under IGWA's First Mitigation Plan and filed a *Motion for Reconsideration*. Director Spackman denied Rangen's *Motion for Reconsideration* on May 16, 2014.

First Mitigation Plan Order, p. 20.

20. Even though Director Spackman had previously advised ground water users when he granted the stay of curtailment that: “. . . *in the event the mitigation plan is not approved, the curtailment order will go into effect immediately,*” he did not order immediate curtailment. Instead, he granted another three-week delay. He ordered:

IT IS FURTHER ORDERED that, at 12:01 a.m. on or before May 5, 2014, users of ground water holding consumptive water rights bearing priority dates junior or equal to October 13, 1978, listed in Attachment A to this order, within the area of common ground water, located west of the Great Rift, and within a water district that regulates ground water, shall curtail/refrain from diversion and use of ground water pursuant to those water rights unless notified by the Department that this amended order of curtailment has been modified or rescinded as to their water rights. This order shall apply to all consumptive ground water rights, including agricultural, commercial, industrial, and municipal uses, but excluding ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(1)), pursuant to IDAPA 37.03.11.020.11.

First Mitigation Plan Order, p. 21.

21. Director Spackman also gave a contingent alternative mitigation obligation which would further limit the scope of the curtailment order if Butch Morris, the holder of Martin-Curren Tunnel water rights, agreed to cease diverting water from the Martin-Curren Tunnel. *See First Mitigation Plan Order*, pp. 21-22.

22. On April 17, 2014, just six days after Director Spackman lifted the stay, IGWA filed a *Second Petition to Stay Curtailment and Request for Expedited Decision* (“IGWA’s *Second Stay Petition*”). A true and correct copy of IGWA’s *Second Stay Petition* is attached to Rangen’s Petition for Writ of Mandate as Exhibit I.

23. Rangen opposed IGWA's *Second Stay Petition* by filing *Rangen's Response in Opposition to IGWA's Second Petition to Stay Curtailment* ("*Rangen's Opposition to Second Stay Petition*"). A true and correct copy of *Rangen's Opposition to Second Stay Petition* is attached hereto as Exhibit J.

24. Director Spackman granted IGWA's *Second Stay Petition* on April 28, 2014. See *Order Granting IGWA's Second Petition to Stay Curtailment* ("*Second Stay Order*"). A true and correct copy of the *Second Stay Order* is attached hereto as Exhibit K.

25. In the *Second Stay Order*, Director Spackman held that:

Curtailment of diversions of ground water for irrigation in April and May would provide little benefit to Rangen because significant irrigation with ground water does not normally intensify until late May or June. In contrast, curtailment of the irrigation of 25,000 acres during the period of reduced ground water use is significant. IGWA's Second Mitigation Plan has been published and a pre-hearing status conference is scheduled for April 30, 2014. The Second Mitigation Plan proposes direct delivery of water from Tucker Springs to Rangen. ***The plan is conceptually viable, and given the disparity in impact to the ground water users if curtailment is enforced versus the impact to Rangen if curtailment is stayed, the ground water users should have an opportunity to present evidence at an expedited hearing for their second mitigation plan.*** All of the standard of the conjunctive management rules will apply at the hearing.

Second Stay Order, p. 4 (emphasis added).

26. IGWA's Second Mitigation Plan involves acquiring Tucker Springs water and piping it over a mile to the Research Hatchery and delivering it over the canyon rim to the raceways. A true and correct copy of IGWA's *Second Mitigation Plan* is attached as Exhibit L to *Rangen's Petition for Writ of Mandate*. On May 19, 2014, IGWA provided an engineering report showing that the delivery system will not be complete until at

least March 2015 and that there are water rights, easements, permits and governmental approvals that have to be obtained.

27. On May 6, 2014, Director Spackman sent Rangen, IGWA and other protestants a letter addressing the standard of proof that will be used to assess IGWA's Second Mitigation Plan ("*Director's Letter*"). A true and correct copy of the *Director's Letter* is attached to *Rangen's Petition for Writ of Mandate* as Exhibit M. The *Director's Letter* states:

At the Status Conference, a question was raised regarding the evidence IGWA must offer to satisfy its burden of proof at the hearing for the Second Mitigation Plan. At the request of the parties for guidance on this issue, I am providing a copy of the Final Order Concerning the Over-the-Rim Mitigation Plan, Doc. No. CM-MP-2009-004 (Mar. 18, 2011) ("*Order*") with this letter. The key points from the Order can be summarized as follows:

- ***Preliminary engineering plans may be acceptable proof at a hearing for a proposed mitigation plan. However, approval may be conditioned upon submittal of final plans.***
- ***A mitigation plan may be approved upon conditions when the necessary easements and constructions permits are pending.***
- ***A mitigation plan may be approved upon conditions when a transfer is pending.***

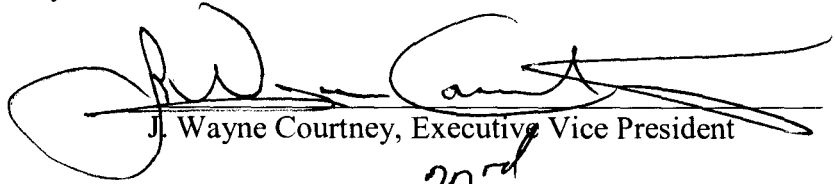
Director's Letter, p. 1 (emphasis added).

28. It appears from the *Director's Letter* and his *Second Stay Order* that he believes he has the authority to approve IGWA's Second Mitigation Plan and continue to allow junior-priority groundwater pumping that is causing material injury to Rangen even though the plan does not comply with the mitigation obligation set forth in the *Final Order*.

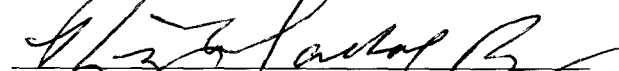
29. Rangen sustains material injury to its spring water flows every day that junior-priority groundwater pumpers are allowed to pump without delivering the mitigation water that Director Spackman has ordered them to provide. Rangen's *Petition for Delivery Call* has been pending for over two and a half years and IGWA has had ample to put together a mitigation plan. Director Spackman told Rangen and IGWA to be prepared for curtailment. To date, curtailment has not happened even though IGWA has not fulfilled its mitigation obligation to Rangen.

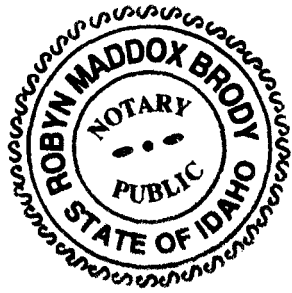
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DATED this 22nd day of May, 2014.


J. Wayne Courtney, Executive Vice President

SUBSCRIBED AND SWORN TO before me this 22nd day of May, 2014.


Notary Public for State of Idaho
Residing at Boyer, ID
Commission Expires: 11/27/14



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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

* * * * *

IN THE MATTER OF DISTRIBUTION)
OF WATER TO WATER RIGHT NOS.)
36-02551 and 36-07694) CM-DC 2011-004
)
(RANGEN, INC.))
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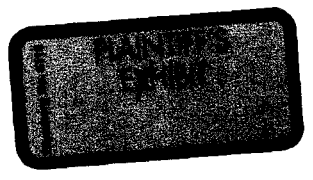
REPORTER'S TRANSCRIPT
OF RECORDED HEARING

DATE: May 22, 2012

LOCATION: Idaho Department of Water Resources
322 East Front Street,
Boise, Idaho.

Before Interim Director Gary Spackman

Transcribed by:
Maureen Newton, CSR #321
P.O. Box 132
Heyburn, ID 83336



1 they just sit there and be quiet and nonobtrusive
2 (inaudible) okay.
3 MR. SPACKMAN: Wasn't there a test at the end?
4 MS. SUKOW: There's no snoring allowed, though.
5
6 Voices talking simultaneously.
7
8 MR. SPACKMAN: You want to show that you passed
9 the class.
10 MR. HAMMERLE: If it's multiple choice I'll give
11 it a go.
12
13 Voices talking simultaneously.
14
15 MR. SPACKMAN: All right, anything else we need
16 to talk about?
17 MR. BAXTER: Director Spackman, we did receive a
18 petition from Pocatello yesterday, it looks like it was
19 sent to Victoria, so I think that's -- Pocatello has moved
20 to be designated as a respondent or in the alternative to
21 intervene in the Rangen proceeding. So I don't know if --
22 I think under the rules the parties have seven days to file
23 any challenge to it, or are you willing to stipulate to
24 that at this point and we can just issue an order?
25 MR. HAMMERLE: You know, Garrick, I don't want to

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1 be problematic, but I think that just came through -- when
2 was that? Yesterday? We'd just like to look at it.
3 MR. BAXTER: Sure. Okay.
4 MR. SPACKMAN: Okay. Thanks everybody.
5 MR. HAMMERLE: Director, there was one more issue
6 since we're moving on a fairly rapid timeframe, which
7 brings us up to notices of curtailment. I don't know if
8 you want to go there yet, or -- Notices of possible
9 curtailment?
10 MR. SPACKMAN: What is it that you're asking
11 about?
12 MR. HAMMERLE: Maybe Robyn can articulate it
13 better.
14 MS. BRODY: Do you think you will issue them in
15 advance? I mean, with the January hearing date will you
16 issue them sometime prior to that, just to let the farmers
17 know that the call's out there and that it's an issue?
18 MR. SPACKMAN: Well, you know, we've issued some
19 of those in the past. We didn't issue them last year.
20 MS. McHUGH: Well, I think the Supreme Court said
21 specifically you can't have curtailment orders before the
22 hearing. You're saying just a fyi?
23 MS. BRODY: Well, a notice of possible
24 curtailment.
25 Voices talking simultaneously.

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1 MR. HAMMERLE: That's what we're asking.
2 MS. BRODY: Yeah, especially because -- and I
3 appreciate the director's comments this morning that you
4 were looking at an April 1 drop-dead date, but it's one of
5 those things that, depending upon when orders get issued
6 you hate to bump up against arguments like, well, we're not
7 prepared for this, we haven't taken this into
8 consideration. And so I guess from our perspective it's
9 good to let everybody know that this is out there.
10 MR. SPACKMAN: My inclination is that we place
11 that burden upon Candace. She's representing those folks,
12 the groundwater users and they should, I guess, have the
13 ability to anticipate the possibility of curtailment. As
14 we go through I'm not sure I want to be issuing a notice
15 ahead of some decision. I think that's a little difficult.
16 When the notices were issued I think they were issued after
17 Carl Dreyer's initial orders, and so it was based on an
18 order that had been issued, an evaluation of where we were
19 at from the standpoint of storage in the system or, you
20 know, what was predicted as a water year, and those were
21 sent out as a result. But I think we're premature
22 (inaudible).
23 MS. McHUGH: Just for the record, we aren't
24 planning to send out any notices.
25 MR. HAMMERLE: You've got a lot of confidence.

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1 That's good.
2 MS. McHUGH: I'll represent the IGWA ground water
3 appropriators and the board, but we're not going to send
4 out notices to individual groundwater users.
5 MR. SPACKMAN: I guess when I said what I did I
6 think everybody -- we can joke. I think it's important we
7 have a collegial relationship here, but the sobriety of
8 what we're involved in, I think everybody knows -- the
9 groundwater users probably know that better than they once
10 did. And so we're talking about an April 1st order
11 issuance and I think everybody needs to be looking at this
12 and saying it's a possibility. Okay. Anything else?
13 Thanks to everybody.
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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF DISTRIBUTION OF)
WATER TO WATER RIGHT NOS. 36-02551) CM-DC-2011-004
AND 36-07694)
RANGEN, INC.) ORDER SUSPENDING
HEARING AND SETTING
STATUS CONFERENCE
)
)
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_____)**

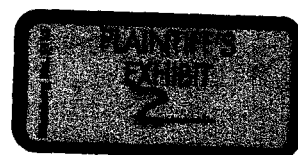
On October 4, 2012, the Director of the Department of Water Resources (“Director” or “Department”) was notified by Department staff of a data error in the Eastern Snake Plain Aquifer Model 2.0 (“ESPAM 2.0”). On October 4, 2012, by electronic mail, Department staff notified the Eastern Snake Plain Aquifer modeling committee of the error:

During review of ESPAM2 model data, [Department staff] noticed that aquifer recharge from seepage at Mud Lake was significantly higher in ESPAM2 than was calculated and used for ESPAM1.1 (approx. 140,000 vs. 9,000 Acre Feet/Year). Recall that Camas Creek inflows to Mud Lake are applied as perched river seepage, and along with other inputs, are used to determine recharge to the aquifer at the same model cells as the lake. Subsequently, a conversion error was found in the ESPAM2 spreadsheet that calculates the seepage based on the water balance for the lake.

In order to ensure that the Department is utilizing the best available science, the Director is compelled to suspend the hearing until further notice.

The Director recognizes that the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed a *Motion to Continue Hearing and Request for Expedited Decision* (“Motion”) with the Department on September 26, 2012. In the Motion, IGWA sought to move the hearing date from January 28, 2013 to March 11, 2013. On October 1, 2012, Rangen, Inc. (“Rangen”) filed a *Response in Opposition to IGWA’s Motion to Continue Hearing and Request for Expedited Decision* (“Response”). On October 4, 2012, IGWA filed a *Reply to Rangen’s Response in Opposition to IGWA’s Motion to Continue*. In its Response, Rangen stated as follows:

IGWA is looking for any way to delay the hearing of this matter because even a slight delay will probably mean that curtailment will not be ordered in 2013 even if Rangen prevails on its material injury claim. The Director has made it clear



that April 1 is the “drop dead” date for ordering curtailment and that he must have time to issue a decision before that date or curtailment will not be ordered.

Response at 18.

While it would be favorable for the parties to know their obligations entering the irrigation season, the Director is receptive to Rangen’s concern. There is no provision in the conjunctive management rules, Idaho Code, or Idaho case law that prevents the Director from curtailing junior-priority ground water users during the irrigation season. *See e.g. North Snake Ground Water District et al. v. Idaho Dept. of Water Resources et al.*, Case No. 2009-0000431 (Gooding County, Aug. 11, 2009) (petition for judicial review by North Snake Ground Water District and Magic Valley Ground Water District challenging the Director’s decision to curtail junior-priority ground water users during the 2009 irrigation season).

The Director must use the best available science, and at the same time must also protect senior-priority rights by enforcing an order finding material injury. Therefore, the parties should be fully aware that if material injury is found, the order finding material injury will be enforced, regardless of the time of year in which it is issued.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that the hearing in the Rangen, Inc. conjunctive management delivery call is SUSPENDED until further order of the Director.

IT IS FURTHER ORDERED that a status conference in this matter shall be held on October 10, 2012 at 1:30 p.m. Parties may participate in-person, or by telephone. If participating by telephone, dial 215-446-0193 and provide participant code 275568#.

Dated this 4th day of October, 2012.

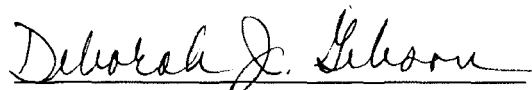


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2012, the above and foregoing document was served on the following by providing US mail, postage prepaid, and email:

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Deborah J. Gibson
Administrative Assistant to the Director