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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.

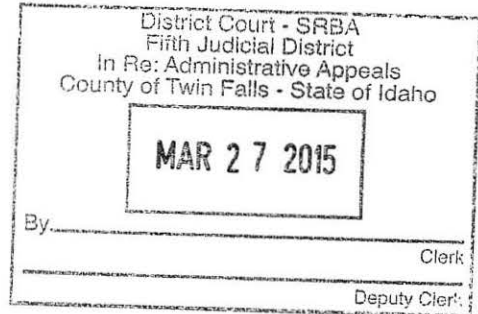
THE IDAHO DEPARTMENT OF WATER
RESOURCES and GARY SPACKMAN in his
capacity as Director of the Idaho Department of
Water Resources,

Respondents,

IDAHO GROUND WATER
APPROPRIATORS, INC.,

Intervenor.

Case No. CV-2014-4970



RANGEN, INC.'S OPENING BRIEF

On Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

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I. STATEMENT OF THE CASE

This appeal is taken from the Director of the Idaho Department of Water Resources *Order Granting Rangen's Motion to Determine Morris Exchange Water Credit; Second Amended Curtailment Order* issued in Case Nos. CM-DC-2011-004, CM-MP-2014-001, and CM-MP-2014-006 on November 21, 2014 ("*Order*"). (A.R., CV-2014-2446, p. 758-808; A.R. CV-2014-4970, p.99-149). This Order purports to "grant" *Rangen, Inc.'s Motion to Determine Morris Exchange Credit and Enforce Curtailment* filed on October 31, 2014. (A.R., CV-2014-2446, p. 660-669; A.R. CV-2014-4970, p.1-10). Despite "granting" Rangen's motion, acknowledging continued material injury, and acknowledging a lack of mitigation, the Order allowed out-of-priority ground water pumping to continue. The gravamen of this appeal is the Director's authority to continue to allow such out-of-priority ground water pumping in the absence of adequate mitigation.

II. PROCEDURAL BACKGROUND AND STATEMENT OF FACTS

The Order in this case is another in a long series of orders allowing out-of-priority pumping to continue without mitigation. On January 29, 2014 the Director issued the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (the "*Curtailment Order*") (Supp. A.R., CM-DC-2014-004, p. 1-104). The Director found that Rangen is being materially injured by out-of-priority ground water pumping and ordered curtailment of ground water users holding consumptive rights junior to July 13, 1962. (Supp. A.R., CM-DC-2014-004, p.41.) Curtailment was to commence on March 14, 2014. (Id., p.42). The Curtailment Order also established a mitigation obligation. (Id., p. 42). Despite the Curtailment Order, as a result of a series of decisions by the Director outlined below, out-of-priority ground water pumping continued unabated. Although a series of mitigation plans was proposed, some of which were approved, adequate mitigation was never provided during 2014.

Before curtailment was to go into effect, on February 21, 2014, the Director issued the first stay of Curtailment by his *Order Granting IGWA's Petition to Stay Curtailment* in CM-DC-2011-004. (Supp. A.R., CM-DC-2011-004, p. 143-149; A.R., CV-2014-2446, p. 68-74). That stay was based upon the possibility of future mitigation. "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 to the harm to Rangen if a temporary stay is granted, the Director will approve a temporary stay pending a decision on the mitigation plan." (Supp. A.R., CM-DC-2011-004, at p. 147; A.R., CV-2014-2446, at p. 72).

The potential mitigation upon which the first stay was granted was insufficient to meet the mitigation obligation. On April 11, 2014, the Director issued an *Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order*, allowing IGWA mitigation credit for a some past and future aquifer enhancement activities and for water from the Morris Exchange Agreement. (A.R. CV-2014-2446, p.464-520; Supp. A.R., CM-DC-2011-004, p.201-257). The Director acknowledged that this mitigation was insufficient and ordered amended curtailment of Ground Water Rights junior to October 13, 1978 commencing May 5, 2014. On May 16, 2014, The Director issued an amended order with respect to IGWA's first mitigation plan which did not substantially modify the curtailment requirements of its April 11th order. (A.R. CV-2014-2446, p.597-620; Supp. A.R., CM-DC-2011-004, p.309-332).

Before the amended curtailment order was to go into effect, on April 28, 2014, the Director issued an *Order Granting IGWA's Second Petition to Stay Curtailment* in CM-DC-2011. (A.R. CV-2014-2446, p.583-591; Supp. A.R., CM-DC-2011-004, p.30-308). This stay of curtailment

was also based upon the possibility of future mitigation. “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. . . . The Director will revisit the stay at the time a decision on IGWA’s Second Mitigation Plan is issued.” (A.R. CV-2014-2446, at p.586; Supp. A.R., CM-DC-2011-004, at p.303).

IGWA’s Second Mitigation Plan was approved, however, the plan did not propose to provide any water during 2014. On June 20, 2014, the Director issued an *Order Approving IGWA’s Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order*. (Supp. A.R., CM-DC-2011-004, p.352-417). This order conditionally approved the Second Mitigation Plan, on condition that “the Tucker Springs project must deliver water to Rangen no later than January 19, 2015. Failure to provide water by January 19, 2015, to Rangen will result in curtailment of water rights junior or equal to August 12, 1973, unless another mitigation plan has been approved and is providing water to Rangen at its time of need.” (Id., at p. 369). The existing mitigation had already been determined to be inadequate. . (A.R. CV-2014-2446, at p.483; Supp. A.R., CM-DC-2011-004, at. p.220). Acknowledging that no new water would be provided during 2014, the Director allowed out-of-priority pumping to continue through the entire 2014 irrigation season based upon a manipulation of the timing of credit for the Morris Exchange. (Supp. A.R., CM-DC-2011-004, at p.368 & 369). Once again the Director justified continued out-of-priority pumping based upon the possibility of water being provided in the future. (Id., at p. 369). The Tucker Springs project was ultimately abandoned and IGWA subsequently withdrew the Second Mitigation Plan. (A.R., CV-2014-2446, at p.759, FN2).

The Tucker Spring project was replaced by a Fourth Mitigation Plan, which proposed to pump water through a pipeline from Magic Springs. (A.R. CV-2014-4633, p.1-24). Like the Second Mitigation Plan, the Fourth Mitigation Plan did not propose to provide any water in 2014. On October 29, 2014, the Director issued an *Order Approving IGWA's Fourth Mitigation Plan*. (A.R. CV-2014-4633, p.178-240). The Fourth Mitigation Plan was approved subject to similar conditions as the Second Mitigation Plan. (A.R. CV-2014-4633, at pp.197-198). Water was to be provided by January 19, 2015.

Once the Curren Tunnel measurements were available for the 2014 irrigation season, it became apparent that despite the Director's manipulation of the Morris Exchange Agreement credit, even the Director's paper water was insufficient to satisfy the 2014 mitigation obligation. On October 31, 2014 Rangen filed *Rangen, Inc.'s Motion to Determine Morris Exchange Water Credit and Enforce Curtailment*. . (A.R., CV-2014-2446, p. 660-669; A.R. CV-2014-4970, p.1-10) On November 21, 2014, the Director issued the Order which is at issue in this appeal, the *Order Granting Rangen's Motion to Determine Morris Exchange Water Credit; Second Amended Curtailment Order* (A.R., CV-2014-2446, p.758-808; A.R. CV-2014-4970, p.99-149). This order stated that "[t]he Director concurs with Rangen's calculations that the Morris Exchange Agreement credit has expired and that the Director must order curtailment to address the shortfall." (A.R., CV-2014-2446, at p.761; A.R. CV-2014-4970, at p.102). The Director nevertheless ordered that out-of-priority pumping could continue through at least January 19, 2015.

The result of this series of orders is that although the Director determined on January 29, 2014 that Rangen is suffering material injury due to junior ground water pumping, that pumping has been allowed to continue unabated. At the same time, the water available to supply Rangen's water rights has continued to decline. During the 2014 irrigation season, the flow in the Curren

Tunnel, which is the source of Rangen's water rights dropped as low as 0.65 cfs on July 22, 2014. (A.R. CV-2014-4970, Exhibit C, Curren Tunnel Flow Data, at p. 37).

III. STANDARD OF REVIEW

The standard of review for factual matters under the Idaho Administrative Procedures Act is as follows:

The Idaho Administrative Procedures Act (IDAPA) governs the review of local administrative decisions. In an appeal from the decision of district court acting in its appellate capacity under the IDAPA, this Court reviews the agency record independently of the district court's decision. The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. Here, the Board is treated as an administrative agency for purposes of judicial review. . . . The Court may overturn the Board's decision where the Board's findings: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in I.C. § 67-5279(3), and then that a substantial right has been prejudiced. If the Board's action is not affirmed, "it shall be set aside ... and remanded for further proceedings as necessary."

Urrutia v. Blaine County, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000) (citations omitted).

IV. ARGUMENT

A. The Director exceeded his authority and violated the Idaho Constitution, Statutes and Administrative Rules by allowing continued out-of-priority groundwater pumping without mitigation.

The CM Rules and the doctrine of prior appropriation mandate that upon a determination of material injury, out-of-priority pumping may only be allowed pursuant to a properly approved "mitigation plan." *In the Matter of Distribution of Water to Various Water Rights*, 155 Idaho 640, 653, 315 P.3d 828, 841 (2013); IDAPA 37.03.11.040.01. By issuing the Order which is at issue

in this matter, the Director exceeded his authority and violated Idaho law by allowing out-of-priority pumping without mitigation following a determination of material injury.

As noted above, the Director approved several mitigation plans including the Fourth Mitigation Plan recognizing credit for the so-called Morris Exchange Water. *See Order* (A.R., CV-2014-2446, at p. 759; A.R. CV-2014-4970, at p.100). This credit was granted based upon a prediction of 2014 irrigation season flows in the Curren Tunnel. *Id.* The Director calculated that this credit would mitigate for out-of-priority ground water depletions through January 19, 2015. *Id.* It turned out that the Director's predictions were incorrect. (A.R., CV-2014-2446, at p. 760; A.R. CV-2014-4970, at p.101).

6. Using the same approach employed by the Department, but with actual 2014 flow data, Rangen recalculated the credit computed for the Morris Exchange Agreement. . . . There is no mitigation credit for the time period from October 2, 2014 through January 18, 2015.

(A.R., CV-2014-2446, at p. 760; A.R. CV-2014-4970, at p.101) (citations omitted). As a result of the actual flow available for the 2014 irrigation season, the Director concluded:

4. The Director previously concluded the Morris Exchange Agreement provided mitigation credit to IGWA through January 19, 2015, based on predicted Martin-Curren Tunnel flows. Because the 2014 Martin-Curren Tunnel flow data established that actual flows were less than predicted, the mitigation credit from the Morris Exchange Agreement must be reconsidered and adjusted. The Director concurs with Rangen's calculations that the Morris Exchange Agreement credit has expired and that the Director must order curtailment to address the shortfall.

(A.R., CV-2014-2446, at p. 760-761; A.R. CV-2014-4970, at p.101-102). Despite this conclusion, the Director once again allowed out-of-priority pumping to continue.

6. The Director concludes that sixty (60) days is a reasonable timeframe for junior ground water users to plan for curtailment. Sixty days from today is January 20, 2015. As described above, the Director previously ordered that junior ground water users be curtailed on January 19, 2015, once the Morris Exchange Agreement credit expired unless additional mitigation is provided. Junior ground water users should have already been planning for the contingency that curtailment could occur on January 19, 2015. For consistency, the Director will adopt January 19, 2015, as the curtailment date.

(A.R., CV-2014-2446, at p. 761; A.R. CV-2014-4970, at p.102). It is interesting to note that the Director waited until precisely 60 days before the previously established curtailment date to issue the Order on Rangen's unopposed motion.

The Director exceed his authority by allowing continued out-of-priority ground water pumping without adequate mitigation.

B. Mootness.

January 19, 2015 has passed. It is anticipated that other parties or the Court itself may question whether this appeal is now moot. However, the issue of the Director's authority to allow out-of-priority pumping with mitigation in place continues to arise. The time frames involved are too short to allow meaningful judicial review. This can clearly be seen from the series of orders discussed above. There are three exceptions to the mootness doctrine: (1) possibility of collateral legal consequences imposed on appellant; (2) conduct is likely to evade judicial review and is capable of repetition; and (3) issue raises concerns of substantial public interest. *See Ameritel Inns, Inc. v. Greater Boise Auditorium District*, 141 Idaho 849, 852, 119 P.3d 624, 627 (2005). The second of these three exceptions is applicable in this case as the issue involved has already proved itself to be both capable of repetition and likely to evade judicial review.

C. Rangen's substantial rights have been prejudiced.

Rangen's substantial rights have been prejudiced by the Order at issue. The Order diminishes Water Right Nos. 36-02551 and 36-07694, as those rights were decreed by the Snake River Basin Water Adjudication and permitted and licensed by the Department. Furthermore, Rangen's substantial rights have been prejudiced by the failure of the Director and Department to deliver the amount of water necessary to address Rangen's injury caused by junior-priority groundwater pumping.

V. CONCLUSION

For the reasons specified above, Rangen requests that the Court find that the Order was in violation of Idaho law, and in excess of the statutory authority or administrative rules of the Department.

DATED this 27th day of March, 2015.

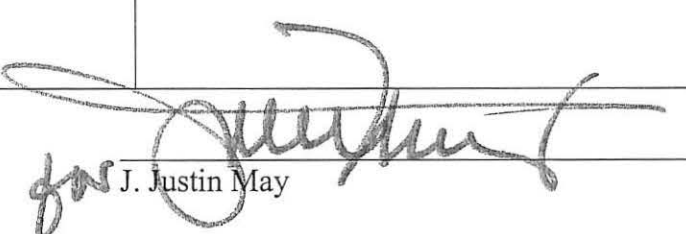
MAY, BROWNING & MAY, PLLC

By 
for J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 27th day of March, 2015 he caused a true and correct copy of the foregoing document to be served by the method indicated upon the following:

Original: SRBA District Court 253 3 rd Avenue North P.O. Box 2707 Twin Falls, ID 83303-2707	Hand Delivery <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input type="checkbox"/>
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"/>
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for J. Justin May