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Department of Water Resources

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-15501, 36-02551, AND 36-07694	**RANGEN, INC.'S PETITION REQUESTING HEARING ON SECOND AMENDED ORDER OF MAY 19, 2005 AND REQUESTING APPOINTMENT OF AN INDEPENDENT HEARING OFFICER**

COMES NOW Rangen, Inc., through counsel, and submits this Petition Requesting a Hearing on the Second Amended Order issued by the Director of the Idaho Department of Water Resources on May, 19, 2005. This Petition is submitted pursuant to the Idaho Administrative Procedure Act, Idaho Code § 67-5201, et. seq., as adopted by Idaho Code § 42-1701A(3) and the Department's Rules of Procedure, IDAPA 37.01.01, et. seq. Rangen requests a hearing on all aspects of the Second Amended Order and requests the appointment of an independent hearing officer pursuant to Idaho Code § 42-1701A(2).

I. INTRODUCTION

Rangen holds water rights with a source in the Curran Tunnel, a spring that is part of the Thousand Springs complex. Rangen conducts research and development and raises fish with those rights at its research facility. The quantity of water flowing from the Curran Tunnel has been decreased substantially. The current flow is sufficient to satisfy only approximately 15% of Rangen's decreed rights.

The Curran Tunnel, like the other springs in the Thousand Springs complex, is hydraulically connected to the Eastern Snake Plain Aquifer. The measured decrease in flows at the Curran Tunnel can be attributed to many sources including depletions due to ground water pumping from the Eastern Snake Plain Aquifer. Some of the water rights causing ground water depletions have priority dates junior to the water rights utilized in Rangen's facility.

II. PROCEDURAL HISTORY

On September 23, 2003 and again on October 6, 2003 Rangen requested that the Director fulfill his duty to administer water rights in accordance with priority. The Director responded on February 25, 2004 with an order curtailing "consumptive ground water rights in Water District No. 130 that are junior in priority to July 13, 1962 . . . unless sufficient replacement water is provided as set forth herein." That order was amended on March 10, 2004 to reduce the simulated reach gains expected as a result of curtailment from 53,000 acre feet to 26,500 acre feet. On or about March 20, 2004, Rangen, the State of Idaho, and the parties to the contested case resulting from Rangen's request for administration, executed the Eastern Snake Plain Aquifer Mitigation, Recovery, and Restoration Agreement for 2004. Pursuant to that agreement "All pending delivery calls against the aquifer and conjunctive management litigation" were stayed and the parties agreed there would be "no further delivery calls against the aquifer . . . from March 15, 2004 to March 15, 2005." Shortly before the expiration of the agreement, on

March 14, 2005, the Director rescinded the March 10, 2004 Amended Order. A Second Amended Order was issued by the Director on May 19, 2005. Rangen now requests a hearing on all aspects of this Second Amended Order and requests appointment of an independent hearing officer.

III. GROUNDS FOR REQUESTING HEARING

Pursuant to Idaho Code § 42-1701A(3) Rangen requests a hearing on all aspects of the Director's Second Amended Order upon the following grounds. Rangen objects to the Directors' findings of fact and conclusions of law except as specifically stated herein. Paragraph references are to paragraph numbers in the Director's Second Amended Order unless specified otherwise.

1. In paragraph 6 the Director finds that "the reformulated and recalibrated ground water model . . . should be used to determine the extent of depletions to springs discharging in the Thousand Springs area resulting from the diversion and use of ground water." In paragraph 25 the Director finds that "The results of simulations from the Department's ground water model are suitable for making factual determinations on which to base conjunctive administration of surface water rights diverted from the Snake River and its tributaries and ground water rights diverted from the ESPA." These findings are in error to the extent that the model is used to quantify and minimize the injury suffered by the holders of senior water rights due to out of priority ground water pumping. On information and belief the ground water model utilized by the Director is not designed or adequately calibrated to specifically quantify the injury suffered at an individual spring or by an individual water rights holder. On information and belief the ground water model utilized by the Director is not designed or adequately calibrated to specifically quantify the injury caused by an individual junior pumper. Rangen is entitled to a hearing and discovery regarding the basis for the Department's model and the adequacy of its calibration.

2. The Department's ground water model divides the Thousand Springs area into six adjacent groupings of spring complexes "based on the relative magnitude of spring discharge" as described in paragraph 20. The Director improperly relied upon these arbitrary groupings of springs to determine the magnitude of injury suffered at Rangen's facility. Following the logic of the Director's order a different arbitrary grouping of springs could result in a different calculation of injury. On information and belief the accuracy of the model and its calibration varies between and within the described spring reaches. Rangen is entitled to discovery to determine the basis for the Director's grouping of springs and the relative accuracy of the model for describing impacts on these groupings of springs.

3. The Director erred by placing the burden of declining ground water levels – from whatever cause – on senior water rights holders. The doctrine of prior appropriation does not guarantee that senior water holders will always have water. Water levels and availability may fluctuate for a number of reasons outside the control of either the Director or the Courts. However, the doctrine of prior appropriation does provide that in a time of shortage water is not available to junior water rights until senior rights are satisfied. A junior appropriator can only obtain a right to use water that is in excess of the water necessary to fill rights existing at the time of the junior's appropriation. "Each junior appropriator is entitled to divert water only at such times as all prior appropriators are being supplied under their appropriations under conditions as they existed at the time the appropriation was made." *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 9, 154 P.2d 507, 515 (1944). The relative percentage of impact due to drought, reduced recharge due to irrigation efficiency, depletions from ground water pumping, and other causes cited by the Director is irrelevant. With regard to the Director's duty to administer water rights according to priority, the only relevant questions are whether the senior water right holder

is receiving enough water to satisfy its rights as decreed and whether the senior water right would receive more water if junior pumping were curtailed.

4. The Director's Second Amended Order fails to comply with the Director's duty to administer water rights pursuant to the SRBA Court's Order Granting the State of Idaho's Motion for Interim Administration as acknowledged in paragraph 27 through 30. The Director's duty is to administer water rights in priority and *as decreed.* In paragraph 63 the Director acknowledges that "the SRBA District Court decreed water right no. 36-07694." However, based upon his own determination that "there was not water available for appropriation at the time or subsequent to the date of appropriation for water right no. 36-07694 . . . the Department erred in licensing water right no. 36-07694, and should not have recommended this right for decree in the SRBA." The Director concludes that "because water was not available to appropriate on the date of appropriation for right no. 36-07694, Rangen may not be entitled to have a delivery call recognized against junior priority water rights." The Director erred by ignoring and attempting to readjudicate Rangen's decreed water rights.

5. The Director's view of water rights as expressed in paragraph 66 is inconsistent with Idaho Law, the Idaho Constitution and the doctrine of prior appropriation. According to the Director: "The rates of diversion authorized pursuant to water rights nos. 36-15501 and 36-02551 . . . are not quantity entitlements that are guaranteed to be available to Rangen. Rather, the authorized rates of diversion are the maximum rates at which water can be diverted under these rights respectively, when such quantities of water are physically available and the rights are in priority." This is wholly inconsistent with the basic principles of Idaho water law.

6. In paragraph 67, the Director states that "Rangen can only call for the distribution of water to its rights through the curtailment of junior priority ground water rights from the hydraulically-connected ESPA when such curtailment would result in a

usable amount of water reaching Rangen's points of diversion in time of need. . .." This is basically a proper statement of the law regarding "futile calls." However, the Director's application of the rule in this matter is improper in at least two respects.

First, after determining that water would reach Rangen's facility if curtailment is ordered, the Director made no effort to determine whether that water would be usable by Rangen. Rather, the Director simply states that the resulting water is "insignificant." This determination is arbitrary and does not comply with the rule set out by the Director and quoted above. Rangen is entitled to a hearing to determine whether the water resulting from any curtailment would be in "a usable amount" and arrive at "Rangen's points of diversion in time of need."

Second, by the application of an arbitrary limitation on which diversions can be curtailed, the Director has improperly allocated the burden of proof regarding a futile call. The burden of showing that a call is futile as to any individual junior water right is on the junior appropriator. The Director has chosen to administer only those rights where 10% of the depletionary effect from junior pumping shows up as a reduction in the reach where Rangen's diversion is located. The apparent basis for this limitation is that "10% is the uncertainty in model simulations." If the Director is determining that those water rights that can't be shown to cause injury above the uncertainty in the model cannot be curtailed because they cannot be shown to cause injury, this is an impermissible shifting of the burden of proof on this issue.

7. On information and belief, the Director erred in determining the model uncertainty as 10%. The Director also erred in utilizing this 10% limitation on the model to minimize the impact of junior ground water pumping.

8. In paragraph 81 the Director states that simulated curtailment of water rights junior to January 1, 1961 within the modeled area would result in an increase of 5 cfs at steady state conditions within the spring reach that includes the Curran Tunnel.

However, the Director concludes that only those rights that meet the Director's arbitrary 10% criteria can be curtailed. Based upon this 10% criteria the Director uses a simulation curtailing 735 acres to conclude that the actual result of curtailment would be .4 cfs. The Director then completes this reduction by concluding that .4 cfs is insignificant. By this use of the 10% uncertainty, the Director has set a de facto standard for a futile call that is inconsistent with Idaho law.

9. The Conjunctive Management Rules on their face and as applied in this matter are unconstitutional and violate Idaho law including the doctrine of prior appropriation.

10. The Director erred in subjecting the doctrine of prior appropriation to a requirement of reasonable use. Once a water right has been decreed, the beneficial use decreed is not subject to reduction according to whether the Director believes the use is reasonable.

11. Idaho Code § 42-226 has no application to surface water rights.

12. Once the Director determines that injury is occurring due to out of priority diversions it is improper for the Director to determine whether curtailment can be ordered based upon "optimiz[ing] the beneficial use of all of the water of this state." The doctrine of prior appropriation together with the limitation on futile calls constitute the method used in this state for optimizing the beneficial use of water and providing that junior water rights are not curtailed needlessly or without reason. There is no provision in Idaho law providing for an examination of the relative beneficial uses of the junior and senior appropriators. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912) cited by the Director has no application to this situation.

13. Even if the director could consider and balance the water received by the holder of a senior water right against the impact on the holders of junior rights, it is improper to aggregate the impact on junior appropriators without considering that

curtailment will result in reduced injury to senior water right holders in the same spring reach as Rangen as well as other reaches. There is no indication that any of the curtailed depletions would result in wasted water. Many of the benefited senior water rights holders have made calls that are subject to other orders by the Director.

14. The Director improperly considered the impact of curtailment upon junior appropriators when deciding whether to enforce Rangen's decreed rights. In response to curtailment, a junior user cannot complain that the impact of curtailment is out of proportion to the percentage of curtailed water that will reach the senior water right.

15. The standard for material injury used by the Director is inconsistent with Idaho law.

16. The Director's Second Amended Order results in a taking of Rangen's water rights in violation of both the Idaho and United States Constitutions.

17. The application of factors enumerated in Rule 42 of the Conjunctive Management Rules to qualify material injury to a senior water rights holder as set out in conclusion of law 23 is unconstitutional and violates the doctrine of prior appropriation.

18. Rangen reserves the right to raise additional issues during the requested hearing.

19. Rangen reserves the right to challenge the Director's Second Amended Order in an action or actions in District Court.

IV. REQUEST FOR INDEPENDENT HEARING OFFICER

Rangen requests that the Director appoint an independent hearing officer in this matter pursuant to Idaho Code § 42-1701A(2). It is anticipated that the Director will be a fact witness in this matter. The Director has been involved in the design, development, and calibration of the ground water model that is relied upon in the challenged order. The Director has also been involved in negotiation between Rangen and others who may

be parties to this action including negotiations involving the Eastern Snake Plain Aquifer Mitigation, Recovery, and Restoration Agreement for 2004.

V. CONCLUSION

Rangen respectfully requests a hearing on all aspects of the Director's Second Amended Order as provided herein and requests the appointment of an independent hearing officer.

DATED This 3rd day of June, 2005.

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By _____
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Attorneys for Rangen, Inc.

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 3rd day of June, 2005 he caused a true and correct copy of the forgoing document to be served upon the following by the indicated method:

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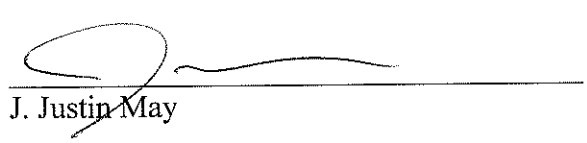

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