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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 THE SECOND
MITIGATION PLAN OF NORTH
SNAKE GROUND WATER DISTRICT
AND MAGIC VALLEY GROUND
WATER DISTRICT PROVIDING FOR
MONETARY COMPENSATION

**RANGEN, INC.'S
MEMORANDUM IN RESPONSE
TO ORDER ON STATUS
CONFERENCE AND
PROVIDING BRIEFING
SCHEDULE ON SECOND
MITIGATION PLAN FOR
MONETARY COMPENSATION**

COMES NOW Rangen, Inc., and submits this Memorandum pursuant to the Director's February 20, 2009 Order on Status Conference and providing briefing schedule on Second Mitigation Plan for Monetary Compensation.

INTRODUCTION AND BACKGROUND

On February 19, 2009, in response to the Ground Water District's withdrawal of their Amended Mitigation Plan dated September 5, 2008, and their original Mitigation Plan dated June 13, 2008, the Director held a telephonic Status Conference with regard to the withdrawal. Following that Status Conference, on February 20, 2009, the Director

RANGEN, INC.'S MEMORANDUM IN RESPONSE TO ORDER ON STATUS CONFERENCE AND PROVIDING BRIEFING SCHEDULE ON SECOND MITIGATION PLAN FOR MONETARY COMPENSATION - 1

issued an Order inviting simultaneous briefing “on the issue of the Director’s authority to approve a mitigation plan providing for monetary compensation as an alternative to replacement water supplies in response to a delivery call without approval of the holder of the calling right.”

On February 23, 2009, Rangen, Inc. timely filed a protest to the Ground Water Districts’s Second Mitigation Plan of North Snake Ground Water District and Magic Valley Ground Water District providing for Monetary Compensation (“Second Mitigation Plan”).

This Brief is submitted in response to the issue identified by the Director in the February 20, 2009, Order. Rangen reserves the right to submit additional argument on other issues related to the Ground Water District’s Second Mitigation Plan including those raised in Rangen’s Protest.

ARGUMENT

The Second Mitigation Plan proposes to provide monetary compensation to Clear Springs, one of the senior spring water users that is currently short of water. Under the Ground Water District’s proposal in their Second Mitigation Plan, the junior ground water users would continue to pump, depleting the aquifer and further reducing spring flows for Clear Springs as well as other water rights holders such as Rangen. The Director has a duty to distribute water in accordance with priority and does not have the authority to impose such a mitigation plan upon Clear Springs or other water rights holders. The Director cannot force senior water rights holders to accept a mitigation plan without a finding that the mitigation plan will not injure other water rights holders.

I. The Director has a duty to distribute water in accordance with priority.

The Director has an affirmative duty to distribute water in accordance with priority. *Doctrine Idaho Code § 42-602*. The statement of legal authority for the

Conjunction Management Rules provides “the Director of the Department of Water Resources is authorized to adopt rules and regulations for the distribution of water from streams, rivers, lakes, ground water, and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.” *IDAPA 37.03.11.000.*

II. The Director does not have the authority to approve a mitigation plan without a finding that the plan will not injure other water rights.

Rule 43.02 of the Conjunctive Management Rules provides “upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the Procedural Provisions of section 42-222, Idaho Code, in the same manner as applications to transfer water rights.” *IDAPA 37.03.11.043.02.* Idaho Code § 42-222 provides that “the Director of the Department of Water Resources shall examine all of the evidence and available information and shall approve the change in whole, or in part, or upon conditions, *provided no other water rights are injured thereby. . .*” Idaho Code § 42-222. The Director does not have the authority to approve, and thereby impose upon a senior water right user, a mitigation plan that does not address the depletionary effect of junior ground water pumping.

The Ground Water District’s Second Mitigation Plan does nothing to address the depletionary effect of junior ground water pumping. The Second Mitigation Plan offers nothing more than compensation to Clear Springs for the taking of its water rights. In light of the Director’s duty to distribute water in priority and the mandate of Idaho Code § 42-222 that no other water rights are injured, the Director does not have the authority either to force Clear Springs to accept compensation or to approve a plan that allows for continued pumping to the detriment of other water rights holders including Rangen.

III. The Second Mitigation Plan simply asks the Director to approve a taking of Clear Springs' water rights and establishes compensation for the taking.

Approval of the Second Mitigation Plan would amount to a taking of Clear Springs' water rights with the Director establishing the amount of compensation/damages. The Director's approval of the Second Mitigation Plan allowing for continued pumping by junior ground water users would also be a taking of the water rights of other affected senior water rights holders. The Director does not have the authority to approve the taking of Clear Springs' water rights with or without the payment of compensation/damages. Simply put, the Director does not have the authority to establish a price and force Clear Springs, or any other water rights holder to give up its rights at that price.

CONCLUSION

Pursuant to the conjunctive management rules, the Director has the authority to approve a mitigation plan that addresses and mitigates the depletions caused by the actions of a junior water right holder and does not injure other water rights. The Director may also accept a settlement between parties as a resolution with regard to the parties to such an agreement. The Director does not have the authority to force the acceptance of compensation of any kind as part of a plan that does not address the depletionary effects of the junior's use of water or injures other water rights users.

Dated this 2 day of March, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2 day of March, 2009, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

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