

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO



IN THE MATTER OF THE DIVERSION OF )      CONSENT ORDER AND  
WATER WITHOUT A VALID RIGHT FROM )      AGREEMENT  
BILLINGSLEY CREEK BY RANGEN, INC )

This matter having come before the Idaho Department of Water Resources (“Department” or “IDWR”), as the result of field investigations by the Department, issuance of a Notice of Violation, and a subsequent compliance conference with Rangen, Inc. (“Rangen”), the Department and Rangen enter into the following Consent Order and Agreement:

**BACKGROUND**

1. On December 13, 2011, Rangen filed a *Petition for Delivery Call* (“Petition”) with the Department alleging that it is not receiving all of the water it is entitled to pursuant to water right nos. 36-02551 and 36-07694 and that it is being materially injured by junior ground water pumping. In response to the Petition, the Department designated a contested case proceeding and held a hearing in May 2013.

2. During the course of the contested case proceeding and in its *Final Order Regarding Rangen, Inc.’s Petition For Delivery Call; Curtailing Ground Water Rights Junior To July 13, 1962*, (“Final Order”), the Department found that Rangen’s Snake River Basin Adjudication (“SRBA”) decrees do not identify Billingsley Creek as a source of water and do not include a point of diversion in the SWSWNW Section 32, T7S, R14E, B.M. The Final Order also found that the SRBA decree was conclusive as to the nature and extent of the water rights.

3. The Department, upon information and belief, finds that Rangen’s diversion of water from Billingsley Creek in the SWSWNW Section 32, T7S, R14E, B.M, at a point known as the Bridge Diversion, is not authorized. Rangen does not possess a water right to divert water from Billingsley Creek in the SWSWNW Section 32, T7S, R14E, B.M.

4. On January 31, 2014, the Department issued Rangen a Notice of Violation (“NOV”) and Cease and Desist Order requiring Rangen to cease and desist all diversion of water at the point of diversion in the SWSWNW Section 32, T7S, R14E, B.M from Billingsley Creek by February 24, 2014

5. On February 12, 2014, the Department received a request for a compliance conference from Fritz X. Haemmerle, attorney for Rangen. The Department scheduled and conducted a compliance conference on February 21, 2014 in Boise, Idaho to give Rangen an opportunity to

explain the circumstances of the alleged violations and perhaps reach an agreement that could lead to a resolution of the outstanding NOV. Rangen submitted documents stating its position that the Bridge Diversion is legal and authorized and that it is entitled to divert water from the talus slope located within the SWSWNW and the SESWNW, both in Section 32, T7S, R14E, B.M. These documents including the Affidavit of Fritz X. Haemmerle, Charles E. Brockway and Brief in Support of its position. These documents are of record.

6. At the February 21, 2014, compliance conference Rangen through its attorney Fritz X. Haemmerle, requested that the Director ("Director") of the Department exercise discretion to not enforce the cease and desist order provision described in the NOV.

7. Rangen argued that its diversion of water from Billingsley Creek was non-consumptive and caused no adverse effects to other water users and should be allowed to continue until such time as the pending permits are processed.

#### APPLICABLE LAW

1. Idaho Code Section 42-351 states in part as follows:
  - (2) It is unlawful for any person to divert or use water from a natural watercourse or from a ground water source without having obtained a valid water right to do so, or to divert or use water not in conformance with a valid water right.
  - (3) It is unlawful for any person to divert or use water in substantial violation of any provision of this title, or any rule, permit, condition of approval or order issued or promulgated pursuant to this title that is related to the diversion or use of water.
  - (4) Upon investigation of available information, the director of the department of water resources shall have the discretion to issue a written notice of violation to the person in accordance with the provisions of Idaho Code Section 42-1701B, for the illegal diversion or use of water.
  
2. Idaho Code Section 42-1701B states in part as follows:
  - (2) Notice....the notice of violation shall identify the alleged violation and shall specify each provision of the designated chapter, rule, permit, condition of approval or order, which has been violated. The notice of violation shall state the remedy, including all restoration and mitigation measures, and the amount of any civil penalty the director seeks for redress of the violation. The notice of violation shall inform the person to whom it is directed of an opportunity to confer with the director, or the director's designee in a compliance conference concerning the alleged violation.
  
  - (4) Compliance conference and consent order.... If the recipient and the director agree on a plan to remedy the damage caused by the alleged violation and to assure future compliance, they [the recipient and the director] may enter into a

consent order formalizing their agreement. The consent order may include a provision providing for payment of any agreed civil penalty. The consent order shall be effective immediately upon signing by both parties and shall preclude a civil enforcement action for the same alleged violation. If a party does not comply with the terms of the consent order, the director may seek and obtain in any appropriate district court, specific performance of the consent order and other relief as authorized by law.

3. A search of Department records indicates that Rangen does not have a water right to divert water from Billingsley Creek in the SWSWNW Section 32, T7S, R14E, B.M.

4. This Order does not constitute a final or appealable Order under Idaho Code Section 67-5273 or under IDAPA 37.01.01.740 or any other administrative rule of the Department.

### AGREEMENT

1. The Director shall stay the enforcement of the Cease and Desist Order. The head gate at the Bridge Diversion may remain open and Rangen may continue the diversion of water from Billingsley Creek. The Director will not reinstate the order to cease and desist without providing 35 days notice to Rangen. In the event the cease and desist order is reinstated, Rangen agrees to cease the diversion of water in the SWSWNW Section 32, T7S, R14E, B.M within 35 days of notice to Rangen. Rangen shall have an opportunity to request a compliance conference and may pursue any of its lawful remedies at that time.

2. This Agreement does not prevent the Department from seeking future compliance or regulation of said water user for other issues not directly related to this violation.

3. This Consent Order and Agreement shall be effective immediately upon execution by both parties.

Dated this 7<sup>th</sup> day March, 2014

  
Gary Spackman  
Director

### CONSENT

Rangen accepts fully the terms and conditions of the Order contained in this Consent Order and Agreement. Rangen makes no admission as to the accuracy of the findings of fact or legal conclusions contained herein. To resolve this matter in an efficient and manner, and to avoid the expense of litigation, Rangen consents to the issuance of the Consent Order and Agreement and waives any right otherwise possessed to contest any provision of the Order.

Upon compliance with Consent Order and Agreement, IDWR agrees not to seek civil enforcement for the violations identified herein.

Signed this 12<sup>th</sup> day of March, 2014

  
Rungen, Inc.