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Attorneys for Rangen, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE SECOND MITIGATION PLAN FILED BY THE COALITION OF CITIES FOR THE DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551, 36-07694 AND 36-15501, IN THE NAME OF RANGEN INC. IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551 & 36-07694 (RANGEN, INC.) IN THE MATTER OF DISTRIBUTION OF WATER TO RANGEN, INC.'S WATER RIGHT NOS. 36-00135B, 36-00135A, AND 36-15501, (RANGEN, INC.)	CM-MP-2014-007 CM-DC-2011-004 CM-DC-2014-004 **RANGEN, INC.'S CLOSING BRIEF REGARDING COALITION OF CITIES' SECOND MITIGATION PLAN**

COMES NOW Rangen, Inc. and submits its Closing Brief with regard to the Coalition of Cities' Second Mitigation Plan.

INTRODUCTION

The Coalition of Cities filed its Second Mitigation Plan on November 20, 2014. Pursuant to an Agreement entered into by the Coalition of Cities, Clear Springs Foods, Idaho Power Company, and Rangen, Inc., the Cities' Second Mitigation Plan proposes to mitigate for material injury to Rangen's water rights by contributing to the implementation of a "pilot" recharge project referred to as the Gooding Site. *Memorandum Agreement ESPA Sustainability Projects,* p.3*; Cities' Second Mitigation Plan Exhibit 2 ("Memorandum Agreement").* In accordance with the Agreement, Rangen stipulated to the Cities' Second Mitigation Plan and "agree[d] that the Mitigation Plan shall be deemed to mitigation the Cities' out-of-priority ground water pumping" through March 31, 2016. *Cities' Second Mitigation Plan* p. 3. The Director issued a *Final Order Conditionally Approving Cities Second Mitigation Plan ("Final Order")* on January 16, 2015. The Director concluded that "[d]uring the first year when mitigation is required (April 1, 2014 through March 31, 2015), the mitigation plan **does not** 'provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal . . .." *Final Order*, p. 6 (emphasis in original). Based upon the failure to provide water in the first year, the Director concluded that "[i]f the mitigation water recharges the aquifer in late February or March of 2015, mitigation will be recognized at the earlier of: (a) the date the modeled transient benefits of the recharge activities to the Curren Tunnel equal the modeled depletions to the Curren Tunnel caused by the Cities' diversions, or (b) April 1, 2015, the beginning of the next mitigation "phase-in" year as established in previous orders." *Final Order,* p. 7, para. 14.

On January 16, 2015, the Coalition of Cities filed its *Petition for Reconsideration and/or Clarification of the Final Order Conditionally Approving Cities' Second Mitigation Plan and Request for Stay ("Petition for Reconsideration")*, petitioning for reconsideration or in the alternative for a hearing. The Director denied the Petition for Reconsideration, but granted the Cities' request for a hearing. A hearing was held on January 30, 2015. This brief is submitted in accordance with the Director's request for closing briefs on or before the close of the business day of Wednesday, February 4, 2015.

ARGUMENT

I. The Cities' Second Mitigation Plan could not be approved over Rangen's objection.

To be approved over Rangen's objection, the Cities' Second Mitigation Plan must "provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal . . .." CM Rule 43.03.b. Both Jennifer Sukow of the Department of Water Resources and Christian Petrich on behalf of the Coalition of Cities performed simulations using ESPAM2.1 comparing the impact of the Cities' out-of-priority pumping with the benefit of recharge proposed in the Cities' Second Mitigation Plan. Sukow concluded that

> Because the recharge is scheduled to occur near the end of the first year of mitigation (April 2014 through March 2015), the recharge does not offset the Cities' predicted impacts to discharge at Curren Tunnel during the first year.

Staff Memorandum, p. 5. Petrich calculated the impact of the Cities pumping to be approximately half of that calculated by Sukow and also used a more conservative estimate for the benefit of recharge. Hearing Exh. 100. However, when compared over the same time frame, Petrich's analysis leads to the same conclusion. Hearing Exh. 143. Recharging 1,500 acre feet of water over a 20-day period in February 2015 will not result in sufficient water beginning April 1, 2014

to offset the depletions caused by the Cities' out-of-priority pumping. This is not surprising since the recharge will not occur until February 2015. Because the Cities' Second Mitigation Plan does not provide water sufficient to timely offset the impact of Coalition members' out-of-priority pumping, the mitigation plan could not be approved over Rangen's objection.

II. Senior water users are entitled to enter into agreements with individual junior water users and those agreements can be approved as mitigation plans.

Pursuant to the Conjunctive Management Rules, when approving a mitigation plan, the Director may consider

> Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such a plan may not otherwise be fully in compliance with these provisions.

CM Rule 43.03.o.

> Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variablility in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.

CM Rule 43.03.c.

The Cities' Second Mitigation Plan was filed pursuant to an agreement between the Coalition of Cities, Clear Springs Foods, Idaho Power Company, and Rangen, Inc. *Memorandum Agreement; Cities' Second Mitigation Plan Exhibit 2.* The purpose of the Memorandum Agreement is in part to study the efficacy of a recharge site referred to as the Gooding Site which Rangen and the other parties to the agreement believe has promise for restoring aquifer levels and spring flows at the Curren Tunnel and other springs. *Id; Draft Proposal to Investigate the Feasibility of Developing Managed Aquifer Recharge near Gooding, Idaho; Cities' Second Mitigation Plan,* Attachment B (the "Draft Proposal"). As part of the Agreement, the Cities have

agreed to pay the majority of the costs for the conveyance, engineering and construction as shown on Attachment B, the Draft Proposal.

The *Final Order* states that "it is ironic and inconsistent for Rangen to stipulate to a mitigation plan that will not provide mitigation water in the time of need." *Final Order,* p.7, para. 12. However, it is neither ironic nor inconsistent for Rangen to support a plan that provides not only some water to address the impact of the Cities' out-of-priority pumping, but also information and data that may allow for more efficient restoration of aquifer levels and spring flows. Rangen has long been an active supporter of both recharge activities and the study of ESPA. Thorlief Rangen was one of the founding member of the Lower Snake Aquifer Recharge District ("LSARD"). Rangen's Vice President, Wayne Courtney, is currently on the LSARD Board. Rangen has participated in the Eastern Snake Hydrologic Modelling Committee almost since its inception. Rangen has also consistently opposed mitigation plans that propose to use ineffective or otherwise undesirable recharge sites such as the Sandy Ponds. *See Rangen, Inc.'s Protest to IGWA's Amended Third Mitigation Plan,* CM-MP-2014-005*; Rangen Inc.'s Protest to Coalition of Cities' Mitigation Plan,* CM-MP-2014-004. Similarly, Rangen has consistently opposed mitigation plans that propose to merely move water around between declining spring sources without mitigating or addressing the underlying problem of aquifer mining. *See Rangen, Inc.'s Protest to IGWA's Second Mitigation Plan,* CM-MP-2014-003; *Rangen, Inc.'s Protest to IGWA's Amended Third Mitigation Plan,* CM-MP-2014-005*;* and *Rangen Inc.'s Protest to IGWA's Fourth Mitigation Plan,* CM-MP-2014-006.

The Cities filed their first mitigation plan on April 25, 2014. The Cities' first mitigation plan proposed recharge at the Sandy Ponds. Rangen opposes recharge at the Sandy Ponds for a variety of reasons. *See Rangen Inc.'s Protest to Coalition of Cities' Mitigation Plan,* CM-MP-

2014-004 and *Rangen, Inc.'s Protest to IGWA's Amended Third Mitigation Plan,* CM-MP-2014-005. Shortly after IGWA filed its first mitigation plan, IGWA and the Cities began negotiations about alternative means to satisfy the Cities' mitigation obligation. The end result of those negotiations was the Memorandum Agreement.

III. No other water users are affected by Rangen's agreement with the Coalition of Cities

On January 29, 2014, the Director determined that out-of-priority ground water pumping including pumping under various water rights held by members of the Coalition of Cities is causing material injury to Rangen's water rights. *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962 ("Curtailment Order").* The Director ordered curtailment of water rights junior to July 13, 1962 on or before March 14, 2014. *Curtailment Order,* p. 42. The Director further determined that junior ground water pumpers could avoid curtailment through approval of a mitigation plan providing for simulated steady state benefits of 9.1 cfs to Curren Tunnel or direct flow of 9.1 cfs to Rangen. *Curtailment Order,* p. 42. This mitigation obligation was based upon a curtailment simulation utilizing ESPAM2.1. The 9.1 cfs mitigation obligation does not include the input from the Cities' pumping.

> Estimates of municipal water use were included in calibration of ESPAM2.1, but junior-priority municipal water use was not included in the curtailment simulation used to calculate the mitigation obligation in the January 29, 2014 order.

Sukow Report, p. 2.

CONCLUSION

Although not approvable over Rangen's objection, the Coalition of Cities' Second Mitigation Plan should be approved by the Director for the reason specified above.

DATED This 4th day of February, 2015.

MAY BROWNING & MAY

By _____
J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 4th day of February, 2015 he caused a true and correct copy of the foregoing document to be served upon the following by the indicated method:

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