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**APR 25 2014**

**DEPARTMENT OF  
WATER RESOURCES**

*Attorneys for Rangen, Inc.*

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

**IN THE MATTER OF THE MITIGATION  
PLAN FILED BY THE IDAHO GROUND  
WATER APPROPRIATORS FOR THE  
DISTRIBUTION OF WATER TO WATER  
RIGHT NOS. 36-02551 AND 36-07694 IN  
THE NAME OF RANGEN, INC.**

CM-MP-2014-001  
CM-DC-2011-004

**RANGEN'S MOTION FOR  
RECONSIDERATION OF ORDER  
RE: IGWA'S MITIGATION PLAN;  
ORDER LIFTING STAY;  
AMENDED CURTAILMENT  
ORDER**

**IN THE MATTER OF DISTRIBUTION OF  
WATER TO WATER RIGHT NOS. 36-  
02551 AND 36-07694  
(RANGEN, INC.)**

Rangen, Inc. ("Rangen"), by and through its attorneys, hereby moves Director Spackman to reconsider portions of the *Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* entered in the above-captioned matters. Specifically, Rangen requests that the Director amend his findings of

**RANGEN'S MOTION FOR RECONSIDERATION OF ORDER RE: IGWA'S MITIGATION  
PLAN; ORDER LIFTING STAY; AMENDED CURTAILMENT ORDER - 1**

fact and conclusions of law to take into account consideration of Rangen's use of its 1957 water right from the Martin-Curren Tunnel.

### **SUMMARY OF MOTION FOR RECONSIDERATION**

Of the problems outlined herein, the most serious problem, as a matter of fact and law, is that the Director, in calculating the benefits to Rangen of Butch Morris ceasing diversions from the Martin-Curren Tunnel, did not account for Rangen's 1957 water right (36-15501). Had the Director accounted for water right 36-15501 and using the Director's own methodology, Rangen would realize the following benefit by Morris foregoing diversions out of the Martin-Curren Tunnel: (1) 0.9 cfs: or (2) 1.1 cfs if Morris ceases all diversion (additional 0.3 cfs).

As grounds, Rangen states the following:

1) 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* ("Curtailment Order").

2) Rangen holds five water rights from the Martin-Curren Tunnel. The elements of these water rights are summarized in a table on page 5 of the Curtailment Order. The priority dates and quantities for these water rights are: 1) 0.09 cfs – October 9, 1884, (36-134B); 2) 0.05 cfs – April 1, 1908, (36-135A); 3) 1.46 cfs – July 1, 1957, (36-15501); 4) 48.54 cfs – July 13, 1962, (36-2551); and 5) 26.0 cfs – April 12, 1977 (36-7694). *Curtailment Order, p. 5.*

3) The Curtailment Order was based upon Rangen's July 13, 1962 water right. *Curtailment Order, ¶ 24, p. 6.*

4) On February 11, 2014, IGWA filed *IGWA's Mitigation Plan and Request for Hearing* ("Mitigation Plan") in IDWR Docket No. CM-MP-2014-001.

5) The Director held an evidentiary hearing on the Mitigation Plan on March 17-19, 2014. 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, IDWR Docket No. CM-MP-2014-001 & CM-DC-2011-004 ("Order on IGWA's Mitigation Plan").

6) Findings of Fact ¶¶ 18 through 27 in the Order on IGWA's Mitigation Plan identify and discuss the use of Martin-Curren Tunnel water rights that are senior to Rangen's 1962 water right. **This discussion does not include any findings related to Rangen's 1957 water right (36-15501). Rangen diverts and uses 1.46 cfs pursuant to this water right. Like the other water diverted for use pursuant to senior water rights, this water is not available for mitigation related to Rangen's 1962 water right.**

7) When Rangen's 1957 water right is properly included, the first four columns of the table included on page 12 of the Order on IGWA's Mitigation Plan become:

Water Right Holder	Water Right Number	Water Right Quantity (cfs)	Diverted for beneficial use, not available for mitigation (cfs)
Morris	36-134D & 36-134E	2.4	0.3
Candy	36-134A	0.49	0.04
Rangen	36-134B	0.09	0.09
Musser	36-102	4.1	0.00
Rangen	36-135A	0.05	0.05
Candy	36-135B	0.51	0.00
Morris	36-135D	1.58	0.0
Morris	36-135E	0.82	0.00
Rangen	36-15501	1.46	1.46

Total			1.9 <sup>1</sup>
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8) When Rangen’s 1957 water right is properly included, the calculations set forth in Finding of Fact ¶ 27 on page 12 of the Order on IGWA’s Mitigation Plan are:

$$3.7 \text{ cfs} - 0.3 \text{ cfs (Morris)} - 1.6 \text{ cfs (Rangen)} - 0.04 \text{ cfs (Candy)} = 1.8 \text{ (approximately)}$$

$$\frac{184 \text{ days}}{365 \text{ days}} \times 1.8 \text{ cfs} = \text{annual average of } 0.9 \text{ cfs provided}$$

9) When Rangen’s 1957 water right is properly included, the calculations set forth in Finding of Fact ¶ 27 on page 12 of the Order on IGWA’s Mitigation Plan for the part of the analysis which states “[i]f Morris foregoes diversion of the 0.3 cfs from the Current Tunnel” would be:

$$3.7 \text{ cfs} - 1.6 \text{ cfs (Rangen)} - 0.04 \text{ cfs (Candy)} = 2.1 \text{ cfs (approximately)}$$

$$\frac{184 \text{ days}}{365 \text{ days}} \times 2.1 \text{ cfs} = \text{annual average of } 1.1 \text{ cfs provided}$$

10) The changes requested above to reflect accurately Rangen’s use of its 1957 water right would also require recalculation of other findings of fact and conclusions of law based upon Findings of Fact ¶¶ 18 through 27: For example, the following findings need to be amended to read:

- a. Finding of Fact ¶ 50. “Proposal No. 2 provides an average of 0.9 cfs through delivery of water not diverted by Morris. If Morris foregoes diversion of all water from Curren Tunnel, the water available for Proposal No.2 would increase to an average of 1.1 cfs.”

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<sup>1</sup> Number rounded to nearest 1/10 cfs for consistency with the Order on IGWA’s Mitigation Plan footnote 2, p. 12.

- b. Finding of Fact ¶ 52. “The mitigation plan provides an average predicted benefit of 2.1 cfs during the first year if Morris continues to divert 0.3 cfs of water from the Curren Tunnel. If Morris foregoes diversion of all water from Curren Tunnel, the average predicted benefit would increase to 2.3 cfs.”
- c. Finding of Fact ¶ 53. The mitigation plan fails to provide the required 3.4 cfs during the first year, and the mitigation shortfall is 1.3 cfs if Morris continues to divert 0.3 cfs of water from the Curren Tunnel. If Morris foregoes diversion of all water from Curren Tunnel, the mitigation shortfall would decrease to 1.1 cfs.”

11) For the purpose of clarity in the above discussion Rangen has utilized 3.7 cfs as the amount of water physically available for use from the Martin-Curren Tunnel because this is the quantity utilized by the Director in the Order. The Director based this number upon the average flow from April 15 through October 15 during the period from 2002 through 2013. The use of such an average is not appropriate for the evaluation of a mitigation proposal like Proposal No. 2. Given current flows in the Martin-Curren Tunnel, the use of such an average gives IGWA mitigation credit for delivering more water than is actually flowing from the Martin-Curren Tunnel and available to satisfy Rangen’s 1962 water right. There is insufficient evidence to conclude that flows in the Martin-Curren Tunnel will be 3.7 cfs or greater in 2014. The flows are in fact lower than that now. The Order states that “if the proposed mitigation falls short of the annual mitigation requirement, the deficiency can be calculated at the beginning of the irrigation season. Diversion of water by junior water right holders will be curtailed to address the deficiency.” *Order on IGWA’s Mitigation Plan, p. 6.* This improperly shifts the risk related

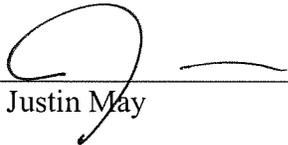
to the Mitigation Plan to the senior water right holder in violation of the Idaho Supreme Court's decision *In the Matter of Distribution of Water to Various Water Rights*, 155 Idaho 640, 315 P.3d 828 (2013).

12) The burden is on IGWA to show that the water will be delivered. There is simply not enough evidence to give IGWA credit for delivery of water based upon water rights held by Morris. IGWA has not met its burden of showing that that water will actually be available to satisfy Rangen's 1962 water right.

WHEREFORE, Rangen respectfully requests that the Director issue an amended order recognizing the use of water pursuant to Rangen's 1957 water right. The Order should also be based upon water actually available in the Martin-Curren Tunnel rather than an average of past years.

DATED this 25 day of April, 2014.

MAY, BROWNING & MAY

By  \_\_\_\_\_  
J. Justin May

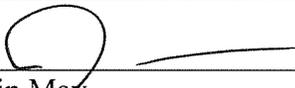
### CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 25 day of April, 2014 he caused a true and correct copy of the foregoing document to be served by email and first class U.S. Mail, postage prepaid upon the following:

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