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Attorneys for Respondents

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

RANGEN, INC., an Idaho corporation,

Petitioner,

vs.

GARY R. SPACKMAN, in his official
capacity as Director of the Idaho Department
of Water Resources, and THE IDAHO
DEPARTMENT OF WATER RESOURCES,

Respondents.

Case No. CV-2014-272

**ANSWER TO AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT AND
PETITION FOR WRIT OF MANDATE**

COME NOW, Respondents Gary R. Spackman, in his official capacity as Director (“Director”) of the Idaho Department of Water Resources (“Department”), and the Department, an executive agency of the State of Idaho, by and through their attorneys of record, and for their

answer to the August 5, 2014, *Amended Complaint for Declaratory Judgment Regarding Constitutionality of Conjunctive Management Rules and Petition for Writ of Mandate* (“Complaint”) filed by Rangen, Inc. (“Rangen”), admit, deny and allege as follows:

1.

Respondents admit allegations contained in paragraph 1 of the Complaint.

2.

Respondents admit allegations contained in paragraph 2 of the Complaint.

3.

Respondents admit allegations contained in paragraph 3 of the Complaint.

4.

Responding to paragraph 4 of the Complaint, Respondents admit only that the Director has a legal duty to distribute water in accordance with the prior appropriation doctrine.

5.

Responding to paragraph 5 of the Complaint, Respondents admit only that the Department is an administrative agency of the state of Idaho and, pursuant to Idaho Code § 42-603, the Director “is authorized to adopt rules and regulations for the distribution of water from the 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.”

6.

Respondents admit allegations contained in paragraph 6 of the Complaint.

7.

Responding to paragraph 7 of the Complaint, Respondents admit only that Rangen is a “person” as defined in Idaho Code § 67-5201(15).

8.

Responding to paragraph 8 of the Complaint, Respondents admit only that jurisdiction is proper in the district court.

9.

Responding to paragraph 9 of the Complaint, Respondents admit only that, as set forth in the *Notice of Reassignment* issued in this case on May 22, 2014, pursuant to the Administrative Order of the Fifth Judicial District Court dated July 1, 2010, which implemented Idaho Supreme Court Administrative Order dated December 9, 2009, and set out procedural rules governing actions for declaratory judgments of decisions of the Department, venue is proper in Twin Falls County.

10.

Respondents admit allegations contained in paragraph 10 of the Complaint.

11.

Responding to paragraph 11 of the Complaint, Respondents admit only that the source element on Rangen's partial decrees for water right numbers 36-134B, 36-135A, 36-15501, 36-2551, and 36-7694 is described as "Martin-Curren Tunnel," tributary to Billingsley Creek.

12.

Respondents admit allegations contained in paragraph 12 of the Complaint.

13.

Respondents admit allegations contained in paragraph 13 of the Complaint. Respondents clarify that, on August 27, 2001, the irrigation period of use element in the partial decrees for water right numbers 36-134B and 36-135A was amended nunc pro tunc to February 15 to November 30.

14.

Responding to paragraph 14 of the Complaint, Respondents admit only that the source element on Rangen's partial decrees for water right numbers 36-134B, 36-135A, 36-15501, 36-2551, and 36-7694 is described as "Martin-Curren Tunnel," tributary to Billingsley Creek, and the point of diversion element is described as T07S R14E S32 SESWNW.

15.

Responding to paragraph 15 of the Complaint, Respondents admit only that water flowing from the Martin-Curren Tunnel has been declining for several years due in part to ground water pumping on the Eastern Snake Plain Aquifer ("ESPA").

16.

Responding to paragraph 16 of the Complaint, Respondents admit only that Rangen's water rights are not the only water rights to take water from the Martin-Curren Tunnel, in 1993 the Mussers made a demand on the Director for delivery of decreed water rights from the Martin-Curren Tunnel, the Mussers sought a writ of mandate to compel the Director to deliver their full decreed water rights and to control the distribution of water from the aquifer according to the priority date of the decreed water rights, the District Court issued a writ of mandate commanding the Director immediately comply with Idaho Code § 42-602, and the Idaho Supreme Court affirmed the District Court's decision in *Musser v. Higginson*, 125 Idaho 392, 397, 871 P.2d 809, 814 (1994).

17.

Respondents admit allegations contained in paragraph 17 of the Complaint.

18.

Responding to paragraph 18 of the Complaint, Respondents admit only that, since adoption of the Conjunctive Management (“CM”) Rules, flows in the Martin-Curren Tunnel have declined.

19.

Responding to paragraph 19 of the Complaint, Respondents admit only that Rangen filed its first delivery call pursuant to the CM Rules in September 2003.

20.

Responding to paragraph 20 of the Complaint, Respondents admit only that, in January 2005, American Falls Reservoir District No. 2, A&B Irrigation District, Burley Irrigation District, Minidoka Irrigation District, and Twin Falls Canal Company submitted a petition for delivery call to the Director pursuant to the CM Rules. Rangen, Clear Springs Foods, Inc., Thousand Springs Water Users Association, and Idaho Power Company joined in the administrative proceeding as intervenors. In August 2005, the above described entities (collectively referred to as AFRD #2) filed a declaratory judgment action alleging the CM Rules were unconstitutional. Idaho Ground Water Appropriators, Inc. (“IGWA”) also intervened.

21.

Respondents admit allegations contained in paragraph 21 of the Complaint.

22.

Responding to paragraph 22 of the Complaint, Respondents admit only that, in the *Order on Plaintiffs’ Motion for Summary Judgment* at 97-8, issued June 2, 2006, District Judge Barry Wood set forth the following:

In the final analysis, one only need to step back from the trees and look generally at the process currently in place. In the Director's effort to satisfy all water users on a

given source, seniors are put in the position of re-defending the elements of their adjudicated water right everytime a call is made for water. The call is the process and means by effect is given to a water user's priority, which is the essence of the right under a prior appropriation system. The mechanism now in place also creates a process that cannot be completed within the attendant time frame exigencies associated with water usage for a crop in progress. In practice, an untimely decision effectively becomes the decision; i.e. "no decision is the decision." Finally, the Director is put in the expanded role of re-defining the elements of water rights in order to strategize how to satisfy all water users as opposed to objectively administering water rights in accordance with the decrees. While full economic development of the state's water resources may be consistent with prior appropriation, even to satisfy prior appropriation, it must be a policy that cuts both ways.

Additionally, the Director or his watermasters are the only ones who can administer these water rights. See Idaho Code 42-603. The individual owner cannot. Therefore, to the extent the Director's application of the CMR's diminish proper administration of the senior's water right, they are unconstitutional. In other words, and assuming the water would otherwise be available, inherent in the senior's water right is the right to use the water. While some minimal due process is required, setting up a procedural labyrinth of requiring a senior water right holder to initiate a contested case proceeding (CMR 30.02.) in accordance with the administrative proceedings which cannot be completed during the irrigation season prevents timely administration to a growing crop, and is not what either the framers of the constitution had in mind or what the legislature had in mind in adopting I.C. § 42-607.

23.

Respondents admit allegations contained in paragraph 23 of the Complaint.

24.

Respondents deny allegations contained in paragraph 24 of the Complaint.

25.

Responding to paragraph 25 of the Complaint, Respondents admit only that water flowing from the Martin-Curren Tunnel has been declining for several years due in part to ground water pumping on the ESPA.

26.

Respondents admit allegations contained in paragraph 26 of the Complaint.

27.

Responding to paragraph 27 of the Complaint, Respondents admit only that Rangen filed a *Petition for Delivery Call* (“Petition”) on December 13, 2011, with the Department pursuant to the CM Rules seeking priority administration of Rangen’s water. Rangen’s petition included information regarding Rangen’s water rights and water flows in the Martin-Curren Tunnel as well as analysis of the impact of junior ground water pumping.

28.

Responding to paragraph 27 of the Complaint, Respondents admit only that the Director held a hearing on Rangen’s Petition from May 6, 2013, to May 16, 2013, and that IGWA and the City of Pocatello were allowed to intervene in the matter.

29.

Responding to paragraph 29 of the Complaint, Respondents admit only that, 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”). In the Curtailment Order, the Director concluded that Rangen’s water right nos. 36-2551 and 36-7694 are being materially injured by junior ground water diversions. *Curtailment Order* at 41, ¶ 60. The Director stated that holders of the junior-priority ground water rights may avoid curtailment if they participate in a mitigation plan which provides “simulated steady state benefits of 9.1 cfs to Curren Tunnel [sometimes referred to as the “Martin-Curren Tunnel”] or direct flow of 9.1 cfs to Rangen.” *Id.* The Curtailment Order explains that mitigation provided by direct flow to Rangen “may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year.” *Id.*

30.

Responding to paragraph 30 of the Complaint, Respondents admit only that, on February 21, 2014, the Director issued an *Order Granting IGWA's Petition to Stay Curtailment* ("Order Granting Stay"). In that order, the Director stated:

Given that IGWA has submitted a mitigation plan, which appears on its face to satisfy the criteria for a mitigation plan pursuant to the Conjunctive Management Rules and the requirements of the Director's curtailment order, and because of the disproportional harm to IGWA members when compared with the harm to Rangen if a temporary stay is granted, the Director will approve a temporary stay pending a decision on the mitigation plan. The Director will conduct an expedited hearing for the mitigation plan and to issue a decision shortly thereafter. Ground water users are advised that in the event the mitigation plan is not approved, the curtailment order will go into effect immediately.

Order Granting Stay at 5.

31.

Responding to paragraph 31 of the Complaint, Respondents admit only that the Director held a hearing on March 17-19, 2014, and approved in part and rejected in part IGWA's first mitigation plan.

32.

Respondents admit allegations contained in paragraph 32 of the Complaint.

33.

Respondents admit allegations contained in paragraph 33 of the Complaint.

34.

Responding to paragraph 34 of the Complaint, Respondents admit only that the Director approved IGWA's second mitigation plan; determined that mitigation would be provided to Rangen up to January 19, 2015; and lifted the stay issued April 28, 2014.

35.

Responding to paragraph 35 of the Complaint, Respondents admit only that the Director has approved mitigation plans in order to address material injury caused by junior ground water diversions to Rangen's water right nos. 36-2551 and 36-7694.

36.

Responding to paragraph 36 of the Complaint, Respondents admit only that Rangen filed another delivery call with the Department pursuant to the CM Rules on June 27, 2014. The Director has scheduled a hearing for November 17-21, 2014.

37.

Responding to paragraph 37 of the Complaint, Respondents admit only that status conferences were held on July 22, 2014, in four other delivery calls made by surface water users in the Hagerman area. The surface water users in the four other delivery calls have requested that the Department stay the delivery call proceedings pending settlement discussions.

38.

Respondents deny allegations contained in paragraph 38 of the Complaint.

39.

Respondents deny allegations contained in paragraph 39 of the Complaint, except Respondents admit delivery call procedures must be conducted timely and consistent with the due process requirements of the Idaho Constitution.

40.

Respondents deny allegations contained in paragraph 40 of the Complaint.

41.

Respondents deny allegations contained in paragraph 41 of the Complaint.

42.

Responding to paragraph 42 of the Complaint, Respondents admit only that holders of the junior-priority ground water rights may avoid curtailment if they participate in a mitigation plan which provides “simulated steady state benefits of 9.1 cfs to Curren Tunnel [sometimes referred to as the “Martin-Curren Tunnel”] or direct flow of 9.1 cfs to Rangen.” *Curtailment Order* at 41, ¶ 60. The Curtailment Order explains that mitigation provided by direct flow to Rangen “may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year.” *Id.* The Director has approved certain mitigation proposals submitted by IGWA and considered by the Department that will provide mitigation as required by the Curtailment Order up to January 19, 2015. *Order Approving IGWA’s Second Mitigation Plan; Order Lifting Stay Issued April 28, 2014; Second Amended Curtailment Order* at 18 (June 20, 2014).

43.

Respondents deny allegations contained in paragraph 43 of the Complaint.

44.

Respondents deny allegations contained in paragraph 44 of the Complaint.

45.

Responding to paragraph 45 of the Complaint, Respondents reallege their responses set forth in paragraphs 1-44 above.

46.

Respondents admit allegations contained in paragraph 46 of the Complaint.

47.

Responding to paragraph 47 of the Complaint, Respondents admit only that the Director has a legal duty to distribute water in accordance with the prior appropriation doctrine.

48.

Respondents deny allegations contained in paragraph 48 of the Complaint.

49.

Respondents deny allegations contained in paragraph 49 of the Complaint.

50.

Responding to paragraph 50 of the Complaint, Respondents admit only that the Director has a legal duty to distribute water in accordance with the prior appropriation doctrine.

51.

Respondents deny allegations contained in paragraph 51 of the Complaint.

52.

Respondents deny allegations contained in paragraph 52 of the Complaint.

53.

Respondents deny allegations contained in paragraph 53 of the Complaint.

54.

Respondents deny the Petitioner is entitled to attorneys fees as alleged in paragraph 54 of the Complaint.

55.

Respondents deny each and every allegation contained in the Complaint not specifically admitted.

AFFIRMATIVE DEFENSES

1. Failure to State a Claim: The Petitioner fails to state a claim upon which relief can be granted.
2. The Extraordinary Remedy of a Writ Of Mandate Is Not Available to Petitioner: Petitioner has a plain, speedy and adequate remedy available in the ordinary course of law. The remedy available to Rangen is to seek judicial review of decisions made by the Director in the underlying proceedings as provided for by Idaho's Administrative Procedure Act ("IDAPA"). I.C. §§ 67-5201, et seq.; *See also* I.C. § 42-1701A. The actions of Rangen confirm that a writ of mandamus is not appropriate in this case because Rangen has filed three petitions for judicial review and is taking advantage of those rights afforded to aggrieved parties under IDAPA.
3. Another Action Pending Between Same Parties for Same Cause: Petitioner has sought to have determined on appeal questions it requests be decided here under the declaratory judgment statute. Because the proper method of contesting the agency decisions at issue in this case is by appeal, Petitioner's request for declaratory relief should be dismissed based on Rule 12(b)(8) of the Idaho Rules of Civil Procedure.
4. Res Judicata: Petitioner is barred from maintaining this action against Respondents based upon the doctrine of res judicata.
5. Failure to Exhaust Administrative Remedies: Petitioner is barred from maintaining this action against Respondents by reason of Petitioner's failure to exhaust its administrative remedies.

PRAYER FOR RELIEF

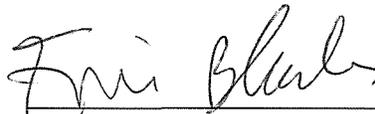
Wherefore, Respondents pray for an order of the Court as follows:

1. Dismissing the Petitioner's Petition for Writ of Mandate;
2. Dismissing the Petitioner's Amended Complaint for Declaratory Judgment Regarding Constitutionality of Conjunctive Management Rules;
3. For such other and further relief as the Court may deem equitable and just.

DATED this 2nd day of September 2014.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Chief, Natural Resources Division
Deputy Attorney General



Garrick L. Baxter
Emmi L. Blades
Deputy Attorneys General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of September 2014, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the methods indicated below:

Original to:
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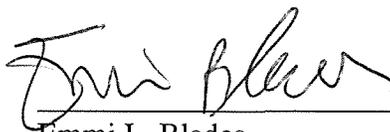
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